



The European Union and the future international legally binding instrument on marine biodiversity beyond national jurisdiction

Pascale Ricard

► To cite this version:

Pascale Ricard. The European Union and the future international legally binding instrument on marine biodiversity beyond national jurisdiction. Marta Chantal Ribeiro. The Global Challenges and the Law of the Sea, Springer, pp.379-399, 2020. hal-02514661

HAL Id: hal-02514661

<https://hal.science/hal-02514661>

Submitted on 9 Feb 2022

HAL is a multi-disciplinary open access archive for the deposit and dissemination of scientific research documents, whether they are published or not. The documents may come from teaching and research institutions in France or abroad, or from public or private research centers.

L'archive ouverte pluridisciplinaire **HAL**, est destinée au dépôt et à la diffusion de documents scientifiques de niveau recherche, publiés ou non, émanant des établissements d'enseignement et de recherche français ou étrangers, des laboratoires publics ou privés.

Chapter 20

The European Union and the Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction



Pascale Ricard

Abstract The present chapter aims at analysing the relationship between the European Union and the future International legally binding instrument (ILBI) related to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction—the high seas and the Area (deep seabed). The chapter will begin with a brief introduction detailing the manner in which the European Union has interacted with the international law of the sea. A particular focus will be placed on the difficulty that has arisen in distinguishing between the exclusive and shared competences of the EU in regard to the conservation of biological resources and the protection of the environment, at both a substantial and institutional level. Thereafter, the chapter will be two-pronged, elaborating upon the formal participation of the EU as regards the future instrument and the specificities of its substantive participation. It also addresses the potential consequences for the Union of the adoption of such an agreement, in terms of its impact on EU maritime policy, on the exercise of its competences and on its participation in international institutions.

1 Introduction: The European Union and the Law of the Sea

The European Union (EU) occupies a unique position in international law of the sea, as it is the only organization that is a party to the United Nations Convention on the Law of the sea (UNCLOS), otherwise constituted by States.¹ This situation was

¹Herein after ‘UNCLOS’ (10 December 1982, entered into force 16 November 1994) *UNTS* 1833 3. The EU signed the UNCLOS on December 7th 1984, and deposited its instrument of formal confirmation on April 1st 1998, in conformity with Art. 216 of the TFEU (Council Decision 98/392/

P. Ricard (✉)

Aix-Marseille University, Research Center in International and European Law,
Aix-en-Provence, France

e-mail: pascale.ricard@univ-amu.fr

enabled by Article 305(1) of the Convention, which provides that “This Convention shall be open for signature by: [...] international organizations, in accordance with Annex IX.”

Annex IX of the UNCLOS deals, indeed, with the concrete modalities of the participation of “international organizations” in the Convention. It specifies in Article 4(3), which mirrors the specific nature of the European Union, that “[s]uch an international organization shall exercise the rights and perform the obligations which its member States which are Parties would otherwise have under this Convention, on matters relating to which competence has been transferred to it by those member States. The member States of that international organization shall not exercise competence which they have transferred to it”. Those elements are aimed at clarifying the repartition of competences between the EU and member States toward third States Parties of the UNCLOS.

The EU has mixed competence for the conservation and sustainable use of marine biodiversity² beyond national jurisdiction. There is, first, a sharing of competences between member States and the Union in the fields of scientific research, protection of the environment and fisheries. Second, the EU has an exclusive competence for the conservation of marine biological resources, in the context of the common fisheries policy. Article 4(2) of the Treaty on the functioning of the European Union (TFEU) states indeed: “[s]hared competence between the Union and the Member States applies in the following principal areas: (a) internal market; [...] (d) agriculture and fisheries, excluding the conservation of marine biological resources; (e) environment; (g) transport; (i) energy; [...]”. In the exercise of shared competences, States can adopt protective and reinforced measures where the European Union did not take any.³

Annex IX of the UNCLOS provides, moreover, that the international organization shall, at the time of the signature of the Convention, “make a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to that organization by its member States which are signatories, and the nature and extent of that competence”.⁴ The Declaration of competence sets

EC). See for instance Churchill (2017), p. 32. About the role of the EU in the law of the sea, see notably Churchill (2018), pp. 290–323.

²The term ‘biodiversity’ can be defined according to Art. 2 of the Convention on biological diversity as “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.”

³Thanks to its exclusive competence regarding the conservation of marine biological resources, the EU is part of several regional fisheries organizations, as the North-East Fisheries Commission, or the International Commission for the Conservation of Atlantic Tuna. See Dross (2014).

