Chapter 19
Three Structural Pillars of the Future International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction

Catherine Blanchard, Otto Spijkers, and Wen Duan

Abstract The Intergovernmental Conference on marine biodiversity of areas beyond national jurisdiction has started its work on the development of an international legally binding instrument (ILBI) on the conservation and sustainable use of such biodiversity. The negotiations on marine biodiversity beyond national jurisdiction (BBNJ) will therefore further evolve within this new stage of the process. Based on a role-playing game conducted with students of the master's in public international law at Utrecht University, this chapter looks at how the regulation for marine biodiversity in areas beyond national jurisdiction could unfold by analysing three structural aspects of the development of the ILBI. First, as the ILBI is to be developed as an agreement under the United Nations Convention on the Law of the Sea, the first substantive section focuses on the relationship between the two treaties (Sect. 2). The next section looks at biodiversity itself, through the relationship between the Convention on Biological Diversity and the ILBI, notably on how the instruments could complement one another in areas beyond national jurisdiction (Sect. 3). Finally, the last substantive section assesses the character of the ILBI, to see whether institutional arrangements should be rooted in a global, region/sectoral and/or hybrid approach (Sect. 4). These three issues form, in our view, the three pillars of the structural development and practical significance of the ILBI.

While the authors share collective responsibility for this chapter, Otto Spijkers was the lead author of Sect. 2, Catherine Blanchard of Sect. 3, and Wen Duan of Sect. 4.

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1 Introduction

The variability among living organisms in the many marine ecosystems of this world is extremely rich.[1] Yet this marine biodiversity is also extremely vulnerable to climate change, overexploitation, and other such threats. In that context, the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ) and the development of an international legally binding instrument (ILBI) covering this issue has definitely made it to the list of law of the sea news not to be missed.[2] The conservation and sustainable use of marine biodiversity in ABNJ has even been characterized as the most contentious aspect in current law of the sea.[3]

A lot has happened for the process surrounding the conservation and sustainable use of biological diversity beyond national jurisdiction (BBNJ) to reach the stage it is now at.[4] Facing a growing concern in the state of marine biodiversity,[5] the United Nations General Assembly (UNGA) established, in 2004, an Open-ended Informal Working Group (the Working Group) to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.[6] This Working Group also followed the establishment, by the conference of the parties of the Convention on Biological Diversity (CBD), of a working group on protected areas,[7] where experts in oceans related fields were encouraged to participate.[8]

The Working Group gathered for the first time in 2006, and, over the following years, met on nine occasions, addressing issues of substance (*i.e.* what topics could/should be covered), institutional framework and scope of the ILBI. The fourth meeting of the Working Group, held in 2011, identified four main issues to be covered—the "package"[9]—namely:

1. Marine genetic resources (MGRs), including questions on benefit-sharing;
2. Area-based management tools (ABMTs), including marine protected areas (MPAs);
3. Environmental impact assessments (EIAs);
4. Capacity building and marine technology transfer (CB&TT).

[1] IISD (2006), p. 1.

[2] E.g., Barnes (2016), Tladi (2017), Scanlon (2018), Warner (2017), Young and Friedman (2018) and Millicay (2018).

[3] Tladi (2017), p. 259.

[4] IISD (2018), pp. 1–2.

[5] IISD (2011), p. 2; WSSD (2002); UNGA Res 57/14 (2002), UNGA Res 58/240 (2003).

[6] UNGA Res 59/24 (2004), para 73.

[7] CBD COP Dec VII/28 (2004), para 25.

[8] UNGA Res 59/24 (2004), para 71.

[9] DOALOS (2017b), p. 9; Scanlon (2018), p. 2; Jeff Ardron (2013), p. 2.

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At its ninth meeting in late January 2015, the Working Group agreed, by consensus, on recommendations to submit to the UNGA to develop an ILBI on BBNJ. In June 2015, the UNGA, having considered the recommendations of the Working Group, made the decision to develop an ILBI under the United Nations Convention on the Law of the Sea (UNCLOS). For that purpose, the UNGA first established a Preparatory Committee (PrepCom or the Committee), with the mandate "to make substantive recommendations to the General Assembly on the elements of a draft text of an [ILBI]".[10]

The Committee met four times, in 2016 and 2017, and at its last meeting adopted its final report, which contained a list of elements to be considered for the draft text of an ILBI.[11] The PrepCom also recommended that the UNGA make a decision on the convening of an intergovernmental conference (IGC) to conclude the ILBI, on the basis of the PrepCom's recommendations.[12] On 24 December 2017, the UNGA followed suit and decided to convene an IGC, "to consider the recommendations of the [PrepCom] [...] with a view to developing the instrument as soon as possible".[13]

With the IGC starting its work in September 2018, the international community saw the BBNJ process enter a new stage of development, where delegations focused on questions and clarifications left open by the PrepCom.[14] The discussions held were a necessary step to get everybody on board and to clearly set the table for this new step of the process.[15] This first meeting was followed by the publication, in January 2019, of the "President's aid to negotiations",[16] a compilation of options for treaty text formulations, which is expected to form the basis of future negotiations on the content of the ILBI.[17]

Against this backdrop, and curious about the future of the BBNJ process, we decided to travel forward in time and to give it a try at anticipating history. With the students of the International Environmental Law course of the LLM programme in Public International Law at Utrecht University, we conducted a role-playing game entitled "Negotiating the new ILBI". Each student represented a particular State or non-State actor and elaborated a position, putting forward the interests and legal arguments of the entity represented, that could contribute to the negotiations.

To address the different issues of the 2011 package, as well as cross-cutting elements, the "plenary" of our time travelling experiment was divided into three "working groups", each of which addressed one structural aspect of the ILBI:

[10]UNGA Res 69/292 (2015), para 1(a).

[11]PrepCom (2017), para 38. It is to be noted that these elements were divided in two categories: elements that generated convergence among most delegations, and main issues on which there is divergence of views.

[12]Ibid.

[13]UNGA Res 72/249 (2017), para 1.

[14]IGC (2018b).

[15]IISD (2018), p. 15.

[16]IGC (2019).

[17]The IGC has since met on two additional occasions, in March-April and August 2019, and a fourth session is pending. A draft text (June 2019) and revised draft text (November 2019) have also been published by the President of the IGC. However, the content of the present chapter was last updated in April 2019, and the authors relied on the state of the negotiations and information available at that time.

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1. As the ILBI is to be developed as an agreement under the UNCLOS, the first working group focused on the relationship between these two treaties.
2. The second group looked at biodiversity itself, through the relationship between the CBD and the ILBI, notably on how the instruments could complement one another in relation to ABNJ.
3. The third group assessed the character of the institutional arrangements established by the new ILBI, to see whether institutional arrangements should be rooted in a global, region/sectoral and/or hybrid approach.

