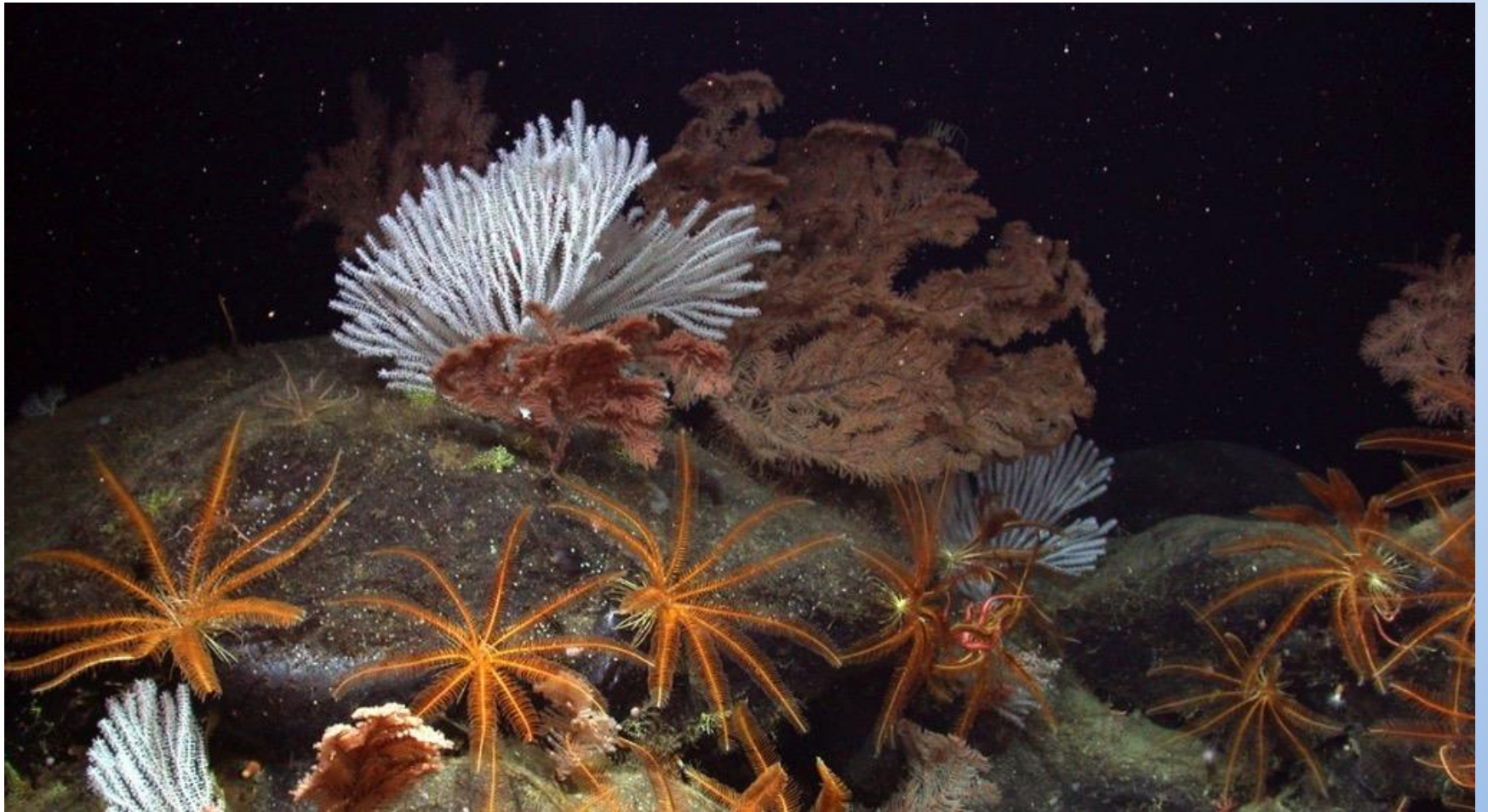


Marine biodiversity in areas beyond
national jurisdiction,
work so far...

Liesbeth Lijnzaad



What is the ambition?

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

- Beyond national jurisdiction?
- What is marine biodiversity?
- Conservation *and* sustainable use?

Cf. definitions in art.2 CBD

What is the ambition?