⁴See Art. 2 of Annex IX to the UNCLOS.

the scope and extent of the participation of the organization.⁵ Moreover, it is also deemed “to address the question of the international responsibility of the Union and its Member State under such ‘mixed agreements’.”⁶ The European Community submitted its Declaration of competence upon the signature of the UNCLOS on 7 December 1984, and made a Declaration upon formal confirmation on 1 April 1998,⁷ identifying the “[m]atters for which the Community has exclusive competence”, which are notably “the conservation and management of sea fishing resources [...]. This competence applies to waters under national fisheries jurisdiction and to the high seas”. It is noteworthy that this Declaration has not been updated, and today the formulation does not entirely correspond to the formulation of the TFEU, as those competences have an “*evolving nature*”,⁸ Although “in practice, the declarations of competences are only very rarely completed or amended”,⁹ the evolution can be indirect or result from the implementation of the treaty, as the repartition of competences is often voluntary left partly blurred.¹⁰ Where the repartition of competences is not clear, Annex IX Article 6 states that the organization and the member States concerned shall “*provide this information*” to any State party which so request and, if they do not provide the relevant information within a “*reasonable time*”, or if they provide contradictory information, this may lead to “*joint and several liability*”.¹¹

However, it is sometimes difficult to distinguish between the shared competences of the EU for fisheries or environment, and its exclusive competence for the conservation of marine biological resources, as the two fields are closely linked (see *infra* Sect. 2.2). This ambiguous repartition of competences, then, creates not only a tension between the Organization and its member States, but also adds level of

⁵Art. 4(2) of the UNCLOS states that “[a]n international organization shall be a Party to this Convention to the extent that it has competence in accordance with the declarations, communications of information or notifications referred to in Art. 5 of this Annex.”

⁶Heliskoski (2013), p. 190. See the ITLOS advisory opinion of 2 April 2015, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, case n° 21, §164.

⁷*Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention on the Law of the Sea of 10 December 1982 and the Agreement of 28 July 1994 relating to the implementation of Part XI of the Convention* (7 December 1984), available on the website of the Division of the United Nations for Oceans Affairs and the Law of the Sea (DOALOS), available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

⁸Heliskoski (2013), pp. 205–207.

⁹Id. at p. 207.

¹⁰Id. at p. 209. For the author, “the reasons beyond the Union’s reluctance to provide specific declarations with updates relate to the fact that the defining of the scope and nature of the Union’s competence runs counter to one of the fundamental characteristics (some would argue, virtues) of mixed agreements; the technique enables questions of the scope and nature of Union’s competence to be postponed and to be decided on a case by case basis in a contextual fashion.”

¹¹For the interpretation of the liability regime settled by Annex IX, see ITLOS advisory opinion of 2 April 2015, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, case n° 21, §§168 and followings.

complexity and legal uncertainty, which could ultimately be detrimental for the effective protection of marine environment and biodiversity.

All these competences and fields are of interest in the context of the International legally binding instrument (ILBI) currently being negotiated within the United Nations and dealing with the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction.¹² The following chapters propose to examine the formal and substantive modalities and implications of the EU's participation in the future ILBI, while presenting the challenges and opportunities of such participation.

2 European Union's Formal Participation in the Future International Legally Binding Instrument on Marine Biodiversity

2.1 The Tension Between Shared and Exclusive Competences of the European Union and Its Consequences in the Context of the Negotiation of a Mixed Treaty

In 2011, the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction¹³ agreed on the structure and content of a “*package deal*”, which is a series of elements gathering, “*together and as a whole*”, marine genetic resources, area-based management tools including marine protected areas, environmental impact assessment, capacity building and transfer of marine technology.¹⁴ Those elements are the constitutive elements of the future ILBI on the conservation

¹²The commercial policy, which could be of interest as regards the future ILBI, is also an exclusive competence of the European Union and the research and development policy has a particular status. Art. 3(1)(e) TFEU and 4(3): “*In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.*”

¹³The ‘Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction’ (here after the ‘BBNJ Working Group’) was introduced by Resolution 59/24 of the UNGA, adopted on 17 November 2004, indicating in its paragraph 73 that the BBNJ Working Group’s mandate was “to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond national jurisdiction”. Indeed, according to Art. 22 of the UN Charter, the UNGA can create subsidiary bodies necessary to the accomplishment of its functions.