These three issues form, in our view, three pillars of the structural development and practical significance of the ILBI, on which this chapter elaborates.

Considering the wide range of issues that arise when discussing the new ILBI, from science to law and including governance, institutions and economic interests, it is important to mention that this chapter does not provide an exhaustive review of the current developments impacting the future ILBI. It aims at providing a glance at some issues, which, we believe, shape the ILBI's content and structure, and are at the heart of its development.

2 Relationship Between the ILBI and the Law of the Sea Convention

This section analyses the relationship between the ILBI and the United Nations Convention on the Law of the Sea (UNCLOS). The PrepCom proposed that the new ILBI should not "prejudice the rights, jurisdiction and duties of States under the [UNCLOS]"; and that it "shall be interpreted and applied in the context of and in a manner consistent with" the UNCLOS; similar statements one finds at all stages of the BBNJ process.[18]

Things get trickier once we enter into the details and technicalities of this special relationship. For example, the President of the IGC openly wondered whether the relationship between the ILBI and the UNCLOS should be dealt with in a single generally applicable provision, or whether different elements of the package deal required specific provisions regulating the relationship between *that specfic part* of the ILBI and the UNCLOS.[19] And an agreement needed to be reached on what to do with those States not party to the UNCLOS.[20] Many of them actively participate in the negotiations leading to the new ILBI. At the first session of the conference, the delegations from Colombia, El Salvador, Eritrea, Iran, and Turkey emphasized that

[18]PrepCom (2017), para 4. See also DOALOS (2017b), para 18, IGC (2018b), para 3, and IGC (2018c).

[19]IGC (2018b), para 3.4.2.

[20]States not party to the UNCLOS include Colombia, Libya, Turkey, the United States, and Venezuela.

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their participation in the conference could not in any way affect their status of UNCLOS non-parties.

The special relationship between the new ILBI and the UNCLOS is further reflected in the proposal to see the new ILBI as an instrument "under" the UNCLOS. There is general agreement that this means the new ILBI will become an implementing agreement, like the Agreement implementing Part XI of the UNCLOS on matters related to the Area, and the Fish Stocks Agreement. In fact, the phrase that the new ILBI must not "prejudice the rights, jurisdiction and duties of States under the" UNCLOS, and that it "shall be interpreted and applied in the context of and in a manner consistent with" the UNCLOS, is copy-pasted from Article 4 of the Fish Stocks Agreement.[21]

There is thus a clear hierarchical relationship, with the "constitution of the oceans" (the UNCLOS) on top of that hierarchy, and the ILBI below it.[22] This relationship is different from the relationship between the ILBI and other international treaties, such as the Convention on Biological Diversity. With respect to those, the new ILBI "should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies".[23] The "not undermine"-condition does not apply to the relationship between the ILBI and the UNCLOS and will thus not be discussed in this section.

The ILBI's main objective is to ensure the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction *through* effective implementation of the UNCLOS. Instead of prejudicing the rights and duties under the UNCLOS, the new ILBI must actively reaffirm, support and strengthen these very rights and duties. The ILBI should show respect for the balance of rights and obligations achieved in the UNCLOS; and the new ILBI should build on the relevant principles of the UNCLOS, and not derogate from them. And the meaning of terms used in the ILBI should be consistent with the meaning of those same terms as used in the UNCLOS. This is not so difficult, since the UNCLOS does not provide a definition of most of the terms it uses.[24] But their meaning did crystallize through the subsequent practice in the application and interpretation of the UNCLOS, and this practice now forms part of that Convention.

What rights and duties do we find in the UNCLOS that are relevant to the ILBI? First, the UNCLOS contains various duties—and rights—of States to protect and preserve the marine environment, also in areas beyond national jurisdiction. Second, one of the most important rights in the UNCLOS is the freedom of the high seas. A formidable achievement of the UNCLOS is that it found a balance between marine environmental protection and high seas freedoms.

[21]Fish Stocks Agreement (1995), Art. 4.

[22]See e.g. UNGA Res 69/292 (2015).

[23]Id., para 19.

[24]Most notably, the UNCLOS does not define "marine environment"; and the term "(marine) biodiversity" is entirely absent from the Convention.

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Let us begin with the latter. Article 87 of UNCLOS states that "the high seas are open to all States". High seas freedoms include the freedom of navigation, overflight, the freedom to lay submarine cables and pipelines, the freedom to construct artificial islands and other installations, the freedom of fishing, and the freedom of scientific research. None of these freedoms is absolute. They are to be "exercised under the conditions laid down by this Convention and by other rules of international law".[25] One such condition laid down in the UNCLOS itself is the obligation to protect and preserve the marine environment (Article 192, UNCLOS). There are conditions that apply to specific freedoms only, such as the obligation for States to "cooperate with each other in the conservation and management of living resources in the areas of the high seas", which primarily constitutes a limitation on the freedom of high seas fishing (Article 118, UNCLOS). States interested in the same living resource must "enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned", which includes an obligation to jointly establish sub-regional or regional fisheries organizations, whose *raison d'être* is to further limit the freedom of high seas fishing.

Article 87 of UNCLOS obliges States to exercise their high seas freedoms "with *due regard* for the interests of other States in their exercise of the freedom of the high seas, and also with *due regard* for the rights under this Convention with respect to activities in the Area". This due regard-condition means States must consult with the relevant other States and figure out jointly how all States' rights and obligations may be balanced, and possibly consider an alternative course of action if that balance appears to get lost.[26]

The high seas freedoms are thus subject to conditions, and these can be based on the UNCLOS, but also on other international law. When the UNCLOS was drafted, the States sought to achieve a fair balance between the freedoms of the high seas and the protection of the marine environment. Clearly, the new ILBI must show some respect for this delicate balance of rights and interests achieved in the UNCLOS.

Let us now look at the other category of rights and duties under the UNCLOS, which might be affected by the new ILBI. The UNCLOS establishes rights and duties for the protection of the marine environment; the term "biodiversity" does not appear at all in the UNCLOS. When the UNCLOS was drafted, there was a feeling that the legal framework on the protection and preservation of the marine environment was still in development, and that the UNCLOS should not solidify or crystallize this development. It was too early for that. Therefore, some of the provisions in the UNCLOS are rather vague and general. Article 192 of UNCLOS simply reads that "States have the obligation to protect and preserve the marine environment". Admittedly, there are more detailed provisions on the States' obligations to take measures necessary to combat pollution (Article 194, UNCLOS), be it from land-based sources (Article 201, UNCLOS), vessels (Article 211, UNCLOS), or through the atmosphere (Article 212, UNCLOS). In their efforts to protect and

[25]UNCLOS, Art. 87(1).

[26]See also Oude Elferink (2018), pp. 446–455.