Conservation and sustainable use

- Impact of human activities on marine biodiversity
 - Fishing (on seamounts)
 - Deep seabed mining (-> ISA)
 - Bio-prospecting
 - Etc. etc.
- Precautionary approach (but: limited knowledge of deepsea marine ecosystems)
- Conservation *and* sustainable use?

Polymetallic sulphides



1992 Convention on Biological Diversity

Article 2 (definitions)

Biodiversity

means the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

What is the ambition?

Marine biodiversity

- Richness and vulnerability of unknown ecosystems
 - From photosynthesis to chemosynthesis
 - Extremophiles
- Lack of knowledge about “new” ecosystems at great depth
- Seamounts, hydrothermal vents, coral reefs etc.
- (Not the deepsea bed??)

What is the ambition?

Beyond national jurisdiction

High Seas

- Tragedy of the commons

The Area?

- Common Heritage of Mankind (art.1, 136)

Beyond national jurisdiction: in-between 2 systems

- CBD: not in areas beyond national jurisdiction
- High Seas regime: no biodiversity rules
 - Area: seabed, ocean floor and subsoil, “resources”, “minerals” (artt.133, 136, and 311(6))
 - ISA not competent (?)
 - Dispute settlement: specific role for Seabed Disputes Chamber (art.186-191 for SDC)
 - SDC not competent (?)

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

1992 Nagoya Protocol (to CBD) on access and benefit-sharing

- access to genetic resources and the fair and equitable sharing of benefits arising from their utilization
- art.15 CDB compliance with domestic legislation
- 1) ... genetic resources utilized *within its jurisdiction*... accessed with prior informed consent, ... mutually agreed terms established ... as required by the *domestic access and benefit-sharing legislation*...
 - 2) address situations of non-compliance
 - 3) interstate cooperation

Regulatory gap vs Implementation gap

What is the problem? (views differ)

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

‘Regulatory gap’ not a unified view

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

- Importance of MGR and ABS
- BBNJ is common heritage (*cf. the Area*)
- Potential for commercial developments, biotechnology: value of genetic resources
- Importance of technology transfer

EU (28 +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 (similar to UNFSA)

Implementation gap

- Role of regional and sectoral organisations: improve coordination to improve conservation
 - MPAs beyond national jurisdiction already exist (in fisheries, RFMOs or regional organisations)
 - Access to genetic resources under UNCLOS already regulated: marine scientific research
- *Everything is already available*

BBNJ discussion in UN since 2004

Work in the UN, so far.....

- Discussion at ICP (UNICPOLOS) in 2004
- AHOEIWG BBNJ: 2006 – 2015 (meets 9 times) (RES/59/24 -> A/69/780)
 - Bi-annually – 2006, 2008, 2010
 - Annually (twice) since 2011, incl. expert workshops
 - ***The package*** (RES/66/213, Annex) shapes work after 2011
- Preparatory Committee 2016 – 2017 (RES/69/292)
- Intergovernmental Conference 2018 - 2020, 4 +1 sessions, RES/72/249 (24 December 2017)

Early discussions

- ‘BBNJ’ very technical subject matter (*nobody has been to these parts of the Oceans*)
 - Rotation of diplomats in New York
 - Biodiversity or environmental background not the same as LoS background
 - NGOs often more knowledgeable than diplomats
- Very entrenched discussions at times: back to the original UNCLOS debate? Political issues such as technology transfer
- BBNJ = common heritage of mankind?

The package (Annex to Res.66/231) 2011

a) A process be initiated...the legal framework for the conservation and sustainable use of MBBNJ...identifying gaps....implementation of *existing instruments* and ... the *possible development of a multilateral agreement* under UNCLOS

The package (2)

b) ...address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction ... *in particular, and as a whole*, marine genetic resources, .. sharing of benefits, area-based management tools (MPAs, EIAs), capacity-building, transfer of marine technology;

Package has shaped the debate on BBNJ:

- > existing instruments + ILBI (a)
- > direction on content (b)
- > five key component to address (b)

“The future we want” (Rio +20, July 2012)

At the same time: A/RES/66/288, par.162

- Before the end of the 69th session
- Taking a decision on the development of an instrument under UNCLOS

-> direction on form and timing

- The first fifteen years -

... it is urgent ...

