

# Finding a Home for BBNJ – The CBD, the LOSC, and the General Assembly

## *Complementary Alternatives?*

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### 1 Introduction\*

The sustainable use and conservation of biological diversity beyond national jurisdiction (BBNJ) has been one of the main issues in the law of the sea and ocean governance the last couple of decades. Looking at the work under the aegis of the United Nations General Assembly on that issue (hereafter BBNJ process), it is clear that there have been significant overlaps with the work in other international frameworks, in particular the Convention on Biological Diversity (CBD).<sup>1</sup> The CBD has been addressing all issues addressed at the BBNJ process (area-based management tools (ABMTs), including marine protected areas (MPAs); environmental assessments; access and benefit sharing in relation to marine genetic resources (MGRS) of BBNJ; and capacity building and transfer of technology). This chapter seeks to reconstruct the interactions between the CBD and the United Nations General Assembly (UNGA or General Assembly) in relation to the development of a comprehensive regime for BBNJ.<sup>2</sup>

\* The authors want to thank the editors and the participants at the workshop *International Law and Marine Areas beyond National Jurisdiction: Current Status and Future Trends* (Utrecht, 3–4 December 2019) for their comments on an earlier version of this chapter). We want to thank Catherine Blanchard for helping us finding our way in developing the story line of this chapter.

- 1 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD). See also Catherine Blanchard and others, 'Three Structural Pillars of the Future International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction' in Marta Chantal Ribeiro and others (eds), *Global Challenges and the Law of the Sea* (Springer 2020) 352–78, 362–63.
- 2 While it should be acknowledged that BBNJ also has been addressed in the context of other global and regional fora, it is submitted that only the CBD and the UNGA were an option for

The focus will be on the period between the middle of the 1990s, when the issue first was considered in both fora, and the first decade of this century. Subsequently, the respective roles of the CBD and the General Assembly became settled. The General Assembly was driving the process of developing a regime for BBNJ, while the CBD was focusing on scientific and technical inputs into that process. These interactions between the General Assembly and the CBD link directly to the overall theme of the book project, which is concerned with different visions of the ocean. On the one hand, the CBD's environmental focus and its emphasis on fair and equitable benefit sharing of genetic resources. On the other hand, the General Assembly has approached this issue primarily from a law of the sea perspective, which has a broader focus and articulates interests in light of the broader focus.

The chapter is set up as follows. When the CBD started considering the issue of BBNJ, the relationship between the CBD and the United Nations Convention on the Law of the Sea (LOSC),<sup>3</sup> which both are relevant to regulating BBNJ, immediately came to the fore. This eventually resulted in a Study on the relationship between the two instruments in 2003.<sup>4</sup> The following year, the General Assembly established the Ad hoc Working Group, initiating the BBNJ process. Section 2 of this chapter looks at developments in the period up to 2004, and in particular focusses on the Study on the relationship between the CBD and the LOSC. Section 3 considers how the establishment of the Ad hoc Working Group impacted on the work of the CBD on BBNJ. Section 4 reflects on the question of what may explain the choice for developing the regime of BBNJ through the BBNJ process instead of the CBD. Finally, section 5 by way of conclusion discusses the findings of the chapter in the light of the themes of the book project.

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developing a comprehensive regime. The CBD because of its centrality in the biodiversity regime and the General Assembly because of its primary role in reviewing ocean policy and law of the sea. Consequently, developments in other bodies and instruments will not be considered in the present chapter.

- 3 United Nations Convention on the Law of the Sea (signed 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).
- 4 Study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed (decision 11/10 of the Conference of the Parties to the Convention on Biological Diversity) UNEP/CBD/SBSTTA/S/INF/3/Rev.1 (hereafter Study or Study on the relationship between the CBD and the LOSC).

## 2 Determining the Relationship between the CBD and the LOSC

### 2.1 *The Early Years*

The interest in developing a regime specifically dealing with BBNJ can be traced back to the middle of the 1990s. The CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) considered the issue of conservation and sustainable use of coastal and marine biological diversity at its first session in September of 1995.<sup>5</sup> Recommendation 1/8 of the SBSTTA observes that the next session of the SBSTTA should 'also address the questions related to bio-prospecting on the deep sea bed, including access to its genetic resources'.<sup>6</sup> During the discussion relating to the issue of conservation and sustainable use of coastal and marine biological diversity, the representative of the United States observed that 'the issue of bio-prospecting on the deep sea bed should be out of the scope of the Convention'.<sup>7</sup> Recommendation 1/8 did not endorse this point, but did point out that national legislation of Parties to the CBD needs to be in conformity with the CBD and other instruments, including the LOSC.<sup>8</sup>

These developments at the CBD were reported to the 50th session of the General Assembly by the United Nations Secretary-General.<sup>9</sup> The report also pointed out that the CBD, 'even as supplemented by certain provisions of the [LOSC]' did not 'provide a coherent and comprehensive regime appropriate to the particularities of marine life-forms'.<sup>10</sup> The General Assembly's Resolution on the law of the sea for the year 1995 does not make any reference to the conservation and sustainable use of marine biodiversity.<sup>11</sup>

The second Conference of Parties (COP) of the CBD in November of 1995, acting on SBSTTA Recommendation 1/8, requested the Executive Secretary of the CBD to undertake a study of the relationship between the CBD and the

5 The SBSTTA had been requested by the first COP to provide 'advice on the scientific, technical and technological aspects of the conservation and sustainable use of coastal and marine biological diversity' (CBD COP Decision 1/7, UNEP/CBD/COP/DEC/1/7, 2, para 5:5.3).

6 Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice, UNEP/CBD/COP/2/5, 36, para 2.

7 *ibid* 15–16, para 75.

8 *ibid* 40, para 12(e).

9 Report of the Secretary-General, Law of the Sea, 1 November 1995, UN Doc A/50/713. For a discussion of developments in relation to BBNJ at the United Nations, see Fernanda Millicay, 'A Legal Regime for Biodiversity of the Area' in Myron Nordquist and others (eds), *Law, Science, and Ocean Management* (Brill 2007).

10 *ibid* 52, para 203.

11 See Resolution Adopted by the General Assembly, 22 December 1995, UN Doc A/RES/50/23.

LOSC in consultation with the then Office for Ocean Affairs and the Law of the Sea of the United Nations Secretariat ‘with regard to the conservation and sustainable use of genetic resources on the deep seabed’.<sup>12</sup> COP Decision 11/10 indicates that the Study was to be carried out ‘with a view to enabling the [SBSTTA] to address at future meetings, as appropriate, the scientific, technical, and technological issues relating to bio-prospecting of genetic resources on the deep seabed’.<sup>13</sup> At first sight, this purpose might suggest a narrow focus of the CBD in relation to a future regime for MGRS. However, reference is to the mandate of the SBSTTA, and the COP on the basis of the recommendations of the SBSTTA might have decided to deal with this issue in a comprehensive manner.

The United Nations Secretary-General in 1996 again reported on developments at the CBD to the General Assembly.<sup>14</sup> According to the report, COP Decision 11/10 ‘demonstrate[s] the increasing attention that States are giving to the need to ensure uniformity and compatibility between the [LOSC] and subsequent legal developments’.<sup>15</sup> The issue of access to genetic resources was relevant to different matters addressed by the LOSC, such as

[The] protection and preservation of the marine environment, including that of the international seabed area, ... the application of the consent regime for marine scientific research, the regime for protected areas in the exclusive economic zone, the duties of conservation and management of

12 CBD COP Decision 11/10, UNEP/CBD/COP/2/19, 16, para 12.

13 *ibid.*

14 Report of the Secretary-General, Law of the Sea, 1 November 1996, UN Doc A/51/645. As the report indicates, the Secretary-General also reported on this matter to the Meeting of States Parties to the LOSC (*ibid.* para 230). The report to the Meeting contains less detail than the Secretary-General’s report on the law of the sea (see Report of the Secretary-General under article 319 of the United Nations Convention on the Law of the Sea, 11 April 1996 ((SPLOS/6), paras 41–46) and the Meeting did not take any specific follow-up actions in relation to the report (see SPLOS/14). It may be noted that the Meeting has played a very limited role in relation to reviewing development in relation to oceans and law of the sea as compared to the General Assembly. See Tullio Treves, ‘The General Assembly and the Meeting of the States Parties in the Implementation of the LOS Convention’ in Alex Oude Elferink (ed), *Stability and Change in the Law of the Sea* (Martinus Nijhoff 2005); Alex Oude Elferink, ‘Reviewing the Implementation of the LOS Convention: the Role of the United Nations General Assembly and the Meeting of States Parties’ in Alex Oude Elferink and Donald R Rothwell (eds), *Oceans Management in the 21st Century: Institutional Frameworks and Responses* (Martinus Nijhoff 2004).