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preserve the marine environment, all States have an obligation to cooperate with other States, on a global or regional basis, directly or through competent international organizations (Article 197, UNCLOS). The UNCLOS does not detail the means and methods of such cooperation, but at the very least it means States cannot frustrate cooperation efforts of other States, or dissociate themselves from any form of cooperation, or engage in cooperation efforts in bad faith. The UNCLOS does not detail the precise modalities and competences of institutionalized forms of cooperation (international organizations). It also does not appear to oblige reluctant States to cooperate with such international organizations, once established by other States.

All States are obligated to take measures necessary for the conservation of the living resources of the high seas (Article 117, UNCLOS) and need to cooperate for that purpose (Article 118, UNCLOS).

They are also under an obligation to take measures necessary to protect the marine environment in the so-called "Area" (Article 145, UNCLOS). The "Area" is defined as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction" (Article 1, UNCLOS). More specifically, Article 145 of UNCLOS obliges States to take "necessary measures", with respect to all activities of exploration for, and exploitation of, the resources of the Area, and to ensure effective protection for the marine environment from harmful effects which may arise from such activities. The International Seabed Authority (ISA) is tasked with deciding which measures are necessary to avoid "interference with the ecological balance of the marine environment", as well as to ensure "the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment".

It could be argued that these duties, taken together, already require States parties to the UNCLOS to adopt all measures necessary to protect the marine environment, and that this includes an obligation to cooperate for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. After all, under the UNCLOS, States have an obligation to cooperate, including in the establishment and functioning of international organizations. To what extent can States then entirely refuse to participate in the institutional framework established by the new ILBI? In the negotiations, the European Union constantly insists on references, in the new ILBI, to provisions in the UNCLOS, as if the new ILBI provides the *only way* to comply with these provisions in the UNCLOS. This would give the impression that States parties to the UNCLOS are basically "obliged" to also ratify the new ILBI. But what if States decide to implement their obligations under the UNCLOS in a way that is different from the way it is done in the new ILBI? The UNCLOS is much too vague and general to provide guidance here. And this was deliberately done.

Indeed, the provisions in the UNCLOS referred to above anticipate that the States will come together and conclude more specific agreements. The ILBI's main aim is thus to fill certain gaps deliberately left in the UNCLOS at the time it was drafted. According to Tiller et al., these gaps relate to "provisions and definitions [that] were not specific enough for states to be certain of the treaty's meaning at the time of

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UNCLOS, such as the application of the common heritage of mankind; or did not address problems that have either arisen since its ratification, such as exploitation of Marine Genetic Resources (MGRs), or worsened since the treaty's completion in 1982, such as marine pollution."[27] Fundamental questions still need to be addressed, such as whether the exploitation of MGRs is a high seas freedom, or falls within the common heritage of mankind regime, whatever that may be. There are also many outstanding questions on the management of marine *living* resources in ABNJ.[28]

Article 237 of UNCLOS, on obligations under other conventions on the protection and preservation of the marine environment, makes very clear that the drafters of the UNCLOS anticipated more detailed rules on the protection of the ABNJ. It proclaims that certain provisions in the UNCLOS are "without prejudice to the specific obligations assumed by States under [. . .] agreements which may be concluded in furtherance of the general principles set forth in this Convention". It further proclaims that "specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention."

Let us look in some more detail at how much policy space is left open by the UNCLOS, when it comes to balancing marine environmental protection and the high seas freedoms. There is some disagreement on this issue. The United States believe there is not really any legal vacuum.[29] The European Union is of the opinion that a global legal regime for the conservation of BBNJ needs to be made, seeking to balance marine environmental protection with high seas freedoms, whilst at the same time finding some modest room for the common heritage of mankind principle.[30] China and most developing States believe that the UNCLOS obliges States to exploit BBNJ on the basis of the common heritage of mankind principle, and that there is a need for a new global agreement to tell States how exactly this is done; marine environmental protection and the high seas freedoms fade a little bit into the background here.[31] References to the common heritage of mankind principle we find, *inter alia*, in Article 136 of UNCLOS, which proclaims that "the Area and its resources are the common heritage of mankind". And Article 311(6) of UNCLOS prohibits States from making "amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 [and to become] party to any agreement in derogation thereof". Article 140 of UNCLOS obliges States *inter alia* to carry out all activities in the Area "for the benefit of mankind as a whole". The ISA was given specific tasks in this context, further elaborated in the Agreement relating

[27]Tiller et al. (2019). See also Kraabel (2019), pp. 152–154.

[28]Warner (2018a).

[29]See also Wright et al. (2018), p. 53. The United States maintain this position especially with regard to marine genetic resources in ABNJ.

[30]Id., pp. 47–49.

[31]China argues in particular that marine genetic resources in the Area should be exploited on the basis of this principle. See Id., pp. 34–35 and 49–51.

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to the implementation of Part XI of the United Nations Convention on the Law of the Sea, which entered into force 28 July 1996. It is important to note that the UNCLOS articles referred to, as well as the Part XI implementing agreement, apply only to the Area, not to the water column situated above it, *i.e.* the high seas. In those high seas, the traditional freedoms prevail.[32] That is why a new ILBI based on an application of the common heritage of mankind principle (also) to the high seas risks to modify—as opposed to implement—the UNCLOS framework.

Let us look briefly at some of the ways in which the new ILBI might play this function of filling in the details left open by the more general provisions in the UNCLOS.[33] Article 192 of UNCLOS obliges States parties to "protect and preserve the marine environment"; and Article 194(5) of UNCLOS obliges the same States to take 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". Article 197 of UNCLOS requires States to cooperate. One way to cooperate in the protection of fragile marine ecosystems is by designating them as MPAs. It could be argued that one can derive an obligation, from the above-mentioned articles in the UNCLOS, to participate in the establishment of such MPAs.[34] The new ILBI can set criteria and procedures for designation of ABMTs, including MPAs, and provide more detailed regulations on their management, and enforcement of the MPA's protective measures.[35]

According to Article 194(4) of UNCLOS, "in taking measures to prevent, reduce or control pollution of the marine environment [such as the designation of an MPA] States shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention". This can be interpreted as a variation of the obligation we find in Article 87 of UNCLOS, *i.e.* to have "due regard for the interests of other States in their exercise of the freedom of the high seas".[36] In other words, when designating an MPA, the obligation to protect the environment must be balanced against the obligation to respect the high seas freedoms. The new ILBI should not distort this balance, which is the very foundation on which the constitution of the oceans is built.

From Article 206 of UNCLOS, a general duty to undertake an EIA, also for activities which might cause harm to the marine environment in areas beyond national jurisdiction, can be derived.[37] But Article 206 of UNCLOS does not tell us when exactly such an EIA is compulsory, and how it should be done.[38] The

[32]See UNCLOS, Art. 87.

[33]See also IUCN (2018).

