

The long and winding road continues: Towards a new agreement on high seas governance

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A CONSENSUS ON A NEW INTERNATIONAL AGREEMENT GOVERNING AREAS BEYOND NATIONAL JURISDICTION

In 2015, States agreed to launch negotiations for the elaboration of an international legally binding instrument dedicated to the conservation and sustainable use of the marine biological diversity of areas beyond national jurisdiction (ABNJ). States have expressed a wide range of positions to date: some have focussed on the issue of marine genetic resources (MGRs); others have been primarily concerned with conservation and sustainable use; a few have been sceptical of the need for a new instrument.

BUILDING ON A DECADE OF DISCUSSIONS: ISSUES AT STAKE

The negotiations, starting at the United Nations on March 28, 2016, will focus on a "Package Deal" of issues: MGRs, including questions on the sharing of benefits; measures for conservation and sustainable use, such as area-based management tools, including marine protected areas (MPAs); environmental impact assessments; capacity-building and the transfer of marine technology. Negotiators will face complex issues and challenges, especially the creation of an access and benefit sharing mechanism for MGRs and a mechanism for the creation of MPAs in ABNJ. Additional challenges will arise in the negotiation of an agreement and the creation of an appropriate institutional structure that do not undermine the mandates of existing organisations.

This document is an expanded and updated version of an IDDRI analysis published in 2013 entitled "A long and winding road: International discussions on the governance of marine biodiversity in areas beyond national jurisdiction" (Study N°07/13).

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LIST OF ACRONYMS

ABMTs	Area-based management tools	ICP	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
ABNJ	Areas beyond national jurisdiction	IMO	International Maritime Organization
ABS	Access and benefit sharing	IOC	Intergovernmental Oceanographic Commission
APEI	Areas of Particular Environmental Interest	IOFC	Indian Ocean Fishery Commission
AU	African Union	IOTC	Indian Ocean Tuna Commission
BBNJ Working Group	Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction ("biodiversity beyond national jurisdiction working group")	IPRs	Intellectual property rights
CARICOM	Caribbean Community	ISA	International Seabed Authority
CBD	Convention on Biological Diversity	ITLOS	International Tribunal on the Law of the Sea
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources	ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
CGTMT	IOC Criteria and Guidelines on the Transfer of Marine Technology	IUCN	International Union for the Conservation of Nature
CHM	Common heritage of mankind	IUU	Illegal, unreported and unregulated (fishing)
CLCS	Commission on the Limits of the Continental Shelf	MCS	Monitoring, control and surveillance
COP	Conference of the Parties	MDG	Millennium Development Goal
CPPS	Comisión Permanente del Pacífico Sur [Permanent Commission for the South Pacific]	MEPC	IMO Marine Environmental Protection Committee
DSCC	Deep Sea Conservation Coalition	MGRs	Marine genetic resources
DOALOS	Division for Ocean Affairs and the Law of the Sea	MoU	Memorandum of understanding
EBSA	Ecologically or Biologically Significant Marine Areas	MPA	Marine protected area
EC	European Commission	MSR	Marine scientific research
EIA	Environmental impact assessment	NAFO	North Atlantic Fisheries Organisation
ENB	Earth Negotiations Bulletin	NEAFC	North East Atlantic Fisheries Commission
EU	European Union	NPFC	North Pacific Fisheries Commission
FAO	United Nations Food and Agriculture Organization	OEABCM	Other effective area-based conservation measures
GOC	Global Ocean Commission	OSPAR	The Convention for the Protection of the Marine Environment of the North-East Atlantic (Oslo-Paris Convention)
GT	Gigatonne; 1 billion tonnes	PrepCom	Preparatory Commission
IA	Implementing Agreement	PSSA	Particularly Sensitive Sea Areas
ICJ	International Court of Justice	R&D	Research and development
		REPCET	Real time plotting of cetaceans
		RFB	Regional fishery body
		RFMO	Regional fisheries management organisation

RSP	Regional Seas Programme	UN	United Nations
SAI	Significant adverse impact	UNCED	United Nations Conference on Environment and Development
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice (CBD)	UNCLOS	United Nations Convention on the Law of the Sea
SDG	Sustainable Development Goal	UNCLOS IA	Implementing Agreement to UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ (proposed)
SEA	Strategic environmental assessment	UNCTAD	United Nations Conference on Trade and Development
SEAFO	South East Atlantic Fisheries Organisation	UNEP	United Nations Environment Program
SIODFA	Southern Indian Ocean Deepsea Fishers Association	UNESCO	United Nations Educational, Scientific and Cultural Organization
SIOFA	South Indian Ocean Fisheries Agreement	UNFSA	United Nations Fish Stocks Agreement
SPAMI	Specially Protected Area of Mediterranean Importance	UNGA	United Nations General Assembly
SPREP	South Pacific Regional Environment Programme	US	United States of America
SPRFMO	South Pacific Regional Fisheries Management Organisation	VME	Vulnerable marine ecosystem
SSA	Sargasso Sea Alliance	WCPA	IUCN World Commission on Protected Areas
SSC	Sargasso Sea Commission		
Tonne	Metric ton; 1,000KG		
UK	United Kingdom of Great Britain and Northern Ireland		

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1. INTRODUCTION

Marine areas beyond national jurisdiction (ABNJ) represent nearly half of the Earth's surface and a significant portion of its biodiversity. The remoteness of ABNJ and a lack of knowledge previously placed them beyond the reach of human activities. However, in recent decades technological advancements, increased scientific knowledge, and growing demand for resources have increased interest in these areas, driving unprecedented exploration and exploitation. The international community has also become increasingly aware of the growing threats to ecosystems in ABNJ and have been discussing options to conserve and sustainably use their biodiversity.

In 2015 States took the historic decision to open formal negotiations for a new international legally binding instrument under the framework of the United Nations Convention on the law of the sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of ABNJ. The next few years will be of great importance for the future of international ocean governance as States begin to navigate the complex issues at stake and negotiate the provisions of a new agreement. It is therefore imperative that States and stakeholders have a clear and comprehensive understanding of the history of the process, State positions to date, and the challenges that may lie ahead.

This paper provides a guide to the discussions for both experienced participants and newcomers to the process. Section 2 recalls the basic context: law of the sea, State jurisdiction in the ocean, the value of ABNJ, and pressures and threats facing ABNJ. Section 3 provides a short summary of the existing legal instruments and institutions that comprise the current framework for governance of ABNJ, while section 4 details the major governance gaps.

Section 5 provides a history of the discussions and sets out the current consensus and process established, as well as highlighting some of the final barriers that were overcome in reaching the consensus on opening negotiations. Section 6 gives a summary of State positions to date, while section 7 concludes by briefly presenting some of the main challenges that States may face in negotiating a new agreement.

2. CONTEXT

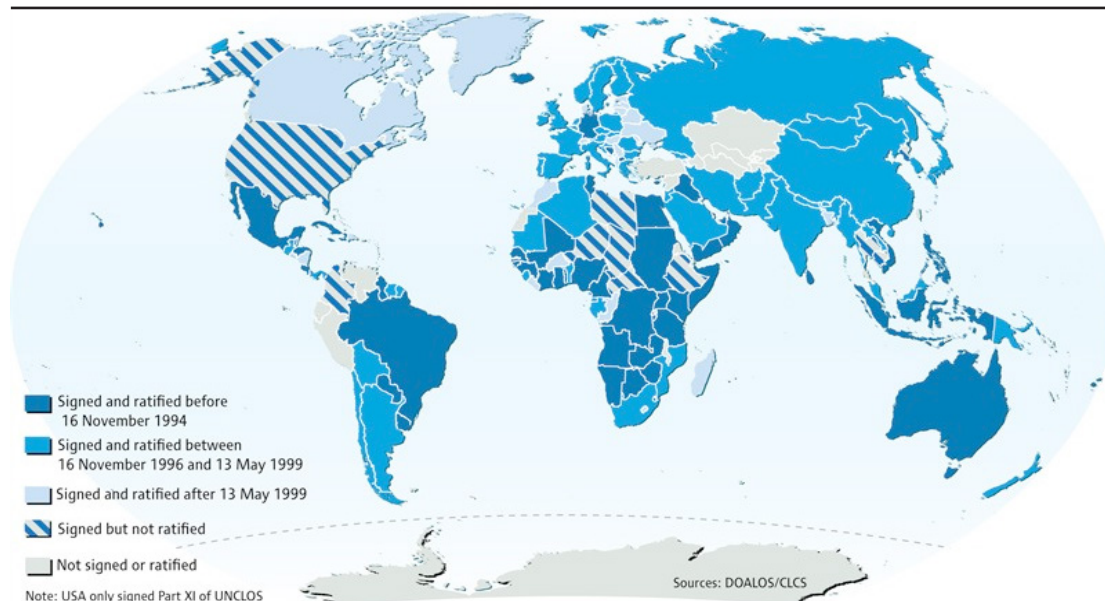
2.1. UNCLOS

UNCLOS is widely considered to be the global “Constitution for the ocean” and has achieved near-universal participation.¹ UNCLOS aims to establish:

“a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the

1. There are currently 167 Parties to UNCLOS and the UN General Assembly has regularly stressed its goal of universal participation in its resolutions on oceans and the law of the sea. Participation has grown steadily since its adoption; 17 ratifications have taken place since the first BBNJ Working Group meeting in February 2006 (see Section 5 below), the most recent being the State of Palestine in January 2015. A chronological list of ratifications is available at: http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm. The following States have not ratified (* denotes States that have nonetheless signed): Afghanistan*, Andorra, Azerbaijan, Bhutan*, Burundi*, Cambodia*, Central African Republic*, Colombia*, El Salvador*, Eritrea, Ethiopia*, Holy See, Iran*, Israel, Kazakhstan, Kyrgyzstan, Libya*, Liechtenstein*, North Korea*, Peru, Rwanda*, San Marino, South Sudan, Syria, Tajikistan, Turkey, Turkmenistan, United Arab Emirates*, the United States, Uzbekistan, Venezuela.

Figure 1. Status of UNCLOS (as at 2010)



Source: Riccardo Pravettoni, Jean-Nicolas Poussart, UNEP/GRID-Arendal
(http://www.grida.no/graphicslib/detail/status-of-the-convention_a3b4)

*equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment”.*²

2.2. State jurisdiction in the ocean

UNCLOS sets out a number of maritime zones subject to State jurisdiction. These zones are measured from a defined baseline, generally the low-water mark.³

The key areas of State jurisdiction are:⁴

- **Territorial sea:** Out to 12 nautical miles from the baseline⁵ the coastal State is free to set laws,

regulate use, and exploit any resource.⁶ Vessels of any State have the right of innocent passage.⁷

- **Exclusive Economic Zone (EEZ):** Extends from the edge of the territorial sea out to 200 nautical miles from the baseline.⁸ The coastal State holds the sovereign rights to explore, exploit, conserve and manage the natural resources, whether living or non-living, of the waters in the EEZ.⁹ The coastal State may also establish artificial islands and structures. The coastal State can conduct marine scientific research (MSR), and has jurisdiction to protect and preserve the marine environment.¹⁰ Other States have the freedom of navigation and overflight, and may lay submarine pipes and cables.¹¹
- **Continental shelf:** The natural prolongation of the land territory to the outer edge of the continental margin, or 200 nautical miles from the baseline, whichever is greater.¹² States have the right to harvest mineral and non-living material from the subsoil of its continental shelf.¹³ Where

2. UNCLOS Preamble.

3. UNCLOS, Article 5. In the case of islands situated on atolls or of islands having fringing reefs, the baseline is the “seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognized by the coastal State low-water line of the reef” (Article 6). In the case of deeply indented coastlines or fringing islands, straight baselines may be employed, subject to certain conditions (Article 7).

4. In addition to the zones described, UNCLOS also defines internal waters (Article 8), archipelagic waters (Part IV), and the contiguous zone (Article 33). The contiguous zone is a further 12 nautical miles from the territorial sea limit, in which a State can continue to enforce certain laws, if an infringement started, or is about to occur, within the State’s territory or territorial waters.

5. UNCLOS, Article 3.

6. UNCLOS, Article 56.

7. UNCLOS, Article 17. I.e. passing through waters in an expeditious and continuous manner, which is not “prejudicial to the peace, good order or the security” of the coastal State (UNCLOS, Article 19).

8. UNCLOS, Article 57.

9. UNCLOS, Article 56.

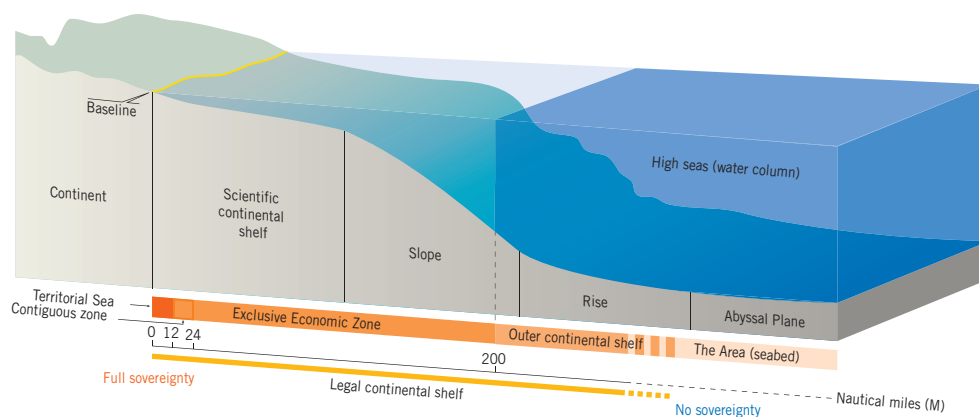
10. UNCLOS, Article 56.

11. UNCLOS, Article 58.

12. UNCLOS, Article 76.

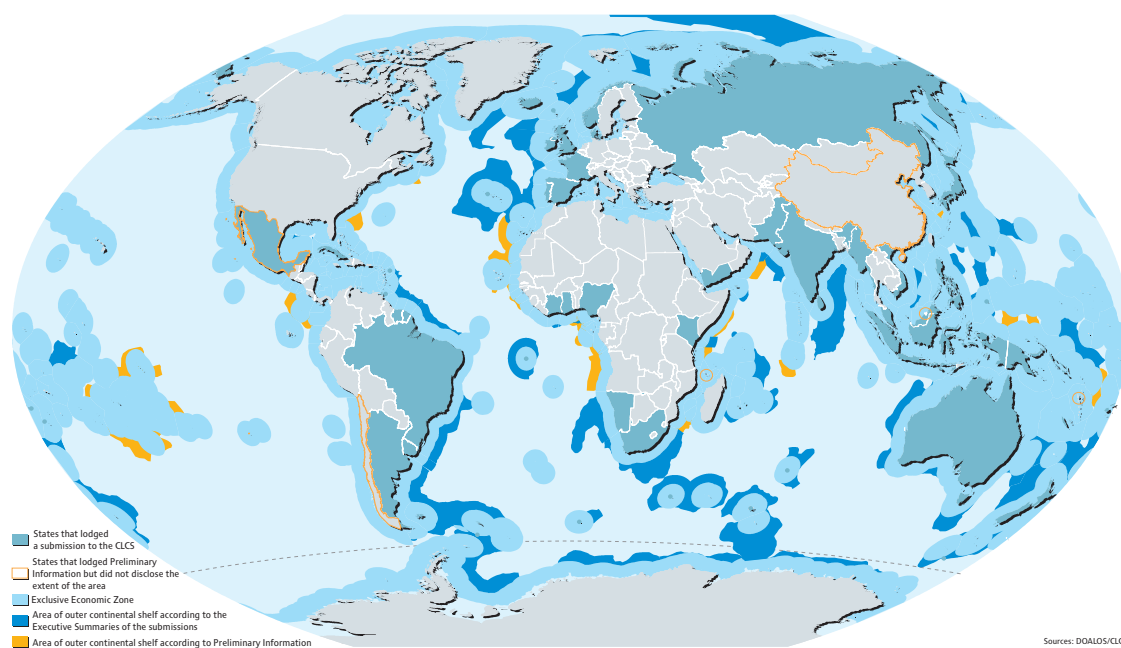
13. UNCLOS, Article 77.

Figure 2. Maritime zones under UNCLOS



Source: Riccardo Pravettoni, GRID-Arendal (http://www.grida.no/graphicslib/detail/maritime-zones_e96c)

Figure 3. Global distribution of outer continental shelf (as at 2009)



Sources: DOALOS/CLCS

Source: Riccardo Pravettoni, GRID-Arendal (http://www.grida.no/graphicslib/detail/global-distribution-of-outer-continental-shelf_97c3)

the continental shelf extends beyond 200 nautical miles, States must make a submission to the Commission on the Limits of the Continental Shelf (CLCS)¹⁴ defining the outer limits.¹⁵ The outer limits of the continental shelf may not exceed 350 nautical miles from the baseline or 100 nautical miles beyond the 2,500-metre isobath.¹⁶

2.3. Marine areas beyond national jurisdiction

According to UNCLOS, ABNJ comprise two distinct components: the “the Area” and the “high seas”.

2.3.1. The Area

“The seabed and ocean floor, and subsoil thereof, beyond the limits of national jurisdiction” is known as “the Area”.¹⁷ The Area and its mineral resources¹⁸ have a specific legal status under UNCLOS: they are considered the “common heritage of mankind”¹⁹ (CHM). Activities in the Area must therefore be conducted for the benefit of mankind as a whole.²⁰ The International Seabed Authority (ISA) was established as the competent organisation through which parties to UNCLOS “organise and control activities in the Area, particularly with a view to administering the resources of the Area”.²¹

For over 20 years, the ISA has been developing regulations related to deep-seabed mining. The rules, regulations and procedures that cover prospecting and exploration of deep-sea mineral resources are gathered in the “Mining

Code”.²² The ISA is currently working on a Draft Framework for the Regulation of Exploitation Activities.²³ The ISA’s mandate includes environmental protection, and it develops norms aimed at ensuring “effective protection for the marine environment from harmful effects which may arise” from activities conducted in the Area. The ISA also has some responsibilities regarding the coordination and promotion of MSR.²⁴

2.3.2. The high seas

The high seas encompass the water column beyond the EEZs of coastal States²⁵ and are governed by the traditional principle of freedom of the seas. Grounded in the desire to secure freedom of navigation, the principle has developed since the beginning of the 17th century²⁶ and triumphed in the 19th century with the establishment of regular shipping lines. It was further endorsed through the 1958 Geneva Convention on the High Seas.²⁷ Despite several constraints, including considerable geographical limitations with the establishment of EEZs following the adoption of UNCLOS, this principle is still regularly cited as a fundamental principle of the law of the sea.

UNCLOS provides a non-exhaustive list of freedoms of the high seas, which include: (i) freedom of navigation; (ii) freedom of overflight; (iii) freedom to lay submarine cables and pipelines; (iv) freedom to construct artificial islands and other installations permitted under international law; (v) freedom of fishing, and (vi) freedom of scientific research.²⁸ However, these freedoms are not absolute rights, and are subject to a number of

14. For further information, see the website of the CLCS: http://www.un.org/Depts/los/clcs_new/clcs_home.htm. A list of submissions and their current statuses is available at: http://www.un.org/depts/los/clcs_new/commission_submissions.htm.

15. Article 76(4). A continental shelf extending beyond 200 nautical miles is sometimes referred to as an “extended continental shelf”, though UNCLOS itself does not use this term.

16. I.e. The line connecting the depth of 2,500 meters. UNCLOS, Article 76(5-6).

17. UNCLOS, Article 1.

18. UNCLOS, Article 133(a): “resources mean all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed (...)”

19. UNCLOS, Article 136. This special status was inspired by a declaration made in 1967 at the UN by the Maltese Ambassador Arvid Pardo, and was subsequently proclaimed in a 1970 United Nations General Assembly resolution. For a detailed discussion, see Noyes (2012).

20. UNCLOS, Article 140.

21. Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, Annex, Section 1, (1). This Agreement, adopted in 1994, is the first Implementing Agreement to UNCLOS.