15 UN Doc A/51/645 (n 14) para 189.

the living resources of the high seas, and the sustainable development of living marine resources generally.<sup>16</sup>

The report pointed to the need for the development of a regime for MGRs in the Area.<sup>17</sup> The Secretary-General's report submitted that the proposed study on genetic resources 'will be of equal, or possibly greater importance to States Parties to the [LOSC], as well as to Member States in the General Assembly reviewing the overall implementation of the Convention and the implications of current trends and developments for the law of the sea' as compared to the importance for the States Parties to the CBD.<sup>18</sup> The report concludes that the issue of genetic resources in the Area might not only raise questions about the applicable legal regime and its further development, but also 'as to the appropriate intergovernmental forum for [addressing the issue], as well as other institutional issues, including coordination among treaty bodies and the competent international organizations'.<sup>19</sup> The difference between the CBD and the Secretary-General's report in approaching the issue at hand is notable. While the former is silent on the broader policy implications of the issue, these are central to the latter.<sup>20</sup> As was the case for the previous year, the General Assembly Resolution on the law of the sea of 1996 does not refer to the issue of biodiversity or the specific matter of MGRs of the Area.<sup>21</sup>

The Secretariat of the CBD prepared a note on bioprospecting of the genetic resources of the deep seabed for the second session of the SBSTTA in September 1996.<sup>22</sup> The note observes that it had been presented to the Office for Oceans Affairs and the Law of the Sea and was a 'preliminary investigation'.<sup>23</sup> The note continued that '[i]n this sense it represents no more than a preparatory step

16 *ibid* para 231.

17 *ibid*.

18 *ibid*.

19 *ibid* para 232.

20 The Secretary-General's report in discussing the issue of choosing the appropriate forum and coordination between instruments observes that some of these issues have been considered at the CBD, *ibid* para 232. The document to which reference is made is a note prepared by the Executive Secretariat of the CBD entitled *Modalities for Enhanced Cooperation with Relevant Biodiversity-Related Bodies* (Note by the Executive Secretary, 21 September 1996, UNEP/CBD/COP/3/35). The document does not specifically address MGRs in ABNJ, and narrowly focusses on practical modalities for cooperation, without touching upon policy choices that might have involved in shaping this cooperation.

21 See Resolution Adopted by the General Assembly, 17 January 1997, UN Doc A/RES/51/34.

22 Provisional Agenda, SBSTTA, UNEP/CBD/SBSTTA/2/15.

23 UNEP/CBD/SBSTTA/2/15, 2, para 5.

for the study requested by the ... COP'.<sup>24</sup> Notwithstanding this cautionary note, the agenda item '3.12.2 Bio-prospecting of genetic resources of the deep seabed' included in the provisional agenda of the SBSTTA was removed, since the Secretariat had not been able to consult with the Office for Oceans Affairs and the Law of the Sea to allow coordination of their positions.<sup>25</sup>

In subsequent years, the issue of MGR in areas beyond national jurisdiction (ABNJ) and BBNJ in general received limited attention in the reports on the law of the sea and oceans of the Secretary-General.<sup>26</sup> The report for 2000 recalled the Secretary-General's reports of the years 1995 and 1996, which had identified the legal and policy issues in relation to marine biodiversity and genetic resources of the deep seabed in ABNJ.<sup>27</sup>

## 2.2 *The Study on the Relationship between the CBD and the LOSC*

The Study on the relationship between the CBD and the LOSC as regards the conservation and sustainable use of MGRs of the deep seabed in ABNJ became available in early 2003.<sup>28</sup> In view of the fact that the Study, as will be further discussed below, likely contributed to initiating the BBNJ process under the

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- 24 *ibid.* For a brief discussion of the content of the note see further below n 28 and 63.
- 25 See Recommendations of the SBSTTA at its Second Meeting, UNEP/CBD/COP/3/3, 5–7, para 14. The provisional agenda is reproduced in Provisional Agenda of the SBSTTA, 15 August 1996, UNEP/CBD/SBSTTA/2/1/Rev.1, and agenda item 3.12.2 appears at *ibid* 3.
- 26 For instance, the report for 1998 refers to an international conference co-organized by the FAO, which flagged the need to look at the issue of 'the sharing of benefits from the exploitation of aquatic genetic resources found outside areas of national jurisdiction' (Report of the Secretary-General, Oceans and the Law of the Sea, 5 October 1998, UN Doc A/53/456, para 310).
- 27 Report of the Secretary-General, Oceans and the Law of the Sea, 20 March 2000, UN Doc A/55/61, para 136.
- 28 Study (n 4). As was observed above, the Secretariat of the CBD had prepared a Note containing a 'preliminary investigation', which it had presented to the SBSTTA in 1996. The Note already prefigures most of the argument contained in the Study. However, where the Study is strongly focused on building the case for equitable access and benefit sharing and, in that connection, submits that all resources of the Area are part of the common heritage of mankind (see further below), the Note submits that:

The regime for the Area makes no reference to genetic resources. As a result, it is not clear how [the LOSC] may apply to the Area's genetic resources. The most plausible interpretation is that, as with all resources of the high seas other than mineral resources, they are freely accessible, open-access resources appropriable by anyone who collects them. These types of resources are governed by a number of broad principles included under the rubric of the freedom to fish, UNEP/CBD/SBSTTA/2/15, 3, para 11 (footnotes omitted).

aegeis of the General Assembly, it is of interest to determine how it frames the regulatory scope of both instruments and their relationship in some detail.<sup>29</sup>

In assessing the relationship between the LOSC and the CBD, the Study starts by referring to the General Assembly's recognition of the centrality of the LOSC in ocean governance, providing the 'legal framework within which all activities in the oceans and seas must be carried out, and with which these activities should be consistent'.<sup>30</sup> The fact that the LOSC does not refer to sustainable use, which is central to the regime of the CBD is explained by the fact that the 'concept only became current after the adoption of the Convention'.<sup>31</sup> However, the Study submits that Article 119 of the Convention provides evidence of an implicit recognition in the Convention of sustainable use.<sup>32</sup> Interestingly, it also submits that the CBD complements the LOSC 'in explicitly providing for the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the use of genetic resources'.<sup>33</sup> Apart from suggesting complementarity, it may be noted that these arguments point to a possible tension between the two regimes. Article 119 is placed in Part VII of the LOSC, regulating the freedoms of the high seas, which are not based on fair and equitable sharing of resources. The Study further posits that the CBD and the LOSC are mutually supportive as they both envisage an ecosystem approach.<sup>34</sup>

The Study also considers the relationship provisions contained in Articles 237 and 311 of the LOSC and Article 22 of the CBD. The latter article, read in conjunction with Article 311 of the LOSC, implies that the implementation of the CBD 'must be compatible' with the LOSC.<sup>35</sup> The Study submits that achieving such compatibility should not be a problem, as the CBD 'is an elaboration of some of the general principles of the [LOSC]', in which connection reference is made to Article 237(1) of the LOSC.<sup>36</sup> The Study does not further develop

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29 For a discussion of the Study and its consideration at the CBD, see Millicay (n 9) 784–86. An introductory note to the Study recalls that it was prepared pursuant to paragraph 12 of CBD COP Decision 11/10 (ibid 1). As paragraph 12 indicates, the Study was to be prepared by the Executive Secretary to the CBD in consultation with the then Office for Oceans Affairs and Law of the Sea of the United Nations Secretariat. The Study does not provide any indication of what these consultations entailed and how they impacted on the preparation of the Study by the Executive Secretariat.

30 Study (n 4) 6, para 13.

31 *ibid* 6, para 15.

32 *ibid*.

33 *ibid*.

34 *ibid* para 16.

35 *ibid* 7, para 18.

36 *ibid*.

the implications of the compatibility requirement. It certainly could be argued that it would not have excluded the CBD from developing a regime for BBNJ that in regulating high seas freedoms would have curtailed the scope for unilateralism of individual States. This might have involved mechanisms for access and benefit sharing or the designation and management of MPAs.<sup>37</sup>

A large part of the Study is devoted to providing an overview of the legal regime of the LOSC (paras 19–69) and the relevant provisions of the CBD (paras 68–102). The discussion of the LOSC might reflect a certain unease with the Convention's regulation of the use of marine living resources in relation to their applicability to MGRs. The Study observes that that the LOSC 'does not specifically address [MGRs]. However, since such resources are biological resources, the jurisdictional framework set forth in the [LOSC] that governs marine living resources applies to them'.<sup>38</sup> The CBD recognizes the LOSC framework and has regulated genetic resources within national jurisdiction accordingly.<sup>39</sup> In relation to genetic resources in ABNJ, the Study submits that both the LOSC and the CBD '*inter alia*, recognize the importance of cooperation among States in respect of the conservation and sustainable use of living resources'.<sup>40</sup> A subsequent discussion of the regime of the Area again suggests a certain unease about the possible implications of the LOSC's jurisdictional framework for regulating the access to (and benefit sharing of) MGRs in ABNJ. At the same time, that argument indicates how the Study views the direction the development of a specific regime for MGRs should take:

37 In this connection reference may be had to the Fish Stocks Agreement (UNFSA). Its relationship provision provides that 'Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the "LOSC"'. (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 (signed 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.) The UNFSA details the obligations of States fishing on the high seas and thus curtails the discretionary decision-making power of individual States existing under Part VII of the LOSC. It may moreover be noted that the Study submits that the CBD could contribute to protecting BBNJ through the establishment on MPAs. The Study in that connection also points to the difficulties involved in establishing MPAs in ABNJ, but that does not detract from the Study's proposition that the CBD could be used in this regard (Study (n 4) 22–23, paras 85–90).