¹⁴UNGA Resolution 66/231 (2011), *Oceans and the Law of the Sea*, Annex – *Recommendations of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction*, §(a). (see *infra* Sect. 3.1 for a detailed explanation).

and sustainable use of marine biodiversity beyond national jurisdiction, which negotiation started in September 2018.¹⁵

The legal basis for the EU to participate in the discussions related to the conservation of marine biodiversity beyond national jurisdiction is exactly the same as the terms for the Preparatory Committee for the development of a legally binding instrument,¹⁶ as set out in Resolution 72/249, wherein the UNGA decided that “for the meetings of the conference, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of States Parties to the Convention.”¹⁷ This latter resolution, which is quite recent, is entitled “Participation of the European Union in the work of the United Nations”, and gives the Union only a status of “*observer*”. The EU, then, as a Party to the UNCLOS in addition to its status as observer to the United Nations, can by exception directly participate to the discussions on marine biodiversity beyond national jurisdiction, stressing its very particular and important role as regards the international law of the sea. It should be stressed that this right to directly and fully participate in discussions is a very important development compared to past practice. The EU's full and direct participation right had indeed in the past been denied on several occasions, before being enshrined in resolution 69/292. For example, the EU did not have such status at the time of the negotiations of the 1995 Straddling Fish Stocks Agreement, although the legal configuration was broadly the same. This is probably why resolutions 69/292 and 72/249 add explicitly: “this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable”, this situation remaining an exception.

The ambiguity affecting the substantive repartition of competences (exclusive or shared) within the EU mentioned above might entail other difficulties regarding the institutional repartition of competences between the Council, in the name of the EU *and* its member States and the Commission, representing the EU itself, in the context of the negotiation of the new international instrument. Indeed, although there is *a priori* a clear repartition of the institutional competences between the Council and the Commission, it is not that clear in practice.¹⁸ On the one hand, according to

¹⁵UNGA Resolution 72/249, paragraph 2, adopted on 24th December 2017 which convened, as a result of the processes conducted by the Preparatory Committee, an intergovernmental conference with the mandate of negotiating a future legally binding instrument under the basis of Resolution 69/292 and of the recommendations of the ‘PrepCom’. Payne (2017).

¹⁶Resolution 69/292, according to which the UNGA decided that ‘the rules relating to the procedure and the established practice of the committees of the General Assembly shall apply to the procedure of the preparatory committee, and that, for the meetings of the preparatory committee, the participation rights of the international organization that is a party to the Convention shall be as in the Meeting of States Parties to the Convention’, adding that ‘this provision shall constitute no precedent for all meetings to which Assembly resolution 65/276 of 3 May 2011 is applicable’ (§1(j)).

¹⁷UNGA Resolution 72/249 (2017), §11.

¹⁸As Elie Jarmache notes, “*on aurait pu penser la question des compétences résolue et bien établie dans le système européen de prise de décision, et le rôle respectif des différents acteurs bien connu. Force est de constater qu’il n’en est rien*”. Jarmache (2014), p. 17. The author refers to M Dony:

Article 17(1) of the Treaty on the European Union (TUE), “[w]ith the exception of the common foreign and security policy, and other cases provided for in the Treaties, [the Commission] shall ensure the Union's external representation.”¹⁹ On the other hand, the Council, which represents the gathering of the Union *and* its member States, also plays an important role in the negotiation of international treaties: according to Article 218(2) of the TFEU, “[t]he Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them”, and following Article 192(4) of the TFEU: “[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure [. . .], shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.”²⁰ The combination and articulation of those articles might, then, be complicated, especially in the context of the opening of the negotiation of a mixed treaty. In case of overlap of competences, however, the solution is to be found in cooperation: Article 13(2) of the TUE provides for the principle of “*mutual sincere cooperation*” between European institutions, which remains the cornerstone of inter-institutional relationships.

As the future ILBI will be a mixed treaty, member States must be represented in the negotiations, in order to protect their interests. Indeed, some substantial issues cover shared and exclusive competences at the same time. For instance, marine protected areas are aimed at protecting marine biological resources as well as the marine environment in general, and can also be combined with measures related to fisheries. The participation of member States in the discussions was stated in the *Decision of the Council authorizing the opening of negotiations on behalf of the European Union on the elements of a draft text of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biodiversity of areas beyond national jurisdiction*,²¹ in the context of the creation of the Preparatory Committee. The substance of this Decision was reiterated at the opening of the “official” negotiating process in 2018, although the relevant document is not public.²² After recalling, in the preamble, that “alongside its Member States, the Union should participate in the

“l’attribution des compétences à l’Union s’est faite de façon pragmatique, au fil de la révision des traités, sans vision systématique d’ensemble, ce qui induit un manque flagrant de lisibilité. Ceci a alimenté une crainte diffuse vis-à-vis d’un caractère de plus en plus envahissant de l’action de l’Union.”

¹⁹See, also, Art. 335 of the TFEU: “[i]n each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws [. . .]. To this end, the Union shall be represented by the Commission.”

²⁰Art. 191 deals with the Union policy on the environment.

²¹Council Decision (EU) 2016/455 of 22 March 2016 established by the General Assembly resolution 69/292. See also, more generally, the document of the Council of the EU, *EU Statements in multilateral organizations – General Arrangements*, 2 October 2011, doc. 15901/11, and Flaesch-Mougin (2013), p. 571.

