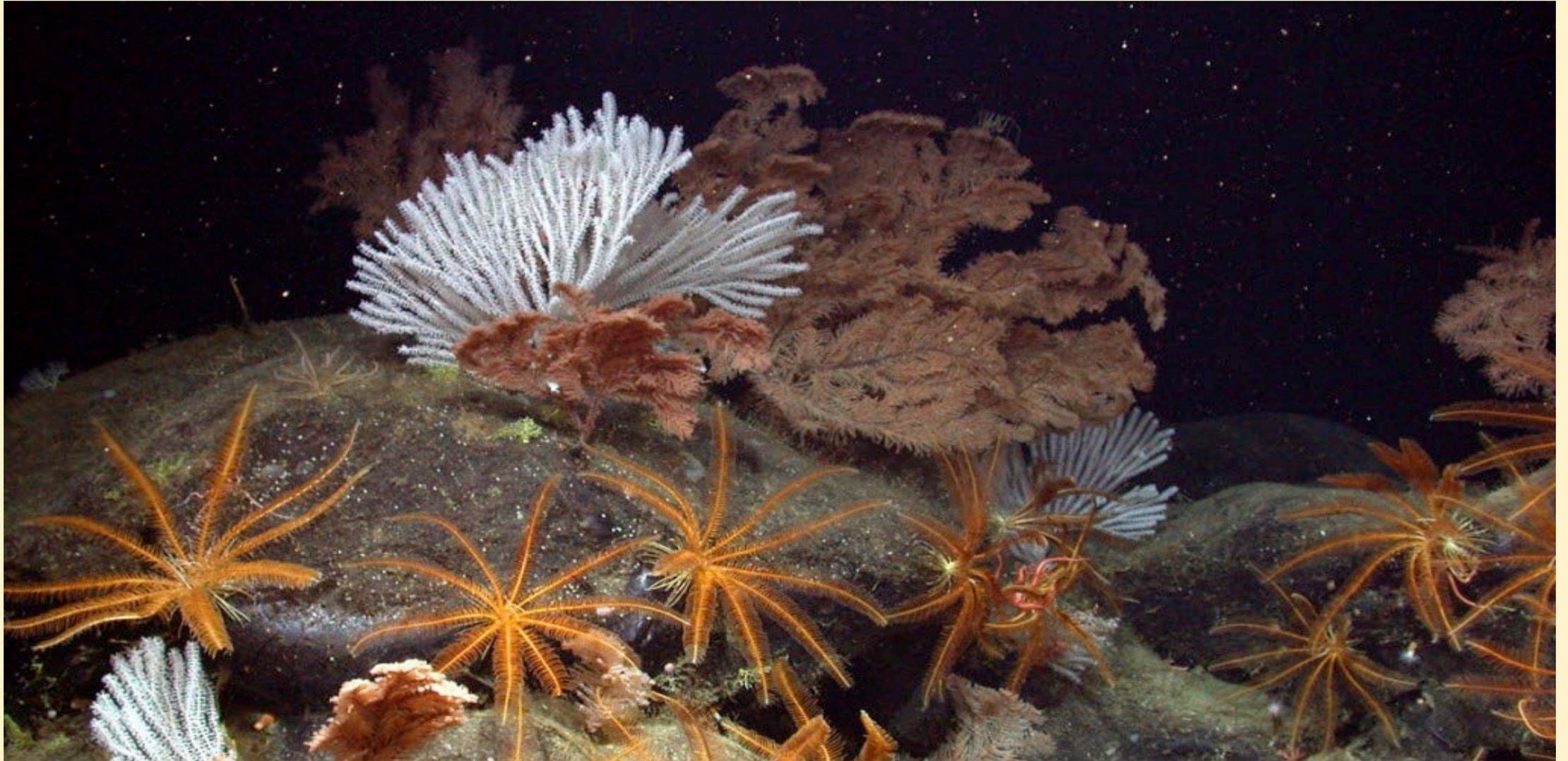


Marine biodiversity in areas
beyond national jurisdiction
some complexities

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The ambition

Conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction

Beyond national jurisdiction

- High Seas
- The Area?