38 Study (n 4) 8, para 21.

39 *ibid.*

40 *ibid* 8, para 21.



It is worth noting that the regime for access and management of living resources under the [LOSC] provides for resources and related activities and uses that were current at the time of the negotiations, primarily fisheries and fishing activities for consumption. Such provisions are therefore based on the specific characteristics of such resources and activities, and take into account the historic development of the regime for fisheries. A more recent development is the understanding of the value of marine biodiversity and ecosystems and of the need to protect and manage them in a sustainable manner using new approaches and considerations ...

While the International Seabed Authority has a clear mandate to deal with the impact of mining on biodiversity and the rules are clear in relation to marine scientific research in the Area, it is not clear what legal regime applies to bioprospecting for genetic resources in the Area. What is certain, however, is that the Area and the resources of the Area whose existence and value was known by the negotiators of the [LOSC] are the common heritage of mankind.<sup>41</sup>

In discussing the specifics of the regime applicable to the Area, the Study observes that no specific rules are in place for the sustainable use and conservation of its biodiversity, apart from those dealing with marine scientific research and the protection and preservation of the marine environment.<sup>42</sup>

The Study's discussion of the CBD starts by considering its jurisdictional scope. Article 4 of the CBD provides that in relation to ABNJ it is only applicable to processes or activities under the jurisdiction or control of Contracting Parties and not components of biodiversity, as is the case for areas within national jurisdiction (AWNJ). The Study relies on this distinction for arguing that in ABNJ, 'Parties have no obligation with respect to the conservation and sustainable use of specific components of biological diversity'.<sup>43</sup> However, bioprospecting for genetic resources carried out by a national of a Contracting Party, is an activity that would take place under the jurisdiction or control of that Contracting Party that would impact a 'component' of biodiversity, specifically, MGRs.<sup>44</sup> Be that as it may, the Study does not consider that option, which could easily have led to a different assessment of the future role of the CBD.

41 *ibid* 28–29, paras 109 and 111 (footnotes omitted).

42 *ibid* 11, para 37.

43 Study (n 4) 19, para 70.

44 See also Daniela Diz, *Unravelling the Intricacies of Marine Biodiversity Conservation and its Sustainable Use: An Overview of Global Frameworks and Applicable Concepts* (University of Edinburgh School of Law Research Paper Series, No 2016/11) 10–11; Charlotte Salpin 'Marine genetic resources of areas beyond national jurisdiction: Soul searching and the

Based on its assessment of the implications of the jurisdictional scope of the CBD, the Study concludes that a future regime for genetic resource of the Area ‘can only be addressed *comprehensively* through further cooperative initiatives amongst Parties and Governments’.<sup>45</sup> The Study seems to consider that this cannot be achieved through the CBD, as the quoted text is preceded by the proviso ‘[g]iven the limitations in the relevant provisions of the Convention’, ie Article 4.<sup>46</sup> It may be questioned whether Articles 4 and 5 of the CBD exclude its Contracting Parties from comprehensively dealing with the regime for MGRs in ABNJ. As is argued above, Article 4 is applicable to activities in ABNJ impacting on biodiversity, which includes activities targeting MGRs, and Article 5 does not exclude cooperation between the parties of the CBD under the framework of the Convention. The practice of the CBD indicates the phrase ‘matters of mutual interest’ has been interpreted broadly to include cooperation in relation to ABNJ, as illustrated by its work related to ecologically or biologically significant areas (EBSAs) discussed in section 3.1 below.

Although according to the Study the CBD itself is not the proper regulatory framework, the principles and concepts it contains are of relevance.<sup>47</sup> The Study among others discusses the role of the CBD in relation to direct regulation of deep seabed activities, the indirect regulation of such activities through the establishment of MPAs, the general framework for the sustainable use of genetic resources and the fair and equitable sharing of benefits.<sup>48</sup> In relation to the latter point, it is submitted that both the LOSC and the CBD contain the idea of equity in relation to the use of marine living recourse.<sup>49</sup> The principles of the CBD could assist in dealing with ‘issues of equity regarding access to and the exploitation of [genetic] resources’.<sup>50</sup>

The final part of the Study is concerned with recommendations regarding the development of a specific regime for MGRs of the Area. The starting point in this respect is provided by the conclusion that neither the CBD nor the LOSC ‘provide a specific legal regime for commercially oriented activities relating to [MGRs] on the high seas and in the Area’.<sup>51</sup> In view of the fact that activities

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art of balance’ in Elisa Morgera and Kati Kulovesi (eds), *Research handbook on international law and natural resources* (Elgar 2016) 418; Blanchard (n 1) 363.

45 Study (n 4) 19, para 72 (emphasis provided).

46 *ibid.*

47 *ibid* para 72.

48 *ibid* 20–26, paras 77–100.

49 *ibid* 25, paras 97–98.

50 *ibid* 26, para 100.

51 *ibid* 26, para 103.

are already taking place, it is recommended that such a regime should be developed.<sup>52</sup>

The Study submits that the objectives of the CBD and the LOSC are similar.<sup>53</sup> Both seek to achieve sustainable use and conservation and provide for equitable sharing mechanisms. The Study at this point recognizes that the LOSC only provides for such a mechanism in relation to the mineral resources of the Area,<sup>54</sup> confirming the discrepancy with the CBD as regards spatial application and substantive regime. The Study observes that it is not certain whether those 'objectives can be effectively achieved concerning deep seabed genetic resources, which do not fall per se within the scope of either instrument, but the exploitation of which is relevant to both'.<sup>55</sup> As an alternative a specific legal regime could be elaborated. According to the Study, this would first require a clarification of the status of MGRS.<sup>56</sup> In this context, the LOSC would provide the basic legal framework, which could be complemented by the principles of the CBD.<sup>57</sup> A major shortcoming of the CBD is that its benefit-sharing mechanisms are not applicable to common resources in ABNJ.<sup>58</sup> These requirements would seem to pose a major obstacle to dealing comprehensively with BBNJ under the CBD. Defining the status of genetic resources arguably requires a clarification of the LOSC's basic jurisdictional framework. However, such jurisdictional issues – the unclarified interaction between the regime for marine scientific research and the access to genetic resources in AWNJ – have not prevented the development of the CBD's Nagoya Protocol. Its Article 10 indicates that the common pool nature of ABNJ resources also does not constitute a fundamental objection to using the CBD framework for dealing with an access and benefit regime for BBNJ.<sup>59</sup>

The Study ends by offering three options for dealing with the governance of BBNJ. First, maintaining the *status quo*. However, that option does not guarantee the sustainable use and conservation of the resources, which 'would be contrary to the regulatory intent of the [LOSC] as a whole, and would run counter to the specific regime of the Area'.<sup>60</sup> Second, a special regime could be

52 *ibid.* The Study sets out a number of arguments in support of this position (see *ibid.*)

53 *ibid.* 26, para 104.

54 *ibid.* 27, para 104.

55 *ibid.* 27, para 105.

56 *ibid.*

57 *ibid.* See also *ibid.* para 107.

58 *ibid.* para 105.

59 See also above for the discussion of the relationship clauses contained in the art 22 of the CBD and arts 237 and 311 of the LOSC. On the Nagoya Protocol see also below.

60 Study (n 4) 29, para 114.

tailored on the detailed regime for mineral resources contained in Part XI of the LOSC.<sup>61</sup> In discussing this approach, the Study submits that the only reason for excluding living resources from the regulatory scope of Part XI is that their existence was largely unknown at the time the LOSC was negotiated.<sup>62</sup> Thirdly, and this might seem surprising in light of the Study's preceding analysis, the CBD is presented as an equally viable alternative.<sup>63</sup>

### 2.3 *The Follow-up to the Study on the Relationship between the CBD and the LOSC*

The Study was submitted for consideration to the SBSTTA together with a note of the Executive Secretary, which summarizes the Study and contains suggestions for recommendations the SBSTTA might forward for consideration by the CBD COP.<sup>64</sup> These suggested recommendations among others included the following items:

- to request the Executive Secretary to look at the options for assessing monitoring the status of genetic resources on the seabed of ABNJ in collaboration with relevant organizations; and
- to invite the General Assembly to call upon relevant organizations 'to review issues relating to the conservation and sustainable use of genetic resources of the deep seabed [of ABNJ] and make appropriate recommendations to the General Assembly regarding appropriate actions'.<sup>65</sup>

Both these suggested recommendations were included in the SBSTTA's recommendation on marine and coastal biodiversity to the COP, but the first one was significantly amended. The SBSTTA included the request to compile and synthesize relevant information 'with a view to addressing processes and activities under Article 4(b) of the [CBD]'.<sup>66</sup> This reference to Article 4(b) could be considered as an implied claim that the CBD should have primary responsibility

61 *ibid* 29–31, paras 115–23.

62 *ibid* 30, para 117.

63 *ibid* 32, paras 124–26.

64 Revised Note by the Executive Secretary, SBSTTA, 20 February 2003, UNEP/CBD/SBSTTA/8/9/Add.3/Rev.1.

65 *ibid* 4.