²²See the Proposition of decision from the Council of 4th of January 2018: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A52017PC0812#document2>. See also the document 6841/18 of the Council of the EU, 12 March 2018, §3.

negotiations” and that “[t]he matters covered by the negotiations may fall within the areas of Union competence as well as within the areas of Member States competence”, the Decision of the President of the Council provides in Article 2 that “[t]he Commission shall conduct the negotiations on behalf of the Union, as regards matters falling within the Union's competence and in respect of which the Union has adopted rules.”

Moreover, according to Article 4 of this mandate of negotiation, “to the extent that the subject matter of the negotiations falls within the competences of both the Union and its Member States, the Commission and the Member States should cooperate closely during the negotiating process, with a view to ensuring unity in the international representation of the Union and its Member States.” The Presidency of the Council and the Commission were vested with distinct mandates. The Commission was only granted a mandate of negotiation for issues deriving from treaties (TFEU), or from its external competence.²³ Conversely, the Presidency of the Council retains the mandate to act in all other matters, on behalf of the EU and its member States. The Council, in document 6841/18 of 12 March 2018, stressed “the mixed nature of the negotiations [on BBNJ] and the related duty of loyal cooperation”,²⁴ duty that weight on both the Commission and the Council.

In practice, in order to ensure unity and clarity in the common European position, delegates from the Council and Commission speak with one voice and States can only participate in the negotiation if a common position has been agreed upon. A joint position is usually elaborated before the discussions in New York, within the framework of the Working Party on the Law of the Sea (COMAR), which is the European “special committee in consultation with which the negotiations must be conducted.”²⁵ That process and the need to agree on a uniform position by the EU and its member States result in some difficulties that have significant consequences for the elaboration of the future ILBI instrument. For instance, the compromise that has to be reached before the actual international negotiations likely leads to a “minimum common denominator”, which can undermine the bargaining power of the EU. It indeed appears very difficult to reach a common position for the EU member States, due to the diversity of views expressed among European States.²⁶ The difficulty of reaching a common, coherent and satisfactory position of the EU also entails a slow capacity to react. As a result, the EU position in the negotiation is very often too soft and convoluted, as a result of an internal compromise, while the position of other States, such as Monaco, appears more elaborate and straightforward. According to Geert De Baere, “while the position may in principle be fairly

²³ According to the case ERTA, 22/70, CJEC, 31 March 1971, *Commission v. Council*, Rec 1971 p. 263. For a clarification of the theory of the external implicit competences of the EU, see Michel (2006), pp. 4–8. See also Michel (2003).

²⁴ Document 6841/18 of the Council of the EU, 12 March 2018, §3.

²⁵ Ibid.

²⁶ In the context, for instance, of Brexit: the United Kingdom has quite often the most “extreme” position on certain issues, as the one of genetic resources or the principle of freedom of navigation or access to marine genetic resources.

straightforward, in practice the fact that the European Union's environmental competences are shared is a potential ground for interminable inter-institutional disputes.”²⁷

One can add that France could, in the same way as it does in regional fisheries management organisations, be represented independently of the Union on behalf of its territories not belonging to the European Common Space. However, such a possibility would complicate the discussions, and could be seen as undermining the principle of cooperation in good faith, since the matter at stake is international negotiation, and not competences of representation in international organizations.

2.2 The Tension Between Shared and Exclusive Competences of the EU and Its Member States and Key Issues Regarding the Participation in International Institutions and the Exercise of Mixed Competences

The external representation of the EU raised some questions and inter-institutional conflicts in other institutions, which could be anticipated in order to avoid such tensions and difficulties in the case of the future ILBI. In order to avoid difficulties of coordination, the Council of the EU already elaborated some guidelines, collected in the document *EU Statements in multilateral organizations – General Arrangements* dealing with the elaboration of positions and declarations of the Union.²⁸ It states: “[g]iven the sensitivity of representation and potential expectations of third parties, it is essential that, in conformity with current practice, the preparation of statements relating to the sensitive area of competences of the EU and its Member States should remain internal and consensual.” The decision adds, furthermore, that “[s]tatements will reflect EU positions agreed in conformity with the decision making procedures as foreseen in the Treaties”, and that “[s]hould the statement refer exclusively to actions undertaken by or responsibilities of the EU in the subject matter concerned including in the CFSP, it will be prefaced by ‘on behalf of the European Union’.” These guidelines are extremely useful in the context of mixed agreements and institutions dealing with marine biodiversity conservation and sustainable use.

Nonetheless difficulties may still arise and have been encountered recently in two different instances: first, before the International Tribunal for the Law of the Sea (ITLOS), and second, in the context of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),²⁹ illustrating partly the

²⁷De Baere (2013), p. 642.