22. Available at: <https://www.isa.org.jm/mining-code>.

23. See Paragraph 3 of Decision of the Council of the International Seabed Authority relating to the summary report of the Chair of the Legal and Technical Commission, ISBA/20/C/31, available at https://www.isa.org.jm/sites/default/files/files/documents/isba-20c-31_o.pdf; ISA Legal and Technical Commission, “Developing a Regulatory Framework for Mineral Exploitation in the Area”, available at <http://www.isa.org.jm/files/documents/EN/Survey/Report-2015.pdf>.

24. UNCLOS, Article 143 (2): “(...) the Authority shall promote and encourage the conduct of marine scientific research in the Area and shall coordinate and disseminate the results of such research and analysis when available”.

25. I.e. “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”. UNCLOS, Article 86.

26. In particular the Dutch jurist Hugo Grotius, in his 1609 book *Mare Liberum*, formulated the principle of freedom of the high seas.

27. Available at: http://www.gc.noaa.gov/documents/8_1_1958_high_seas.pdf.

28. UNCLOS, Article 87.

Figure 4. The high seas (light blue)

Source: Seas Around Us. <http://www.seaaroundus.org/data/#/global>.

Note that the "EEZs" shown on this map represent theoretical boundaries to 200 nautical miles. This map does not reflect the current status of claims before the CLCS.

limitations and corresponding duties. In recent years, in particular due to the continuous degradation of the ocean, these freedoms have been progressively restricted.

An emblematic example of these restrictions relates to the freedom of fishing. Following the adoption of UNCLOS, *"more coastal States claimed their rights and jurisdiction over fisheries in the EEZ, large distant-water fishing fleets were displaced from some of their traditional fishing grounds and the pressure to fish in the high seas grew rapidly and without much control"* (Maguire *et al.*, 2006). Aware of the problem, States agreed during the United Nations Conference on Environment and Development (UNCED ; Rio de Janeiro, 1992) to convene an intergovernmental conference under the auspices of the UN to promote the effective implementation of the provisions of UNCLOS related to straddling and highly migratory fish stocks. This Conference led to the adoption, in 1995, of the UN Fish Stocks Agreement (UNFSA).²⁹ The UNFSA limits the freedom of fishing considerably

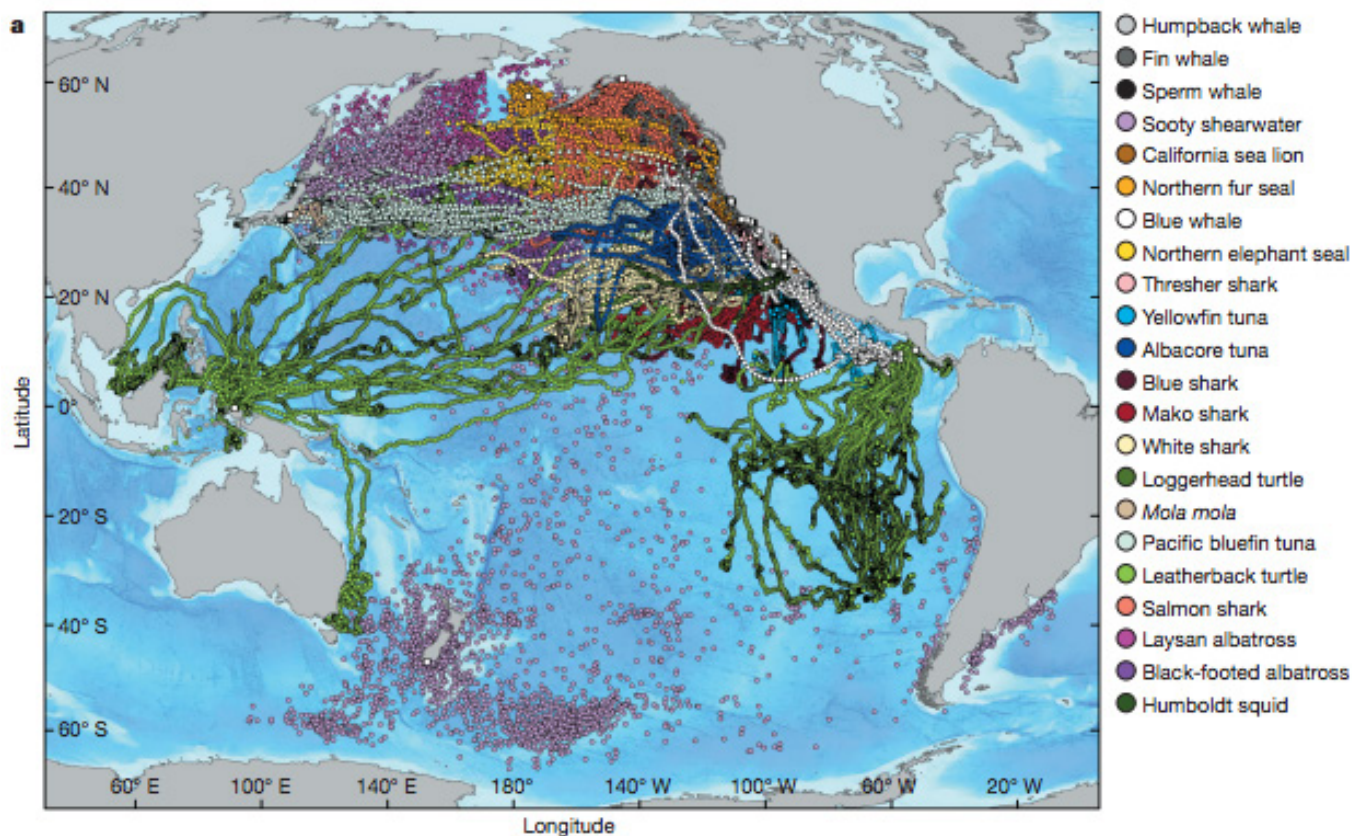
in order to promote conservation and sustainable use.³⁰ The UNFSA defines some guiding principles for the conservation and management of highly migratory and straddling fish stocks, including the application of the precautionary and ecosystem approaches and the protection of biodiversity in the marine environment. States Parties to UNFSA, and their vessels, are required to join the relevant regional fisheries management organisations (RFMOs), or at least agree to abide by their conservation and management measures.³¹

29. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks. The UNFSA was the second Implementing Agreement to UNCLOS following the 1994 Agreement related to the implementation of Part XI of UNCLOS (regarding seabed minerals). The Agreement entered into force in 2001.

30. UNFSA, Article 5. While the UNFSA applies only to straddling and highly-migratory fish stocks, the 2006 Review Conference encouraged States to recognise that the general principles of the UNFSA should also apply to non-straddling and non-highly migratory fish stocks, i.e. "discrete fish stocks", in the high seas. Document A/ CONF.210/2006/15, Report of the Review Conference on the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (5 July 2006), Preamble §2.

31. UNFSA, Article 8(4). Where no RFMO exists, the UNFSA required States to establish new ones (Article 8(5)).

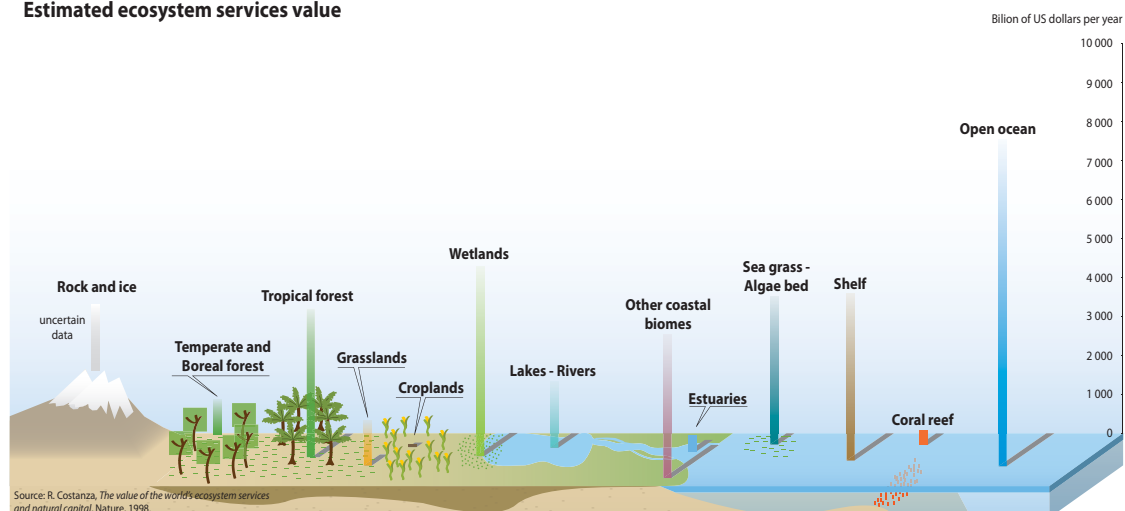
Figure 5. Distribution of top predators inhabiting and migrating into the coastal upwelling region off the west coast of North America



Source: Block *et al.*, 2011

Figure 6. Estimated value of ecosystem services (US\$ billions per year)

Estimated ecosystem services value



Source: GRID-Arendal

(http://www.grida.no/graphicslib/detail/estimated-ecosystem-services-value_4f0c).

2.4. The importance of ABNJ

ABNJ provide a wealth of resources and vital ecosystem services. These services include the provision of: seafood; raw materials; genetic resources; medicinal resources; air purification; climate regulation; habitat services; and cultural services (de Groot *et al.*, 2012; Rogers *et al.*, 2014). ABNJ are also valuable for their connectivity with areas within national jurisdiction (Figure 5) and the unique habitats they provide.

The value ecosystem services that can potentially be provided by an average hectare of open oceans has been estimated at int\$490/ha/year (de Groot *et al.*, 2012).³² The sheer scale of ABNJ makes them the most valuable provider of ecosystem services overall.

The Global Ocean Commission (GOC) has estimated that (Rogers *et al.*, 2014):

- High seas ecosystems are responsible for almost half of the total biological productivity of the global ocean;
- Nearly half a billion tonnes of carbon (the equivalent of over 1.5 billion tonnes of carbon dioxide) are captured and stored by high seas ecosystems annually, a value of between US\$74 billion and US\$222 billion.
- Close to 10 million tonnes of fish are caught annually on the high seas, i.e. more than US\$16 billion in gross landed value per year.
- The majority of global ocean fish harvests are of species captured both in EEZs and in the high seas,³³ suggesting that overfishing on the high seas is likely to negatively impact nearshore fish catches and vice versa.

2.5. Overview of pressures and threats to ABNJ

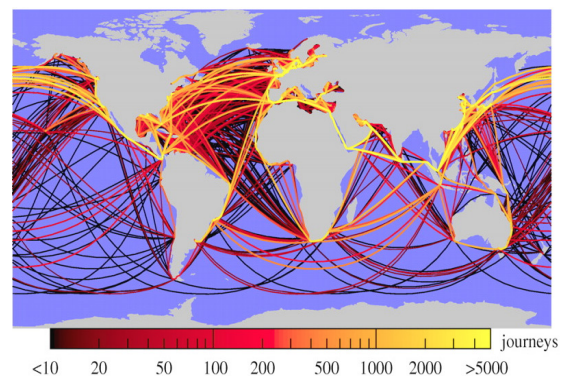
Since the adoption of UNCLOS in 1982, human activities in ABNJ have developed rapidly. Existing activities, such as shipping and fishing have intensified and expanded, while a range of new activities are under development (Ramirez-Llodra *et al.*, 2011; Merrie *et al.*, 2014; Inniss *et al.*, 2016). Climate change and ocean acidification are predicted to compound the impacts of these activities and place further pressure on marine ecosystems.

2.5.1. Shipping

Around 90% of world trade is carried by the international shipping industry;³⁴ 9.84 billion tonnes of

cargo were loaded in 2014.³⁵ Shipping has a range of environmental impacts, including air and noise pollution, dumping of waste, and introduction of invasive species.³⁶

Figure 7. The trajectories of all cargo ships bigger than 10,000 gross tonnage during 2007



Source: Kaluza *et al.*, 2010

2.5.2. Fishing

According to the UN Food and Agriculture Organization (FAO), 87% of the fish stocks it monitors were overfished or fully fished in 2011 (FAO 2014). Global fisheries catches, which are self-reported to the FAO by fishing States,³⁷ saw large increases in the 1960s and 1970s due the expansion of industrial fisheries in developed countries (Norse *et al.*, 2012). Reported catches declined from the late 1980s onwards, before stagnating in the late 1990s at around 90 million tons (FAO, 2014; Norse *et al.*, 2012).

This plateau in catch, coupled with ever increasing demand, led to scarcity in traditional nearshore fisheries and has driven industrial fishing to ever deeper and more distant waters (Maguire *et al.*, 2006; FAO, 2014). According to the FAO, about 30% of the highly migratory tuna and tuna-like species are now considered overexploited or depleted, as are more than 50% of the highly migratory oceanic sharks, and nearly two-thirds of straddling stocks (Maguire *et al.*, 2006). All fisheries in

Trade, Safety, Security, Environment, 2012, <http://www.imo.org/en/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf>.

35. UNCTAD, Review of Maritime Transport 2015, http://unctad.org/en/PublicationsLibrary/rmt2015_en.pdf.

36. For an overview, see the World Shipping Council website: <http://www.worldshipping.org/industry-issues/environment>

37. Recent research estimates that true global catches are significantly higher than those reported to the FAO and reflected in its reports. This research also suggests that catches are declining (Pauly & Zeller, 2016).

32. I.e. Translated into US\$ values on the basis of Purchasing Power Parity.

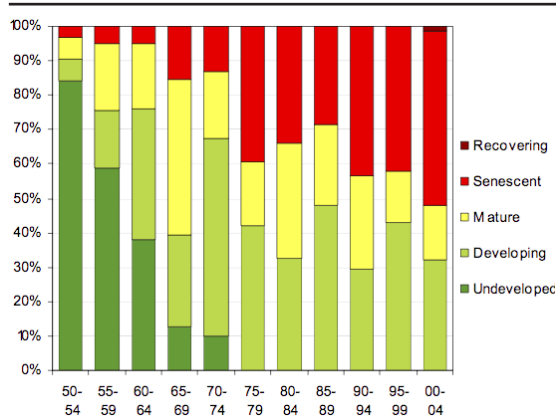
33. 54 million tonnes or 68% of global fish harvests.

34. IMO Maritime Knowledge Centre, International Shipping Facts and Figures – Information Resources on

ABNJ are considered fully exploited, overexploited, or depleted; none are considered sustainable (Maguire *et al.*, 2006).

The target species in ABNJ are mostly long-lived with slow reproduction rates, and their exploitation entails considerable bycatch. Indeed, it is doubtful whether fisheries in ABNJ will ever be sustainable: the “*serial collapses that took 50 years in coastal marine fisheries takes only 5-10 years in the deep-sea. These fisheries also often rely extensively on bottom trawling, and a sustainable combination of low catches with limited ecosystem impact is a difficult, almost impossible, balance to achieve*” (Norse *et al.*, 2012).

Figure 8. Percentage of the world's top oceanic-deepwater marine fishery resources in various phases of fisheries development, 1950-2004.



Source: Maguire *et al.*, 2006

2.5.3. Seabed mining

Exploration for mineral resources in the Area is underway, with 26 contracts for exploration signed between contractors and the ISA (see Annex 1).³⁸ Seabed mining could potentially have a range of impacts on marine ecosystems, including: impacts on the benthic community where nodules are removed; impacts of the discharged plume on the near-surface biota; impacts on the deep ocean from plume and suspended sediments; and impacts on the benthos due to deposition of suspended sediment (Markussen, 1994; Morgan *et al.*, 1999; ISA, 2008; Allsopp *et al.*, 2013).

2.5.4. Bioprospecting

Extreme environments in ABNJ, such as submarine trenches, cold seeps, seamounts, and hydrothermal vents, have given rise to the development of organisms with unique characteristics.

These organisms are potential sources of novel genes that could be of both scientific and commercial interest, and bioprospecting has increased in ABNJ in recent years (Arnaud-Haond *et al.*, 2011; Broggiato *et al.*, 2014a).³⁹

Bioprospecting may introduce light and noise to otherwise undisturbed environments, affect water temperature, and produce pollution (such as debris or discharge from vessels and equipment) and inadvertent movement or introduction of organisms can lead to contamination. There is also a risk that subsequent collection or harvesting of promising organisms may pose a particular threat to those organisms and the ecosystems from which they are harvested. Despite a range of potential impacts, it is currently thought that the overall impact of bioprospecting is low (Hunt & Vincent 2006). Three countries currently own 70% of patents on marine genetic resources (Arnaud-Haond *et al.*, 2011); this has been raised as an equity issue by many developing countries (Druel *et al.*, 2013).

2.5.5. Greenhouse gas emissions

Anthropogenic greenhouse gas emissions have caused measurable physical changes in the oceans through ocean warming, sea-level rise and acidification (Howes *et al.*, 2015; Inniss *et al.*, 2016). Though the precise consequences of warming and acidification will depend on future levels of greenhouse emissions (Gattuso *et al.*, 2015) a range of impacts are likely to occur, including on fisheries and aquaculture, coastal tourism, and human health (Weatherdon *et al.*, 2015; Inniss *et al.*, 2016).

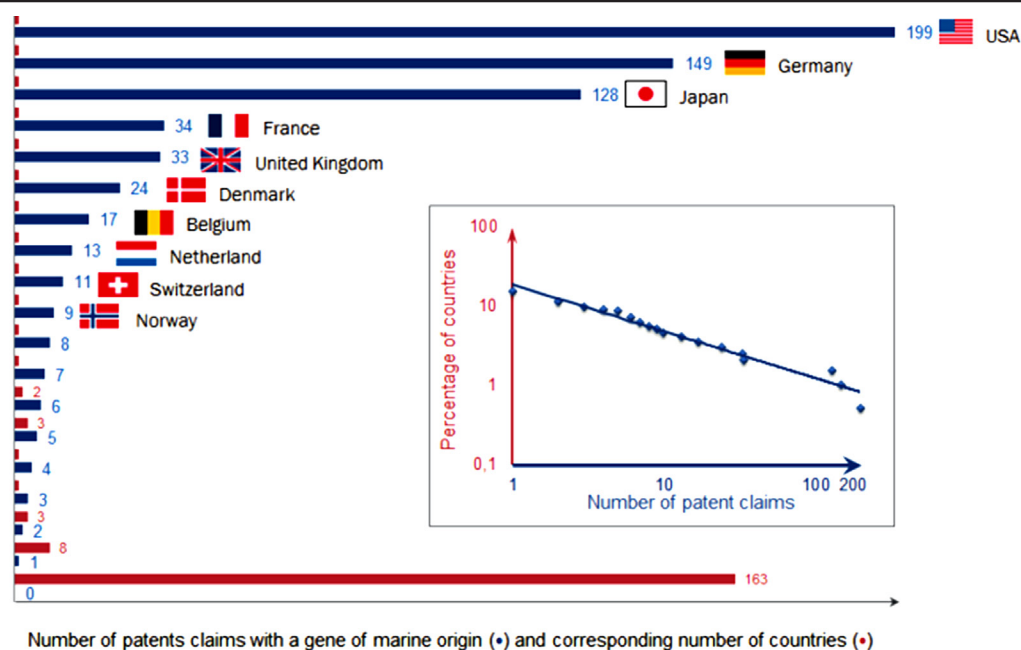
Proposals have also been made to use the ocean to mitigate the effects of greenhouse gas emissions: activities such as geoengineering⁴⁰ are being developed, and some techniques, such as ocean fertilisation,⁴¹ are already at the experimentation stage (Rayfuse *et al.*, 2008; Lukacs, 2012; Boyd, 2013).