66 Recommendations Adopted by SBSTTA at Its Eight Meeting (Recommendation VIII/3), UNEP/CBD/COP/7/3, Section D, 63. Conservation and sustainable use of deep seabed genetic resources beyond national jurisdiction: study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea.

for addressing issues related to conservation and use of the genetic resources of the Area.<sup>67</sup>

The Study was also mentioned in the United Nations Secretary-General's 2003 report on oceans and law of the sea. The report highlighted the Study's conclusions that the CBD and the LOSC were mutually supportive and complementary and that 'there is an important legal lacuna with respect to commercially oriented activities relating to [MGRs] in deep seabed [of ABNJ]'.<sup>68</sup> The report submitted that this entailed 'the risk of their overexploitation without due regard to conservation and equity imperatives'.<sup>69</sup> The General Assembly in Resolution 58/240 on oceans and the law of the sea invited the relevant instruments to identify the risks and threats to BBNJ and how these instruments could be used to address them consistent with international law and the LOSC. The Secretary-General was requested to report on the matter to the General Assembly in his next report on oceans and the law of the sea.<sup>70</sup>

CBD COP 7 addressed the Study and the recommendations of the SBSTTA in its Decision VII/5. The decision requests the Executive Secretary to look at the options for assessing and monitoring the status of genetic resources on the seabed of ABNJ in collaboration with relevant organizations, but it excluded the SBSTTA's reference to Article 4(b) of the CBD. In addition, the decision welcomed General Assembly Resolution 58/240, which had been adopted after the SBSTTA had drafted its recommendations to the COP. The COP invited the General Assembly to take upon itself the task of coordinating work in relation to the conservation and sustainable use of genetic resources in ABNJ.<sup>71</sup>

The United Nations Secretary-General in an addendum to his 2004 report on oceans and law of the sea dealt comprehensively with the request of the General Assembly to report on the risks and threats to biodiversity in ABNJ and the existing regulatory frameworks. After describing ecosystems and biodiversity in ABNJ and the risks and threats posed to them, the addendum considers the legal and policy framework,<sup>72</sup> concluding that:

67 A report on the meeting indicates the existence of different views in the SBSTTA as regards the appropriate forum for dealing with the issue (*Earth Negotiations Bulletin* Vol 9, No 252, 2003, 12).

68 Report of the Secretary-General on Oceans and Law of the Sea, 3 March 2003, UN Doc A/58/65, 46, para 147.

69 *ibid.*

70 Resolution adopted by the General Assembly on 23 December 2003, UN Doc A/RES/58/240, 10, para 52.

71 Decision Adopted by the COP to the CBD at Its Seventh Meeting, Decision Five, 13 April 2004, UNEP/CBD/COP/DEC/VII/5.

72 Report of the Secretary-General, Oceans and Law of the Sea, Addendum, 18 August 2004, UN Doc A/59/62/Add.1, 45–79. These same issues are also considered in the report itself,

[The LOSC] sets out a legal framework within which all activities in the oceans are to be conducted, including in areas beyond national jurisdiction. This general legal framework is supplemented by a number of international instruments adopted at the global and regional levels. Effective implementation of the relevant provisions of [the LOSC] and those instruments, within the scope of their regulatory mechanisms, is essential to conserve and manage vulnerable marine ecosystems and [BBNJ]. Nevertheless, it appears that additional steps are needed. The General Assembly may therefore consider what further action is required[.]<sup>73</sup>

In response to this call for action, the General Assembly established the Ad hoc Working Group.<sup>74</sup> The mandate of the Ad hoc Working Group was formulated in broad terms and did not imply any specific choice as regards the legal framework for elaborating the regime for the conservation and sustainable use of BBNJ:<sup>75</sup>

To indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.<sup>76</sup>

CBD COP 8, which was held in 2006, reconfirms the CBD's secondary role in relation to the development of the regime for the sustainable use and conservation of BBNJ. In Decision VIII/21, the COP:

*Recognizes also* that the [LOSC] regulates activities in [ABNJ], and *urges* Parties and other States to cooperate within the relevant international

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which was issued previously (see Report of the Secretary-General, Oceans and Law of the Sea, 4 March 2004, UN Doc A/59/62, 59–68, paras 229–66).

73 UN Doc A/59/62/Add.1, 80, para 318.

74 Resolution adopted by the General Assembly on 17 November 2004, UN Doc A/RES/59/24, 13, para 73. According to a report on the first meeting of the Ad hoc Working Group there was broad support for the United Nations General Assembly taking the lead in the development of the regime for BBNJ. Only Venezuela and the Russian Federation submitted the CBD should have been given priority (*Earth Negotiations Bulletin* Vol 25, No 25, 9.) Other participants did refer to the role of the CBD in providing scientific and technical input (*ibid*).

75 See *ibid* 14, para 73(a)–(d).

76 *ibid* para 73(d). For a detailed discussion of the work of the Ad hoc Working Group and the legal issues involved see eg Salpin (n 44).

and/or regional organizations in order to promote the conservation, management and sustainable use of marine biodiversity in [ABNJ], including deep seabed genetic resources.<sup>77</sup>

The call upon Contracting Parties to cooperate indicates that this is an individual responsibility, which, although it flows from Article 5 of the CBD, indicates that this is not a matter to be addressed by the COP as such.<sup>78</sup>

### 3 Developments in Relation to BBNJ at the CBD following the Establishment of the Ad Hoc Working Group

The Ad hoc Working Group started its work in 2006 and initially met biennially and made little progress. The package of issues that is currently subject of negotiations at the IGC was only finally agreed upon in 2011.<sup>79</sup> In 2015, the Ad hoc Working Group wrapped up its work, recommending to the General Assembly that it '[d]ecide to develop an international legally binding instrument under the [LOSC] on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction'.<sup>80</sup> This resulted in the General Assembly establishing a Preparatory Committee and subsequently the Inter-governmental Conference (IGC). Notwithstanding the BBNJ process, the CBD continued paying attention to all four of the elements of the package at the BBNJ process. The present section identifies relevant work of the CBD on these individual elements of the BBNJ package: ABMTs, including MPAs; EIAs; MGRs; and capacity building and transfer of technology. This analysis serves the purpose of establishing how these developments may have impacted (and may continue to impact) the BBNJ process. In addition to looking at the CBD, the subsections that follow will also briefly look at the relevant provisions of the LOSC to allow comparing

77 Decision Adopted by the COP of the CBD at Its Eighth Meeting, Decision VIII/21, UNEP/CBD/COP/DEC/VIII/21, 2, para 6.

78 See also Study (n 4) 19, paras 70–71.

79 See eg David Freestone 'The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in David Freestone (ed), *Conserving Biodiversity in Areas beyond National Jurisdiction* (Brill 2019) 17.

80 Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly, UN Doc A/69/780, Annex I.1(e).

the two conventions as regards their ‘regulatory potential’ in relation to BBNJ.<sup>81</sup>

An issue that is relevant to all of the elements of the package is the institutional architecture of the CBD and the LOSC. The CBD has the institutional structure that is typical to multilateral environmental agreements, with a COP at its apex that is supported by the SBSTA and other subsidiary bodies and working groups that have been set up on an ad hoc basis. Another possibility is the convening of various expert groups. The LOSC has much more limited institutional arrangements. The International Seabed Authority (ISA) is set up to regulate mining in the Area, including its environmental impacts, but has no mandate to deal with other aspects of the sustainable use and conservation of BBNJ. The Meeting of States Parties of the LOSC has limited functions and attempts to broaden its mandate in the 1990s were unsuccessful.<sup>82</sup> Contrary to the CBD, the current institutional framework of the LOSC hardly can be said to allow addressing issues of BBNJ in a comprehensive manner at the global level.

### 3.1 *Area-based Management Tools and Marine Protected Areas*

The CBD deals explicitly with the establishment of MPAS in its Article 8, which requires States parties among others to ‘establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity’.<sup>83</sup> Although there might be some uncertainty about the scope of application of Article 8, it provides a basis for establishing MPAS in ABNJ.<sup>84</sup> The LOSC does not explicitly refer to ABMTs and MPAS. However, Article 194(5), dealing with rare and fragile ecosystems and marine life, has been considered to provide a legal basis for establishing ABMTs or MPAS in ABNJ.<sup>85</sup> In addition, the provisions of the Convention dealing with specific activities also allow for the adoption of ABMTs.<sup>86</sup> However, those provisions are lacking the specific detail that is provided by Article 8 of the CBD.

At the political level, the international community committed itself to establishing a coherent network of MPAS by 2012 at the World Summit on

81 The term ‘regulatory potential’ is used here to refer to the substantive rules and procedural mechanism that are (potentially) applicable/available in relation to the sustainable use and conservation of BBNJ.

82 See eg Treves (n 14); Oude Elferink (n 14).

83 CBD art 8(a).

84 See eg Petra Drankier, ‘Marine Protected Areas in Areas beyond National Jurisdiction’ (2012) 27 *International Journal of Marine and Coastal Law* 296–97.

85 See eg Alex Oude Elferink, ‘Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC’ (2018) 33 *International Journal of Marine and Coastal Law* 445.