Marine biodiversity

- Richness and vulnerability of unknown ecosystems
- Lack of knowledge about “new” ecosystems at great depth
- Seamounts, hydrothermal vents, coral reefs etc. > role of ISA?

Conservation and sustainable use

- Impact of human activities on marine biodiversity
- Precautionary approach (but how to operate with limited knowledge)
- Conservation *and* sustainable use > do they go together?

Beyond national jurisdiction: in-between 2 systems

UNCLOS (1982)

Areas beyond national jurisdiction

- High Seas regime: no specific biodiversity rules
- Area: seabed, ocean floor and subsoil (artt.133, 136)
 - resources – solid, liquid or gaseous mineral resources in situ in the Area (> non-living)
 - minerals (= recovered resources) – common heritage of mankind
- ISA not competent because living resources (art.153)
 - but deep seabed mining may impact on biodiversity

Beyond national jurisdiction: in-between 2 systems

Convention on Biological Diversity (1992)

Article 4 - Jurisdictional Scope

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, **the provisions of this Convention apply**, in relation to each Contracting Party:

- (a) In the case of components of biological diversity, in areas **within the limits of its national jurisdiction**; and
- (b) In the case of processes and activities, regardless of where their effects occur, **carried out under its jurisdiction or control**, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

Beyond national jurisdiction: in-between 2 systems

CBD Nagoya Protocol to CBD (2010)

on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization

→ art.1 NP – objective

- Fair and equitable sharing of benefits from utilization of genetic resources
- Appropriate access to genetic resources
- Appropriate transfer of relevant technologies
- Appropriate funding, contributing to conservation of biological diversity and sustainable use

→ art.15 CDB – access to genetic resources

- Role national governments
- National legislation is applicable

→ Access and benefit-sharing: ABS

'Drivers and difficulties' in BBNJ negotiations

Drivers

- Motives and roles of States (role of diplomats)
- Role of science and scientists
- Role of civil society & NGOs
- UN work on SDGs (SDG 14 = Oceans)
- Economic and technological possibilities *re* genetic resources: IP debate, *are we all going to get rich?*

Difficulties

- 'BBNJ' very technical subject matter (*nobody has been to these parts of the Ocean*)
 - NGOs often more knowledgeable than diplomats
 - Rotation of diplomats in New York
- Very entrenched discussions at times: back to the original UNCLOS? Political issues such as technology transfer
- BBNJ = common heritage of mankind?