39. I.e. The “exploration of biodiversity for commercially valuable genetic and biochemical resources”. CBD, Progress report on the Implementation of the Programmes of Work-Information on Marine and Coastal Genetic Resources including Bioprospecting, 20 April 2000. UNEP/CBD/COP/5/INF/7, <https://www.cbd.int/doc/meetings/cop/cop-05/information/cop-05-inf-07-en.pdf>

40. “Geoengineering proposals aim to intervene in the climate system by deliberately modifying the Earth’s energy balance to reduce increases of temperature and eventually stabilise temperature at a lower level than would otherwise be attained”. Royal Society, *Geoengineering the Climate: Science, Governance and Uncertainty* (2009) RS Policy document 10/09, https://royalsociety.org/~/media/Royal_Society_Content/policy/publications/2009/8693.pdf

41. I.e. Adding nutrients to the ocean with the aim of increasing the rate at which atmospheric carbon dioxide is transferred to the deep sea. See *ibid* 16-18.

38. The contracts are for exploration in the Clarion-Cliperton Fracture Zone (Pacific Ocean), the Western Indian Ocean, and on the Mid-Atlantic Ridge.

Figure 9. Patent claims with a gene of marine origin

Source: Arnaud-Haond *et al.*, 2011

Offshore wind and ocean energy technologies are also being developed and deployed, though there are currently no plans for projects in ABNJ (Wright *et al.*, 2016).

3. EXISTING FRAMEWORK FOR ABNJ: A PATCHWORK OF LEGAL INSTRUMENTS

3.1. Duties and objectives related to the conservation and sustainable use of marine biodiversity in ABNJ

UNCLOS provides for some general environmental duties, applicable to both the high seas and the Area. They include:

- (i) The general duty to protect and preserve the marine environment;⁴²
- (ii) The duty to conserve and manage the living resources of the high seas;⁴³
- (iii) The duty to prevent, reduce and control pollution of the marine environment.⁴⁴

42. UNCLOS, Article 192: "States have the obligation to protect and preserve the marine environment".

43. UNCLOS, Articles 116-119 on the conservation and management of the living resources of the high seas.

44. UNCLOS, Articles 194-196 on the measures to prevent, reduce and control pollution of the marine environment, the duty not to transfer damage or hazards or

(iv) The duty to take the measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life";⁴⁵

(v) The duties of States to cooperate with other States both at the regional and global levels.⁴⁶

Given the foregoing, it is clear that the freedoms of the high seas "are not absolute rights but are subject to a number of limitations and corresponding duties upon which their legal exercise is preconditioned" (Freestone 2009).

In 2010 several objectives relevant to marine biodiversity in ABNJ were adopted within the framework of the Convention on Biological Diversity (CBD).⁴⁷ Known as the "Aichi Targets", they include:⁴⁸

transform one type of pollution into another and the use of technologies or introduction of alien or new species and UNCLOS Articles 207-212 on the international rules and national legislation to prevent, reduce and control pollution from (i) land-based sources, (ii) seabed activities subject to national jurisdiction, (iii) activities in the Area, (iv) dumping from vessels, (v) the atmosphere.

45. UNCLOS, Article 194 (5).

46. UNCLOS, Article 197 on the cooperation on a global or regional basis; UNCLOS, Articles 242-244 on international cooperation with respect to marine scientific research.

47. Adopted in 1992 and entering into force in 1993, the CBD currently has 193 Contracting Parties and has therefore reached almost universal acceptance.

48. CBD COP 10, Decision X/2, Strategic Plan for

- “Target 3: By 2020, at the latest, incentives, including subsidies, harmful to biodiversity are eliminated, phased out or reformed in order to minimise or avoid negative impacts, and positive incentives for the conservation and sustainable use of biodiversity are developed and applied, consistent and in harmony with the Convention and other relevant international obligations, taking into account national socio-economic conditions”;
- “Target 6: By 2020, all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem-based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits”;
- “Target 10: By 2015, the multiple anthropogenic pressures on coral reefs, and other vulnerable ecosystems impacted by climate change or ocean acidification are minimised, so as to maintain their integrity and functioning”;
- “Target 11: By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes”.

The Rio+20 outcome document, cognisant of Aichi Target 11, also reaffirmed some important goals and principles, with States committing to: “protect and restore, the health, productivity and resilience of oceans and marine ecosystems, to maintain their biodiversity, enabling their conservation and sustainable use for present and future generations, and to effectively apply an ecosystem approach and the precautionary approach in the management, in accordance with international law, of activities having an impact on the marine environment, to deliver on all three dimensions of sustainable development”.⁴⁹

At the 2012 Rio+20 Conference, States also agreed to develop a set of Sustainable Development

Goals (SDGs) to bring together the Millennium Development Goals (MDGs) and environmental concerns in one coherent and comprehensive global development agenda. The SDGs were formally adopted in September 2015, with a stand-alone Ocean SDG (SDG 14). Associated targets, including those related to the conservation of marine ecosystems and the effective regulation of fishing activities, directly concern ABNJ.

3.2. A sectoral governance framework

A large variety of international instruments applicable to the ocean pre-date UNCLOS, with many additional instruments adopted since its entry into force. The ocean governance framework is therefore often characterised as fragmented (see, e.g. Tladi 2011; Druel *et al.*, 2013; Töpfer *et al.*, 2014). This is especially the case in relation to ABNJ where a number of international agreements or instruments are applicable.

These agreements mostly cover a particular sector or issue, though they are sometimes developed on a geographical basis. The following is a non-exhaustive overview of key sectoral instruments:

- Fishing in ABNJ is addressed under the auspices of the FAO, which provides guidance through the adoption of codes of conduct, plans of action and legally binding instruments. This is complemented, at the regional level by RFMOs. RFMOs either manage straddling and highly migratory fish stocks⁵⁰ (“tuna RFMOs”) or high seas fish stocks (“non-tuna RFMOs”).
- Exploration and exploitation of the mineral resources of the Area are regulated by the ISA.
- Shipping and dumping are regulated through international conventions adopted in the framework of the International Maritime Organisation (IMO).⁵¹
- Marine science is discussed at the global level under the auspices of the Intergovernmental Oceanographic Commission (IOC) of the United Nations Educational, Scientific and Cultural Organisation (UNESCO).
- Other sectoral instruments are also applicable in ABNJ, such as: the International Convention on the Regulation of Whaling; the Convention on Migratory Species; the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and the Agreement on the Conservation of Albatrosses and Petrels.

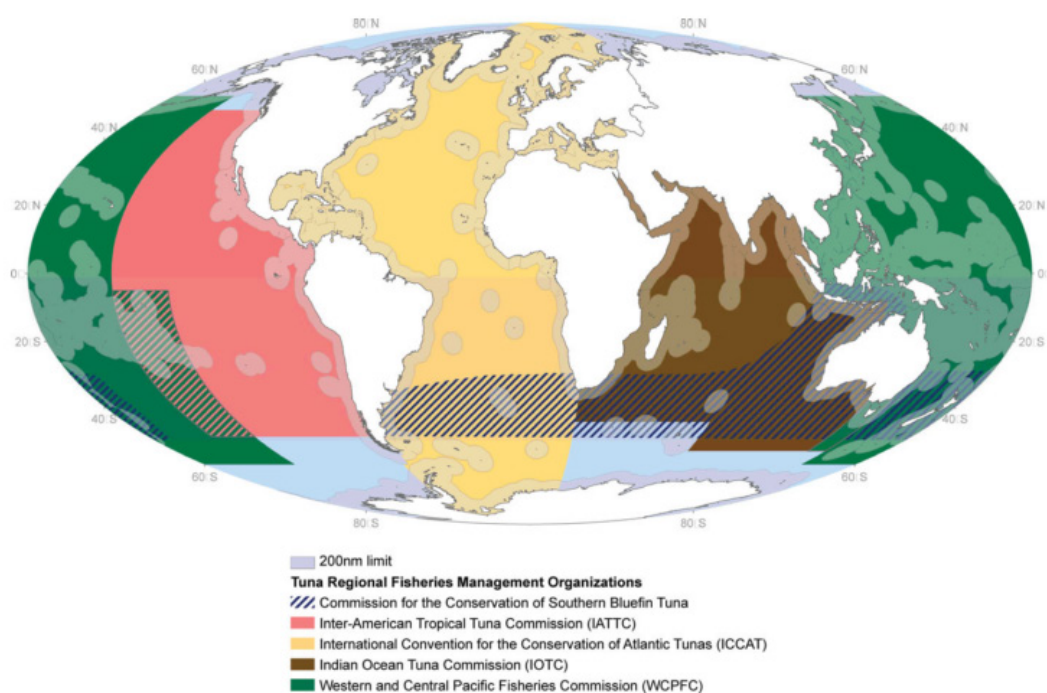
Biodiversity 2011/2020. For further information, see: <https://www.cbd.int/sp/>.

49. The Future We Want (2012) UNGA Resolution A/66/288, §158. This commitment applies to marine areas within and beyond national jurisdiction.

50. I.e. Tuna and tuna-like species.

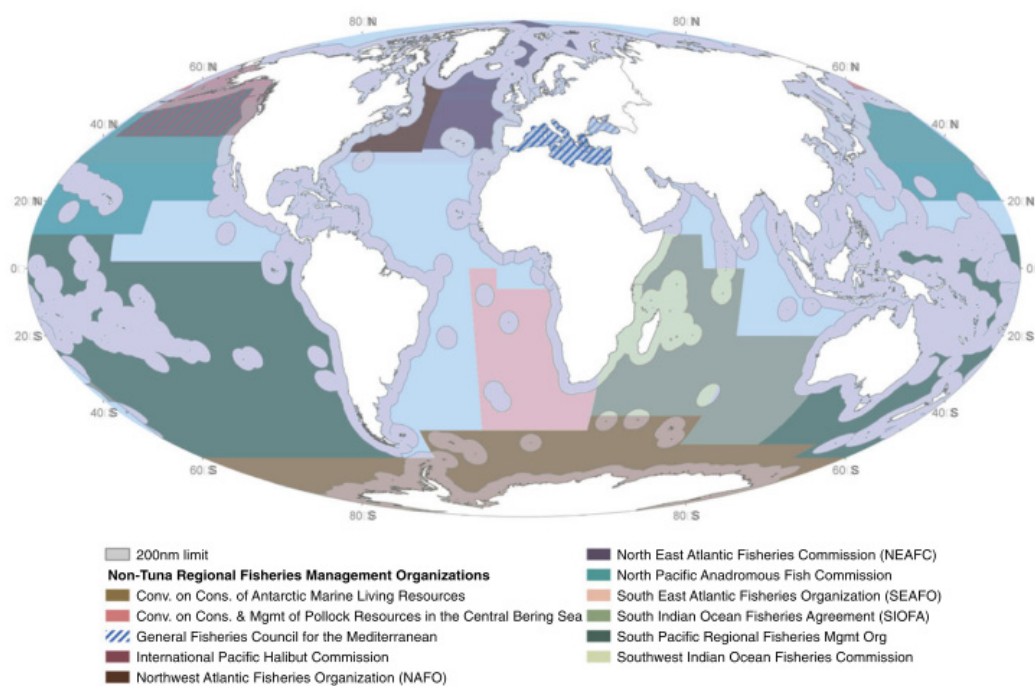
51. For example, the London Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter (1972) and its 1996 London Protocol.

Figure 10. Tuna RFMOs



Source: Ban *et al.*, 2014. Areas in light blue indicate no RFMO exists; all fisheries in the Southern Ocean are managed by CCAMLR.

Figure 11. Non-tuna RFMOs.



Source: Ban *et al.*, 2014

The CBD also has a role to play and its objectives closely echo the current concerns regarding marine biodiversity in ABNJ.⁵² The CBD has a mandate covering ABNJ, although its extent is the subject of debate (Gjerde & Rulska-Domino 2012): the Convention applies, in relation to each Contracting Party, “in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction”.⁵³ The CBD states that contracting Parties “shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction... for the conservation and sustainable use of biological diversity”.⁵⁴

In practical terms, the role of the CBD in relation to marine biodiversity in ABNJ has been limited by the Contracting Parties to the provision of scientific and technical information and advice. The main contribution in this regard has been the development of a process to describe “ecologically or biologically significant marine areas” (EBSAs) (Dunn *et al.*, 2014). The CBD has also contributed to the global discussions with the adoption of voluntary Guidelines for the consideration of biodiversity in environmental impact assessments (EIA) and strategic environmental assessments (SEA) in ABNJ.⁵⁵ These efforts have been noted in the UNGA omnibus resolutions on oceans and the law of the sea.⁵⁶

3.3. The development of regional initiatives

UNCLOS emphasises the importance of global and regional cooperation with regard to the marine environment, stipulating that States, “shall cooperate on a global basis and, as appropriate, on a regional basis” for the protection of the marine environment, “taking into account regional features”.⁵⁷ The regional approach to

marine environmental protection can increase the likelihood of political consensus among parties as they may share a similar history, culture and interests in the region, and can provide an appropriate scale for the implementation of an ecosystem approach to conservation. In this context, a number of regional initiatives have been established with the aim of advancing the conservation and sustainable use of marine biodiversity in ABNJ (Druel *et al.*, 2012; Rochette *et al.*, 2014; Rochette *et al.*, 2015).

3.3.1. MPAs within Regional Seas programmes

The United Nations Conference on the Human Environment (Stockholm, 1972) led to the creation of the United Nations Environmental Programme (UNEP) “to serve as a focal point for environmental action and coordination within the United Nations system”.⁵⁸ At its first session, UNEP made the oceans a priority action area,⁵⁹ and its Regional Seas Programme was initiated in 1974 (UNEP, 1982). Today almost 150 States across 18 regions participate in such programmes (Rochette *et al.*, 2015).

Some Regional Seas programmes (RSPs) have progressively extended their activities to ABNJ (Rochette & Chabason, 2011; Rochette *et al.*, 2014) (Annex 3). Four RSPs currently have a specific mandate in ABNJ: the Mediterranean through the Barcelona Convention;⁶⁰ the Southern Ocean through the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR);⁶¹ the North-East Atlantic through the OSPAR Convention;⁶² and the South Pacific through the Nouméa Convention.⁶³

Three RSPs have already taken action in ABNJ through the creation of MPAs:

- In the Mediterranean, France, Italy and Monaco

52. Its objectives are “the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources”. CBD, Article 1.

53. CBD, Article 4 (b).

54. CBD, Article 5.

55. CBD Decision XI/18 on Marine and Coastal Biodiversity, 5 December 2012, UNEP/CBD/COP/DEC/XI/18, <https://www.cbd.int/doc/decisions/cop-11/cop-11-dec-18-en.pdf>.

56. See, e.g. UNGA Resolution 67/78 of 11 December 2012, §189, 196, 197, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/483/28/PDF/N1248328.pdf>.

57. UNCLOS, Article 197.

58. UNGA Resolution 2997 (XXVII) of 15 December 1972, [http://www.unep.org/scienceinitiative/GC_decisions/UNGAResolution2997\(XXVII\).doc](http://www.unep.org/scienceinitiative/GC_decisions/UNGAResolution2997(XXVII).doc).

59. UNEP, Report of the governing council on the work on its second session, 11-22 March 1974, United Nations, New York, Decision 8(II).

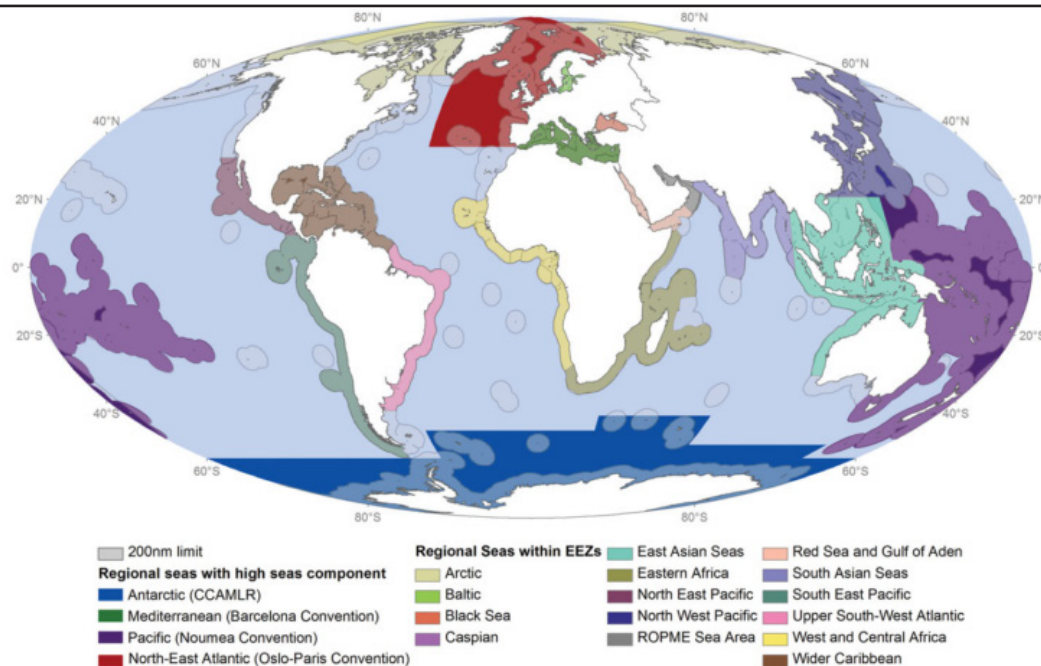
60. Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean 1995. For further information, see: <http://www.unepmap.org/index.php?module=content2&catid=001001004>.

61. Convention on the Conservation of Antarctic Marine Living Resources 1980. For further information, see: <https://www.ccamlr.org/en>.

62. Convention for the Protection of the Marine Environment of the North-East Atlantic 1992. For further information, see: <http://www.ospar.org/>.

63. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986. For further information, see: <https://www.sprep.org/legal/the-convention>.

Figure 12. Regional Seas programmes



Source: Ban *et al.*, 2014.

established the Pelagos Sanctuary for marine mammals in 1999 (see 2.2.1),⁶⁴ which was recognised as a Specially Protected Area of Mediterranean Importance (SPAMI) under the Barcelona Convention in 2001 (Scovazzi, 2011).⁶⁵

- In the Southern Ocean, CCAMLR adopted its first MPA on the South Orkney Islands continental shelf in 2009 (Brooks 2013).⁶⁶ In the same year, CCAMLR agreed to work towards a coherent and representative network of MPAs within the Convention Area.
- In the North East Atlantic, Contracting Parties to the OSPAR Convention established a network

of 6 MPAs in ABNJ in 2010 (Freestone *et al.*, 2014);⁶⁷ a seventh MPA was agreed in 2012.⁶⁸

Initiatives conducted in these three regions have inspired others to consider extending their governance efforts to ABNJ. In the South Pacific, the Permanent Commission for the South Pacific (CPPS) adopted the Galapagos Declaration (2012), whereby signatories committed to promote coordinated action regarding their interests in living and non-living resources in ABNJ.⁶⁹ Contracting Parties to the Abidjan Convention⁷⁰ adopted in a decision in 2014 requesting the Secretariat “set up a working group to study all aspects of the conservation and sustainable use of marine biological diversity beyond

64. The Pelagos Sanctuary incorporates the territorial waters of the three founding States, but also ABNJ. The situation of the Mediterranean Sea is particular in that there is no point located at a distance of more than 200 nautical miles from the closest land or island. Therefore, “any waters beyond the limits of national jurisdiction (high seas) would disappear if all the coastal States decided to establish their own exclusive economic zones (EEZ)” (Scovazzi, 2011). Despite Mediterranean States increasingly choosing to declare their EEZs, parts of the Mediterranean Sea remain ABNJ (IUCN, 2011).

65. UNEP/MAP, Report of the twelfth ordinary meeting of the Contracting Parties to the Convention for the protection of the Mediterranean Sea against pollution and its protocols 14-17 November 2001, UNEP(DEC)/MED IG.13/8, 30 December 2001, Annex IV.

66. CCAMLR, CM 91-03 (2009) Protection of the South Orkney Islands Southern Shelf, http://archive.ccamlr.org/pu/E/e_pubs/cm/11-12/91-03.pdf.