[34]See also Oude Elferink (2018), p. 445. Here, the author discusses the legal basis for the establishment of MPAs in ABNJ but does not expressly indicate that there is an obligation for States to participate in the establishment of MPAs in ABNJ.

[35]Wright et al. (2018), pp. 32–34. See also Park and Kim (2019).

[36]See also Oude Elferink (2018), pp. 447–448. Support for this interpretation can be found in Chagos Marine Protected Area Arbitration (2015), para 475.

[37]This interpretation of 206 UNCLOS finds support in ITLOS Advisory Opinion (2011), para 146–148.

[38]See also Wright et al. (2018), p. 35.

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implicit reference to EIAs in Article 204 of UNCLOS also says nothing about the requirements—procedural and substantive—a good EIA must meet.[39] The President's aid to discussion proposes three different strategies through which the new ILBI could provide clarity on this issue: first, the new ILBI could set general "thresholds and criteria for environmental impact assessments"; second, the new ILBI could include a "list of activities that require or do not require an environmental impact assessment"; third, the new ILBI could provide a combination of the two.[40] Such a list need not be exhaustive, and could, for example, allow for regular updating without a need to formally amend the ILBI. A fourth alternative, not suggested by the President, would be to impose an obligation to conduct an EIA on *all* proposed activities which might affect the marine environment in areas beyond national jurisdiction. But that would not be in accordance with Article 206 of UNCLOS, which limits such obligation clearly to activities which may cause *substantial* pollution of or *significant and harmful* changes to the marine environment. In the context of EIA, the general obligation to cooperate of Article 197 of UNCLOS is also relevant, as it obliges States to share information, consult each other, and so on.[41]

These are some of the ways in which the new ILBI could provide the necessary details for effective implementation of the general obligations under the UNCLOS.

3 Relationship Between the Convention on Biological Diversity and the ILBI

The Convention on Biological Diversity (CBD) was developed[42] as a response to the loss of biodiversity triggered by certain human activities, on land, in internal waters, and at sea, by providing an overarching and coherent framework for the conservation and sustainable use of biodiversity.[43] As such, it complements other instruments related to nature conservation.[44]

The CBD puts forward three main objectives: the conservation of biodiversity, the sustainable use of its components, and the fair and equitable sharing of benefits from the use of genetic resources.[45] More specifically, the CBD creates obligations targeting the components of biodiversity found within the limits of national

[39]Warner (2018b), pp. 41–42.

[40]IGC (2018b), 5.3.

[41]See also Wright et al. (2018), pp. 35–36.

[42]The CBD was opened for signature at the 1992 UN Conference on Environment and Development (Rio Conference), and it entered into force the next year, see CBD (1992), preamble; CBD, History of the Convention.

[43]Yzquierdo (2017), p. 10.

[44]E.g. Ramsar Convention (1971); CMS (1979); CITES (1973).

[45]CBD (1992), Art. 1.

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jurisdiction of States parties, and the processes and activities carried out beyond national jurisdiction.[46] It also covers the conservation of the components of biodiversity inside and outside their natural habitat.[47]

As per the third main objective of the CBD, the access to genetic resources,[48] and the fair and equitable sharing of their benefits, lies at the heart of the regulatory framework established by the CBD. These aspects are further regulated by the Nagoya Protocol[49] which aims for more transparency and predictability in the access to genetic resources.[50] The Nagoya Protocol also elaborates on the clearing-house mechanism[51] established under the CBD.[52] This measure embodies one of the objectives of the Protocol to support appropriate transfer of technologies,[53] and is linked to the access to and transfer of technology found in the CBD itself.[54]

The framework set forth in the CBD is additionally complemented by soft law instruments. This includes, for example, the Jakarta Mandate on the conservation and sustainable use of marine and coastal biodiversity adopted by the conference of the parties,[55] which commits the CBD to goals that specifically target the marine environment.[56] Further, the 2010 Strategic Plan for Biodiversity 2011–2020 provides an overarching plan for all actors, stakeholders and partners involved in biodiversity management through, among others, the revision and update of national strategies and action plans targeting biodiversity.[57] This Plan also includes the Aichi Biodiversity targets, classified under five broader strategic goals, including capacity building.[58]

Against this framework, the structural role of the CBD for the development of the ILBI arises first because of the objectives the two instruments share. Of course, not only are the conservation and sustainable use of biodiversity, the first two objectives of the CBD, at the heart of the overarching goals of the ILBI (and its name!), but the

[46]Id., Art. 4.

[47]Id., Art. 8–9.

[48]Id., Art. 15, see also Art. 8(j).

[49]Nagoya Protocol (2010).

[50]CBD, About the Nagoya Protocol.

[51]Nagoya Protocol (2010), Art. 14.

[52]CBD (1992), Art. 18. A clearing-house mechanism works for the collection, centralisation, and distribution of information and materials.

[53]Nagoya Protocol (2010), Art. 1.

[54]CBD (1992), Arts 16 and 18.

[55]CBP COP Dec II/10 (1995).

[56]Indeed, biodiversity specifically in the context of the costal and marine environment are not discussed at length in the CBD. The Jakarta mandate completes the CBD in that field, see Wolfrum and Matz (2000), p. 459.

[57]CBD, Strategic Plan for Biodiversity 2011–2020.

[58]CBD, Aichi Biodiversity targets.

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third objective of the CBD is intrinsically linked with the issue of MGRs, which is one of the elements of the 2011 package. Yet, since the CBD is widely ratified[59] and, as portrayed above, covers a broad range of activities, through the Convention text and other related instruments, one could ask whether there really is a need for an ILBI, and whether the CBD is not already enough for ensuring biodiversity conservation. Why adopt yet another instrument dealing with the same issues, and potentially contributing to treaty fragmentation?[60]

One important reason lies in the debate surrounding the CBD's scope of application to ABNJ. Article 4 of the CBD states that the Convention does cover the components of biodiversity, *i.e.* the biological resources, in areas within national jurisdiction (paragraph a). In ABNJ, the Convention applies only to processes and activities carried out (paragraph b). It is most likely because of (marine) genetic resources that components of biodiversity in ABNJ were not directly included in the text of the article, as the access to and use of these resources is subject to the everlasting debate on whether the freedom of the high seas or the common heritage of humankind principle should apply.[61]

In fact, it is the practical impact of this distinction between the two paragraphs of Article 4 that triggers the debate. One interpretation argues that there is no real distinction in the scope of application of the CBD; indeed "these distinctions are in some way arbitrary since the components of biological diversity are necessarily affected by human processes and activities."[62] Consequently, since processes and activities in ABNJ are covered under the CBD, their potential impacts on components of biodiversity in these areas are also covered. Another interpretation is supported by the different language used by the drafters in the two paragraphs, which reinforces a distinction in their meaning. According to such interpretation, while all obligations of the CBD are applicable in areas within national jurisdiction, only the obligations covering activities and processes are applicable in ABNJ. These obligations do refer to the responsibility not to cause environmental damage, to cooperate, and to identify activities which have or are likely to have significant adverse impacts on biodiversity.[63] However, these obligations remain broadly phrased and lack specificity. Further, in practice, while the role of the CBD in providing scientific and technical assistance and advice with respect to MPAs in ABNJ has been clearly expressed by the conference of the parties,[64] the CBD remains an instrument of support only, as the UNGA retains the main role in addressing issue relating to conservation and sustainable use of BBNJ.[65] This debate

[59]196 parties have ratified as of 13 December 2018.