²⁸See Council of the EU, *EU Statements in multilateral organizations – General Arrangements*, 2 October 2011, doc. 15901/11. See Flaesch-Mougín (2013), p. 571.

²⁹In another field, such difficulties have also explicitly emerged, as it is the case for the negotiations of the convention on mercury. De Baere (2012), pp. 640–655.

“determination of the Commission to assert its newly accentuated primary role in the international representation of the European Union.”³⁰ It is important to keep those difficulties in mind while studying the relationship between the EU and the future ILBI.

First, in the context of the advisory proceedings before the ITLOS in 2015 in relation to the responsibility of the EU as regards illegal, unreported and unregulated fishing in the EEZ of coastal States with whom it collaborates bilaterally,³¹ members of the EU denied to the Commission the competence to express itself on behalf of the Union. This reflected a very tense situation between the two EU institutions. Indeed, the Council (supported by ten member States) introduced a case before the Court of Justice of the European Union (CJEU) in order to cancel the decision of the Commission to produce a written contribution on behalf of the Union in the ITLOS advisory proceedings.³² The Council’s claim was however rejected in its entirety.³³ The Court considered, indeed, that the questions raised in the submission of the request for consultative opinion dealt with, at least, one area of exclusive competence of the EU, which, as a Party of the UNCLOS, had the right to participate in the ITLOS advisory proceedings.³⁴ Moreover, although Article 335 TFEU only refers to the representative competence of the Commission before internal jurisdictions, the Court recalled that the representative competence of the EU legitimately extended to international jurisdictions, according to the related case law.³⁵ It added that the participation in a case before a jurisdiction did not fall under the definition of a “policy” under Article 16 of the TFEU on the competence of the Council.³⁶ The Commission could then exercise its exclusive competence dealing with the

³⁰De Baere (2013), p. 648.

³¹ITLOS advisory opinion of 2 April 2015, *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, case no. 21.

³²See on this issue and also on the substance of the advisory opinion, Oanta (2017), p. 48 and following.

³³High Court, 6 October 2015, *Council of the European Union v European Commission*, Case C-73/14. See also Morin (2015), p. 3.

³⁴*Council of the European Union v European Commission*, Case C-73/14, Id. at §55.

³⁵Id. at §58: “However, it is clear from the case law of the Court that Art. 335 TFEU, although restricted to Member States on its wording, is the expression of a general principle that the European Union has legal capacity and is to be represented, to that end, by the Commission (see, to that effect, judgment in *Reynolds Tobacco e.a./Commission*, C-131/03 P, EU:C:2006:541, paragraph 94).”

³⁶Id. at §63 Art. 218(9) TFEU “means that the application of that provision concerns the positions to be adopted on behalf of the European Union in the context of its participation, through its institutions or, as the case may be, through its Member States acting jointly in its interests, in the adoption of such acts within the international body concerned. The European Union was invited to express, as a party, a position ‘before’ an international court, and not ‘in’ it”. For the Chamber Art. 218 is not applicable here: “by sending the written statement, on behalf of the European Union, to ITLOS in Case No. 21 without having submitted its contents to the Council for approval, the Commission did not infringe that provision” (§76).

conservation of marine biological resources related to fisheries, by submitting a written contribution to the tribunal.³⁷ On the contrary, according to others, the Commission could not invoke the exclusive competence, as the opinion dealt with other issues, such as the liability and responsibility of member States. In a nutshell, the question of the repartition of the competences between the Commission and the Council in the context of competences related to the protection of marine environment remains particularly sensitive.

Second, the issue of the representative competence of the Union within other international organizations emerged within the CCAMLR, which is also a mixed agreement, for the purpose of the creation of a marine protected area. It is the Commission, here, that introduced an action on partial annulment against the decision of the Council on the approval of the submission of a document dealing with the creation of a protected area in the Weddel sea.³⁸ The Commission claimed that: “[a]s, in view of the aim, content and context, the envisaged establishment of a marine protected area in the Weddell Sea falls within the exclusive Union competence for the conservation of marine biological resources, the Council committed an error in law by imposing the submission on behalf of the Union and its Member States and violated Article 3(1)d TFEU.”³⁹ The case was introduced on 23 November 2015.⁴⁰ A second action for annulment under Article 263(2) TFEU was introduced by the Commission on 20 December 2016, about the decision of the Council of 10 October 2016 dealing with the establishment of the position of the European Union for the 35th annual meeting of the CCAMLR, about the creation of three new marine protected areas, in the Weddell sea, the Ross sea and the East Antarctic. The

³⁷ Michel Morin stresses then the bad faith of member States: “en réalité, ce n’est pas le Conseil mais la Commission qui avait des motifs d’introduire un recours, non contre le Conseil puisque celui-ci n’a pas participé à l’instance devant le TIDM, mais contre tous les Etats membres qui ont adressé à ce tribunal des exposés écrits puisque ce sont eux qui ont violé le principe d’attribution des compétences au sein de l’UE.” Morin (2015), p. 4.