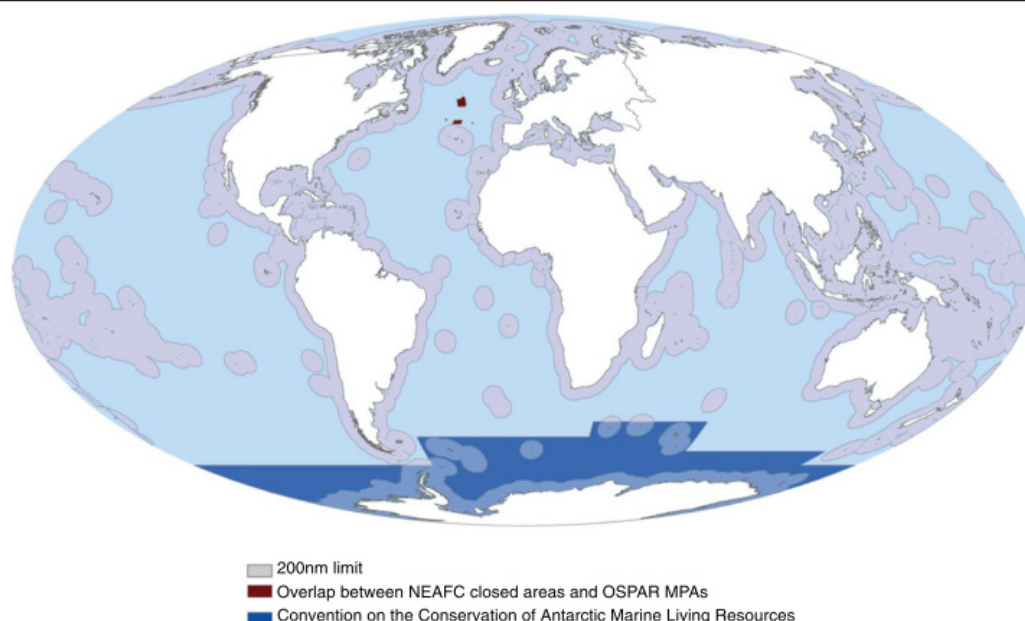
67. OSPAR Commission, Decisions 1-6, 2010; OSPAR Commission Recommendations 12-17, 2010.

68. OSPAR Commission, 2012 Status Report on the OSPAR Network of Marine Protected Areas (2013), http://www.ospar.org/documents/dbase/publications/p00618/p00618_2012_mpa_status%20report.pdf.

69. Permanent Commission for the South Pacific, Commitment to Galapagos for the XXI Century, VIII Meeting of Ministers of Foreign Affairs, Puerto Ayora, Galápagos, Ecuador, 17 August 2012, http://cpps.dyndns.info/asambleas/x_asamblea/Commitment%20of%20Galapagos%20for%20the%20XXI%20Century.pdf.

70. Abidjan Convention for Cooperation in the Protection, Management and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central and Southern Africa Region 1981, entered into force 5 August 1984.

Figure 13. Map showing CCAMLR MPAs in the Southern Ocean and the OSPAR MPAs (including overlapping NEAFC VME fisheries closures) in the North-East Atlantic



Source: Ban *et al.*, 2014.

areas of national jurisdiction within the framework of the Abidjan Convention”.⁷¹

These regional initiatives are of interest for a number of reasons. Such initiatives can allow advancements in ABNJ governance to be made while the international process to establish a new legally binding agreement is in progress. They may also help to raise awareness of the importance of conserving marine biodiversity in ABNJ, and can lead to the development of scientific knowledge and management tools. However, such initiatives suffer from important limitations. Crucially, they are only binding for contracting parties to the regional organisation: e.g. there is no mechanism for the creation of internationally recognised legally binding MPAs. Moreover, since RSPs have no mandate for the regulation of many activities,⁷² cooperation and coordination with relevant global and regional organisations is essential.

The OSPAR Commission has begun to address the need for cooperation with the development of a “Collective Arrangement” between competent authorities in its region, underpinned by a set of more formal memoranda of

understanding (MoUs) (Johnson, 2013). The Collective Arrangement seeks to foster the development and implementation of appropriate management measures to be applied in the region by the appropriate organisations. The OSPAR Commission and the North East Atlantic Fisheries Commission (NEAFC) have endorsed the Collective Arrangement, and discussions with the ISA and IMO are ongoing. Although promising, it has proved “time and labour intensive, particularly in the global bodies, IMO and ISA, to move such an idea forward, with organisations’ different levels of technical scrutiny and sometimes complex and mutually incompatible annual meeting cycles” (Freestone *et al.*, 2014a).

3.3.2. Coalition-based regional initiatives

In addition to the initiatives established under RSPs, there have been efforts to establish more comprehensive management regimes, including MPAs, through coalitions of States and other partners. The two main efforts in this category are the Pelagos Sanctuary for Mediterranean Marine Mammals, mentioned above, and recent developments concerning the Sargasso Sea.

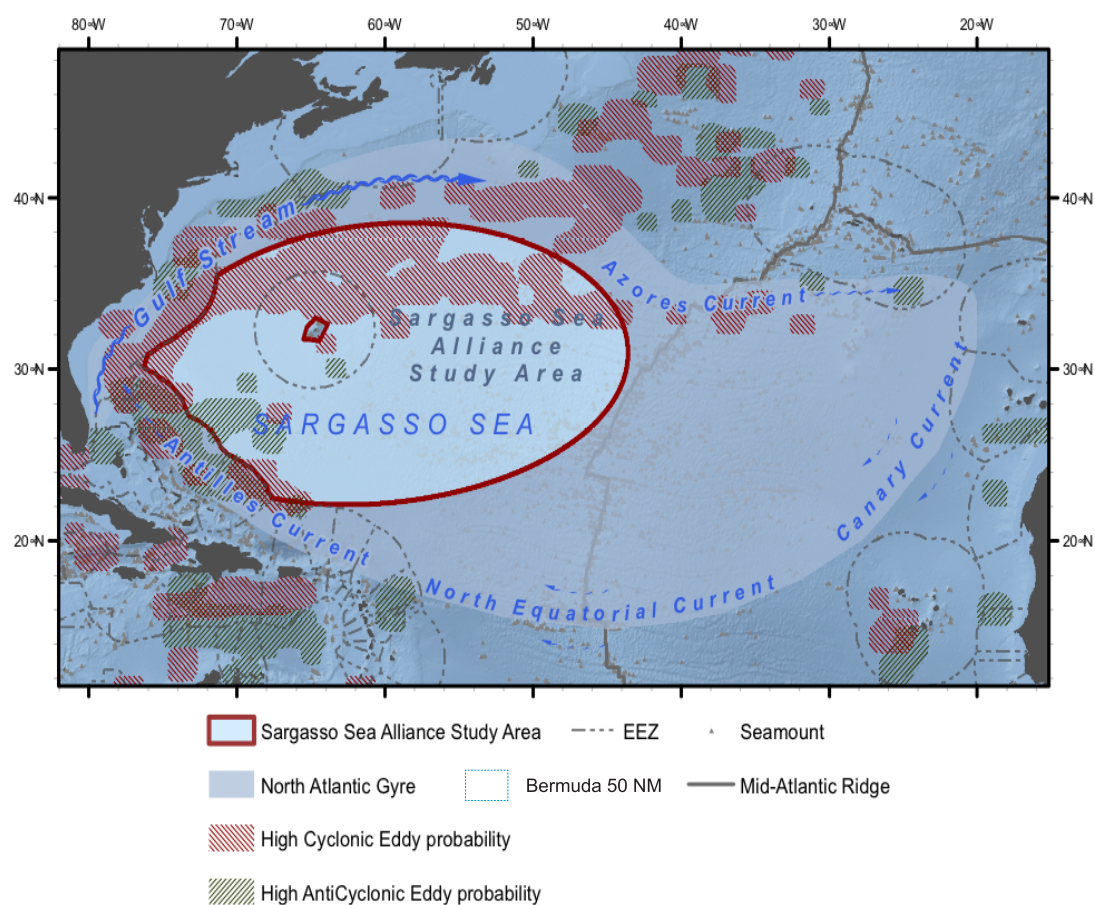
The Pelagos Sanctuary for Mediterranean Marine Mammals, designated in 1999, aims to protect the eight resident cetacean species in the area.⁷³ The Agreement seeks to coordinate initia-

71. Decision CP11/10 Conservation and Sustainable use of the Marine Biodiversity of the Areas Located beyond National Jurisdictions, UNEP (DEPI)/WACAF/COP.11/Rev1, <http://cop11.abidjanconvention.org/media/documents/Report/COP11%20-%20-%20Final%20Report%20En.pdf>.

72. E.g. Fishing, navigation and seabed mining.

73. Agreement concerning the creation of a marine mammal sanctuary in the Mediterranean 1999, <http://www>.

Figure 14. SSA study area



Source: SSA

tives to protect cetaceans and their habitats from all sources of disturbance, including: pollution, noise, accidental capture and injury, and disruption. In 2001, the Sanctuary was recognised as a SPAMI.⁷⁴ A joint management plan of the Sanctuary was approved in 2004 and additional steps have been taken to ensure the protection of marine mammals in the area, including restrictions on fishing with towed dredges and bottom

trawlnets,⁷⁵ refraining from conducting naval exercises in the area, and the discontinuation of discharge of certain wastes in Sanctuary waters. A few shipping companies have also accepted to use the real time plotting of cetaceans (REPCET) system to avoid collisions with cetaceans,⁷⁶ and the founding States have committed to seeking recognition as a Particularly Sensitive Sea Area (PSSA, see 4.3; Mayol *et al.*, 2013; Mangos & André, 2008). Concerns are however regularly expressed regarding the efficacy and implementation of the management and conservation tools developed in the Sanctuary (Notarbartolo di Sciara, 2009).

ecolex.org/server2.php/libcat/docs/TRE/Full/En/TRE-001399.txt. For further information, see <http://www.sanctuaire-pelagos.org/en/about-us/presentation>. See also Notarbartolo di Sciara *et al.*, 2008.

74. Under the Barcelona Convention, specifically the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean 1995 (SPA/BD Protocol). See: UNEP/MAP, Report of the twelfth ordinary meeting of the Contracting Parties to the Convention for the protection of the Mediterranean Sea against pollution and its protocols, Monaco, 14-17 November, 2001, UNEP(DEC)/MED IG.13/8, 30 December 2001, Annex IV.

75. GFCM Recommendation on Establishment of Fisheries Restricted Areas in order to Protect the Deep Sea Sensitive Habitats (2006) REC-GFCM/30/2006/3, ftp://ftp.fao.org/Fi/DOCUMENT/gfcm/web/GFCM_Recommendations.pdf. There are no particular regulations for pelagic fishing.

76. See: http://www.repcet.com/docs/SE_2014_01_03_Pres-REPCET_en.pdf

The Sargasso Sea Commission (SSC) was established in 2014 by the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea and is intended to exercise a stewardship role for the ABNJ surrounding the island of Bermuda (Freestone, 2014). The Declaration is a non-binding agreement to collaborate to pursue conservation measures through existing regional and international organisations, and was adopted and signed by Bermuda, Azores, Monaco, the UK and the US. The creation of the SSC builds upon the earlier efforts of the Sargasso Sea Alliance (SSA), a partnership between the Government of Bermuda, NGOs, scientists and private donors (Freestone *et al.*, 2014b). In 2012, the Parties to the CBD recognized the Sargasso Sea as an EBSA,⁷⁷ and a range of additional conservation and management actions are being considered.⁷⁸

4. MAJOR GAPS IN GOVERNANCE OF ABNJ

4.1. Absence of a comprehensive set of overarching governance principles

UNCLOS envisages a role for overarching principles in ocean governance⁷⁹ and a range of principles, derived from UNCLOS and other sources,⁸⁰ are potentially applicable to ABNJ. Principles have been a frequent, if peripheral, feature at international discussions, with various States calling for the use of principles in defining the parameters of a new agreement. Principles could help bridge the gap between the need for a fixed legal document and the need for flexibility, support practical implementation, and guide future decision-making processes.

77. Decision XI/17 on Marine and Coastal Biodiversity: Ecologically or Biologically Significant Marine Areas (2012) UNEP/CBD/COP/DEC/XI/17, p.23, item 13, <https://www.cbd.int/doc/decisions/cop-11/full/cop-11-dec-en.pdf>.

78. These include: recognition of the Sargasso Sea as a UNESCO World Heritage Site; regulation of tuna fishing activities through ICCAT; regulation of navigation through IMO, possibly through the designation of a PSSA with associated protective measures; coordination and cooperation with ISA with respect to mining activities; and initiation of coordination and cooperation with relevant actors.

79. E.g. The preamble to UNCLOS states, “matters not regulated by this Convention continue to be governed by the rules and principles of general international law”.

80. Such as environmental treaties, customary international law, and soft-law sources such as UNGA resolutions.

States often refer to principles contained in UNCLOS, the CBD and more recent international declarations, specifically: precaution; cooperation; accountability; transparency; intergenerational and intra-generational equity; the ecosystem approach; and stewardship. However, a standalone declaration of principles for ABNJ does not yet exist. Numerous efforts have been made to highlight the importance of principles and comprehensively identify those that might apply to ABNJ (Freestone 2008; Houghton 2014; IUCN).

Consolidation and reaffirmation of these principles to establish minimum standards for decision-making processes and activities in ABNJ could help improve consistency between different regional initiatives, and guide the evolution of sectoral regimes. Incorporation of modern governance principles would also “unequivocally confirm” their applicability to ABNJ and “provide a sound basis for developing a coherent regime” (Houghton 2014), as well as further cementing the role of principles in fostering integrated decision-making.

4.2. A fragmented institutional framework

While each of the institutions and instruments mentioned above presents an opportunity to advance conservation and sustainable use, they “bear no real relationship to one another and operate independent of each other without an overarching framework to ensure structure, consistency and coherence” (Tladi 2011).

Moreover, there are gaps in this governance framework: not all human activities in ABNJ are adequately regulated and not all regions are covered. In addition, some existing organisations continue to manage activities within their mandate without taking into account modern governance principles such as the ecosystem approach, the precautionary principle, or the need for decision-making processes to be transparent and open. This hinders the implementation of integrated and multi-sectoral measures. The establishment of multi-purpose MPAs in ABNJ provides a good example of these challenges (see section 5.2).

This fragmentation also hinders the efforts of competent organisations to coordinate and cooperate with each other. As underlined by the GOC:

“In such a highly fragmented landscape, policy coherence and effective international cooperation at and between global and regional levels are essential to achieving common objectives (...) Over the years, efforts have been made to improve

coordination and coherence (...) These efforts have not generally met with great success”.

There are some isolated exceptions where frameworks for cooperation exist in the form of MoUs or other non-binding instruments: e.g. the efforts of OSPAR to establish MPAs in North-East Atlantic and, more formally, the Antarctic Treaty System (ATS)⁸¹ and CCAMLR in the Southern Ocean (Druel *et al.*, 2012).

4.3. Absence of a global framework to establish MPAs in ABNJ

An MPA may be defined as:⁸²

“an area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings”.

Or, more broadly:⁸³

“A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values”.

MPAs are widely acknowledged as an important tool for biodiversity conservation, and ecologically connected networks of MPAs are crucial for sustaining high seas ecosystems (Sumaila *et al.*, 2007).⁸⁴ The international community has

committed, in numerous global forums, to establish a network of MPAs covering a significant percentage of the oceans, including in ABNJ.⁸⁵

There is therefore strong interest in the establishment of multi-purpose MPAs in ABNJ,⁸⁶ yet there is currently no global mechanism to make this possible. The prevailing approach to conservation and sustainable use at the global level is sectoral, and several international organisations already have certain “area-based management tools” (ABMTs) at their disposal (Annex 2):

- The IMO can identify PSSAs that, for recognised ecological, socio-economic or scientific reasons, may be vulnerable to damage by international maritime activities.⁸⁷ PSSAs are designated by non-legally binding resolutions from the IMO Marine Environment Protection Committee (MEPC) and therefore have no immediate effect. Associated protective measures may subsequently be adopted to protect the area.⁸⁸ No PSSAs have yet been designated in ABNJ.
- The ISA can designate Areas of Particular Environmental Interest (APEI) and preservation reference zones.⁸⁹ The ISA has preliminarily designated 9 APEIs in the Clarion-Clipperton Zone (North Central Pacific).⁹⁰
- RFMOs can designate closures of certain fisheries to protect or restore the stocks they manage,

as fishing or tourism could be regulated, though not necessarily prohibited. Definitions of MPAs are generally broad so as to incorporate this variety, though the basic idea remains that MPAs will have “a special status in comparison with the surrounding area due to their more stringent regulation of one or more human activities [...] by one or more measures [...] for one or more purposes” (Molenaar & Elferink 2009).

81. I.e. The various instruments in place regulating relations among States in the Antarctic. The Antarctic Treaty was signed in Washington on 1 December 1959 and entered into force on 23 June 1961. The Treaty is supplemented by the Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 1991 – Madrid Protocol), and two additional conventions dealing with the Conservation of Antarctic Seals (London 1972) and the Conservation of Antarctic Marine Living Resources (Canberra 1980). A further Convention on the Regulation of Antarctic Mineral Resource Activities (Wellington 1988) was negotiated but never entered into force; it has now been superseded by the Madrid Protocol.

82. SBSTTA 8, Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas; Note by the Executive Secretary, 2003, UNEP/CBD/SBSTTA/8/INF/7, <https://www.cbd.int/doc/meetings/sbstta/sbstta-o8/information/sbstta-o8-inf-07-en.pdf>.

83. Guidelines for applying the IUCN Protected Areas Categories to MPAs (2012) Best Practice Protected Area Guidelines Series No.19, http://cmsdata.iucn.org/downloads/iucn_categoriesamp_eng.pdf.

84. The level of protection may vary depending on the pressures on the area to be protected and on the conservation needs. Some MPAs may be entirely or partly “no-take zones”, while in others certain activities such

85. E.g. WSSD, 2002 Aichi Target 11 and the Rio+20 “Future We Want” document, discussed above.

86. I.e. MPAs which to regulate a large variety of human activities with the ultimate objective of conserving marine biodiversity.

87. IMO, Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSAs) (2005) A.982(24), <http://www.imo.org/en/OurWork/Environment/PSSAs/Documents/A24-Res.982.pdf>.

88. For example: designation of the PSSA as a Special Area under Annexes I-V of the MARPOL Convention, where discharges from ships are more strictly controlled or prohibited; a SOx-emission control area; declaration of the proposed PSSA as an ‘area to be avoided’ by ships.

89. ISA, Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters (2013) ISBA/19/C/17, §V.31.6, <http://www.imo.org/en/OurWork/Environment/PSSAs/Documents/A24-Res.982.pdf>.

90. ISA, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (2012) ISBA/18C/22, <http://www.isa.org.jm/files/documents/EN/18Sess/Council/ISBA-18C-22.pdf>.

or to protect the vulnerable marine ecosystems (VMEs) located on the seabed (pursuant to relevant UNGA resolutions regarding non-tuna RFMOs).⁹¹ Approximately 30 such closures have been made in the North-East Atlantic, North-West Atlantic, and South-East Atlantic (Annex 4; Wright *et al.*, 2015).

As previously highlighted, some efforts have been made to develop specific initiatives to conserve marine biodiversity in ABNJ through the creation of MPAs, though these are only binding on Contracting Parties to CCAMLR or the relevant regional organisations, or on other States or bodies on a voluntary basis, and only apply to a limited number of activities.

4.4. Legal uncertainty surrounding the status of MGRs in ABNJ

MGRs and bioprospecting are not explicitly covered by UNCLOS as they were relatively new concepts at the time of the Convention was negotiated. As a result there is a “lack of clarity on the applicable regime relating to bioprospecting and equitable use” of MGRs in ABNJ (Gjerde *et al.*, 2008). This has precipitated an ideological divide between States that argue MGRs form part of the CHM and those that argue that they are covered under the freedom of the high seas principle.