86 See, for instance, LOSC arts 118 and 211.



Sustainable Development (WSSD) in 2002. Three basic requirements were identified in relation to this goal: the network of MPAs has to be coherent and representative, consistent with international law and based on scientific information.<sup>87</sup> This political commitment was quantified at the 2010 CBD COP, where the Contracting Parties adopted the Aichi Targets, which called for at least 10 percent of the world's coastal and marine areas to be conserved by 2020 by either ABMTs or MPAs.<sup>88</sup>

The work of the CBD on MPAs indicates the impact of the BBNJ process. A decision on protected areas of the 2004 COP indicates that the issue of MPAs in ABNJ would be part of the CBD's plan of work on protected areas.<sup>89</sup> The decision observes that the CBD's ecosystem approach and the fact that relevant ecosystems extend beyond national boundaries 'presents a strong argument for and adds complexity to the establishment of transboundary protected areas and protected areas in [ABNJ]'.<sup>90</sup> The decision views the relationship with the UNGA as requiring collaboration on the basis of equality.<sup>91</sup> Two subsequent decisions, from respectively 2006 and 2008, reflect a different view on the CBD's role. Both decisions recognize the General Assembly's 'central role in addressing issues relating to the conservation and sustainable use of [BBNJ]'<sup>92</sup> and frame the role of the CBD in relation to BBNJ as being in support of the work of the General Assembly.<sup>93</sup> In 2010 the CBD COP voiced concern

87 Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, 4 September 2002; Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002 (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), Resolution 2, para 32(c).

88 Decision Adopted by the COP of the CBD at Its 10th Meeting 10, Decision X/2, Annex IV, UNEP/CBD/COP/DEC/X/2. For a further discussion on the relationship between ABMTs and MPAs in this connection and more in general see ch 8 in this volume.

89 Decision of the COP of the CBD at its Seventh Meeting, Decision VII/28, UNEP/CBD/COP/DEC/VII/8, see eg para 18, 29(a) and Annex, Section II at 7. However, at the time Parties to the CBD already differed over the question whether the CBD should be dealing with MPAs in ABNJ (see *Earth Negotiations Bulletin* Vol 9, No 252, 2003, 12).

90 *ibid* Annex, Section II at 7.

91 *ibid* 11, para 1.3.2. which reads:

Collaborate with other Parties and relevant partners through the United Nations Informal Consultative Process on the Law of the Sea (UNICPOLOS) to establish and manage protected areas in marine areas beyond the limits of national jurisdiction, in accordance with international law, including the [LOSC], and based on scientific information.

92 Decision by COP of the CBD at Its Eighth Meeting, Decision VIII/24, UNEP/CBD/COP/DEC/VIII/24, para 42; Decision by COP of the CBD at Its Ninth Meeting, Decision IX/20, UNEP/CBD/COP/DEC/IX/20, 1st preambular consideration.

93 UNEP/CBD/COP/DEC/VIII/24, para 34; UNEP/CBD/COP/DEC/IX/20, 5th preambular consideration. See also Daniel Dunn and others, 'The Convention on Biological Diversity's

about the slow progress of the BBNJ process in relation to the topic of MPAs.<sup>94</sup> Subsequent COPs have not revisited this issue.

Consistent with its supporting role in relation to the General Assembly, the CBD has been working on the establishment of specific scientific and technical criteria for EBSAs, including in marine areas.<sup>95</sup> The CBD COP in 2008 stated its key role was providing scientific and ‘technical information and advice relating to marine biological diversity, the application of the ecosystem approach and the precautionary approach’. To that end, it adopted a decision defining EBSA criteria for ocean areas in need of protection.<sup>96</sup> The COP requested the Executive Secretary to forward the decision to ‘relevant General Assembly processes’,<sup>97</sup> ie primarily the Ad hoc Working Group, and decided convening an expert workshop on EBSAs, that ‘shall not consider issues relating to management and only provides scientific and technical information and guidance’.<sup>98</sup> In addition to establishing criteria for EBSA identification, ongoing regional workshops have generated a large number of data sets that have resulted in detailed mapping of EBSAs.<sup>99</sup> In its capacity as an observer to the BBNJ process, the CBD Secretariat has presented its work on EBSAs to BBNJ participants.<sup>100</sup>

### 3.2 *Environmental Assessments*<sup>101</sup>

The CBD addresses environmental assessments in its Article 14. Although being somewhat more specific than the relevant provisions of the LOSC, Article 14

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Ecologically or Biologically Significant Areas: Origins, development, and current status’ (2014) 49 *Marine Policy* 138–39.

94 Decision by COP of the CBD at Its Tenth Meeting, Decision 29, UNEP/CBD/COP/DEC/X/29, para 33.

95 See also Robin Warner, *Protecting the Oceans Beyond National Jurisdiction: Strengthening the International Law Framework* (Brill 2009) 214.

96 UNEP/CBD/COP/DEC/IX/20, Annex I; 11.

97 UNEP/CBD/COP/DEC/IX/20, 4, para 14.

98 *ibid* 4, para 19. Subsequent decisions have emphasized that ‘the identification of ecologically or biologically significant marine areas and the selection of conservation and management measures is a matter for States and competent intergovernmental organizations’. (CBD COP Decision X/29, para 26; CBD COP Decision XI/17, para 6).

99 See generally Nicholas Bax and others, ‘Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas’ (2015) 30(3) *Conservation Biology* 571; Dunn (n 93) 137–45.

100 See eg IISD Reporting Service, ‘Coverage of Side Events at BBNJ’ 5–6 September 2018 <<https://enb.iisd.org/oceans/bbnj/igc1/side-events/5sep.html>> accessed 25 April 2021.

101 We acknowledge that legal text both refer to environmental assessment and EIAs. For the purposes of this chapter, any difference that may exist between these two terms is not relevant and should not be read into the use of either of these terms in the chapter.

also fails to add specificity to the regime for environmental assessment. Similar to its approach to EBSAs, the CBD has played a proactive role in addressing environmental assessments in ABNJ in a way that sought to develop normative guidance based on scientific principles, while deferring legal and policy decisions to the BBNJ process.<sup>102</sup> Starting with the 2009 Manila working group, the CBD decided that it would develop voluntary environmental assessment guidelines that would inform the BBNJ process with technical information.<sup>103</sup> Voluntary guidelines on environmental and strategic impact assessments were finalized by the SBSTTA in 2012.<sup>104</sup> The CBD COP has taken note of both sets of guidelines, while emphasizing that the guidelines were ‘without prejudice to the ongoing consideration of biodiversity’ in the BBNJ process. It requested that the Executive Secretary forward the guidelines to the General Assembly, and encouraged States and international organizations to use the guidelines ‘in accordance with national and international law’, including the LOSC.<sup>105</sup>

The LOSC includes a number of general obligations in relation to environmental assessments in Articles 204–206. Some clarification of these provisions of the LOSC have been achieved through the law of the sea case law,<sup>106</sup> but with the exception of mining in the Area, the Convention has not accomplished a clear and comprehensive framework for carrying out and following up impact assessments.<sup>107</sup> Apart from the ISA, the LOSC does not dispose of an institutional framework that could assist in the elaboration of such a framework.

102 For a discussion of the CBDs work in relation to EIA in ABNJ see also Alex Oude Elferink ‘Environmental Impact Assessment in Areas Beyond National Jurisdiction’ (2012) 27 *International Journal of Marine and Coastal Law* 449–480 at 464–465.

103 Warner (n 95) 337–38. The CBD’s work on assessments for ABNJ built on its earlier development of voluntary guidelines that applied to biodiversity generally, including in marine and coastal ecosystems. (ibid 322–23. See Decision of the COP of the CBD at Its Eighth Meeting, Decision 27, Addendum 2, UNEP/CBD/COP/8/27/Add.2.).

104 The annotated guidelines are contained in an annex of document entitled ‘Note by the Executive Secretary’ 12 August 2012, UNEP/CBD/COP/11/23.

105 Decision of the COP of the CBD at Its Eleventh Meeting, Decision XI/18, UNEP/CBD/COP/11/18, Part B, paras 1–3.

106 See eg *In the Matter of the South China Sea Arbitration (Philippines v. China)* [2016] PCA, Arbitral Award, para 991.

107 *Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area* (Advisory Opinion, Judgment of 1 February 2011) ITLOS, paras 148–49. Customary law is equally lacking in specific as regards the obligations in relation to environmental impact assessment, see *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* [2011] ICJ Rep 14, para 205.

### 3.3 *Marine Genetic Resources*

Access and benefit sharing in relation to genetic resources in AWNJ is addressed in general terms in the CBD, and a specific regime for access and benefit sharing has been established through its 2010 Nagoya Protocol. Neither the CBD nor the Nagoya Protocol envisage specific mechanisms for access and benefit sharing in relation to MGRS of ABNJ. However, the CBD does not exclude the development of such a mechanism.<sup>108</sup> The negotiations leading up to the Nagoya Protocol also show some support for this proposition.<sup>109</sup> Article 10 of the Protocol provides that:

Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in trans-boundary situations or for which it is not possible to grant or obtain prior informed consent ...<sup>110</sup>

108 CBD art 1 states that its objectives include ‘fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources’. This objective is not limited in spatial terms. Art 5 provides that the Convention is applicable to activities in ABNJ. Accessing genetic resources is an activity and benefit sharing a modality of such access. Art 28 on protocols to the Convention is broadly formulated and allows for the conclusion of a protocol dealing with this issue, see Dire Tladi, ‘The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The Choice between Pragmatism and Sustainability’ (2015) 25 Yearbook of International Environmental Law 120.