³⁸ Commission Decision of 18.11.2015 *concerning the lodging of an action for the partial annulment of the Council Decision of 11 September 2015, as reflected in point 65 of the summary minutes of 23 September 2015 of the 2554th meeting of the Committee of Permanent Representatives, on the endorsement of the submission, on behalf of the Union and its Member States, of a reflexion paper to the Commission for the Conservation of Antarctic Marine Living Resources on the creation of a future marine protected area in the Weddell Sea*. European Commission, Decision C(2015) 8166.

³⁹ Adding: “In addition, even if the envisaged measure would possibly fall within the shared competence of the Union and the Member States (*quod non*), the Council failed to properly take into account that a general decision had already been taken by the Union, i.e. the Union acting alone, to support the establishment of marine protected areas, and that the envisaged measures may affect existing Union measures.”

⁴⁰ Case introduced 23 November 2015, *European Commission v Council of the European Union*, Case C-626/15. The Commission invoked the fact that “by considering that competence in the matter is shared and indicating, consequently, that the reflection document should be decided by consensus and be submitted on behalf of the European Union and its Member States, the contested decision is unlawful, in that it thus precludes the Commission from submitting that document on behalf of the European Union alone, in breach of the European Union’s exclusive competence in the matter (and of the Commission’s prerogatives to represent the European Union).”

Commission considered again that its competence in this field is exclusive and that the decision, thus, must be adopted on behalf of the EU only and not of the EU and its member States. The Council, according to the Commission, acted in opposition to the legal context, the aim and the content of the measure contested.⁴¹

Recalling that “[s]uch questions of competence are questions of power that have been fiercely debated in legal proceedings for decades”,⁴² the advocate general Juliane Kokott affirmed, in its joined conclusions related to both cases, that “[t]he Court’s judgment in these two cases will form a further piece in the complex mosaic of the external competences of the Union and its Member States produced by the Treaty of Lisbon.” Moreover, and more precisely, she considered that “the present case offers an opportunity to clarify whether the existence of a competence shared between the Union and its Member States necessarily requires joint (‘mixed’) action by the Union and its Member States in international bodies or whether the Union is also permitted, or even obliged, to take external action alone.”⁴³ The advocate general, referring to the definition of shared competences between the EU and its member States, concluded on the “*sufficient competence*” of the Commission, on behalf of the Union only and on its own, to “participate alone in the discussions and decisions in the CCAMLR on the establishment of marine protected areas in the Antarctic.”⁴⁴

The CJEU did not follow the conclusions of the advocate general Kokott and the action has been dismissed in its entirety. The Court agreed with the advocate general on the fact that the measures contested were adopted in the context of the protection

⁴¹Introduced 20 December 2016, *European Commission v Council of the EU*, C-659/16.

⁴²Opinion of Advocate General Kokott delivered on 31 May 2018, joint cases C-626/15 and C-659/16, *European Commission v Council of the European Union*.

⁴³Id. at §2.

⁴⁴Id. at §§108–109. See also §117: “[a]gainst this background, the Union must be considered not only to have had a competence in the field of environmental policy for all the measures to be discussed or decided in the CCAMLR, but also to have exercised that competence fully. The member States were therefore prevented, pursuant to the second sentence of Art. 2(2) TFEU, from exercising their own competences in respect of the same subjects, even only by acting alongside the Union in the CCAMLR”, and the conclusion §139. To decide, the advocate general relied on a “*centre of gravity approach*”, which means that the judge will have to balance and choose which competence, among the environmental, research, and fisheries fields of competences, is the “centre of gravity”, or the closest and principal objective of the decision, leading to the determination of its legal basis (Id. at §79). Under this approach, “the Antarctic marine protected areas to which the contested 2015 and 2016 decisions were dedicated did not, according to their centre of gravity, constitute fisheries policy measures with an environmental conscience, but environmental protection measures with—very serious—implications for fishing” (Id. at §97). Under this argumentation, the Commission would be unsuccessful in its claims. However, finally, the, advocate concluded that the Commission was competent to act on behalf of the EU on its own, even in the context of the exercise of a shared competence: “[t]here is a need for mixed action by the Union and its Member States on the international stage only where the Union itself does not have sufficient exclusive or shared competences to act alone in relation to third countries or in international bodies. Only if the Union does not have powers of its own is it absolutely necessary for the Member States to participate alongside the Union in international matters.”