ThisWay2Treaty

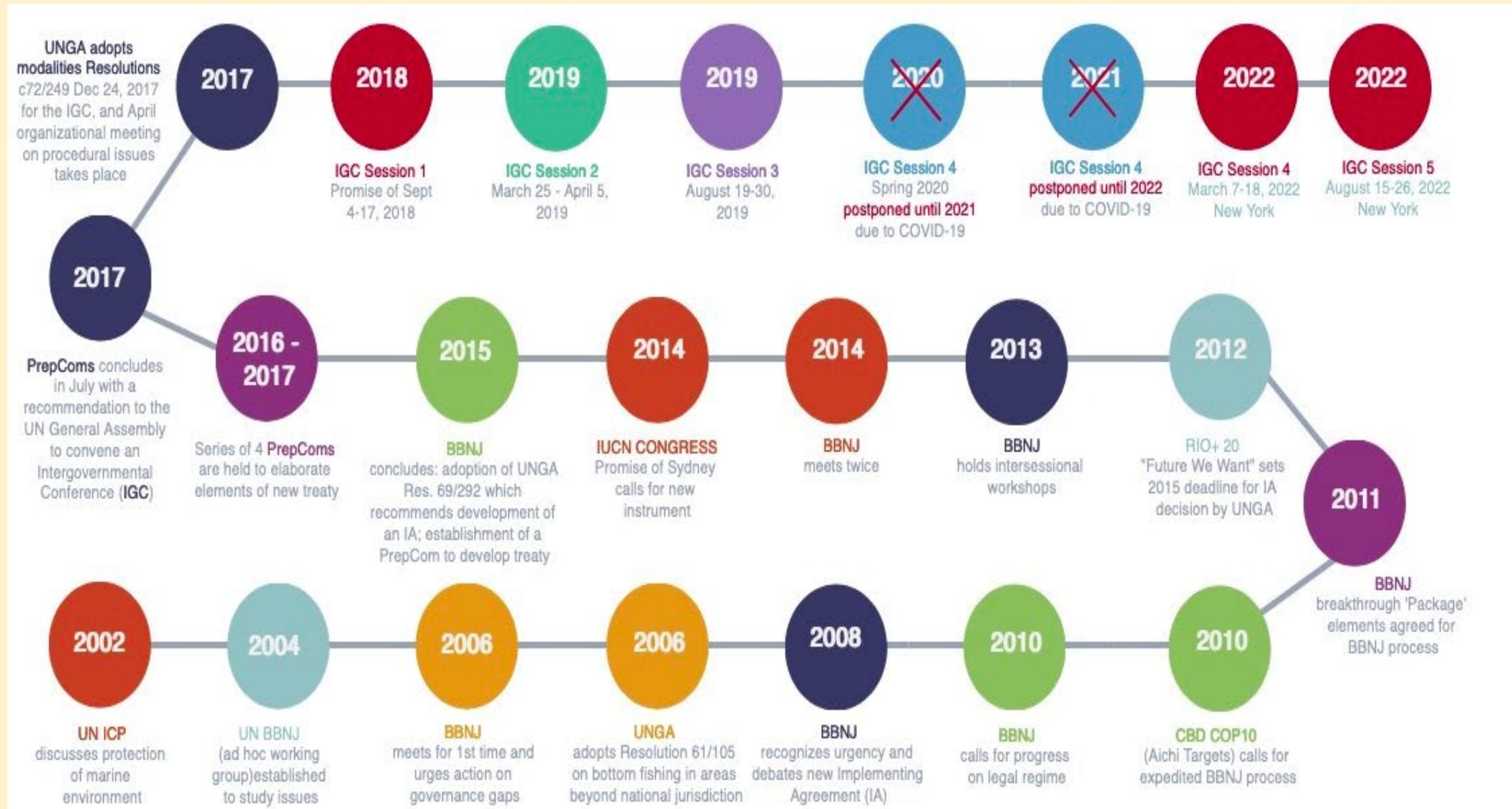
- Important role of NGOs
- Specific expertise on BBNJ, on Oceans and on CBD
- More knowledgeable than many diplomats
- Only pro-BBNJ NGOs, no negative NGOs (industry?)
- Commercial companies not represented (but by ‘implementation gap’ States) → not influencing the debate
- *High Seas Treaty (bbbrrrhhh!!)*

BBNJ discussion in UN since 2004

Timeline for an urgent project

- Annual omnibus resolution on oceans and law of the sea defines BBNJ process in UNGA
- ICP (UNICPOLOS) 2004
- AHOEIWG BBNJ (2006 – 2015) (A/RES/59/24)
 - Bi-annually – 2006 - 2008, 2010
 - Annually since 2011, incl. expert workshops
 - ***The Package*** (A/RES 66/213) shapes the work
- PREPARATORY COMMITTEE (2016 – 2017)
(A/RES/69/292)
- Intergovernmental Conference on Marine Biodiversity in Areas Beyond National Jurisdiction (since 2017) (A/RES.72/249) (since 2018, now 5th session) = **20 years!**

BBNJ – Negotiations' timeline



Regulatory gap vs Implementation gap

Different perspectives on the problem with BBNJ:

- There is *lack in rules* for marine biodiversity beyond national jurisdiction (majority)
- Not a lack of rules, but a *lack of implementation* of existing rules (mostly fisheries rules from RFMOs) (important minority)

'Regulatory gap' not a unified view

G77 + China – **sustainable use** of marine biological diversity;

- Importance of technology transfer
- Importance of MGR and ABS
- BBNJ is common heritage (*cf. the Area*)