The G77,⁹² China and others have supported the application of the CHM principle to MGRs found in the Area, drawing a parallel with mineral resources of the Area. They have argued for the establishment of an access and benefit sharing (ABS) mechanism, inspired by that developed for the Area,⁹³ and an extension of the role of the ISA to the management of these resources on behalf of all humankind, with special consideration for the needs of developing countries. On the other

hand, some States have argued that the freedom of the high seas principle applies to MGRs in ABNJ. As a consequence, they argue that access to these resources is on a “first come first served” basis and that there is no obligation to share the benefits derived from their exploitation. The EU has taken something of an intermediate position in this debate: while it does not recognise MGRs as CHM,⁹⁴ it has also indicated that application of the freedom of the high seas principle to MGRs undermines conservation. Instead the EU favours benefit-sharing, including monetary and non-monetary benefits.⁹⁵

In 2010, Parties to the CBD adopted the Nagoya Protocol,⁹⁶ through which they seek to establish international rules on “*fair and equitable sharing of the benefits arising from the utilisation of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies and by appropriate funding*”.⁹⁷ The Nagoya Protocol, though conceived in the context of MGRs within national jurisdiction, “*leaves open the possibility for the future negotiation of a multilateral benefit-sharing mechanism, which could, if States so chose, provide the basis for future benefit-sharing arrangement in regards of marine genetic resources from areas beyond national jurisdiction*” (Vierros *et al.*, 2015).⁹⁸ Nonetheless the starting point for discussion of ABS in the ABNJ context has been that MGRs do not fall within the scope of the Nagoya Protocol (Greiber *et al.*, 2012) and the general view among States is that this issue should be resolved under the auspices of UNCLOS, rather than the CBD.

The precise definition of bioprospecting and whether it could fall under the existing UNCLOS regime for MSR⁹⁹ has also been debated within the UNGA, as well as the questions of the traceability

91. In particular UNGA Resolution 61/105 on Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments (2006) A/RES/61/105, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/No6/500/73/PDF/No650073.pdf>.

92. Despite its name, the G77 has 134 Member States. For a list of G77 Members, see Annex 6.

93. UNCLOS, Article 82. Notably §4: “the payments or contributions shall be made through the Authority [the ISA], which shall distribute them to State Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them”.

94. See EU Presidency Statement, Working Group on Marine Biodiversity – Agenda item 5c (15 February 2006), http://www.eu-un.europa.eu/articles/en/article_5705_en.htm.

95. IISD, Marine Biodiversity Working Group Highlights (1 June 2011) ENB 25(68) <http://www.iisd.ca/vol25/enb2568e.html>.

96. Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity, adopted in 2010, <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>. For further information, see: <https://www.cbd.int/abs/>.

97. Nagoya Protocol, Article 1.

98. Article 10 of the CBD allows for Parties to create a global multilateral benefit-sharing mechanism for genetic resources obtained in transboundary situations or for situations where it is not possible to grant or obtain prior informed consent.

99. See UNCLOS, Part XIII, in addition to Article 87 and 143.

of MGRs and issues regarding intellectual property rights (IPRs) (Brogiato *et al.*, 2014b).

4.5. Lack of global rules for EIAs and SEAs in ABNJ

Environmental impact assessments (EIA) and strategic environmental assessments (SEA) are tools intended to integrate environmental considerations into decision-making by providing “clear, well organized information on the environmental effects, risks, and consequences of development options and proposals” (Partidário 2003). EIA is applicable at the project level, while SEA applies to the environmental implications of broader strategic policy decisions.

UNCLOS places an obligation on States to carry out EIAs when they have “reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment”.¹⁰⁰ The obligation to conduct EIA may also form part of customary international law, including for activities in ABNJ.¹⁰¹ There are, however, no global requirements or mechanisms in place for cumulative impact assessment¹⁰² or SEA in ABNJ.

UNCLOS does not provide details regarding the minimum standards for EIAs, and no reporting mechanism is specified. Perhaps owing to the vague nature of this obligation, it has been sparsely and poorly implemented. Only a few sectoral intergovernmental organisations have developed specific requirements to conduct EIAs for human activities in ABNJ. These include: (i) several RF-MOs for deep-sea bottom fisheries; (ii) the ISA for the exploration of seabed mining in the Area; and (iii) the Contracting Parties to the London Convention and its Protocol for the dumping of wastes and ocean fertilisation.¹⁰³ As a result, there are no

specific requirements for EIAs for a wide range of activities.¹⁰⁴

At the regional level, the ATS has developed requirements for EIA for activities having the potential for more than a minor or transitory impact, while the OSPAR Commission has developed requirements, albeit to a much lesser extent.

4.6. Limited capacity building and technology transfer

UNCLOS devotes an entire chapter to the development and transfer of marine technology. According to Article 268, States shall promote:

(a) *the acquisition, evaluation and dissemination of marine technological knowledge and facilitate access to such information and data;*

(b) *the development of appropriate marine technology;*

(c) *the development of the necessary technological infrastructure to facilitate the transfer of marine technology;*

(d) *the development of human resources through training and education of nationals of developing States and countries and especially the nationals of the least developed among them;*

(e) *international cooperation at all levels, particularly at the regional, subregional and bilateral levels.*

This section also contains detailed provisions on how to achieve these objectives, most notably through international cooperation¹⁰⁵ and the establishment of national and regional marine scientific and technological centres. These provisions are complemented by the IOC Criteria and Guidelines on the Transfer of Marine Technology (2003) (CGTMT).¹⁰⁶ A number of tools are therefore at the disposal of States and international organisations wishing to engage in capacity building and the transfer of marine technology.

100. UNCLOS, Article 206.

101. The International Court of Justice has held: “it may now be considered a requirement under general international law to undertake an environmental assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2010] ICJ Rep. 14, 83 par. 204. ITLOS, referring to this judgment, held that it “may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the [ICJ]’s references to ‘shared resources’ may also apply to resources that are the common heritage of mankind”. *Seabed Disputes Chamber of ITLOS, Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the “Area”* (Case 17, 2011) par. 148.

102. I.e. the impact of individual activities in the context of the impacts of other human activities.

103. London Convention on the Prevention of Marine

Pollution by Dumping of Waste and Other Matter (1972) and its 1996 Protocol.

104. Including: “seabed activities other than mining, (e.g. cable and pipelines, seabed installations, marine scientific research, bioprospecting, sea-based tourism); high seas activities other than dumping and some fishing (e.g. shipping, marine scientific research, floating installations (e.g. wave, nuclear, CO₂ mixers)); impacts of high seas fishing activities on outer continental shelves of coastal nations (e.g. deep-sea fishing impacts on sedentary species and resources, vulnerable benthic ecosystems); impacts of outer continental shelf activities on high seas (e.g. seismic testing noise); military activities; new or emerging uses of the seas” (Gjerde *et al.*, 2008).

105. UNCLOS also mentions the special role of the ISA in this respect (Articles 273 and 274).

106. Available at <http://unesdoc.unesco.org/images/0013/001391/139193m.pdf>.

The implementation of these provisions nonetheless remains limited. The 11th meeting of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea (ICP) in 2010 was devoted to “Capacity-building in ocean affairs and the law of the sea, including marine science”. Here it was noted by several delegations “that the transfer of marine technology was essential for capacity-building in particular in marine science” and that this section of UNCLOS is “the part with the greatest gap in implementation”.¹⁰⁷

For example, in the context of MGRs and bio-prospecting the gap between developed and developing countries is particularly evident: 10 developed countries own 90% of the patents associated with a gene of marine origin (Arnaud-Haond *et al.*, 2011);¹⁰⁸ training is lacking; access to expensive technologies and relevant data is limited; and only a handful of countries possess the large research vessels required for expeditions in ABNJ.¹⁰⁹

4.7. Uneven and ineffective governance of high seas fisheries

There are two distinct issues to take into consideration when discussing governance of high seas fisheries. Firstly, despite being a small fraction of total global catch, commercial exploitation of deep-sea fisheries has generated an intensive debate due to concerns regarding its sustainability and the destruction of VMEs (Ardron *et al.*, 2014).

Secondly, high seas fisheries face considerable governance challenges. In ABNJ, fisheries management relies primarily on two different types of entities: the flag State, for vessels flying its flag and authorised to fish in the high seas, and RFMOs, through which States cooperate for the management of fisheries resources and adopt conservation and management measures. With regards to the flag State, the absence of a clear definition of the “genuine link” (see 4.8) has facilitated the development of so-called “flags of convenience”, encouraging illegal, unreported and unregulated (IUU) fishing.¹¹⁰

At the same time, not all species are managed through these organisations, and several parts of the ocean are not yet managed by a fully functioning RFMO for deep-sea fisheries.¹¹¹ Extant RFMOs have been criticised for failing to integrate conservation and biodiversity concerns into their regulatory approaches to fisheries (Gianni *et al.*, 2011; Weaver *et al.*, 2011; Rogers & Gianni, 2010; Cullis-Suzuki & Pauly, 2010; Wright *et al.*, 2015). There has been a “general reluctance on the part of many States and RFMOs to close high seas areas to protect VMEs where bottom fishing currently takes place” (Gianni *et al.*, 2011) and “the priority of RFMOs—or at least of their member countries—has been first and foremost to guide the exploitation of fish stocks. While conservation is part of nearly all their mandates, they have yet to demonstrate a genuine commitment to it on the water” (Cullis-Suzuki & Pauly 2010).

4.8. Flag State responsibility and the “genuine link” issue

According to UNCLOS, “every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas”¹¹² on the condition that there is a “genuine link between the State and the ship”.¹¹³ UNCLOS does not precisely stipulate what such a “genuine link” entails. In the absence of detailed guidance on attributing nationality (a “flag”) to a ship, the practice of “open registries”, “flags of convenience”, or “flags of non-compliance”, whereby States with little interest in effectively regulating vessels provide registration, has flourished.

International environmental and safety standards are easily avoided through the flags of convenience system as little or no effective monitoring, control and surveillance (MCS) is conducted by the flag State. Such unregulated vessels can conduct IUU fishing and are free to engage in activities such as ocean fertilisation free from any controls imposed by a responsible flag State. Flags of convenience also make it easy to register a vessel that does not conform to IMO environmental and safety standards, potentially making it more likely that these vessels will be involved in pollution or maritime safety incidents (Druel *et al.*, 2013).

and fishing vessels flagged to what are commonly called open registers”. Ministerially-led Task Force on IUU Fishing on the High Seas (High Seas Task Force), Closing the Net: Stopping illegal fishing on the high seas (2006), <http://www.illegal-fishing.info/uploads/HSTFFINALweb.pdf>.

III. I.e. The Arctic, parts of the Atlantic and Pacific oceans, and the Indian Ocean. These regions are, however, covered in relation to tuna fisheries.

112. UNCLOS, Article 90.

113. UNCLOS, Article 91 (1).

107. See Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its eleventh meeting (2010) A/65/164, §28, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/462/32/PDF/N1046232.pdf>.

108. These countries are the US, Germany, Japan, France, the UK, Denmark, Belgium, the Netherlands, Switzerland and Norway.

109. I.e. Vessels over 60 metres in length. See Juniper (2013) (presentation made during the intersessional workshop on marine genetic resources, 2-3 May 2013, New York).

110. The High Seas Task Force notes: “There is a clear and compelling link between IUU fishing on the high seas

Conscious of this problem, States negotiated stricter rules for flagging in 1986,¹¹⁴ though they never entered into force.¹¹⁵ The issue of effective State control over their nationals in ABNJ (whether through companies, individuals, or ships) is once again starting to gain momentum, as evidenced by:

- The establishment by the IMO of a Sub-Committee on Flag State Implementation;¹¹⁶
- Implementation of a voluntary IMO Member State Audit Scheme, now transitioning to a mandatory audit scheme;¹¹⁷
- Work within the FAO on the establishment of a global record of fishing vessels;¹¹⁸ and
- An Advisory Opinion delivered in 2015 by the International Tribunal on the Law of the Sea (ITLOS) on the responsibilities and obligations of coastal and flag State duties to ensure sustainable fisheries management.¹¹⁹

5. HISTORY OF THE INTERNATIONAL DISCUSSIONS

5.1. The UNGA as the global political arena

Although aspects of marine biodiversity in ABNJ can be discussed in various international forums, the UNGA is the only global political arena with a clear mandate to consider the question as a whole. This central role is often emphasised in UNGA resolutions on Oceans and the Law of the Sea,¹²⁰ and is

also recognised by other international bodies and conventions.¹²¹

There are two main reasons for the UNGA's central role: firstly it is universal in nature, with 193 Members; secondly, discussions related to the Law of the Sea, and to UNCLOS in particular, have historically been held under the auspices of the UNGA, supported by a special division of the UN Office of Legal Affairs which serves as the UNCLOS Secretariat (Division for Ocean Affairs and the Law of the Sea, DOALOS). A State need not be Party to UNCLOS to participate in the discussions held within the UNGA framework, or to become party to the UNFSA.¹²²

5.2. A brief history of the BBNJ Working Group

In 2004, the UNGA created the *Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction* ("BBNJ Working Group").¹²³ Since the first meeting in 2006, the focus has mainly been on weaknesses and gaps in the current international framework and whether these necessitate the adoption of a new instrument (Druel *et al.*, 2013).

5.2.1. The 2006 and 2008 sessions: ideological divide and status quo

The BBNJ Working Group met first in 2006, and again in 2008. An ideological divide appeared during the first meeting regarding the legal status of MGRs found in the Area. This divide became a defining issue during subsequent meetings.

The G77, joined by China, advocated the application of the CHM principle to MGRs found in the Area. These States have therefore argued that benefits arising from the exploitation of MGRs should be shared between all countries. Other States focussed their attention on issues such as the

role relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction" (§180).

114. UN Convention on Conditions for Registration of Ships 1986.

115. The Convention only has 15 Contracting Parties, none of them being a major maritime nation. The last ratifications were in 2005. See: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtidsg_no=XII-7&chapter=12&lang=en.

116. See: <http://www.uscg.mil/imo/fsi/>.

117. See: <http://www.imo.org/en/OurWork/MSAS/Pages/AuditScheme.aspx>.

118. See: <http://www.fao.org/fishery/global-record/en>.

119. Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC Advisory Opinion), Advisory Opinion of Apr. 2, 2015, ITLOS, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf. On the duties of sponsoring States, see: Seabed Disputes Chamber of ITLOS, Advisory Opinion on Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the "Area" (2011) 17, https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.17/17_adv_op_010211_en.pdf.

120. For example, UNGA Resolution A/RES/67/78 of 11 December 2012 states the UNGA "reaffirms its central

121. For example, a CBD Decision underlines "the United Nations General Assembly's central role in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction". CBD Decision X/29 on Marine and Coastal Biodiversity, § 21.

122. A number of States, including the US, are not Party UNCLOS but are Party to the UNFSA. Indeed, non-Parties to UNCLOS do not necessarily oppose all of its provisions, or the choice of the UNGA as the forum to discuss these issues. The US, for example, considers the majority of UNCLOS provisions to be customary international law and thus actively participates in the discussions.

123. UNGA resolution 59/24 of 17 November 2004, §73.

application of the precautionary approach and the establishment of MPAs in ABNJ. Recognising that a regulatory gap existed in UNCLOS with respect to the protection of marine biodiversity in ABNJ, as early as 2004 the EU stated that in principle it would support the development of a new instrument.¹²⁴ In 2006 the EU called for the adoption of an Implementing Agreement (IA) to UNCLOS,¹²⁵ though at that time, this call was only supported by a few NGOs and did not receive the support of many States participating in the discussions within the BBNJ Working Group.

5.2.2. The 2010 and 2011 sessions: the package deal

The BBNJ Working Group was invited to make recommendations to the UNGA for the first time in 2010.¹²⁶ The Working Group subsequently met on an annual basis. During this period, a number of proposals were made by States to advance the conservation and sustainable use of marine biodiversity in ABNJ. This included inter alia: (i) the proposal to develop an UNCLOS IA; (ii) the adoption of modern management principles (e.g. through a UNGA resolution); (iii) the adoption of a UNGA resolution on EIAs for all human activities that may have significant adverse impacts on marine biodiversity in ABNJ; and (iv) the establishment of a standard model for regional cooperation through a MoU on designation of MPAs in ABNJ. Ultimately not all States agreed with these proposals and they were not reflected in the final outcome.¹²⁷

Discussions in 2011 were almost entirely devoted to the need for a multilateral agreement under UNCLOS on the conservation and sustainable use of marine biodiversity in ABNJ, and the Working Group made significant progress. For the first time, the EU and the G77+China (now joined also by Mexico) found a common position on the subject. They agreed to work towards the establishment of an intergovernmental negotiating process that would “address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole”.¹²⁸

- marine genetic resources, including questions on the sharing of benefits;
- measures such as area-based management tools, including marine protected areas;
- environmental impact assessments;
- capacity-building and the transfer of marine technology.

These issues came to be known as the “Package Deal”.

The package deal approach implies that “acceptance by a State of a particular provision is conditioned on the results of bargaining in other areas of negotiations satisfying its requirements. It also implies that in principle all compromises achieved in the course of the negotiations are considered as preliminary arrangements depending on the overall assessment of negotiations as a whole” (Danilenko, 1993). Such an approach can be summarised as “nothing is agreed until everything is agreed” (Danilenko, 1993). It encourages compromise as participants are incentivised to accept the “resolution of a particular issue or issues, despite shortcomings, because of the relatively favourable disposition of another issue or issues, not necessarily directly related” (MacDougal & Burke, 1987). Structuring negotiations around a package of issues derives from the history of the UNCLOS negotiations, during which such a process was used.¹²⁹

The opening of the negotiations for a new agreement was not retained in the final recommendations of the Working Group, largely due to opposition by a few States, including the US, Canada, Japan, Iceland and Russia. It was nonetheless agreed that “a process be initiated, by the General Assembly, with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea”.¹³⁰

UNDOC/GEN/N11/397/64/PDF/N1139764.pdf.

124. EU Statement to the ICP, 8 June 2004.

125. See EU Presidency statement of 13 February 2006, http://eu-un.europa.eu/articles/en/article_5691_en.htm.

126. See UNGA resolution 64/71 of 4 December 2009, § 146.

127. Recommendations of the BBNJ Working Group had to be adopted by consensus.

128. Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Document A/66/119, § I.1(a) and (b), <http://daccess-dds-ny.un.org/doc/>

129. The decision to adopt a package deal approach for the negotiations of UNCLOS was taken “because different States displayed extremely divergent attitudes to issues under consideration (...) successful negotiations on all major problems required the adoption of a “package deal” approach as a special technique of tradeoffs between different areas of bargaining” (Danilenko 1993). This approach was also seen in the development of the CBD (which also addresses conservation and sustainable use, and equitable benefit-sharing of genetic resources).

130. Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Document A/66/119,

States also agreed that intersessional workshops be held, aimed at improving the understanding of issues and clarifying key questions. Overall, the 2011 meeting was a watershed moment in the discussions of the Working Group.

5.2.3. The 2012 session: slow progress

The 2012 meeting of the BBNJ Working Group was a stark reminder that there was still some way to go before any formal negotiations could begin. Most of the discussions focused on the preparation of the intersessional workshops, and the final recommendations mostly discussed the practical organisation of two workshops before the 2013 meeting.¹³¹

5.2.4. Rio+20

Explicit discussions on launching negotiations on an UNCLOS IA took place in the preparatory meetings for Rio+20 and this was one of the most hotly debated topics during the conference itself.

Many States were hoping that a political consensus could be reached between Heads of States and Governments to open the negotiations for an UNCLOS IA.¹³² Indeed, the first “zero draft” of the outcome document stated: *“we agree to initiate, as soon as possible, the negotiation of an implementing agreement to UNCLOS that would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction”*.¹³³

However, a few States could not agree to this proposal and the necessary consensus was not reached. Instead, a commitment was made to address, on an urgent basis, the issue of the conservation and sustainable use of marine biodiversity in ABNJ, including by taking a decision on the development of an international instrument under UNCLOS.¹³⁴ A deadline was agreed, according to which a decision on the development of a

new agreement had to be taken before the end of the 69th session of the UNGA (i.e. September 2015).¹³⁵

5.2.5. 2013: scientific and procedural discussions

Discussions continued in 2013 through two intersessional workshops on MGRs and conservation and management tools.¹³⁶ Although the main value of the workshops was in the information they provided to negotiators on these two topics, they were also an opportunity for States to develop and affirm some of their positions, and to hold informal discussions.