of the marine environment and not for the conservation of fisheries resources only. However, unlike the advocate general, who concluded on the application of Article 2 (2) TFEU on the definition of shared competences of the EU, the Court stated on the facts that “to permit the European Union to have recourse, within the CCAMLR, to the power which it has to act without the participation of its Member States in an area of shared competence, when, unlike it, some of them have the status of Antarctic Treaty consultative parties, might well, given the particular position held by the Canberra Convention within the system of Antarctic agreements, undermine the responsibilities and rights of those consultative parties—which could weaken the coherence of that system of agreements [. . .].”⁴⁵ The Council, finally, was competent to adopt the contested documents not only in order to ensure *internal* coherence, as regards the definition of shared competences, but also to protect the *external* coherence of the Antarctic Treaty System, although it acted in the field of shared competences without member States’ participation.

In conclusion to an article on “The Protection of Biodiversity in the Framework of the Common Fisheries Policy: What Room for the Shared Competence?”, Marta Chantal Ribeiro focused on the “*balance and tension between exclusive and shared competences*” of the EU.⁴⁶ The same argument could be made here: there is indeed undoubtedly a tension (substantive and institutional) between shared and exclusive competences of the EU regarding the conservation of marine environment and biodiversity.

3 The European Union and the Substance of the Future International Legally Binding Instrument on Marine Biodiversity

3.1 The Balanced and Pragmatic Position of the European Union Regarding the Elements of the Package Deal

As mentioned above, the future regime of areas beyond national jurisdiction should fit the elements of the package deal agreed on in 2011.⁴⁷ The elements of the package indeed remain at the centre of the discussions of the intergovernmental conference, with the mandate of negotiating a legally binding instrument on the basis of Resolution 69/292 and of the recommendations of the Preparatory Committee. The conference met for the first time from 4th to 17th September 2018⁴⁸ as settled in

⁴⁵ *European Commission v. Council of the European Union*, Judgment of the Court (Grand Chamber), 20 November 2018, joined cases C-626/15 and C-659/16, §133.

⁴⁶ Ribeiro (2017), pp. 65–86.

⁴⁷ Annex to Resolution 66/231 of the UNGA.

⁴⁸ IISD Reporting service, “Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the

Resolution 72/249.⁴⁹ The package deal covers marine genetic resources, area-based management tools, including marine protected areas, environmental impact assessments, in addition to capacity building and transfer of marine technology, which are to be studied separately.

3.1.1 Marine Genetic Resources

First, as regards marine genetic resources, including the sharing of benefits, States will have to decide whether the exploitation of those resources must be governed by the principle of the freedom of the high seas, should fall under the common heritage of mankind regime, or should be governed by an alternative, intermediate solution. The EU is in favour of the creation of a balanced regime permitting the sharing of benefits resulting from the exploitation of marine genetic resources, while refusing to consider them under the common heritage status. The Nagoya Protocol under the Convention on Biological Diversity could be an inspiration for such a complementary benefit-sharing regime for areas situated beyond national jurisdiction: although it does not apply in areas beyond national jurisdiction, its principles, such as the principle of equity, could be relevant for the elaboration of a specific regime for marine genetic resources beyond national jurisdiction. The EU is, so far, in favour of a non-monetary sharing of benefits rather than a monetary sharing of benefits, meaning a benefit-sharing focused mainly on education, sharing of research results, capacity building and partnerships.⁵⁰ However, it remained pragmatic during the discussions, suggesting that the agreement would “set out the types of benefits that could be shared”, in order not to oppose too radically the position of the Group of the 77 and China.

The EU defends a very flexible approach for the access and utilization of marine genetic resources, based on the provisions of the Convention dealing with marine scientific research in the Area and in the high seas (Articles 242 and 244 on cooperation and dissemination, as well as the general provisions on marine technology transfer). The access should be free, according to the EU, with a process of *ex*

Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018”, *Earth Negotiation Bulletin*, vol. 25, n° 179, 20 September 2018, available at <http://enb.iisd.org/oceans/bbnj/igc1/>.

⁴⁹United Nations General Assembly (UNGA), 24 December 2017, Resolution 72/249 on *International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*.