109 The Pacific regional group of states consultation indicated those states wanted high seas pockets completely surrounded by EEZ’s to be covered by the Protocol, see Ad hoc Open Ended Working Group on Access and Benefit Sharing, ‘Final Report of the Regional Consultations for the Pacific on Access and Benefit Sharing’ UNEP/CBD/WG-ABS/9/INF/5, 9. The African Group of States reportedly submitted an informal white paper that advocated including a ‘global multilateral benefit-sharing mechanism’ within the Protocol that could address genetic resources in ABNJ, see Thomas Greiber, ‘Access and Benefit Sharing in Relation to Marine Genetic Resources from Areas Beyond National Jurisdiction A Possible Way Forward’ Research Project for Federal Agency for Nature Conservation and IUCN (2011) 34. Other States indicated that they favored the exclusion of genetic resources in ABNJ from the scope of the Protocol, see eg Commentary of Mexico to a draft of the Protocol, CBD Ad hoc Informal Working Group on Access and Benefit Sharing, ‘Compilation of Submissions in Respect to Legal Regime on Access and Benefit Sharing’ 2 February 2009, UNEP/CBD/WG-ABS/7/INF/1, 40–41.

110 The Preamble of the Protocol recognizes that innovative solutions are required to address this issue. There has been some scholarly analysis on how the Protocol could be used to address MGRS in ABNJ, see Greiber (n 108) 31–34. See also Morten Walløe Tvedt and Ane E Jørem, ‘Bioprospecting in the High Seas: Regulatory Options for Benefit Sharing’ (2013) 16(3–4) The Journal of World Intellectual Property 160.

However, according to the CBD Secretariat, the inclusion of ABNJ in the Protocol was not discussed 'in depth'.<sup>111</sup>

After the adoption of the Nagoya Protocol, the development of an Article 10 mechanism has been considered, but with limited support for including genetic resources in ABNJ in its scope.<sup>112</sup> In their formal submissions to the Nagoya Protocol's intergovernmental committee, and later, its COP, States expressed a range of views in this respect. The African Group submitted that the global mechanism should regulate MGRS accessed in ABNJ.<sup>113</sup> Canada stated that the parties should consider situations where genetic resources are accessed in areas outside national jurisdictions in connection with a global mechanism.<sup>114</sup> The European Union did not take an express position on the mechanism's scope, but stressed the need for the mechanism in general, and the importance of considering how it would relate to other legal instruments, in particular the LOSC.<sup>115</sup> In 2014, Argentina voiced concern that the mechanism might be a way to regulate genetic resources in ABNJ, and stated that it would oppose that outcome.<sup>116</sup> Following the 2014 intergovernmental committee meeting and first Protocol COP, the Parties invited further discussion and instructed the Executive Secretary to further study the need for and modalities of the mechanism.<sup>117</sup> It appears these issues were not finally resolved, but

111 CBD Ad hoc Informal Working Group on Access and Benefit Sharing, 'Overview of Recent Developments at the International Level Related to Access and Benefit Sharing' UNEP/CBD/WG-ABS/6/INF/3, 10.

112 As is observed by Tladi (n 108) 120.

The adoption by the UNGA of a process that could lead to the adoption of such an implementation agreement under UNCLOS makes the extension of the Nagoya Protocol to cover genetic resources in areas beyond national jurisdiction all the less likely.

113 African Group Submission on The need for and modalities of a Global Multilateral Benefit-Sharing Mechanism (Art 10) Prepared for the Second Meeting of the Intergovernmental Committee for the Nagoya Protocol (ICNP 2) <[www.cbd.int/abs/submissions/icnp-2/african-group-en.pdf](http://www.cbd.int/abs/submissions/icnp-2/african-group-en.pdf)> accessed 25 April 2021, 2.

114 Government of Canada Submission to the Secretariat of the Convention on Biological Diversity on a Global Multilateral Benefit Sharing Mechanism under art 10 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization <[www.cbd.int/abs/submissions/icnp-2/canada-en.pdf](http://www.cbd.int/abs/submissions/icnp-2/canada-en.pdf)> accessed 25 April 2021, 1.

115 EU submission in response to CBD notification 2011-142 on awareness-raising and new issues to be addressed by the ICNP-2 <[www.cbd.int/abs/submissions/icnp-2/eu-en.pdf](http://www.cbd.int/abs/submissions/icnp-2/eu-en.pdf)> accessed 25 April 2021, 5-6.

116 Report of the Third Meeting of the Open Ended Ad hoc Intergovernmental Committee for the Nagoya Protocol, 14 April 2014, UNEP/CBD/COP/12/6, 7.

117 Decision of the Nagoya Protocol COP, 20 October 2014, UNEP/CBD/NP/COP-MOP/DEC/1/10.

submissions to subsequent Protocol COPs did not focus on the potential application of the mechanism to ABNJ.<sup>118</sup> The 2016 COP considered other aspects of the mechanism and invited further dialogue, as did the 2018 COP.<sup>119</sup> As of writing, no Article 10 mechanism has been established.<sup>120</sup>

The LOSC does not explicitly address the issue of MGRs and different views have been advanced in relation to their status under the Convention. On the one hand, it has been argued that access to these resources is part of the freedom of the high seas. On the other hand, it has been submitted that the living resources of the Area are part of the Area and as such are part of the common heritage regime, even though Part XI only sets up a specific regime for mineral resources.<sup>121</sup>

### 3.4 *Capacity Building and Transfer of Technology*

Capacity building and the transfer of technology go to the heart of the sustainable use and conservation of the ocean.<sup>122</sup> Without the requisite capacity and access to technology, States in particular developing States, will not be able to implement policies that ensure sustainability.<sup>123</sup> These needs were already recognized by the drafters of the LOSC. Part XIV of the Convention is

118 See generally Note by Executive Secretary of the Subsidiary Body on Implementation of the CBD on Submissions regarding Art 10 Mechanism, 18 May 2018, CBD/SBI/2/5.

119 Decision by the Nagoya Protocol COP at Its Third Meeting, Decision 3/13, CBD/NP/MOP/DEC/3/13.

120 See CBD Website on Art 10 mechanism <[www.cbd.int/abs/art10-whatdone.shtml](http://www.cbd.int/abs/art10-whatdone.shtml)> accessed 25 April 2021.

121 See further eg Marie Bourrel and others, 'The Common Heritage of Mankind as a Means to Assess and Advance Equity in Deepsea Mining' (2018) 95 *Marine Policy* 311, 314.

122 Capacity is complex concept, with different dimensions. The World Bank has provided the following description 'the ability of individuals, institutions and societies to solve problems, make informed choices, define their priorities and plan their futures. The objective of aid assistance is to help developing countries build capacities that boost their ability to achieve their development goals'. (Report of the Secretary-General, Oceans and Law of the Sea, 29 March 2010, UN Doc A65/69, para 17).

123 See eg *ibid* para 34. As this report also observes '[n]o comprehensive assessment has been carried out at the global level of the capacity-building needs of States in relation to ocean affairs and the law of the sea, including marine science' (*ibid*). Notwithstanding continued efforts at capacity building, the above findings no doubt remain relevant today. As a 2019 report by the Secretary-General observes:

However, significant knowledge and capacity gaps remain to be filled. For example, UNEP reported that there were insufficient data to assess progress with respect to 68 per cent of the 93 environment-related indicators of the Sustainable Development Goals (Report by the Secretary-General, Oceans and Law of the Sea, 11 September 2019 (UN Doc A/74/350)).

dedicated to the transfer of marine technology. The Convention does not refer explicitly to capacity building, but as has been observed ‘it contains over 25 references to the need to help developing States and take their concerns into account’.<sup>124</sup> At the same time, the continued focus on these topics indicates that Part XIV and the Convention’s calls to assist developing States have led to limited results. A 2007 review of the accomplishment in relation to capacity building and transfer of technology rhetorically asked, ‘Has the Normative Framework Set Down by the [LOSC] Failed?’<sup>125</sup> Long identifies a number of factors explaining this failure. First, the lack of basic capacities in developing States to take advantage of the opportunities the Convention is offering to them.<sup>126</sup> Secondly, ‘weak institutional structures at both national and international levels [make] it difficult to implement the broader principles of international cooperation and benefit sharing enshrined by the [LOSC]’.<sup>127</sup> This latter point identifies what may be a critical defect in the legal regime as contained in the LOSC. Its broadly stated principles are sound, but will remain ineffective if specific timelines, rules and specific mechanisms for implementation and review are lacking.<sup>128</sup> As is argued by Harden-Davies and Gjerde, the BBNJ Agreement could be used to give greater effect to the existing LOSC regime by making the existing obligations more specific. The CBD, its Nagoya Protocol and other relevant instruments provide an inspiration in that connection.<sup>129</sup>

124 UN Doc A/65/69, para 8. In addition, provisions that do not explicitly refer to the special needs of developing States, may also be relevant in this respect. This for instance concerns the provision of Part XIII of LOSC concerning the rights of the coastal State to participate in and be informed about marine scientific research in its exclusive economic zone and continental shelf (LOSC art 249). At the same time, this provision reconfirms that to effectively reap the benefits of these rights, the coastal State has to have the necessary capacities.