EU (28/27 +1) – **conservation** of marine biological biodiversity

- Importance of environmental impact assessment and marine protected areas
- No regulation of MGR
- No new institutions, no role for ISA
- Within UNCLOS structure → Implementing Agreement

Implementation gap (significant minority)

- Role of regional and sectoral organisations: improve coordination to improve conservation
- MPAs beyond national jurisdiction already exist under regional instruments
- Access to genetic resources under UNCLOS already regulated: marine scientific research

→ *Everything is already available*

Key concern

Not undermine UNCLOS or other existing relevant legal instruments, or work of regional and specialized international organisations.

- Implementing Agreement of UNCLOS, similar to 1994 Agreement (deep seabed mining) or 1995 UN Fish Stocks
- *'An ILBI under UNCLOS'*

Not all participants are Party to UNCLOS (US, TU, VEN etc.)

- difficulty of amending UNCLOS, see art.312- 314



Current BBNJ negotiations

5th round of negotiations now taking place, under presidency of ambassador Rena Lee (Singapore)

1st round – President’s aid to discussions (15 p., September 2018)

2nd round – President’s aid to negotiations (64 p., December 2018)

3rd round – (Zero) Draft text (46p., May 2019)

4th round – postponed because covid-19

Revised draft text. (45 p., November 2019)

intersessional work via Teams

Compilation of textual proposals (404 p., February 2020)

5th round - Further revised draft text (56 p., July 2022)

Textual proposals (243 p., August 2022)

Substantive issues

CONTENT OF FUTURE TREATY

- [Preamble, definitions, general principles]
- Marine Genetic Resource (MGR) & Access and benefit sharing (ABS)
- Area-based Management Tools (ABMTs) incl. Marine Protected Areas (MPAs)
- Environmental Impact Assessment (EIA)
- Capacity-building and transfer of technology
- Institutional arrangements
 - Conference of the Parties
 - Scientific/ technical body
 - Secretariat
 - Clearing-house mechanism
- Review
- [Financial resources]
- Implementation & compliance
- Dispute settlement
- [Final clauses]

Marine generic resources

We are going to get rich (remember the manganese nodules?)

Conservation and sustainable use of marine biodiversity

- To own a fish (for consumption) is not the same as to own a fish for (the value of) its DNA
- Fish (aka marine life) may be in/ out of area beyond national jurisdiction
- Questions about intellectual property rights: whose property, whose income?
 - How to organize transfer of technology > role for the clearing house mechanism
 - Obligation to declare collection *in situ* to clearing-house
 - How to dispense income from the collection in situ in a fair manner?