- ICP (UNICPOLOS) (2004) – first discussion in UN
- AHOEIWG (1st phase) – (2006 – 2010) ‘exchange of views’
- AHOEIWG (2nd phase) – (2011 – 2015) development of (general) recommendations
-> report in 2015 - A/69/780
- Preparatory committee (2016 -2017) – development of specific recommendations, framework for a treaty structure
no consensus on many issues!
-> report in 2017 - A/AC.287/2017/C.4/2
- IGC (2018 - 2020) – work on drafting an Implementing Agreement
-> starts with ‘zero draft’, (now: 3rd session), first draft text: A/Conf.232/2019/6



Complexities

Not undermine

- UNCLOS, or
- other existing relevant legal instruments,
- work of regional and specialized international organisations

Not all participants are SP to UNCLOS (US, TU, VEN)

Taking into account everything (incl. treaties, work of international and regional organisations) that exists is difficult (three dimensional!)

→ Implementing Agreement of UNCLOS, similar to 1994 Agreement (deep seabed mining) or UN Fish Stocks (1995): *an ILBI under UNCLOS*

Towards a diplomatic conference: end of working group
(January 2015)

A/RES/69/292 (19 June 2015)

-> Preparatory Committee ('Prepcom') on the elements and to elaborate a text of an international legally binding instrument under UNCLOS on..... with a view to developing instrument as soon as possible

- 4 Sessions
- **Ends work in July 2017**

Report: A/AC.287/2017/PC.4/2

Towards a diplomatic conference: end of preparatory committee
(*summer 2017*)

- > Consensus decision that no consensus exists
- Substance and structure of an IA identified, but not determined - *a shopping list of issues to be discussed for inclusion*
- Issues on which no consensus exists have not really changed since the Working group - but much more detail
- Not be a High Seas treaty but an Implementing Agreement with a more limited (and complicated scope) - *NGOs say otherwise*

Section B highlights divergence of views (1)

- Marine genetic resources: regulation of access; nature of the resources; what kind of benefits; intellectual property rights; monitoring of utilization of MGR
 - Within and beyond national jurisdiction same ecosystems??
- Area-based management: decision-making and institutional set up
 - Huge regional differences.

Section B highlights divergence of views (2)

- Environmental impact assessment: conducted by States or internationalized, strategic EIAs.
- Conditions for transfer of technology
- Institutional arrangements, monitoring, review and compliance
- Funding, and possible financial mechanism
- Dispute-settlement
- Liability

(2017) The Preparatory Committee,..., recommends to the General Assembly:

(b) .. to take a decision, as soon as possible, on **the convening of an intergovernmental conference**, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and **to elaborate the text of an international legally binding instrument under the Convention.**

-> decision on Intergovernmental Conference in autumn 2017: A/RES/72/249; A/Conf.232/2018/1

Towards a diplomatic conference

A/RES/72/249 (24 December 2017): convening of Intergovernmental Conference ('diplo conference') to

- Consider recommendations of prepcom on the elements, and
- To elaborate a text of an ILBI

with a view to developing the instrument as soon as possible

- *4 meetings in 2018-2020 + organizational meeting -> 3rd meeting 19-30 August 2019 (!)*
- *(more meetings require new UNGA decision)*
- *Summer 2019 initial text ('zero draft')*



Now let's make a splash for the
high seas at **Prep Com 4**

'Drivers' in BBNJ negotiations

- Motives and roles of States (role of diplomats)
- Role of science and scientists (BBNJ workshops during AHOEIWG)
- Role of civil society & NGOs
- UN work on SDGs (SDG 14 = Oceans)
- Economic and technological possibilities *re* genetic resources: IP debate, *we are all going to get rich*
 - *Q - is this similar to enthusiasm about manganese nodules in the 1970ies?*

A new High Seas treaty?



ThisWay2Treaty

- Important role of NGOs
- Specific expertise on BBNJ, on oceans, on CBD, on environmental law
- More knowledgeable than many diplomats
- Only pro-BBNJ NGOs: voice of *conservation*
- Commercial companies (bioengineering, biotechnology) not represented, but ‘implementation gap’ States: voice of *(sustainable?) use*