125 Ronán Long, ‘Marine Science Capacity Building and Technology Transfer: Rights and Duties Go Hand in Hand Under the 1982 UNCLOS’ in Myron H Nordquist and others (eds), *Law, Science & Ocean Management* (Brill 2007) 307.

126 *ibid* 307–08.

127 *ibid* 308.

128 A similar conclusion is likely justified in relation to the provisions of the UNFSA on capacity building. The report of the President of the 2016 resumed Review Conference of the Agreement, makes a number of reference to capacity building, but lacks any reference to a comprehensive approach or assessment in this respect (see 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, 1 August 2016, UN Doc A/CONF.210/2016/5, *passim*).

129 Harriett R Harden-Davies and Kristina Gjerde, ‘Building Scientific and Technological Capacity: a Role for Benefit-sharing in the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction’ (2019) 33 *Ocean Yearbook* 392–98.

Transfer of technology and appropriate funding are specifically identified as means for achieving fair and equitable sharing of the benefits resulting from the use of genetic resources, one of the three objectives of the CBD.<sup>130</sup> Articles 16 to 21 of the CBD elaborate this general reference to transfer of technology and funding. While Part XIV of the LOSC is general in nature, the relevant provisions of the CBD are in part directly linked to providing access to genetic resources.<sup>131</sup> However, it should be noted that these provisions are based on the proprietary rights of the developing State concerned and are not applicable as such to ABNJ.<sup>132</sup> The CBD's Nagoya Protocol addresses capacity building and transfer of technology respectively in Articles 22 and 23. Article 22 identifies areas for capacity building in support of the implementation of the Protocol. Article 23 requires parties to cooperate and collaborate on transfer of technology in accordance with the relevant articles of the Convention as a means to achieving the objective of the Protocol. The CBD COP in its decisions on marine and coastal biodiversity has also highlighted the need for capacity building and transfer of technology in relation to BBNJ.<sup>133</sup>

#### 4 What May Explain the Choice for the BBNJ Process?

The preceding analysis indicates that it would not seem to be too difficult to build a convincing case that a detailed regime for the sustainable use and conservation of BBNJ could well have taken place in the framework of the CBD. The sustainable use and conservation of biodiversity is the core business of the CBD, and the CBD as a matter of fact has been addressing all of the elements of the package that provided the basis for the current negotiations at the IGC. In addition, the CBD might have been able to conclude the negotiations on that package in a shorter time frame than that of the still ongoing BBNJ process. Opting for the CBD likely would have avoided much of the exploratory consultations that took place in the Ad hoc Working Group. At the time the Working Group was holding its biennial meetings, the CBD was making significant progress on elements of the package through *inter alia* the EBSA process

130 CBD art 1.

131 See CBD art 16(3).

132 The CBD has specific programs for capacity building and for technology transfer and technological and scientific cooperation. See further CBD Secretariat *Thematic Programmes and Cross-Cutting Issues* <[www.cbd.int/programmes/](http://www.cbd.int/programmes/)> accessed 25 April 2021.

133 See eg COP of the CBD at its Eighth Meeting, Decision VIII/21, UNEP/CBD/COP/DEC/VIII/21, 2, para 9.



and the work on environmental assessments in ABNJ. So, why the choice for the BBNJ process?

In answering the question why the UNGA-led BBNJ process, with its law of the sea focus, was preferred instead of according the CBD a central role in developing the regime for BBNJ, the sequence of events at the CBD and the UNGA provides some indications.<sup>134</sup> The issue was taken up by the CBD during the first meetings of the COP and the SBSTTA, but there was an immediate recognition of the need to further explore the implications of the relationship between the CBD and the LOSC. It was moreover accepted that this required the involvement of the then Office of Oceans and Law of the Sea of the United Nations Secretariat. Although the issue was included in the Secretary-General's report on the law of sea to the General Assembly, which argued the importance of the issue for the law of the sea, the General Assembly did not immediately pick up the issue. The initial recognition that the Office of Oceans and Law of the Sea had to be involved, was a reason for the SBSTTA to not deal with the legal issues involved when the CBD secretariat submitted a 'preliminary investigation' on the issue in 1996. The SBSTTA only picked up the issue again and reported back to the CBD COP after the Study on the relationship between the CBD and the LOSC had been finished in 2003. The SBSTTA's recommendations to the COP, while referring to Article 4(b) of the Convention, might seem to have held the potential of a central role for the CBD in developing the legal regime for BBNJ. However, the General Assembly in the meantime also had started monitoring this issue more actively and, prior to the relevant COP meeting, adopted its Resolution 58/240, which requested other instruments to report on the issue to the Secretary-General and the latter to report back to the General Assembly. The CBD COP in its subsequent decision on marine and coastal diversity refrained from referring to Article 4(b) of the CBD and, while referring to Resolution 58/240, deferred to the General Assembly as the central body for dealing with BBNJ.<sup>135</sup>

<sup>134</sup> We note that this section examines a 'relational form of regime interaction' between the CBD and UNGA that is more collaborative than conflictual, Jeffrey Dunoff, 'A New Approach to Regime Interaction' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (Cambridge University Press 2012) 158. See also Margaret A Young and Andrew Friedman 'Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction' (2018) 112 AJIL Unbound 123.

<sup>135</sup> One of the persons with whom we informally discussed our views on the relationship between the CBD COP and the UNGA mentioned that the number of delegation members with a law of the sea and/or foreign affairs background attending the CBD COP seemed to increase at the COPs up to and including COP 7 as compared to the number of delegation members from ministries of the environment. This might indicate that law of the sea interests in contracting parties to the CBD did not want to entrust the issue to the CBD,

At the same time, as the preceding analysis demonstrates, the CBD remained concerned with the various elements that eventually became included in the BBNJ package. That involvement would seem to be relevant for a number of reasons. First, it demonstrated the capacity of the CBD for dealing with these issues. In case the BBNJ process would have continued stalling, the CBD would have offered an alternative. Second, the CBD contributed to developing aspects of the BBNJ package beyond the BBNJ process. This is probably most vividly illustrated by the regional implementation of the EBSA process, where EBSA workshops sought input and collaboration from bodies such as the OSPAR Commission and regional fisheries management organizations to facilitate the ‘description’ of EBSAs.<sup>136</sup> The CBD’s work on environmental assessments also contributed to identifying the specific requirements in relation to ABNJ. As discussed above, the CBD’s COP convened an expert workshop expressly mandated to examine assessments for activities and processes in ABNJ.<sup>137</sup>

The General Assembly’s involvement in addressing the regime for BBNJ likely made the choice for a focus on the development of an instrument under the LOSC inevitable. The issue of BBNJ was included in the Secretary-General’s reports on oceans and law of the sea and the General Assembly dealt with the

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with its focus on the environment. To assess whether there actually was a relative increase in the representation of delegates with a law of the sea and/or foreign affairs background, we compared the composition of delegations at CBD COPs 4 to 8. In that connection, we would like to thank Johanna Bürkert for her compiling the relevant information. An assumption we have made is that persons from ministries of foreign affairs in these kinds of meetings typically will represent broader foreign policy interests, including the public international law/law of the sea context, in which cooperation in the framework of the CBD takes place. While the number of delegates from ministries of the environment at COPs 5, 6 and 7 was respectively 348, 442 and 466 for ministries of foreign affairs these figures respectively are 43, 58 and 100. Otherwise stated, for the former category there was an increase of 25% between 2000 and 2004, for the latter this concerned an increase of 133%. Although these figures obviously only tell part of the story, they can be taken as corroborating the observation of our resource person.

136 See Report of Regional Workshop to Facilitate Description of EBSA’s in the Northeast Atlantic Ocean 8 November 2019, CBD/EBSA/WS/2019/1/4. Although the EBSA process has capacity for addressing these issues, it likewise faces similar challenges to the BBNJ process, with disagreements at the 2018 CBD COP about the relative legal position of LOSC and regional bodies, and a lack of consensus about EBSA modalities (See *Earth Negotiations Bulletin*, Vol 9, No 725, 15), parties disagree about LOSC as the framework for all ocean activities and EBSA modification, identification, and process modalities; Decision Adopted by the COP of the CBD at its Fourteenth Meeting, Decision 14/2, CBD/COP/14/14, 100, 122, 127 (COP decision recalling UNGA Resolution on law of the sea and LOSC and bracketing annex on modalities).

137 See section 2.1; UNEP/CBD/COP/11/23.

issue in the context of its resolutions on oceans and law of the sea, involving government representatives with an affinity for the significance of the LOSC for ocean governance having the conviction that the Convention's integrity had to be safeguarded,<sup>138</sup> who at the same time may have been less involved in the CBD. The two implementation agreements to the LOSC that had been concluded in the 1990s had shown that the law of the sea regime could be further developed without reliance on the cumbersome amendment procedure contained in the Convention. Finally, Part XI provided a model for equitable access and benefit sharing that might be adapted to the issue of MGRS.<sup>139</sup> The attraction of this model may have been further enhanced by the fact that most genetic resources with potential commercial value are located on the seabed, downplaying the importance of and possibilities to rely on the regime of freedom of the high seas as an alternative approach offered by the LOSC to regulate the access to these resources.