[60]Caddell (2016).

[61]Millicay (2018), pp. 172–173.

[62]Glowka et al. (1994), p. 27.

[63]CBD (1992), Arts 3, 5, 7(c) and 8(l). See also Robinson and Kurukulasuriya (2006), pp. 226–227.

[64]CBD COP Dec X/29 (2010), para 24; CBD COP Dec XI/17 (2012), preamble; Gjerde and Rulska-Domino (2012), pp. 360–361; Wright et al. (2018), p. 23.

[65]COP 13 XIII/12 (2016), preamble; COP 12 XII/22 (2014), preamble.

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surrounding the scope of application of the CBD illustrates one of the major issues concerning ABNJ: these areas are prone to legal uncertainty, which leads to regulatory, governance and implementation gaps.[66] The ILBI could therefore clarify and/or strengthen an extended coverage for the conservation of biodiversity.

While the ILBI could provide clarifications to the uncertainties related to the scope of application of the CBD, the relationship between the instruments is not one-sided. The CBD is also of relevance for the development of the ILBI, which could build on concepts and mechanisms found in the CBD's provisions. Although the final report of the PrepCom does not refer to the CBD specifically,[67] opinions and ideas on how this Convention could be used as a source of inspiration for the ILBI can be found in the discussions held during the different meetings of the PrepCom, in working documents issued by the Chair of the Committee, and in opinions and ideas discussed at the first meeting of the IGC. References to the CBD have also found their way in the President's aid to negotiations.

For example, the CBD has indeed been referred to as a starting point, within the ILBI, for definitions of terms, explanation of principles, and elaboration of processes. It has been suggested that the definitions of genetic material and resources, of biotechnology, and of biodiversity itself should rely on the definitions found in Article 2 of the CBD.[68] Within general principles and approaches, developing a principle of equity could be done in line with the fair and equitable benefit-sharing objective of the CBD.[69] Further, a principle of cooperation, primordial for the conservation and sustainable use of biodiversity and stated as a main objective of the ILBI,[70] could build on the duty of cooperation found under Articles 5 and 18 of the CBD. The engagement of relevant stakeholders—and not only States—also figures as a general principle that should drive the ILBI,[71] which reminds us of the overarching aim sought by the CBD Strategic Plan for Biodiversity 2011–2020.[72] Measures such as biodiversity strategies and plans, as found under Article 6 of the CBD, could also be undertaken as part of the ILBI, to integrate marine biodiversity concerns into decision-making and management.[73] These are only a handful of examples, but it is expected that some principles that transpire from the CBD—sustainability, respect for sovereignty, ecosystem approach, science-based approach, respect of traditional knowledge, public participation, transparency and availability of the information—will most probably find their way into the ILBI.[74]

[66]See, e.g., Ardron et al. (2013), Blasiak and Yagi (2016), Houghton (2014) and Takei (2015).

[67]PrepCom (2017).

[68]DOALOS (2017b), pp. 6–8; IISD (2018), p. 4; IGC (2019), p. 4.

[69]IISD (2017), p. 8.

[70]PrepCom (2017), pp. 8 and 10.

[71]Id., p. 9.

[72]CBD, Strategic Plan for Biodiversity 2011–2020.

[73]DOALOS (2017a), p. 56.

[74]PrepCom (2017), pp. 9–10. We can indeed find these principles in the list of general principles and approaches.

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When it comes to the elements of the package, the definition of an MPA[75] could build on the definition of protected area, also contained in Article 2 of the CBD. The process for designing and establishing MPAs could also rely on the Ecologically or Biologically Significant Marine Areas (EBSAs) as source of inspiration.[76] EBSAs, launched by the CBD in 2005, aim for the designation of "geographically or oceanographically discrete areas that provide important services to one or more species/populations of an ecosystem or to the ecosystem as a whole, compared to other surrounding areas or areas of similar ecological characteristics, or otherwise meet [certain] criteria".[77] Such designation can lead to protective measures. Although the designation process, based on several criteria,[78] is scientifically and technically driven, it has, for now, not achieved broad acceptance nor legal value.[79] By relying on the EBSA process to develop the ILBI, the goal would not be to fast-track a designated EBSA into an ABMT/MPA under the ILBI; this process could however serve as a starting point for the development of ABMT designation procedures under the ILBI.[80]

In regards to EIAs, the activities addressed by such assessments under the ILBI could be harmonized with the ones having an impact on ABNJ in accordance with the content of Article 14 of the CBD, *i.e.* projects likely to have significant adverse effects on biological diversity.[81] Whether to include strategic environmental assessments (SEAs) in the ILBI has also been discussed.[82] In order to develop the EIA processes under the ILBI, including their conduct but also the threshold and criteria relied upon, the CBD Voluntary guidelines on biodiversity-inclusive impact assessment,[83] as well as the CBD Revised Voluntary Guidelines for the Consideration of Biodiversity in EIAs and SEAs in Marine and Coastal Areas,[84] could be of assistance. Small-island developing States have also reiterated the need to incorporate traditional knowledge in the assessments, by building upon the CBD Akwé:Kon Guidelines on socio-cultural and environmental assessments.[85]

Regarding the question of access and benefit sharing of MGRs, the Nagoya Protocol could be relied upon to develop a list of benefits, as well as for establishing

[75]DOALOS (2017a), pp. 8–9; IISD (2018), pp. 6–7, 9.

[76]DOALOS (2017a), pp. 41, 44, 48, 66, 95; IISD (2018), p. 6.

[77]CBD COP Dec XI/17 (2012). See also Ardron et al. (2013), p. 11; Gjerde et al. (2013), p. 546.

[78]The criteria are uniqueness or rarity, special importance for life history stages of species, importance for threatened, endangered or declining species and/or habitats, vulnerability, fragility, sensitivity or slow recovery, biological productivity, biological diversity, and naturalness.

[79]See, e.g., Freestone (2016), pp. 248 and 264.

[80]Id., p. 248.

[81]IISD (2017), pp. 12–13.

[82]IGC (2018b), p. 12; IISD (2018), pp. 11–12.