During the 6th meeting of the BBNJ Working Group, States focused their discussions on procedural issues. States discussed the establishment of a process that would allow States to take a decision regarding the launch of the negotiations before the end of the 69th session of the UNGA.¹³⁷ To this end, States agreed to recommend to the UNGA that at least three four-day meetings of the Working Group take place to discuss the possibility of an international instrument under UNCLOS.

The UNGA subsequently convened three meetings of the BBNJ Working Group to discuss the “scope, parameters and feasibility” of a new international instrument and to take a decision on the opening of negotiations.¹³⁸

5.2.6. The 2014 sessions: a solid coalition for the opening of the negotiations

The April 2014 meeting was seen as successful as it engaged delegations “for the first time in an interactive substantive debate that created momentum for more detailed deliberations”.¹³⁹ The informal Co-Chairs’ overview of issues raised highlighted a number of issues under discussion, including: the overall objective and starting point for negotiations; the relationship of a potential new agreement to other instruments; and the guiding approach to negotiations, including the package

§I.1(a), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/397/64/PDF/N1139764.pdf>.

131. See Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, Document A/67/95, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N12/372/82/PDF/N1237282.pdf>.

132. A precedent for such a development had been set by the political agreement reached during the first Rio Conference in 1992 to call for an intergovernmental UN conference on highly migratory and straddling fish stocks, which resulted in the UNFSA.

133. The Future We Want (Zero Draft, 10 January 2012) paragraph 80, http://www.uncsd2012.org/content/documents/370The%20Future%20We%20Want%2010Jan%20clean%20_no%20brackets.pdf.

134. The Future We Want (2012) UNGA Resolution A/66/288.

135. Ibid.

136. For an overview of the presentations delivered during the workshops, see: <http://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>.

137. The possibility of opening negotiations for a new instrument earlier than the final August 2015 deadline was not discussed.

138. UNGA Resolution 68/70 on Oceans and the law of the sea (2014) paragraphs 198-200, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/443/65/PDF/N1344365.pdf>.

139. IISD, Summary of the Seventh Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction (2014), http://www.iisd.ca/oceans/marinebiodiv7/brief/brief_marinebiodiv7e.html.

deal. The April 2014 meeting was lauded by NGOs for its transparent proceedings.

The June 2014 meeting saw increasing convergence among States on a number of issues. There was broad support for maintaining the deadline set at Rio+20 and avoiding the prolongation of the BBNJ Working Group process (Wright *et al.*, 2014). States agreed that UNCLOS provides the authority for any international agreement and should therefore form the basis of any negotiations, and that any future negotiations should be based on the Package Deal agreed in 2011. A nascent consensus also began to emerge on substantive issues, including the debate regarding the legal principles applicable to MGRs extracted from the Area.

While only a handful of States and regional groupings had previously been actively engaging in discussions at the BBNJ Working Group, the second of these three meetings in June 2014 saw a number of regions add their support for the opening of negotiations toward agreement (in particular the African Union [AU], the Caribbean Community [CARICOM], and the Pacific States).

5.2.7. January 2015: recommendation to open negotiations

This process culminated at the third and final meeting in January 2015, where States took the historic step of recommending to the UNGA that it “decide to develop an international legally-binding instrument under the Convention on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction”.¹⁴⁰ Specifically, it was recommended that the UNGA:

“Decide that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as a whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology”

There were a number of final barriers to reaching this consensus (Rochette *et al.*, 2015). States clashed over the question of whether the new process should lead to “an international

legally-binding instrument” or more broadly “an international instrument”, which is the wording used in the Rio+20 outcome document.¹⁴¹ The latter formulation was favoured by the US, Russia and Japan, and could have paved the way for a soft-law document; the EU, the G77+China, and many individual States fought to include an explicit mention of a legally binding instrument.

States also disagreed on the mandate to be given to a Preparatory Commission (PrepCom). Some States argued that the PrepCom should focus on preparing rules of procedure and a structure for the negotiations, which raised concern that the new process would, in practice, lead to the continuation of the same informal discussions that had taken place under the auspices of the BBNJ Working Group. It was agreed that the PrepCom will “make substantive recommendations to the General Assembly on elements of a draft text of an international legally binding instrument”.¹⁴²

An important point of disagreement was whether the PrepCom would automatically lead to the convening of an intergovernmental conference, or if the UNGA should take a decision on the convening of such a conference depending on the outcome of the PrepCom. As part of reaching consensus, no deadline was set for the convening of the intergovernmental conference, but a target date of the end of the seventy second session of the UNGA was set for deciding on the convening of and a start date for such a conference, taking account of the PrepCom report.

States held different positions regarding the level of detail in which substantive issues should be mentioned in the recommendations. In the end it was simply agreed that the negotiations should address the topics identified in the package agreed in 2011.

5.3. The process established

The recommendations of the BBNJ Working Group were formally approved by UNGA Resolution 69/292 in June 2015.¹⁴³ A PrepCom will be

140. Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly (23 January 2015), http://www.un.org/Depts/los/biodiversityworking-group/documents/AHWG_9_recommendations.pdf.

141. The Future We Want (2012) UNGA Resolution A/66/288, §162.

142. Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction to the sixty-ninth session of the General Assembly (23 January 2015), http://www.un.org/Depts/los/biodiversityworking-group/documents/AHWG_9_recommendations.pdf.

143. UNGA Resolution of 19 June 2015 on Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, A/

established in order to prepare substantive recommendations on elements of a draft text and will meet at UN Headquarters for a total of 4 weeks in 2016 and 2017.¹⁴⁴ The PrepCom is to report to the UNGA by the end of 2017;¹⁴⁵ the UNGA will then decide on the convening of an intergovernmental conference. The PrepCom will have a single Chairperson¹⁴⁶ and will select a bureau to assist the chair on procedural issues.¹⁴⁷ The bureau will consist of 10 persons, with 2 representatives from each regional group.

6. STATE POSITIONS TO DATE

During the course of the discussions at the BBNJ Working Group, States have expressed a range of positions regarding the need for a new international agreement on the conservation and sustainable use of marine biodiversity in ABNJ. The summary of State positions here is necessarily only an overview of previously expressed positions, and it is important to highlight that States made the decision to negotiate a new agreement by consensus. It is therefore clear that all States are now in agreement of the need to move forward on these issues.

At the broadest level, States have either been in favour of a new agreement or opposed to it, though State positions in reality are generally much more complex and nuanced than this simple dichotomy would suggest. In general, States that have favoured the negotiation of a new agreement were divided between those focussed on conservation and sustainable use on the one hand and those more focussed on MGRs on the other, although there are also States that are concerned with both issues. Likewise, while some States have clearly been in complete opposition, others have expressed specific concerns about particular elements of the package deal or the discussions, but have otherwise acknowledged some of the gaps in the current framework and have been willing to negotiate an agreement covering a limited number of issues.

Table 1. Summary of BBNJ Discussions

Date	Meeting	Summary
13-17 February 2006	First meeting of the BBNJ Working Group	Emergence of an ideological divide regarding the legal status of MGRs found in the Area EU called for adoption of an UNCLOS IA.
28 April-2 May 2008	Second meeting of the BBNJ Working Group	Continued discussions and development of State positions.
1-5 February 2010	Third meeting of the BBNJ Working Group	Working Group invited to make recommendations to the UNGA. Numerous proposals for advancing conservation and sustainable use.
31 May-3 June 2011	Fourth meeting of the BBNJ Working Group	Common position reached between EU, G77, China, Mexico; the "Package Deal". Intersessional workshops proposed.
7-11 May 2012	Fifth meeting of the BBNJ Working Group	Discussions focused on the preparation of the intersessional workshops.
20-22 June 2012	Rio+20	Commitment made to decide on whether to negotiate a new agreement; deadline set (September 2015).
2-3 May 2013	Intersessional workshop on MGRs	Scientific expertise provided to delegations.
6-7 May 2013	Intersessional workshop on conservation and management tools	
19-23 August 2013	Sixth meeting of the BBNJ Working Group	Recommended 3 meetings of Working Group on scope, parameters and feasibility.
1-4 April 2014	Seventh meeting of the BBNJ Working Group; first of three special sessions on scope, parameters and feasibility	Substantive debate; move towards identification of key issues.
16-19 June 2014	Eighth meeting of the BBNJ Working Group; second of three special sessions	Increasing convergence among States on a number of issues. Broader engagement of States in the process, especially CARICOM, the African Union, and the Pacific States.
20-23 January 2015	Ninth meeting of the BBNJ Working Group; third and final special session	Recommendation to the UNGA to decide to open negotiations.
19 June 2015	UNGA Resolution 69/292	Establishment of the negotiation process.

RES/69/292, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N15/187/55/PDF/N1518755.pdf>.

144. Ibid §1(a)-(c).

145. Ibid §1(a).

146. Ibid §1(d). The Chair will be H.E. Eden Charles, Ambassador of Trinidad and Tobago and Deputy Permanent Representative to the UN.

147. Ibid §1(e).

6.1. Advocating for an UNCLOS IA: the EU, G77+China & Mexico, Australasia

The States most consistently in favour of a new agreement have been: the EU Member States; the G77+China and Mexico; Australia and New Zealand.

6.1.1. The EU: compromising to establish MPAs in ABNJ

The EU has been the leading proponent of an UNCLOS IA since the beginning of the discussions. The first EU proposal for an IA focussed on the establishment of MPAs in ABNJ,¹⁴⁸ and the group initially suggested certain priority short-term measures for conservation,¹⁴⁹ with the IA proposed as a medium-term measure.¹⁵⁰ Following conclusion of the 2011 Package Deal, the EU increasingly included MGRs and capacity building issues in its statements¹⁵¹ in order that the G77+China would also support the need for such an agreement. The EU has occupied a middle ground between the competing principles of freedom of the high seas and CHM, seeking pragmatic and practical compromises to advance the discussion of ABS.

In 2006, the EU first considered that a new agreement should focus on: biodiversity protection and conservation, including through MPAs; cooperation and coordination between existing competent bodies; and identification of vulnerable ecosystems and species in ABNJ.¹⁵² This early fo-

cus on biodiversity protection and MPAs is understandable as the EU had already adopted EU legislation with regard to environmental protection, including protected areas, such as the Habitats Directive.¹⁵³ Furthermore, the EU and its Member States are parties to a number of regional agreements, within which the establishment of MPAs in ABNJ has increasingly become an important issue.¹⁵⁴ However, implementation and management of regionally established MPAs in ABNJ is impeded by the absence of international recognition, their subsequent unenforceability against third Parties, and the difficulty of coordinating and cooperating with other competent organisations to adopt management measures (Druel *et al.*, 2012; Freestone *et al.*, 2014b). The EU therefore sought to obtain international recognition for these existing MPAs through a new agreement.

The EU's position on MGRs has evolved over the course of the discussions, and this was crucial in securing the 2011 compromise on the package deal. The EU has indicated on several occasions that it does not consider MGRs in the Area to be included within the CHM principle and that they fall outside the mandate of the ISA,¹⁵⁵ however it has not been opposed to discussions on this topic. The EU has itself proposed discussion voluntary guidelines or codes of conduct with the aim of improving the environmental management of MGRs.¹⁵⁶

In 2008, realising that widespread support for an agreement would likely not be attained without concrete proposals on the MGR issue, the EU suggested several approaches,¹⁵⁷ including: (i) the development of international guidance on the use of impact assessment on MGRs in ABNJ; (ii) the sharing of information and knowledge resulting from research on MGRs collected in ABNJ and the increased participation of researchers from developing countries in relevant research projects; (iii) the possible establishment of a multilateral system for MGRs in ABNJ, inspired by the one developed

148. See EU Presidency statement of 13 February 2006, http://eu-un.europa.eu/articles/en/article_5691_en.htm.

149. E.g. The establishment of multi-purpose pilot MPAs and the development of a standard model for regional cooperation through a memorandum of understanding for MPA designation in ABNJ. See: IISD, Briefing Note on UNGA WG on Marine Biodiversity (8 February, 2010) p.4, http://www.iisd.ca/oceans/marinebiodiv3/brief/brief_marinebiodiv3.pdf.

150. Measures were divided into short- and medium-term actions, since, at that time the major issue was the protection of VMEs from destructive fishing practices. However, in light of the fact that this issue was tackled by UNGA Resolution 61/105, and in view of the lengthy duration of the BBNJ discussions, the EU later shifted its focus to the negotiation of an UNCLOS IA as the main objective.

151. I.e. following agreement on the Package Deal, the EU "refrained from advocating for a fast-lane for conservation tools. That is, the EU avoided requesting work on EIAs and MPAs as a short-term measure". See: IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf> p.7.

152. See EU Presidency statement of 13 February 2006, http://www.eu-un.europa.eu/articles/en/article_5691_en.htm.

153. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora

154. E.g. Within the frameworks of the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic and the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR Convention).

155. See EU Presidency Statement, Working Group on Marine Biodiversity – Agenda item 5c (15 February 2006), http://www.eu-un.europa.eu/articles/en/article_5705_en.htm.

156. Ibid.

157. EU Presidency Statement, United Nations Sixth Committee: Agenda item 5(d) – Genetic resources beyond areas of national jurisdiction, http://www.eu-un.europa.eu/articles/en/article_7847_en.htm.

under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) for facilitating access to MGR samples and sharing of benefits. In 2010 the EU went further, proposing the integration of the question of fair and equitable benefit sharing for MGRs in ABNJ into a potential new agreement.¹⁵⁸

Following the compromise reached with the G77 in 2011, the EU has supported the view that the establishment of an ABS regime for MGRs in ABNJ should be considered. Without compromising its initial position on the application of the CHM principle, the EU nonetheless agrees that a “first come, first served” approach to MGRs undermines conservation and has expressed willingness to discuss ABS, including the consideration of both monetary and non-monetary benefits.¹⁵⁹ The EU also agreed to include capacity building and the transfer of marine technology in the package deal.¹⁶⁰

During the early discussions, EIAs and other related tools such as SEAs and the assessments of cumulative impacts of human activities on the marine environment were not included in the proposals made by the EU. Indeed, the EU, recognising that a gap existed in the current legal framework, was keen to address this issue through so-called “short-term actions”. In 2008, the EU indicated that EIA and SEA “can help to assess and control human impacts on marine biodiversity in ABNJ”¹⁶¹ and further proposed to develop guidelines, either through the BBNJ Working Group or through the CBD, “for the implementation of EIA/SEA for activities which have a potential to adversely impact marine biodiversity beyond national jurisdiction, including the requirement for prior notification of such planned activities”. The EU also suggested

the establishment of a mechanism to provide for regular assessments of the state of the marine environment and give advice with respect to the individual and cumulative impacts of human activities and emerging threats.¹⁶²

In 2010, the EU proposed “as an immediate measure the adoption of a General Assembly resolution on implementation of EIAs, incorporating a general process similar to that established for bottom fisheries by resolution 61/105 to assess whether human activities have significant negative impacts on marine biodiversity in ABNJ, subject to periodic review”.¹⁶³ In the same year, it also highlighted the need to develop a common methodology for carrying out EIAs at the regional and sectoral levels.

Due to the 2011 compromise with G77+China and Mexico, EU statements in 2011 and 2012 did not discuss EIA and SEA, and the EU fell silent on the short-term measures it had previously proposed.¹⁶⁴ This analysis also applies to capacity building and the transfer of marine technology. In the early years of the BBNJ Working Group, the EU made several proposals that were mostly short-term measures, including: the participation of scientists from developing countries in relevant research projects; the establishment of a UN programme of cooperation in the development and transfer of marine technology to be applied on a regional level; specific training for EIAs, MPAs, climate change mitigation and adaptation;

158. See, IISD, Briefing Note on UNGA WG on Marine Biodiversity (8 February, 2010) http://www.iisd.ca/oceans/marinebiodiv3/brief/brief_marinebiodiv3.pdf, p.5.

159. IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>, pp.3-4. The EU wanted to reflect all the possibilities included in Annex I of the Nagoya Protocol of the CBD.

160. This is linked to the MGR discussion, as most developing countries do not benefit from the technology and human expertise necessary to carry out research on the genetic resources found in ABNJ. However, the EU intended capacity building and technology transfer to relate also to the other elements of the Package, namely ABMTs and EIA.

161. EU Presidency Intervention, United Nations 6th Committee: Agenda item 5(a) – The environmental impacts of anthropogenic activities on marine biological diversity beyond areas of national jurisdiction (28 April 2008) http://www.eu-un.europa.eu/articles/en/article_7846_en.htm.

162. Ibid. Voluntary guidelines for the consideration of biodiversity in environmental impact assessments annotated specifically for biodiversity in marine and coastal areas, including in ABNJ, were adopted by the Conference of the Parties to the CBD in 2012 (CBD COP 11, Decision XI/18 on Marine and Coastal Biodiversity). These guidelines are limited to a certain amount of technical and scientific advice and do not provide guidance on legal and governance issues (see Druel, 2013).

163. See, IISD, Briefing Note on UNGA WG on Marine Biodiversity (8 February, 2010) http://www.iisd.ca/oceans/marinebiodiv3/brief/brief_marinebiodiv3.pdf, p.4.

164. Namely (i) the establishment of multi-purpose pilot MPAs; (ii) the development of a standard model for regional cooperation through a memorandum of understanding for MPA designation in ABNJ; (iii) the extension of the geographical coverage and mandate of RFMOs and regional seas conventions; (iv) the adoption of overarching governance principles; (v) the joint development of research cruises, including with participants from developing countries and (vi) the establishment of a UN programme of cooperation in the development and transfer of marine technology to be applied on a regional level. See: IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>, p.7. This is presumably due to the fact that the Package approach means that States must advance all elements at the same pace.

and support for research activities in areas of interest for developing countries.

6.1.2. The G77+China & Mexico: compromising to establish an ABS mechanism for MGRs

The G77 is a large and varied group, whose Members are permitted to speak separately and submit views on their own behalf. This means the G77 does not necessarily maintain unified positions on all issues: some G77 States have made strong statements on the importance of conservation, while others have sought to extend the stewardship aspects of the CHM principle more broadly to all biodiversity in ABNJ. Broadly, the G77+China & Mexico¹⁶⁵ agree that the status quo is not acceptable and that an UNCLOS IA is essential for the sustainable use of marine resources. The group's original position was that the CHM principle should apply to MGRs found in the Area.¹⁶⁶ As the discussions have advanced, the G77 States have at times appeared willing to be flexible on the legal status of MGRs, as long as a suitable ABS regime is adopted and strong advances are made on capacity building and technology transfer. The group's statements on conservation issues have been less detailed, though they have regularly reaffirmed that the importance of these issues as an integral part of the Package Deal.¹⁶⁷

The G77 proposition that the CHM principle and concomitant ABS regime should apply to MGRs found in the Area is based on a 1970 UNGA resolution regarding the principles governing the seabed and the ocean floor and the subsoil thereof in ABNJ.¹⁶⁸ According to this resolution, the Area and its "resources" are CHM and as such exploitation "shall be carried out for the benefit of mankind as a whole". The resolution does not, however,

define "resources", nor does it explicitly exclude any specific resources from its scope. As a result, the G77 considers that this resolution applies to all the resources of the Area, including MGRs. These States have therefore argued that benefits arising from the exploitation of MGRs should be shared between all countries. The Preamble to UNCLOS recalls this resolution, and affirms the desire of Parties to develop the principles embodied therein, but UNCLOS later states that the "resources" in the Area to which the CHM principle applies are "all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules".¹⁶⁹

The G77 has nonetheless reiterated its position in various arenas, from the 2004 meeting of the ICP to the 2012 BBNJ Working Group meeting, where the group clearly stated: "the common heritage of mankind principle applies to the biological resources of the Area".

The CHM principle is commonly referred to an encompassing: (i) a principle of non-appropriation, (ii) equitable considerations in particular of the interests and needs of developing States, including the equitable sharing of monetary and non-monetary benefits, transfer of technology and capacity building; and (iii) peaceful use of the designated area and its resources (e.g. Wolfrum 2009). The G77 has primarily focused on these elements and therefore most discussion focuses on the goal of active and equitable sharing of benefits arising from MGR exploitation in the Area. However, the G77 has shown some flexibility in the past on the application of the CHM principle, so long as an ABS regime is adopted for MGRs in ABNJ (and particularly if progress is made regarding the treatment of MGRs extracted from the high seas, i.e. the water column).