Area-based management tools

MPA's already exist, differ in content and legal basis

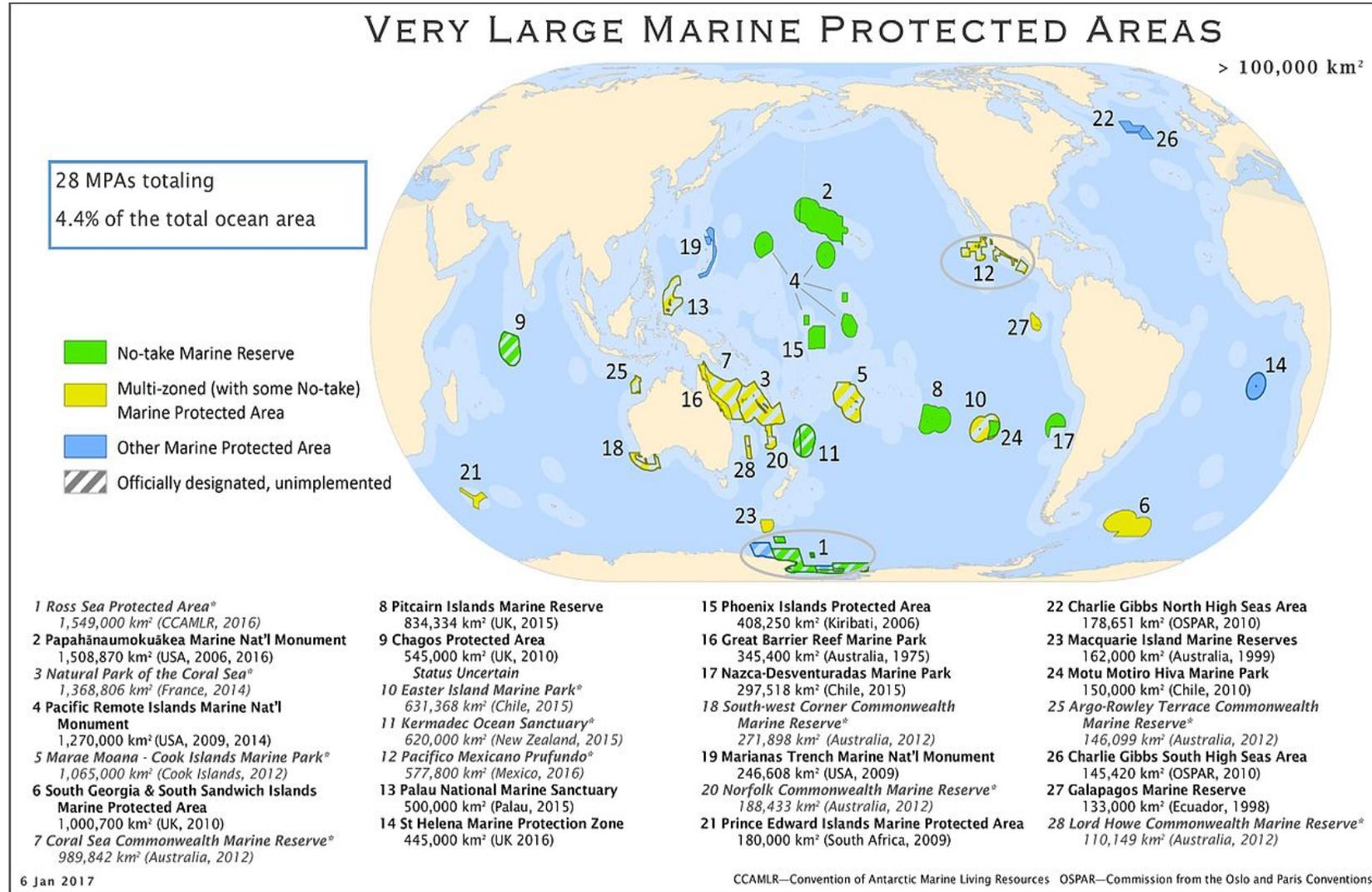
- Fisheries management tool, incl. from RFMOs
- Examples of ABMTs:
 - UNCLOS: 211(6), 234
 - MARPOL
 - IMO: PSSA (IMO Guidelines)
 - Other regional seas: CCAMLR, OSPAR, Baltic, Mediterranean, South-East Pacific etc.

Fisheries management organisations



- Differences in management, in species, in authority

MPA's



Environmental impact assessment

- EIA's already covered in art.204 – 206 UNCLOS
- EIA's also in other (regional, sectoral) instruments
- Importance of cumulative and transboundary impacts
- Importance of strategic EIAs
- Role of scientific and technical body

Capacity-building and transfer of marine technology

Goals:

- Assist developing States in implementing this (BBNJ) Agreement
- Enable participation in activities under the Agreement
- Develop the marine scientific and technological capacity of developing States Parties

- However: *transfer of technology* (in deep seabed mining, Part XI) was one of the problems with UNCLOS!



Dispute settlement for BBNJ

BBNJ dispute settlement

Starting point: a good treaty needs good dispute settlement rules

> protection of content, stability and credibility

- Need to establish mechanisms *before* trouble arises
(otherwise: too late & too difficult)
- Not an *afterthought*: choices to be made for effective system at the start

Imagine the types of conflicts that may arise under the future treaty:

> what kind of dispute settlement mechanisms would be necessary?