[83]CBD COP Dec VIII/28 (2006). IGC (2019), pp. 33 and 35.

[84]IISD (2018), p. 16.

[85]CBD COP Dec VII/16 (2004); IISD (2017), p. 8.

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the modalities for benefit sharing.[86] Similarly, in terms of CB&TT, and for the development of an eventual clearing-house mechanism,[87] the ILBI could use the CBD and the Nagoya Protocol as sources of inspiration. Not only could it draw from the instruments to reflect the recognition of the special requirements of developing countries[88] or to develop a list of categories and types of CB&TT,[89] but it could also rely on the CBD to develop funding mechanisms.[90]

These examples give a rough overview of how the ILBI could complement the biodiversity framework overseen by the CBD. Reciprocally, it also gives examples of how the CBD could be used in several aspects of the development of the ILBI. What is illustrated above is however only a portrait of ideas that have been suggested; there is, for now, no consensus on what precise elements of the CBD could and/or should be used and/or relied upon. The relationship between the CBD and the ILBI will also most probably be influenced by the way the institutional arrangements of the ILBI are developed.[91]

Yet, when raising the question of relationships between instruments in the context of the CBD, it is not to be forgotten that its Article 22 indicates that the Convention pays a particular respect to the law of the sea, which would include the ILBI. Indeed, paragraph 1 of Article 22 *prima facie* gives a primary status to the conservation of biodiversity over rights and obligations found under other instruments.[92] However, this direct reference to biodiversity is not found under the second paragraph, which provides that "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea". Although a literal interpretation of the wording of paragraph 2 would give priority to the balance between rights and obligations in the law of the sea provisions over CBD related obligations, this has been characterised as illogical for two reasons. First, the drafters would most probably have used more explicit vocabulary if they had wanted to give priority to law of the sea rules over biodiversity related ones. Second, the law of the sea framework and biodiversity law do not have the same scope of application as to substance; consequently, always giving priority to law of the sea would leave some issues partially or completely uncovered.[93] This is why, as pointed out by Wolfrum and Matz, "[a]rticle 22 paragraph 2 of the [CBD] instead means that the two regimes exist in parallel and supplement

[86]IGC (2019), p. 17.

[87]DOALOS (2017a), pp. 33, 80, 83, 90 and 104; IGC (2019), p. 62.

[88]More specifically Articles 16 and 20 CBD, see IGC (2019), p. 46.

[89]More specifically Article 16 CBD and Article 22(5)(g) of the Nagoya Protocol, see IGC (2019), p. 47.

[90]IGC (2019), p. 54.

[91]Id., p. 57. The institutional arrangements are described in further details in Sect. 4.

[92]"The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, *except* where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity." (emphasis added). See also Robinson and Kurukulasuriya (2006), p. 226.

[93]Robinson and Kurukulasuriya (2006), p. 226; Wolfrum and Matz (2000), p. 476.

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and reinforce each other. Only if the application of the [CBD] does infringe upon the rights or obligations of States, the law of the sea rules prevail."[94]

This necessity for the regimes to supplement and reinforce each other is also found in the nature of the two regimes. As a matter of fact, the law of the sea and biodiversity law have different aims. The former focuses mostly on regulating the use of resources, while the latter puts the emphasis on preservation. Moreover, the two regimes are not completely coherent, as they come from two different "generations".[95] Facing this different nature, the watchwords remain compatibility and collaboration. And this is even more important considering the requirement that the ILBI "should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies".[96] Although the scope of this "not undermine"-condition still triggers some uncertainties,[97] it will impact the way the CBD and the ILBI interact, influence, and complement one another. This could also potentially impact the cooperation that the CBD maintains with organizations that have law of the sea related mandates, such as the Food and Agriculture Organization, Regional Fisheries Management Organizations (RFMOs) and other regional seas agreements.[98] The ILBI could, once again, become an instrument of complementarity, which would expressly put the focus on biodiversity in a law of the sea context. The ILBI is therefore seen as a potential bridge between the two regimes.

4 Institutional Arrangements of the ILBI

This section analyses the third pillar of the ILBI: the institutional arrangements that would operationalize its relationship with other instruments. The question to be answered in this section is whether the institutional arrangements of the ILBI should be global, regional or hybrid in character. As indicated in the discussions of the PrepCom and IGC 1 and the "President's aid to negotiations", there are three approaches for the institutional arrangements of the proposed ILBI:

- *Option 1—Global Model*: A global institution with a meeting or conference of parties would be established under the ILBI to undertake scientific advice, decision-making, review and monitoring of implementation.[99] States parties to the ILBI would become the members of this global institution and thus participate in these activities.[100] The decisions adopted by the global institution would be

[94]Id., p. 476.

[95]Id., pp. 464, 473–474, 477.

[96]UNGA Res 72/249 (2017), para 7; PrepCom (2017), p. 9.

[97]See, generally, Scanlon (2018).

[98]Robinson and Kurukulasuriya (2006), pp. 226–227.

[99]DOALOS (2017b), paras 94, 121, 241; See also IGC (2019), pp. 23, 57–58.

[100]DOALOS (2017b), Ibid.

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legally binding on all States parties to the ILBI.[101] An example of this model is the regulation, by the ISA, of the mining activities in the Area, and such activities are subject to the organization, performance and control of the ISA "for the benefit of mankind as a whole" *as per* Article 137 of UNCLOS.[102]

- *Option 2—Regional or Sectoral Model:* The full authority of existing regional and sectoral regimes, such as the International Maritime Organization, RFMOs and Regional Environmental Conventions, would be recognized, which means that all matters would still be addressed by existing regional and sectoral legal regimes.[103] The global mechanism would only provide general principles or policy guidance on those above-mentioned matters to enhance cooperation and coordination among existing relevant mechanisms, but it would have no competence to oversee the decision-making and implementation by existing relevant mechanisms.[104]
- *Option 3—Hybrid Model:* The regional/sectoral regimes would still be relied upon for scientific advice, decision-making, implementation and compliance, but a global institution would be established to provide general guidance, criteria and standards on those above-mentioned matters at the global level to enhance the coherence and complementarity.[105] In addition, the global institution could oversee the decision-making and implementation by existing regional/sectoral regimes and thus ensure those existing regimes duly respect the global mechanism.[106]

By making a comparison between these three different approaches, this section addresses the question as to which approach should be chosen and why.

The choice of institutional arrangements is considered as a cross-cutting issue, which is relevant to all four elements of the "package"—MGRs, EIAs, ABMTs including MPAs, and CB&TT.[107] This section intends to take one element of the "package" as a case study on the general approaches to be taken, which will be helpful for better understanding how would these different approaches work on a specific element. The element to be analysed is the establishment of MPAs in ABNJ. This is because the process for establishing MPAs has to address the issues of institutional arrangements such as "who will establish the criteria..." and "who will take the decision" and thus must be built upon the institutional arrangements of the ILBI.[108]

[101] Ibid.