The 2011 Package Deal did not explicitly mention the issues surrounding the application of CHM, but instead deals with "marine genetic resources, including questions on the sharing of benefits".¹⁷⁰

165. Mexico, while not part of the G77, has frequently aligned itself with the G77's position calling for the opening of negotiations for a new agreement. In 2011, Mexico joined the EU and the G77+China in reaching the common position that led to the Package Deal.

166. A claim frequently restated, e.g. at the 2004 meeting of the ICP 2004 ICP on "New Sustainable Uses of the Oceans, including the Conservation and Management of the Biological Diversity of the Seabed in Areas beyond National Jurisdiction" and at the 2012 BBNJ Working Group meeting (G77+China statements to BBNJ Working Group, 7 May 2012, <http://www.g77.org/statement/2012.html#may>).

167. E.g. "all aspects of the issue: conservation, [etc.] are all integral parts of a specific legal regime to be negotiated" and in 2012: "Conservation is one of the integral elements of the issue". See G77/China statements to BBNJ Working Group, 1 June 2011 (<http://www.g77.org/statement/getstatement.php?id=110601>) and 7 May 2012 (<http://www.g77.org/statement/2012.html#may>).

168. UNGA resolution 2749 (XXV) of 12 December 1970.

169. UNCLOS, Article 133(a). Indeed the historical focus of UNCLOS in this regard was on polymetallic nodules, rather than MGRs, which were not considered to a potentially exploitable or lucrative resource at the time the Convention was drafted.

170. Tladi (2015) notes: "In the interest of moving beyond what might be termed ideological differences, there appears to be an emerging trend to avoid the term [CHM] in favour of a more pragmatic approach. Such an approach purports to give effect to the demands of adherents of the... principle but relies on the term 'benefit sharing'... The result of this search for consensus has been an almost imperceptible shift in the deliberations of the Working Group and the UNGA away from discussions based on the [CHM] to that of benefit sharing."

Indeed, recognition as CHM is by no means a prerequisite for the establishment of benefit-sharing obligations.¹⁷¹ However, some submissions by G77 members have reiterated the importance of the CHM as a principle of stewardship, intergenerational equity and solidarity.¹⁷²

The G77 has also argued that an equitable ABS regime for MGRs in ABNJ would not only entail the establishment of a benefit-sharing mechanism, whether monetary or non-monetary, but also the enhancement of capacity building and the transfer of marine technology in order to facilitate access to these resources. In 2012, the G77 underscored that “access to genetic resources of seabed and ocean floor and the subsoil thereof [...] and the exclusive exploitation by a few have serious global economic and social implications”.¹⁷³ They further stated, “transfer of technology is an essential tool for capacity-building in the sphere of marine science. There is also an urgent need for a continued and enhanced participation of scientists from developing countries in marine scientific research in the Area”.¹⁷⁴

The G77 has not held a unified position on conservation issues and the groups statements in this area have generally been less detailed than their statements on MGRs. Some G77 States are strongly in favour of conservation measures, others oppose them, while some remain indifferent. The G77 States nonetheless acknowledge that conservation issues form an integral part of the Package Deal and consider that they should be discussed in the framework of the future negotiations.¹⁷⁵ Prior to the agreement on the Package Deal, these States

had not been in favour of an IA (Tladi 2014) and had expressed disagreement regarding the short-term measures previously proposed by the EU.¹⁷⁶

A potential point of contention for some G77 States is the adoption of measures at to conserve marine biodiversity in ABNJ at the regional level through RFMOs and RSPs. A number of G77 States, especially some Latin American Members that are not parties to the UNFSA, have expressed concerns with regard to the role of RFMOs in ABNJ. Some argue that certain provisions of the UNFSA amend UNCLOS and are therefore inconsistent with it; in particular provisions on compatibility and high seas enforcement by non-flag States. Some coastal States are also unsupportive of the notion that RFMOs are the preferred vehicles for the conservation and management of straddling and highly migratory fish stocks under the UNFSA, unless perhaps if coastal States are given a preferential status within RFMOs (Molenaar 2011). Others have argued that RFMOs represent the views of just a small sub-section of States with an economic interest in the resource, and may not reflect the wider interests of the global community. Notwithstanding these concerns, many G77 and Latin American States participate in various RFMOs across the globe, though the role of RFMOs, the way they function, and the rights of coastal States remain sensitive issues.

Similarly, some of the G77 States have expressed concerns with regard to the role played by RSPs in the conservation of marine biodiversity in ABNJ (as noted only 4 RSPs currently have a mandate covering ABNJ, and the EU has been promoting the establishment of MPAs networks in at least two of them—the OSPAR Commission and the CCAMLR). The first OSPAR MPAs designated in 2010 have been at the heart of some controversies in the UNGA context: while some have positively noted this progress at the regional level,¹⁷⁷ others have

171. This is evidenced, for example, by the Nagoya Protocol or the FAO International Treaty on Plant Genetic Resources for Food and Agriculture.

172. See, e.g. Statement by Dr Dire Tladi, Legal Counsellor, South African Permanent Mission to the UN General Assembly on Oceans and the Law of the Sea, 10 December 2010, http://www.southafrica-newyork.net/speeches_pmun/view_speech.php?speech=2017390. “[T]he common heritage of mankind principle is not solely about benefit-sharing. [It] is just as much about conservation and preservation. The principle is about solidarity: solidarity in the preservation and conservation of a good we all share and therefore should protect. But also solidarity in ensuring that this good, which we all share, is for our benefit.” See also Tladi (2015).

173. G77+China statements to BBNJ Working Group, 7 May 2012, <http://www.g77.org/statement/2012.html#may>.

174. Ibid.

175. In 2011: “all aspects of the issue: conservation, sustainable use, including the sharing of benefits derived from such use and capacity-building and the transfer of technology are all integral parts of a specific legal regime to be negotiated” and in 2012: “Conservation is one of the integral elements of the issue”. Ibid.

176. “The G77 and China is concerned at some suggestions aimed at adopting “practical measures” or “short-term” measures without a definition of the legal regime for the adoption of such measures”. Ibid. Some G77 States, however, have been strong proponents of conservation, including short-term measures using existing instruments

177. For example, during the 2011 meeting, South Africa has “pointed to progress at the regional level, reiterating that a possible legal basis for global action on MPAs should be part of a package including benefit sharing. Brazil noted the need for a legal basis to provide details on the establishment and management of MPAs. Chile stressed the need for guidelines on a common methodology on MPAs”. See IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>.

questioned whether regional undertakings have a place in the future of MPAs in ABNJ.¹⁷⁸

6.2. An increasingly vocal majority: Africa, the Caribbean, and the Pacific

The June 2014 and January 2015 meetings of the BBNJ Working Group saw a number of regional groups become engaged in the BBNJ Working Group discussions and speak out more strongly in favour of a new agreement (Rochette *et al.*, 2015). The African Union has noted that current gaps in the legal regime for ABNJ, particularly on ABS, mean that technologically advanced States can exploit marine resources without taking on a concomitant responsibility to protect the environment. CARICOM has argued that a binding agreement is the only feasible solution for ensuring that developing States benefit from conservation and sustainable use of resources. The Pacific States have called for urgent actions to conserve marine biodiversity in ABNJ.

6.3. Reluctant to negotiate a new agreement: active and influential voices

A small number of States have historically expressed reluctance to negotiate such an agreement for a variety of reasons. These States have variously argued that a new agreement is not necessary, that MGRs fall firmly within the principle of freedom of the high seas, and that the UNCLOS provisions on MSR are not applicable to bioprospecting for commercial purposes. These States have also engaged strongly in the debate regarding the need to respect the mandates of existing organisations and have argued that a new agreement would add little value to the existing governance landscape. Some of these States have nonetheless acknowledged that implementation gaps exist and have often made proposals to advance through existing instruments, including at the regional level and through the development of non-legally binding tools. It is important to once again recall that the decision to negotiate a new

agreement was made by consensus, and that these States, in spite of their initial reluctance, have agreed to move forward with the negotiations. Nonetheless, they may retain specific concerns that they wish to see addressed.

Particular attention must be paid to the US, not only because of its considerable weight as an international political and maritime power, but also because of the peculiar relationship the country has with the Law of the Sea. The US has not ratified UNCLOS,¹⁷⁹ despite compromises made in its favour during the negotiation,¹⁸⁰ but nonetheless applies most of its provisions and recognises them as customary international law. The US is also a Contracting Party to the UNFSA and is an active member of many RFMOs.¹⁸¹ The US participated in the meetings of the BBNJ Working Group, frequently expressing reluctance to negotiate a new agreement, and especially a mechanism for ABS.

Regarding MGRs, the US argues that the principle of freedom of the high seas applies and that exploitation is covered by this principle. The US makes a distinction between pure MSR, which it agrees is regulated through UNCLOS Part XIII, and commercial research or bioprospecting, which it argues is not covered. The US holds by far the most patents associated with a gene of marine origin (Arnaud-Haond *et al.*, 2011) and has argued that a “new legal regime on MGRs (...) would impede research and development”.¹⁸² The US has also previously expressed concern that negotiations would lead to an increased role for the ISA.¹⁸³ In addition,

178. For example, in 2012 Argentina stated: “regional undertakings cannot be seen as a way forward on MPAs”. See IISD, Summary of the Fifth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 7-11 May 2012 (14 May 2012) ENB 25(83) <http://www.iisd.ca/vol25/enb2583e.html/>. This view is potentially inconsistent with the overall nature of the package deal approach, i.e. that progress on conservation initiatives must proceed hand in hand with progress on MGRs.

179. Various US Presidents have made several attempts to gain the Senate’s advice and consent, but the required two-thirds majority has never been attained.

180. Concerns from industrialised countries, including the US, regarding mandatory technology transfer, production policy and decision-making under Part XI of UNCLOS led to the adoption of the Part XI Agreement. The agreement contains an unusual provision implicitly guaranteeing a seat to the US in the Council of the ISA (Section 3, Article 15, of the Annex to the 1994 Agreement guarantees a seat in the Council to “the State, on the date of entry into force of the Convention, having the largest economy in terms of gross domestic product”).

181. It is not necessary to be a Contracting Party to UNCLOS in order to become a Party to the UNFSA or to RFMOs.

182. IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>.

183. “On the work of the ISA to develop regulations for mineral resources and matters related to the biodiversity of hydrothermal vents and seamounts, the US proposed using language from previous General Assembly resolutions to avoid broadening the mandate of the ISA”. See IISD, Summary of the Fifth Meeting of the Open-Ended Informal Consultative Process on Oceans and the Law of the Sea: 7-11 June 2004 (14 June 2004) ENB 25(12), <http://www.iisd.ca/download/pdf/enb2512e.pdf>.

they raise as an issue the questions of patents and, more generally, of IPRs in the discussions on MGRs and benefit sharing.¹⁸⁴

Seeking to move discussions away from these contentious issues, the US has made several proposals related to capacity building.¹⁸⁵ The US has also recognised an implementation gap¹⁸⁶ and has made several proposals for ways to address this, including:¹⁸⁷

- Calling on the UNGA to “encourage competent bodies to collaborate to protect EBSAs and share relevant information”;
- Encouraging “progress by States and competent organisations in identifying and managing MPAs and cooperating on a case-by-case basis on potential cumulative impacts”; and
- “Using EIAs to understand activities that may cause significant harmful changes to the marine environment and exchanging information about implementation of relevant UNCLOS obligations”.

The US also prioritises enhancing cooperation, coordination, and data-sharing among existing organizations. Whereas the US does not support the development of a benefit-sharing regime for MGR in ABNJ, it has expressed support for sharing data and research results, capacity building, and scientific collaboration related to the exploration, protection, and study of these resources.

The US has historically sought to prevent reference to a legally binding instrument being included in text generated by the Working Group. In 2011 the US sought to exclude the term “UNCLOS Implementing Agreement” from the final recommendations, proposing alternative wording that left

open the question of whether any new agreement would be legally binding.¹⁸⁸ At the final BBNJ Working Group meeting in January 2015 the US similarly argued that a new process should lead to “an international instrument” rather than “an international legally binding instrument”, following the wording used in the Rio + 20 outcome document.¹⁸⁹ This wording would have left the door open for the development of a soft-law instrument.¹⁹⁰

A number of other States have also expressed concerns. Canada has regularly repeated that the added value of a new instrument has not been demonstrated.¹⁹¹ Russia is “opposed to the creation of new instruments”¹⁹² and does not believe that a new agreement will meld with existing regional approaches. Russia has argued for the negotiations to be limited to clear legal gaps and consensus issues, which excludes, in its view, EIA and fisheries. Japan has also explicitly disavowed the need for a new agreement and has expressed similar concerns regarding integration with existing regional approaches and fisheries regulation. Both States argued alongside the US that any negotiation should discuss “an international instrument”, rather than explicitly seeking a legally binding instrument under UNCLOS. As stated above, however, the consensus decision to move forward suggests that these States ultimately decided to pursue the negotiation of a new instrument, rather than insist on their initial positions.

Iceland, a party to the OSPAR Convention, has often pointed out the existing efforts of regional organisations. Iceland has preferred to focus on voluntary participation in, and better implementation of, existing agreements, rather than the creation of new frameworks. Iceland has opposed the opening of negotiations for a new agreement (other than with respect to MGRs) and has expressed its concerns regarding the interaction of any new instrument with existing fisheries regulation. Korea

184. “Underlining that IPR issues do not belong in the Working Group, the US stressed that patents should not be used for enforcing benefit-sharing”. See IISD, Summary of the Seventh Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 1 – 4 April 2014 (7 April 2014) http://www.iisd.ca/oceans/marinebiodiv7/brief/brief_marinebiodiv7e.pdf.

185. “The US instead urged (...) focusing discussions on MGRs on: conservation, potential criteria and guidelines for MSR [marine scientific research], capacity-building and training opportunities”. See IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70), <http://www.iisd.ca/download/pdf/enb2570e.pdf>.

186. See IISD, Summary of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 13 - 17 February 2006 (20 February 2006) ENB 25(25), <http://www.iisd.ca/download/pdf/enb2525e.pdf>.

187. See IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>.

188. See IISD, Summary of the Fourth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 31 May - 3 June 2011 (6 June 2011) ENB 25(70) <http://www.iisd.ca/download/pdf/enb2570e.pdf>.

189. The Future We Want (2012) UNGA Resolution A/66/288, §162.

190. Despite this, US ratification of the UNFSA provides a precedent for its participation in a legally binding UNCLOS implementing agreement.

191. IISD, Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015 (26 January 2015) ENB 25(94), <http://www.iisd.ca/download/pdf/enb2594e.pdf>.

192. IISD, Summary of the Fifth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 7-11 May 2012 (14 May 2012) ENB 25(83), <http://www.iisd.ca/download/pdf/enb2583e.pdf>.

has similarly argued that there are no major regulatory gaps, particularly in relation to fisheries.

Norway is also party to the OSPAR Convention and has often highlighted existing regional initiatives. While in the past Norway had expressed doubts about the need for a new instrument, at the January 2015 BBNJ Working Group meeting it supported the development of a new agreement and laid out some fundamental elements where it saw a convergence of views.

7. DELIVERING A NEW INTERNATIONAL AGREEMENT

The challenges inherent in negotiating a new agreement should not be underestimated. The negotiations will have to navigate a range of complex and often charged issues.

7.1. Package Deal elements

7.1.1. Marine Genetic Resources & Access and Benefit Sharing

Parties will need to develop a mechanism that can reconcile the views of those in favour of the application of the CHM principle and those that have argued for the application of the freedom of the high seas principle. An ABS regime will need to cover three main issues: (i) access to the resources; (ii) fair and equitable sharing of benefits; and (iii) compliance.

The regulation of *in situ* access¹⁹³ raises questions of geographic scope¹⁹⁴ and sustainability, while facilitation of *ex situ* and *in silico* access could provide a clear benefit for the international scientific community by promoting further scientific research. Addressing *in vitro* access points to future challenges for governing MGRs: at present there are many technical and financial barriers to generating molecules of interest *in vitro* or synthesising compounds in a lab, however rapid advances in science mean this is likely to become

increasingly feasible; this creates problems due to the difficulties of tracing the information through a long, complex and fragmented research and development (R&D) chain.

With regards to benefit sharing, both monetary and non-monetary benefits could be considered.¹⁹⁵ It has been argued that the monetary benefits from the development of commercially viable products from MGRs should be distributed on a fair and equitable basis. Key procedural questions concern the trigger for monetary benefit sharing, the blurred distinction between commercial and non-commercial research and development, and the difficulty of traceability.¹⁹⁶

Options include an upfront payment for access, potentially appropriate where there is a clear commercial intent, or payments at various stages along the R&D chain.¹⁹⁷ At the same time, fees could be charged to acquire MGR samples from *ex situ* collections, or for access to *in silico* knowledge for commercial purposes. Some form of trust fund for ABNJ could be established to administer the monetary benefits on behalf of the international community. These resources could be used to support further non-monetary benefit sharing (e.g. capacity-building and technology transfer). They could also be used to support activities related to conservation and sustainable use of marine biodiversity in ABNJ, thereby linking a benefit-sharing regime with the other elements of the Package Deal.

Due to the high cost of obtaining MGRs in ABNJ and the long route to developing a commercial product, the most secure and direct benefits from MGR are likely to be non-monetary (Broggiato *et al.*, 2014b). UNCLOS already envisages international cooperation on MSR,¹⁹⁸ publication and dissemination of results,¹⁹⁹ and promotion of data flow and knowledge transfer.²⁰⁰ These basic provisions could provide the basis for further development of non-monetary benefit-sharing obligations.

Established elements of the existing multilateral

193. In terms of regulating access to MGRs, a distinction is generally made between *in situ*, *ex situ*, *in silico*, and *in vitro* access. *In situ* refers to samples of MGRs collected in their natural setting, while *ex situ* refers to samples previously collected in ABNJ and subsequently stored in “biorepositories”. *In silico* refers to access to any knowledge associated with the MGRs, such as observational or experimental data and other findings. *In vitro* refers to MGRs that are generated in a laboratory using *in silico* data.

194. Sampling takes place in both the Area and the water column, while some resources are “transboundary”, i.e. existing in and migrating between both maritime areas. MGRs from both spaces should be covered by an ABS system.

195. The Nagoya Protocol provides indicative lists of monetary and non-monetary benefits (Annex 1).

196. In practice, sampling cruises in ABNJ tend to be non-commercial, or at least their objectives are not solely or primarily commercial. This makes them difficult to distinguish and therefore difficult to ensure that the appropriate remunerations are sought at the point of access.

197. Payment could become due upon reaching certain milestones (e.g. an exclusivity fee when an intellectual property right is granted), or when a commercial product is created and sold. See IUCN (2015) for further information.

198. Articles 242 and 143.3(a).

199. Articles 244.1 and 143.3(c).

200. Articles 244.2 and 144.2.

ABS approach under the ITPGRFA, which establishes a common pool of resources, could be adapted to the ABNJ context and provide a starting point for advancing the discussions on this issue.²⁰¹ In particular its development of standard material transfer agreements, differentiated and flexible access rights and benefit-sharing obligations, and the regulation of intellectual property rights may be of interest.

7.1.2. Area-based management tools, including Marine Protected Areas

7.1.2.1. MPAs

The negotiations will have to consider a number of issues in the creation of MPAs in ABNJ, including: (i) criteria used to identify potential areas for protection; (ii) proposal and adoption of MPAs; (iii) implementation of management measures; and (iv) enforcement.

In order to identify appropriate areas, a new agreement could use existing scientific criteria, such as those used for EBSAs, VMEs, PSSAs, and criteria set out under regional agreements, or States could choose to develop new criteria. Proposal of MPAs could be by States, a specific body convened under the agreement, or by NGOs or organisations with State support (Druel & Gjerde, 2014; IUCN, 2015). Provisions may be needed to ensure that a dedicated scientific body considers proposals and that they are officially endorsed by a Conference of the Parties (COP) or competent organisational meeting (Druel & Gjerde, 2014; IUCN, 2015).