The choice between the CBD and the LOSC may also be assessed from a legal perspective. Did the issues that would need to be addressed in developing a regime for BBNJ require dealing with it under the LOSC, instead of the CBD? The Study on the relationship between the two conventions identifies arguments for and against the use of both. Although the above analysis of the Study indicates that some doubts may be entertained about some of its specific arguments, that does not detract from the overall conclusion that a legal perspective does not offer conclusive arguments for choosing either the CBD or the LOSC as the framework for developing the regime for BBNJ.

## 5 Concluding Thoughts – The Interaction between the CBD and the LOSC in Light of the Themes of the Book Project

The editors of this book project requested the authors of the individual chapters to consider how their topic 'relate[s] to different visions of the oceans, and to the framing themes identified above, that is, justice, space, power,

138 See also Alan J C Simcock 'The UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) – Current Status' in Hjalmar Thiel and J Anthony Koslow (eds), *Managing Risks to Biodiversity and the Environment on the High Sea, Including Tools Such as Marine Protected Areas – Scientific Requirements and Legal Aspects* (Proceedings of the Expert Workshop held at the International Academy for Nature Conservation Isle of Vilm, Germany, 27 February–4 March 2001, BfN-Skripten 43, German Federal Agency for Nature Conservation Bonn 2001) 134–35.

139 The authors would like to thank Daniela Diz for suggesting this point. See also Millicay (n 9) 832.

knowledge?’<sup>140</sup> The first theme, justice, is framed as meaning ‘questions of distribution in relation to access to and utilization of marine resources.’<sup>141</sup> The CBD and the LOSC provide different perspectives on justice. The LOSC in relation to ABNJ distinguishes between regime for the freedom of the high seas, which is premised on open access and limited attention to issues of distributional fairness, and the regime of the Area, which provides for equitable access and benefit sharing of its mineral resources. The Convention fails to provide for clarity in relation to the living resources of the Area in this respect. On the other hand, one of the objectives of the CBD is ‘the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.’<sup>142</sup> The CBD represents a broader vision of ocean justice and allows States to argue that the CBD implies a recognition that the freedom of the high seas needs to be regulated in line with this objective.<sup>143</sup> The two conventions probably are more aligned as regards other aspects of justice, such as inter- and intra-generational and environmental justice. To the extent that these concepts are not included explicitly in the LOSC and the CBD, they have been incorporated in both instruments through the subsequent development of general international law and supported by political commitment of the international community.

The theme of power is defined as ‘the way power is distributed and how it affects decision making, the distribution of rights and obligations, jurisdiction over ocean areas as well as activities, and participation in the relevant legal and governance processes.’<sup>144</sup> Recourse to the General Assembly for elaborating the regime of BBNJ may be explained by that body’s central role in international policy making in relation to oceans and law of the sea. At the same time, the CBD itself recognized the significance of the General Assembly, and made the relationship between the CBD and the LOSC a focal point of the discussion. A different frame could also have been imagined, and might have resulted in another dynamic. For instance, the Executive Secretary could have been requested to prepare a Study on how the CBD might address the sustainable use and conservation of BBNJ in accordance with its objectives and the scope of the Convention. In a study of that nature, the relationship with the LOSC could have been addressed through the lens of Article 22 of the CBD. As was argued above, Article 22 does not impede the development of a regime

140 See ch 1 (this volume).

141 *ibid.*

142 CBD art 1.

143 This latter point also raises the need to consider the relationship clauses of the CBD and the LOSC, which will be further discussed below.

144 See ch 1 (this volume).

that regulates and conditions high seas freedoms, as is also witnessed by other specific regimes that have been developed after the adoption of the LOSC.

Another point that is illustrated by the Study on the relationship between the CBD and the LOSC is the power of international bureaucracies to influence the framing of issues. It also illustrates how legal arguments may be used to frame issues and impact upon the further development of the future legal regime of the oceans. The current development of the BBNJ Agreement illustrates that the issue area that needs to be regulated also impacts decision making. Although the agreement likely will be an implementation agreement to the LOSC, the institutional arrangements envisaged by the draft agreement make it akin to multilateral environmental agreements, and differentiate it from the LOSC.

The third theme of the project, space, involves 'reference ... to the way space is understood and regulated in the law of the sea with regards to ABNJ'.<sup>145</sup> Where the LOSC provides for two regimes in respect of ABNJ, with a different spatial scope of application, and different core principles – freedom of the high seas and common heritage of mankind – the CBD refers to ABNJ as a single space, to which the CBD's substantive provisions in principle apply without distinction. In view of the CBD's emphasis on community interests in formulating its objectives, this approach to ocean space may contribute to further downplaying the role of individual high seas freedoms and foregrounding international governance approaches.

The fourth theme of the project is meant to 'capture ... knowledge, or its lack, plays in the construction of legal principles and regimes etc'.<sup>146</sup> Knowledge, and the lack thereof, has been a main driver in the development of the regime for BBNJ. The Study on the relationship between the CBD and the LOSC is most likely right in arguing that, had knowledge about the presence and value of MGRS been known at the time the LOSC was negotiated, these resources of the Area would have been included explicitly in the common heritage regime. Increased knowledge about these resources and the capabilities to exploit them in the 1990s led the CBD and subsequently the UNGA to making this knowledge widely available throughout the international community and garnering support for the creation of a specific regime.<sup>147</sup> Another example of the

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145 *ibid.*

146 *ibid.*

147 See also Charlotte Salpin and Valentina Germani 'The Status of High Seas Biodiversity in International Policy and Law' in Pierre Jacquet and others (eds), *A Planet for Life – Oceans: The New Frontier* (TERI Press 2011) 194–96; *Earth Negotiations Bulletin* Vol 9, No 252, 12.

importance of knowledge to the BBNJ process is provided by the CBD's work on EBSAs. The identification of EBSAs on the basis of the scientific criteria and guidance has generated a significant increase in awareness about ecosystems that are critical to maintaining the ocean's biodiversity and provide a steppingstone to establishing a representative network of MPAs. The significance of knowledge to the BBNJ process as such is recognized by the inclusion of capacity building and transfer of technology as one of the issues of the BBNJ package.

To put the above remarks in perspective, it should be realized that BBNJ process was never intended to fundamentally remap legal ocean space. The General Assembly in defining the mandate of the IGC has provided that the 'work and results of the conference should be fully consistent with the provisions' of the LOSC.<sup>148</sup> Similarly, in terms of justice, power and knowledge, the BBNJ process is unlikely to lead to a departure of the current trajectory of the law of the sea. True, the regime for access and benefit sharing may imply some distributional justice. However, in general a future BBNJ Agreement unlikely will result in a redistribution of power between the actors with interests in ABNJ. The same actors will remain competent to regulate ocean activities, albeit under stricter environmental regulation. Perhaps the major innovation of a future BBNJ Agreement would be in the dissemination of knowledge about the oceans. The clearing house mechanism(s) that is/are envisaged by the draft agreement, coupled with the development of new technologies, which have the potential to exponentially increase humanity's knowledge base, may lead to a (much) more even distribution of knowledge within the international community, including among non-State actors.

Finishing with the question that is posed in the chapter title, it is without doubt possible to subscribe to the view of the Study on the relationship between the CBD and the LOSC that both are complementary and mutually supportive.<sup>149</sup> What counts most in elaborating an effective regime for BBNJ will be the content of a BBNJ Agreement, not the framework in which it was negotiated. The current draft suggests that a BBNJ Agreement will share many characteristics with multilateral environmental agreements and less so with the LOSC and the Fish Stocks Agreement, one of its other implementation agreements.<sup>150</sup> That approach may contribute to addressing the lack of a

148 Resolution adopted by the General Assembly on 24 December 2017, UN Doc A/72/249.

149 See also Blanchard (n 1) 365–67.

150 It could be argued that in the current negotiations the relationship between the rights and obligations of coastal States and the rights and obligations is one of the major controversial issues and is a law of the sea matter that should not be addressed in an environmental law context. However, as the current draft of the BBNJ Agreement states,

dedicated environmental institutional framework under the LOSC and contribute to the systemic integration of international law.

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it 'shall be interpreted and applied in the context of and in a manner consistent with the Convention' (Draft text of an agreement 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, 17 May 2019, A/CONF.232/2019/6 Annex, art 4(1); see also *ibid*, art 4(2)). As art 22 of the CBD illustrates a similar savings clause could have been included in an instrument negotiated in an environmental law context. Such a treaty could also have further detailed the rights and obligations of States in relation to BBNJ, while respecting the jurisdictional framework of the LOSC. Again, reference may be had to the more detailed rights and obligations of States in relation to marine biodiversity as contained in the CBD as compared to the LOSC. For a further discussion concerning the use of either the LOSC or the CBD as a framework for dealing with BBNJ, see Tvedt and Jørem (n 110) 159–61.