[102] Tanaka (2014), pp. 146–147.

[103] Ibid.

[104] DOALOS (2017b), paras. 96, 123, 241; See also IGC (2019), p. 23.

[105] DOALOS (2017b), paras. 95, 122, 241; See also IGC (2019), p. 24.

[106] DOALOS (2017b), Ibid.

[107] Fletcher et al. (2017), p. 42.

[108] See Millicay (2018), p. 175; See also ICG (2018a), p. 5.

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4.1 Global Model

Under the global model, the global institution created by the ILBI would have full competence to establish MPAs in ABNJ,[109] and to recognize the MPAs in ABNJ established by existing regional or sectoral regimes and thus make those MPAs legally binding on all State parties to the ILBI.[110] In addition, the global institution would be competent to adopt relevant management measures associated with existing MPAs in ABNJ.[111] This means that, even where an MPA has already been established by existing regimes, the global institution would still be able to adopt additional measures to complement the measures of existing regimes. This model would to a large extent ensure universal participation of States in the establishment of MPAs and coordination with other relevant competent organizations, provided that the ILBI adopting this approach was universally accepted. By making the establishment of those MPAs under the existing regional or sectoral regimes legally binding on all States parties to the ILBI, the global model would also obligate those States that are not parties to the regional regimes, but parties to the ILBI, to comply with the measures associated with those MPAs established under the existing regimes. This means that non-party States would also be legally bound by the MPAs established by existing regional or sectoral regimes via the ILBI on the condition that the non-party States are parties to the ILBI. As a result, if the ILBI adopting the global model was universally accepted and ratified, the global model would be better at ensuring universal participation of States in the establishment of MPAs than existing regional/sectoral regimes, and thus enhance further compliance of States with their general obligations to protect the marine environment and marine biodiversity. By establishing a process to recognize existing MPAs and complement the protection of those existing regional or sectoral MPAs, the global model would promote coordination of the management measures related to MPAs in ABNJ with existing legal regimes in relation to the establishment of MPAs in ABNJ. However, it should be admitted that the global model runs the risk of having a number of States who would probably not ratify the ILBI because of their disagreement with the global model. As indicated in the discussions of the PrepCom, there are some States that are not in favour of such a global model, such as the United States, Russia, Japan, Australia, New Zealand and so on.[112] Rather, they prefer using existing mechanisms or emphasize that the institutional arrangements under the ILBI shall not contravene with the existing mechanisms nor interfere with the mandate of existing regional or sectoral bodies.[113] If the ILBI, adopting the global model, is

[109]DOALOS (2017a), p. 49.

[110]DOALOS (2017b), para. 138; See also Id., p. 57.

[111]See DOALOS (2017a), p. 57.

[112]See IISD (2017), pp. 11–12, 15–16; See also DOALOS (2017a), p. 53; See also Millicay (2018), pp. 167–168.

[113]IISD (2017), Ibid.

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not ratified by those States, the effectiveness of the global model would be weakened due to the lack of participation of those States.

4.2 Regional/Sectoral Model

Under the regional or sectoral model, any issues in relation to the establishment of MPAs would still be addressed within existing sectoral/regional regimes.[114] However, the existing legal regimes related to the establishment of MPAs in ABNJ are highly fragmented.[115] This is because the establishment of existing MPAs in ABNJ is addressed in various regional or sectoral regimes rather than an overarching global regime, and each regional regime only includes a limited number of States.[116] In addition, the competence or scope of various relevant existing regimes or bodies related to the establishment of MPAs in ABNJ is limited and no holistic mechanism exists to coordinate these regional regimes.[117] Due to such a fragmentation, it is difficult to ensure universal participation of States in the establishment of MPAs in ABNJ and to achieve the cooperation or coordination of various regional regimes for ensuring legal coherence and consistency in that respect.[118] In addition, as analyzed by Fletcher et al., under this approach, due to the lack of a dedicated scientific body of a global institution and the reliance on the scientific bodies of existing regional or sectoral institutions, there may exist "gaps in the capacity of these existing bodies to consider elements currently outside their normal scope".[119] At this point, those elements outside the normal scope of those existing bodies may include the establishment of MPAs in ABNJ and management measures therein. Therefore, if the regional or sectoral model was adopted by the ILBI, the establishment of MPAs in ABNJ would still be addressed within existing fragmented legal regimes, and thus the shortcomings of existing legal regimes would still not be solved under the ILBI. Nevertheless, this model is still favoured by several States, such as Russia and Japan.[120] Russia strongly objected to the creation of a new global institution for establishing MPAs in ABNJ, but preferred establishing those MPAs through

[114]DOALOS (2017b), paras. 96, 123, 241.

[115]Such a fragmentation is also an embodiment of the fragmented legal landscape related to the conservation of BBNJ, see Fletcher et al. (2017), p. 53.

[116]The CCAMLR establishing CCAMLR MPAs has 25 members, the OSPAR Commission establishing OSPAR High Seas MPAs has 16 parties, and the SPAs Protocol by which the Pelagos Sanctuary was established has 17 parties. It should be noted that contracting parties or members of those existing regimes related to the establishment of MPAs in ABNJ are not the only States whose nationals or vessels are conducting activities in the MPAs established by those regimes.

[117]See Drankier (2012), p. 341.

[118]See Tanaka (2012), pp. 325–326.

[119]Fletcher et al. (2017), p. 43.

[120]See IISD (2017), pp. 11–12, 15–16; See also DOALOS (2017a), p. 53; See also Millicay (2018), pp. 167–168.

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existing specialized mechanisms.[121] It can also be inferred from the discussions of the PrepCom that Japan preferred using or strengthening existing bodies, including RFMOs, rather than relying on an overarching global institution.[122] However, if the ILBI simply recognized the competence of existing regimes rather than solving their shortcomings, there would still be a lack of global regime in respect of the establishment of MPAs in ABNJ, thus it would make little sense to have such an ILBI. As maintained by the European Union, there is a need for the ILBI to establish a global regime in that respect.[123]

4.3 Hybrid Model

The hybrid model is a compromise-option between the global model and the sectoral/regional model. Under this model, the global institution would have, to some extent (but not fully), the competence to establish an MPA in ABNJ, together with the existing regimes, which would retain their competence in that matter.[124] Nevertheless, the hybrid model would contribute to ensuring universal participation of States in the establishment of MPAs in ABNJ and the achievement of cooperation or coordination between different legal regimes related to such establishment. Firstly, the global institution under the hybrid model could oversee the decision-making process of existing regional/sectoral regimes by requiring States parties to the ILBI that are also parties to the existing relevant regimes to cooperate within the existing legal regimes.[125] This would ensure that the existing legal regimes duly respect the guidance and process developed by the global institution, and contribute to the promotion of cooperation and coordination for the establishment of MPAs among relevant competent bodies. Secondly, the decisions made by existing regional or sectoral mechanisms might be legally binding on all States parties to the ILBI through the recognition by the global institution.[126] Unlike the global model, there are less political objections to the hybrid model. Some of the States not favouring the global model, such as Australia and New Zealand, are in favour of this hybrid approach and consider this approach as a global mechanism of cooperation and coordination with relevant regional and sectoral bodies.[127]

[121] See IISD (2017), pp. 11–12, 15–16.