There are many potential structures that could be implemented for the adoption of management plans and management measures for meeting the objectives of an MPA. This could include proposal of a plan and measures along with the MPA, or development by States cooperating directly and through competent international, regional, and sectoral organisations.

States could use efforts underway at the regional level to create MPAs in ABNJ, such as those taken by the OSPAR Commission and the SSC (Freestone *et al.*, 2014a) but not yet reached a decision, on whether existing institutional agreements and structures are sufficient to meet global commitments to protect marine biodiversity, or if additional mechanisms may be required. This paper considers two

very different efforts to protect marine biodiversity in these areas: (1, to stimulate discussion and generate ideas for a new global mechanism.

7.1.2.2. Other area-based management tools

Though the discussions regarding conservation have often focussed on MPAs, the Package Deal and Resolution 69/292 refer to “measures such as area-based management tools, including marine protected areas”. States are therefore not limited to MPAs and may wish to consider the broadest possible range of options available for achieving conservation and sustainable use.

Similar language, that of “other effective area-based conservation measures” (OEABCM), is used in the context of Aichi Target 11. Early commentary on OEABCM suggests that such measures may entail: an express purpose of biodiversity conservation; the primacy of conservation objectives where they conflict with other objectives; long term management; and the possibility that conservation objectives can be achieved as a co-benefit of other management efforts (Jonas *et al.*, 2014).²⁰²

Similarly, in the context of in situ conservation, the CBD states that Contracting Parties shall *inter alia*:²⁰³

- “Regulate or manage biological resources important for the conservation of biological diversity, with a view to ensuring their conservation and sustainable use”;
- “Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas”; and
- “Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species, *inter alia*, through the development and implementation of plans or other management strategies”.

As previously noted, a number of ABMTs are already available in ABNJ, and a new agreement could build on these, taking note of the CBD text above. A new agreement could, for example, encourage or place obligations on States to regulate or manage marine activities or resources important for the conservation of marine biological diversity in ABNJ or adopt measures to avoid or minimise adverse impacts of activities (IUCN 2015). It may also seek to improve the integration

201. It is nonetheless worth highlighting that the ITPGRFA is applicable to a limited set of 64 key food crops and forages, based on their importance for food security and the level of interdependence among countries. A new instrument for MGR in ABNJ, which will essentially apply to all marine life in ABNJ, will face some unique challenges in terms due to its wide scope and large scale.

202. The IUCN World Commission on Protected Areas (WCPA) has convened a task force to examine precisely what is included in OEABCM: the eventual findings of this task force may be of interest to States as a point of reference in future discussions regarding ABMTs other than MPAs in future discussions.

203. Article 8 on In-Situ Conservation.

of conservation and sustainable use of marine biological diversity into decision-making processes (IUCN 2015). Such measures could be based on existing criteria, such as those used for EBSAs, VMEs, PSSAs, and criteria set out under regional agreements.

States may also wish to consider options for implementing some form of marine spatial planning (MSP) in ABNJ.²⁰⁴ In this regard, the EU Directive on MSP²⁰⁵ or the CBD guidance on MSP²⁰⁶ may provide inspiration. The agreement could specify more detailed obligations for MSP, such as an obligation to adopt spatial plans for areas of specific interest, or could even provide for more detailed obligations to be developed by a decision making body (IUCN 2015).²⁰⁷

7.1.3. EIA

Some elements of EIA to be considered include the threshold for EIA, the content of impact statements, and consultation processes, as well as provisions for review, monitoring and reporting (Warner 2012; Currie 2014). Similar issues will also need to be considered in relation to SEA.

A new agreement could reiterate and reinforce the existing obligation of prior assessment under UNCLOS Article 206, establishing principles for EIAs in ABNJ. Such principles might include the precautionary principle, the ecosystem approach, and a no net biodiversity loss principle. The agreement could also include more specific provisions on EIAs and SEAs to implement these principles, such as: the establishment of a mandatory EIA mechanism for new, emerging and unregulated activities; notification to potentially affected States of such activities; transparency and stakeholder participation; and review by a designated body under the new agreement (Warner, 2012).

A new agreement could provide a best practice standard for EIA in ABNJ, setting out a process that

is biodiversity inclusive, transparent and subject to international scrutiny, with associated powers to impose conditions on any activities that may negatively impact marine ecosystems in ABNJ (Warner, 2012; Currie, 2014).

7.1.4. Capacity building and transfer of marine technology

With international guidelines already in place,²⁰⁸ the key question is how a new agreement can catalyse capacity building and technology transfer efforts beyond those already being undertaken.

Capacity building might be developed and enhanced by: increasing the links between regional institutions, e.g. through establishment of mentoring and partnership linkages between North and South regional organisations, such as regional fisheries bodies and the regional seas organisations; increasing the availability of finance for South-South cooperation;²⁰⁹ establishment of a global scholarship programme to foster science, policy and governance research into high seas biodiversity conservation;²¹⁰ and ensuring that projects and initiatives are assessed and monitored to ensure continuity and enforcement.

Regarding technology transfer, an international instrument would need to address: how the sharing of data and the sharing of technology should take place; whether this transfer will be voluntary or compulsory; and in which areas technology should be transferred (i.e. if the agreement will relate only to transfer of technology relating to MGRs or if the scope will be more broadly related to conservation and sustainable use).

7.2. Overarching issues

7.2.1. Institutional arrangements

The effective implementation of the provisions of a new international instrument for ABNJ will potentially necessitate the establishment of some institutional structure through which parties can take decisions, undertake coordination and integration efforts, and perform reviews and assessments of implementation.

Based on experience with similar multilateral agreements, this framework could include (Mace *et al.*, 2006; IUCN, 2015):

204. "Marine spatial planning is a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives that usually have been specified through a political process." Website of the IOC MSP Initiative: http://www.unesco-ioc-marinesp.be/marine_spatial_planning_msp.

205. EU Directive 2014/89/EU.

206. Marine Spatial Planning in the Context of the Convention: A study carried out in response to CBD COP 10 decision X/29 (2012) CBD Technical Series No. 68, <https://www.cbd.int/doc/publications/cbd-ts-68-en.pdf>.

207. E.g. It could "Provide for objectives, scientific criteria and minimum requirements for maritime spatial planning and plans to be developed by the decision making body or subsidiary body."

208. IOC Criteria and Guidelines on the Transfer of Marine Technology (2003).

209. E.g. For GEF-funded projects or other global funding mechanisms.

210. This programme could be established in a similar manner to the UN-Nippon Fellowships, which provide capacity-building through the provision of advanced education and research opportunities in ocean affairs for developing country professionals.

- A Conference of the Parties (COP) to bring together all parties in order to take critical decisions relating to the implementation of the agreement and to review progress;
- An Executive Committee to oversee the implementation of the decisions, policies and procedures established by the COP;
- A scientific and technical body to provide advice on scientific and technical matters;
- A compliance body to resolve disputes and facilitate compliance with the provisions of the agreement; and
- A Secretariat to provide support to the parties to the agreement.

Any eventual agreement will need to specify, *inter alia*, which of these bodies will be established, their relationships to each other, how they will be funded, how they will be staffed, and their rules of procedure.

7.2.2. Not undermining the mandates of existing organisations

A number of bodies at the global and regional levels already have a mandate covering ABNJ and it has been agreed that any new agreement should not undermine existing agreements or institutions. Defining what this means in practice has proved difficult and could continue to be a point of contention.

Some delegations argue that a new agreement will act as a mechanism to enhance cooperation and coordination by, for example, advising existing institutions, communicating information, and formulating recommendations. Others argue that a new agreement with a strong mandate for proactive intervention would inevitably encroach on the mandates of existing organisations. IUCN suggested a possible third way during meetings of the Working Group: parties could be called upon to strengthen existing institutions in accordance with the priorities and principles of an eventual agreement (Wright *et al.*, 2014). As with the UNFSA, a new instrument could elaborate on the duty to cooperate by setting priorities, principles and obligations of States Parties to implement both directly and via their participation in international competent organisations. The new instrument could further require Parties and invite competent international institutions to regularly report on their progress as with the UNGA resolutions on deep-sea bottom fishing (IUCN, 2015).

The role of existing regional organisations may be difficult to navigate as there are considerable differences in the structures, mandates and

capacities of these organisations (Druel *et al.*, 2012; Ardron *et al.*, 2014; Freestone *et al.*, 2014). The new instrument could be used to describe principles and priorities for States Parties to enact via their participation in these regional organisations based on their duty of cooperation. Mechanisms for capacity building and funding could also be directed at enhancing the ability of regional organisations to better conserve and manage areas beyond national jurisdiction.

7.2.3. Addressing fisheries

The debate surrounding existing organisations has been particularly pronounced in relation to fisheries. Fisheries are governed by the UNFSA and regulated by RFMOs (at least with respect to their States Parties). However UNFSA has not attained universal ratification, while the efficacy and completeness of RFMO regulation has been criticised (Cullis-Suzuki & Pauly, 2010; Rogers & Gianni, 2010; Wright *et al.*, 2015). Given that fishing is currently the greatest threat to marine biodiversity in ABNJ, many delegations have argued that a new agreement could make improvements to the existing fisheries management framework, at least with respect to the way RFMOs protect biodiversity in the marine environment.

There are many ways existing fisheries management regulation could be expanded and strengthened through a new agreement an ABNJ. This ranges from a substantial overhaul of the framework, to more incremental steps, such as: additional reporting and accountability procedures; reiterating and reinforcing the need for an ecosystems approach to fisheries; elaborating mechanisms for integrating biodiversity protection into decision-making processes; establishing criteria and priorities for biodiversity-focused measures including area-based management tools; expanding the coverage of RFMOs; refining the integration of fisheries in management tools, such as MPAs; and focusing attention on monitoring and surveillance efforts.

7.2.4. Funding

The issue of how funding for the implementation of a new agreement components could be raised and equitably allocated will be crucial to the success of any new agreement. A global fund could be established to support capacity-building projects as well as to fund the development of a possible Clearing House for technology transfer (Druel & Gjerde, 2013). Existing funds could also be better leveraged: for example only 2% of full-scale GEF projects to date have focussed on ABNJ. ■

ANNEXES

Annex 1. Contracts with the ISA¹

Contract Start	Contract End	Resource targeted	Location	Company	Sponsoring State(s)
March 29, 2001	March 28, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Interocean metal Joint Organization	Bulgaria, Cuba, Czech Republic, Poland, Russian Federation and Slovakia
March 29, 2001	March 28, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Yuzhmoregeologiya	Russian Federation
April 27, 2001	April 26, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Government of the Republic of Korea	Republic of Korea
May 22, 2001	May 21, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	China Ocean Mineral Resources Research and Development Association	China
June 20, 2001	June 19, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Deep Ocean Resources Development Co. Ltd.	Japan
June 20, 2001	June 19, 2016	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Institut français de recherche pour l'exploitation de la mer	France
March 25, 2002	March 24, 2017	Polymetallic Nodules	Indian Ocean	Government of India	India
July 19, 2006	July 18, 2021	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Federal Institute for Geosciences and Natural Resources of Germany	Germany
July 22, 2011	July 21, 2026	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Nauru Ocean Resources Inc.	Nauru
November 18, 2011	November 17, 2026	Polymetallic Sulphides	Southwest Indian Ridge	China Ocean Mineral Resources Research and Development Association	China
January 11, 2012	January 10, 2027	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Tonga Offshore Mining Limited	Tonga
October 29, 2012	October 28, 2027	Polymetallic Sulphides	Mid-Atlantic Ridge	Government of the Russian Federation	Russian Federation
January 14, 2013	January 13, 2028	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	G-TEC Sea Mineral Resources NV	Belgium
February 8, 2013	February 7, 2028	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	UK Seabed Resources Ltd.	UK
January 27, 2014	January 26, 2029	Cobalt-Rich Ferromanganese	Western Pacific Ocean	Japan Oil, Gas and Metals National Corporation (JOGMEC)	Japan
April 29, 2014	April 28, 2029	Cobalt-Rich Ferromanganese	Western Pacific Ocean	China Ocean Mineral Resources Research and Development Association (COMRA)	China
June 24, 2014	June 23, 2029	Polymetallic Sulphides	Central Indian Ridge	Government of the Republic of Korea	Republic of Korea
November 18, 2014	November 17, 2029	Polymetallic Sulphides	Mid-Atlantic Ridge	Institut français de recherche pour l'exploitation de la mer	France
January 19, 2015	January 18, 2030	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Marawa Research and Exploration Ltd.	Kiribati
January 22, 2015	January 21, 2030	Polymetallic Nodules	Clarion-Clipperton Fracture Zone	Ocean Mineral Singapore Pte Ltd.	Singapore
March 10, 2015	March 9, 2030	Cobalt-Rich Ferromanganese	Magellan Mountains, Pacific Ocean	Ministry of Natural Resources and Environment of the Russian Federation	Russian Federation
May 6, 2015	May 5, 2030	Polymetallic Sulphides	Central Indian Ocean	Federal Institute for Geosciences and Natural Resources of the Federal Republic of Germany	Germany
November 9, 2015	November 8, 2030	Cobalt-Rich Ferromanganese	Rio Grande Rise, South Atlantic Ocean	Companhia De Pesquisa de Recursos Minerais	Brazil

1. Information from ISA website (<https://www.isa.org.jm/deep-seabed-minerals-contractors>). Correct as of March 2016.

Annex 2. Existing ABMTs applicable to ABNJ

Agreement/body	Area-based tools in ABNJ	Usage
Agreement relating to the implementation of Part XI of the UNCLOS, 1994 (establishing the International Seabed Authority)	Areas of Particular Environmental Interest (APEI); preservation reference zones ²	9 APEIs in the Clarion-Clipperton Zone (North Central Pacific) ³
International Convention for the Prevention of Pollution From Ships, 1973 (as modified by the Protocol of 1978)	Special Areas (SAs)	2 SAs in ABNJ (Mediterranean and Antarctic)
International Maritime Organization	Particularly Sensitive Sea Areas (PSSAs) ⁴	None designated in ABNJ
International Convention for the Safety of Life at Sea, 1974	Areas To Be Avoided (ATBAs)	None designated in ABNJ
International Convention for the Regulation of Whaling, 1946	Sanctuaries	Two established: Indian Ocean (1979) and Southern Ocean (1994)
Convention for the Protection of the World Cultural and Natural Heritage, 1972	World heritage sites	None designated in ABNJ
Regional Fisheries Management Organisations/Arrangements (non-tuna)	Fisheries closures (pursuant to UNGA resolutions)	Approximately 30 fisheries closures in the North-East Atlantic, North-West Atlantic, and South-East Atlantic and 13 equivalent closures voluntarily undertaken by members of an industry association in the Southern Indian Ocean (Wright <i>et al.</i> , 2015)

² ISA. Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters. 2013; ISBA/19/C/17; Section V.31.6.

³ ISA. Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone. 2012. ISBA/18C/22. <http://www.isa.org.jm/files/documents/EN/18Sess/Council/ISBA-18C-22.pdf>.

⁴ IMO. Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSAs), 2005; A.982(24)

Annex 3. Existing regional initiatives for the establishment of MPAs or other area-based management tools

Area	Organisations/Conventions	MPA-related actions/measures
The North-East Atlantic	OSPAR NEAFC	First network of MPAs in ABNJ (OSPAR) NEAFC fisheries closures Collective Arrangement between competent organisations on cooperation
Mediterranean	Mediterranean Action Plan (MAP), Barcelona Convention General Fisheries Commission for the Mediterranean and Black Sea (GCFM)	First MPA partly covering High Seas (Pelagos Sanctuary) MoU between MAP and GCFM Project on developing a network of SPAMIs in the Open seas, including the deep seas Proposal to designate parts of the Sanctuary as a Particularly Sensitive Sea Areas (PSSA).
The Southern Ocean	CCAMLR	South Orkney Islands MPA Process to establish a circumpolar network of MPAs is ongoing
South Pacific	SPREP	SPREP Convention applies to four “high seas pockets” (no measure through SPREP taken so far)
South East Pacific	CPPS	Member States of CPPS committed themselves in 2012 “Galapagos Declaration” to promote action to protect living resources in ABNJ
Western Africa	Abidjan Convention	Establishment of a working group to study all aspects of the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction within the framework of the Abidjan Convention (COP 11 in 2014: Decision CP. 11/10).
Western Indian Ocean	Nairobi Convention	Feasibility of the extension of the geographical coverage of the Nairobi Convention to ABNJ in progress, in the context of a project funded by the French GEF
Sargasso Sea	Sargasso Sea Alliance and Commission 2014 Hamilton Declaration (signed by Azores, Bermuda, Monaco, UK and US).	Encourages and facilitates voluntary collaboration toward the conservation of the Sargasso Sea (measures through competent management authorities)

Annex 4. Summary of RFMO bottom fisheries closures in ABNJ

Region	Body/ State	Type of body	Parties	Closures
North-East Atlantic	NEAFC	RFMO	Denmark (Faroe Islands & Greenland), EU, Iceland, Norway, Russia	11 closures
North-West Atlantic	NAFO	RFMO	Canada, Cuba, Denmark (Faroe Islands & Greenland), EU, France (Saint Pierre & Miquelon), Iceland, Japan, South Korea, Norway, Russia, Ukraine, US	20 closures
South-East Atlantic	SEAFO	RFMO	Angola, EU, Japan, South Korea, Namibia, Norway, South Africa	11 closures
North Pacific	NPFC	RFMO	Canada, Japan, Russia, South Korea, US	Formal closures yet to be declared, agreement on tentative closure of one seamount, and some agreement on tentative closure of another.
South Pacific	SPRFMO	RFMO	Australia, Belize, Chile, China, Cook Islands, Cuba, EU, Denmark (Faroe Islands), New Zealand, Russia, South Korea, Chinese Taipei (Taiwan), Vanuatu	Formal closure yet to be declared; footprint approach taken effectively limits fishing activity; voluntary closures implemented by New Zealand
Southern Ocean	CCAMLR		Australia, Argentina, Belgium, Brazil, Bulgaria, Canada, Chile, China, Cook Islands, EU, Finland, France, Germany, Greece, India, Italy, Japan, Korea, Mauritius, Namibia, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Poland, Russia, South Africa, Spain, Sweden, Ukraine, UK, US, Uruguay, Vanuatu	1 MPA, 1 blanket closure in relation to toothfish fisheries, 4 additional closures. Commercial bottom trawling prohibited throughout the CCAMLR region. Regulations apply to mainly longline fisheries.
Indian Ocean	SIOFA	RFMO	Australia, Cook Islands, EU, Mauritius, Seychelles	Formal closures yet to be declared.
Indian Ocean	SIODFA	Industry association	Austral Fisheries (Pty) Ltd, (Australia) ORAFCO Limited (Cook Islands) United Frame Investments Ltd (Cook Islands) Kanai Fisheries Co. Ltd., Hokkaido (Japan) B&S International Ltd (Mauritius) ⁵	13 voluntary closures

5. Ceased fishing operations in the SIODFA area in 2011.

Annex 5. Membership of regional groupings

Grouping	States
Group of 77 (G77)	Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Bahamas, Bahrain, Bangladesh, Barbados, Belize, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Jamaica, Jordan, Kenya, Kiribati, Kuwait, Lao People's Democratic Republic, Lebanon, Lesotho, Liberia, Libya, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Mauritania, Mauritius, Micronesia, Mongolia, Morocco, Mozambique, Myanmar, Namibia, Nauru, Nepal, Nicaragua, Niger, Nigeria, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Solomon Islands, Somalia, South Africa, South Sudan, Sri Lanka, State of Palestine, Sudan, Suriname, Swaziland, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Uganda, United Arab Emirates, Tanzania, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe
European Union (EU)	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, the UK
Caribbean Community (CARICOM)	Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago
African Union	Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cape Verde, Cameroon, Central African Republic, Chad, Comoros, Republic of the Congo, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, The Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Republic Arab Saharawi Democratic, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania

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