Existing dispute settlement rules

1. UNCLOS Part XV

- Compulsory system (section 2)
- Choice of procedure: art.287
 - ITLOS
 - ICJ
 - Arbitration incl. when no choice (art.287(3)) or different choice (art.287(5))
 - Special arbitration
- Advisory Opinions: SDC (art.191) and full Tribunal (Case 21, SRFC)

2. UNFSA Part VIII

- *Mutatis mutandis* application of UNCLOS (art.30), also for non-Parties to UNCLOS
- Applicable law: UNCLOS, UNFSA, fisheries agreements, generally accepted standards for conservation and management and *rules not incompatible with UNCLOS*

BBNJ dispute settlement

Dispute settlement mechanism needs to fit in with the structure/ architecture of the ILBI

- Not starting from scratch: UNCLOS Part XV already exists, UNFSA Part XI already exist
 - but are the activities covered really similar?
- Relationship between compliance and dispute settlement?
- Role for the Conference of the Parties?
 - Advisory Opinions

BBNJ dispute settlement

What (contentious) cases to expect?

- What cases to expect > jurisdiction for the dispute settlement mechanism (cf. art.187, 188 UNCLOS for SDC jurisdiction)
 - Consider *both* the preservation and the sustainable use
 - Could there be commercial disputes (> sustainable use of BBNJ), cf. role of SDC
 - Litigation related to MGR, to authority about/in ABMT
 - Who would be parties in such cases, and why? What kind of rights or entitlements would lead States to bring a case?
- Contentious cases presume the presence of two parties: States Parties (or an IO such as EU acting as a Party)
 - Including non-SP to UNCLOS
- Who could act on behalf of ‘marine biodiversity’ > beyond national jurisdiction?
 - Cf. ISA acting on behalf of the Common Heritage of Mankind

BBNJ dispute settlement

What is the problem with *mutatis mutandis*?

Mutatis mutandis: existing rules (which rules?) are applied after that what needs to be changed, has been changed

- Rule of reference, not a substantive rule on dispute settlement itself > how predictable will the system be?
- Rule of reference, but reference to what? > do these rules fit with the substantive content of ILBI?
 - Part XV UNCLOS
 - Part VIII UNFSA
- *Mutatis mutandis* may strengthen systemic coherence between ILBI and UNCLOS

BBNJ dispute settlement

Advisory Opinions

Why advisory opinion?

- General legal questions (not contentious issues) when:
 - Legal questions not addressed in the text, or not addressed in detail > fills gaps, solves unclarity
 - Useful tool as new issues arise not specifically covered in the text > new technology, new scientific insights (“open door”)

Whose advisory opinion?

- ITLOS? Full tribunal [ICJ?] – cf. art. 159(10) and 191 for SDC
- Who requests the Advisory Opinion > ITLOS Case 21 contains requirements related to mandate
- Threshold for adoption of request for Advisory Opinion? (= access to procedure)

BBNJ dispute settlement

BBNJ as a specialist issue

BBNJ is a specialist issue > how to include experts/ specialist(s) and expert knowledge into dispute settlement?

- Role of experts in dispute settlement? (cf. art.289 UNCLOS)
- Need for a specialist BBNJ dispute settlement body (cf. Seabed Disputes Chamber/ITLOS)?
 - Permanent ITLOS Chamber?

BBNJ Dispute settlement

Current state of play

(A/Conf.232/2022/5, Part IX)

- 6 articles, incl. 2 options for the central provision article 55
 - Option 1 – looks somewhat like art.30 UNFSA (but not great)
 - Option 2 – far away from compulsory system in UNCLOS Part XV and UNFSA Part VIII
- Articles on dispute-settlement have only appeared now in the further revised draft
- Comments in doc. A/Conf.232/2022/INF.5 (dd. 1/8/2022)
 - TU: position of non-parties to UNCLOS (incl. deletion of Advisory Opinions)
 - US: technical editing issues + position of non-parties to UNCLOS
 - *Non-parties to UNCLOS have been dealt with before in UNFSA: art.4, 30(1), 30(2)*