[122] See DOALOS (2017a), p. 53.

[123] Millicay (2018), pp. 167–168; See also DOALOS (2017a), p. 38.

[124] DOALOS (2017b), para. 241.

[125] Id., para. 122.

[126] Ibid.

[127] IISD (2017), p. 15.

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4.4 The Requirement of "Not Undermine"

As a preliminary conclusion, it can be argued that the global model and hybrid model are better options than the sectoral and regional model. This is because both the global model and hybrid model are helpful to solve the shortcomings of existing legal regimes by enhancing the universal participation of States in the establishment of MPAs in ABNJ and promoting the coordination and cooperation of the management measures related to MPAs in ABNJ among different global, regional and sectoral legal regimes. A further question is which one is better between the global model and the hybrid model.

Under the global model, it might be possible for the establishment of MPAs and management measures therein adopted by the global institution to conflict with the measures adopted by existing regional or sectoral regimes.[128] As required by UNGA Resolutions 69/292 and 72/249, the development of an ILBI shall "not undermine" existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.[129] Consequently, the institutional arrangements of the ILBI should "not undermine" the existing measures taken by regional or sectoral regimes or competence of existing institutions. Whether the global model would "not undermine" depends on how to interpret the phrase "not undermine". As indicated by Scanlon, there are two different interpretations of this term.[130] The first one requires that the ILBI should "not undermine" the authority or mandate of existing institutions and the measures under existing regimes, i.e. the ILBI should leave their mandates untouched.[131] In accordance with this interpretation, the ILBI cannot create an overlapping mandate or weaken the competence of those existing institutions to operate.[132] The second interpretation requires that the ILBI should "not undermine" the effectiveness or objectives of existing frameworks and bodies, which means improving or strengthening the effectiveness of existing frameworks and bodies would not be considered as "undermine".[133] If the first interpretation were adopted, then the global model would tend to be inconsistent with the requirement of "not undermine". This is because, under this model, the competence of the global institution overlaps with the mandates of existing bodies, provided that the global institution was competent to adopt measures that fall within the competence of existing regimes. By contrast, if the second interpretation were adopted, it would not be likely for the global model to "undermine". Even in case of overlap, the global

[128]Illustrative of this point, it should be noted that the global model runs the risk of creating the possibility of a conflict between the measures adopted by the global mechanism of the ILBI and those adopted by the RFMOs and other organizations with sectoral mandates in ABNJ. See Tladi (2015), p. 668.

[129]UNGA Res 69/292 (2015), paras. 1,3; UNGA Res 72/249 (2017), para. 7.

[130]Scanlon (2018), pp. 405–416.

[131]Scanlon (2018), pp. 406–407; See also IISD (2016), pp. 19–20.

[132]Scanlon (2018), pp. 406–407.

[133]Ibid.; See also IISD (2016), pp. 19–20.

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model would not reduce the effectiveness of existing regimes or bodies, but would possibly improve or enhance their effectiveness. Thus, the global model does not necessarily "undermine" existing regimes, and this depends on how to interpret the term "not undermine". This section does not provide a definitive answer on how to interpret the term "not undermine", but it should be noted that such interpretation would inevitably affect the choice of legal options for the institutional arrangements of the ILBI.

Although the global model does not necessarily "undermine", the hybrid model, in a general sense, would be less likely to "undermine" than the global model. This is because, under the hybrid model, the existing regional or sectoral regimes would still be relied upon, and the global institution would only play a complementary role and not have full competence. In this case, the hybrid model is less likely than the global model to cause conflict between the management measures adopted by the global institution and those adopted by existing regional or sectoral regimes. Therefore, it can be argued that the hybrid model is a better option than the global model in terms of meeting the requirement of "not undermine".

In conclusion, as noted by Millicay, it is not feasible to allocate all functions either to a global body under the ILBI or to existing regional/sectoral bodies.[134] In terms of the establishment of MPAs in ABNJ, a hybrid model is an appropriate choice for the institutional arrangements of the ILBI. For one thing, both the hybrid model and global model are more capable of solving the shortcomings of existing regimes than the regional/sectoral model. For another, the hybrid model envisages less political objections and is less likely to undermine existing regimes than the global model. Thus, the hybrid model might be a better choice than the other two options. In this respect, a further question is, under the hybrid approach, to what extent global body under the ILBI might have the mandate in respect of the establishment of MPAs in ABNJ and to what degree the existing regional/sectoral body might have the mandate. At this point, the answer to this question is not yet clear and depends on further outcomes of the BBNJ negotiations.

5 Conclusion

The three issues discussed above constitute central structural elements for the development of the ILBI and will shape its practical significance. While the relationship between the UNCLOS, the CBD and the ILBI raises questions of instrument interaction, it also raises questions of regime interaction. Indeed, the ILBI is expected to act as the bridging element between the law of the sea and biodiversity law in ABNJ. The way the instruments impact and complement one another will therefore be of major significance for understanding the role that the ILBI can play in solidifying the regime in ABNJ. For their part, the options for the institutional

[134] See Millicay (2018), p. 175.

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arrangements guide us in analysing the different ways in which the institutional design of the ILBI could take shape, and how the ILBI could influence State and non-State actors' practice on how to conserve and sustainably use BBNJ.

The three structural elements analysed in this chapter cannot, however, be looked at without taking into consideration the necessity not to undermine existing frameworks, structures, instruments and bodies. Indeed, such necessity has been at the heart of the discussions of the PrepCom, has found its way to the Report of the Committee, and remains a central concern for the delegations taking part in the IGC. Although the impact of the terms remains uncertain, they will shape the way the ILBI is constructed and, within its framework, how mechanisms are developed, and existing bodies interact.

The protection and conservation of ABNJ is at a critical juncture, where we must take advantage of the momentum that the BBNJ process enjoys and of the enthusiasm of State and non-State actors towards the next stages of the process. Yet we should remain prudent in anticipating the real impact that the ILBI will have. Positions vary, so do interests, and many crucial elements remain far from triggering consensus. Finding ways to rally certain dissident actors on critical issues will also require diplomatic perseverance. The progress achieved through almost 15 years of discussions on the topic must be acknowledged, but the work that still needs to be done should not be underestimated.

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