⁵⁰IISD Reporting Services, “Summary of the fourth session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 10-21 July 2017”, *Earth Negotiation Bulletin*, vol. 25, n° 141, pp. 9–10. IISD Reporting service, “Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018”, *Earth Negotiation Bulletin*, vol. 25, n° 179, pp. 3–6.

post notification as regards the collection of marine genetic resources *in situ*. The flexibility and pragmatism of the European position are also characterised by the suggestion not to mention the relationship with intellectual property rights in the ILBI, in order not to hamper too much the activities of scientists and industries, which is an important argument for the scientific research.⁵¹ The EU also appears to be against any form of monitoring on the utilization of marine genetic resources, while the question of intellectual property rights is still very problematic.⁵² Other questions remain to be raised: would a benefit-sharing regime be applicable to all marine genetic resources, or only to resources of the Area? Would the International Seabed Authority play a role in their exploitation? The question of the articulation with the intellectual property rights and notably the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* or with the work of the World Intellectual Property Rights Organisation (WIPO) is also at the centre of the debate and the Union has not really taken yet a position on these elements. For instance, it is not necessary under the existing regimes to indicate the origin of the resource used to obtain a patent. Moreover, patenting a microorganism is possible under the TRIPS agreement.⁵³ Those difficult and crucial issues are still open to discussion, and the EU's balanced position will probably be a decisive point for the success of the negotiating process.

3.1.2 Area-Based Management Tools

Second, as far as area-based management tools—including marine protected areas—are concerned, States will have to decide whether or not it is appropriate to create a centralized system for the designation of protected areas, in areas beyond national jurisdiction. Indeed, so far, only a few global sectorial organizations (such as the

⁵¹See Arnaud-Haond (2018). For the author, it is indeed necessary to preserve the freedom and flexibility of marine scientific research, while trying to reach at the same time a more equitable regime, in order to foster the research and discoveries dealing with the conservation of marine biodiversity and environment.

⁵²During the meeting of September 2018, the question of the elaboration of a *sui generis* system, including a mandatory disclosure of origin, was discussed. The other option in this regard would be to leave the matter to another body such as the WTO or WIPO. See IISD Reporting service, "Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018", *Earth Negotiation Bulletin*, vol. 25, n° 179, p. 6. See notably Chiarolla (2014), pp. 171–194.

⁵³*Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization*, Annex 1C, 1869 UNTS 299, 33 Article 27 (3)(b): "Members may also exclude from patentability: (b) plants and animals *other than micro-organisms*, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof." See also Voigt-Hanssen (2018), pp. 683–705.

International Maritime Organization or the International Seabed Authority), and regional fisheries organizations or regional environmental frameworks have the power to design sectorial and/or regional “protected areas”.⁵⁴ However, those areas are only binding for member States of a specific organization, and the designation does not usually cover all the maritime areas or all activities at sea, thus limiting the efficiency of these tools. This also explains the slow and limited development of area-based management tools in areas beyond national jurisdiction so far. The future regime, then, could be based on a global and centralized approach, permitting the construction of a coherent network of marine protected areas (MPAs), applicable to all members of the future agreement. It could also be designed according to a regional approach, only encouraging the development of the regional framework, or a “hybrid approach” could also be adopted, comprising both global and regional perspectives. The European Union is advocating for the creation of a hybrid regime for the creation of marine protected areas that is not totally centralized, in order not to undermine the mandate of the regional organizations but without overemphasizing the regional perspective. The hybrid approach calls for “including in the MPA network those MPAs established under existing bodies; and further elaborating on compatibility”, taking into account the relationship with future measures to promote coherence and cooperation while underscoring the need for reporting on implementation.⁵⁵ The main obstacle to the implementation of this hybrid approach is the issue of enforceability of measures proposed by a global secretariat (through the preparation of a draft management plan for instance or general guidelines) but formally adopted at the regional level only.

Moreover, coastal States are strongly concerned by the future regime, not only because the areas beyond national jurisdiction are adjacent to their maritime zones, but also because there is an overlap between their extended continental shelf and the high seas. The interests of the coastal States—including, some EU States—towards the reaffirmation of their sovereignty over their extended continental shelf, are significant issues for discussion, especially concerning the question of the establishment of an international regime for the creation of marine protected areas. For instance, one of the questions raised within the Preparatory Committee is whether the consent of the coastal State should be required for the creation of a protected area in the water column situated over its continental shelf. Such consent would, on the one hand, protect the sovereign rights of the coastal State for the exploitation of the

⁵⁴Rochette et al. (2015).

⁵⁵IISD Reporting Services, “Summary of the fourth session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 10-21 July 2017”, pp. 11–12 and IISD Reporting service, “Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018”, pp. 6–9. The EU, moreover, “suggested that: proposals include socio-economic mitigation measures; and management plans, as part of final decisions, include measures identified by competent international organizations and a communication strategy towards affected stakeholders”, showing one’s again its pragmatic approach. Oude Elferink (2018), pp. 437–466.

mineral resources of its continental shelf, but on the other hand, accentuate its *creeping jurisdiction* on areas beyond national jurisdiction and potentially limit the adoption conservation measures in those areas. For the EU, at least, the legally binding instrument must state that the marine protected area should be created “with due regard to the rights and legitimate interests of any coastal State”, as Article 142 of the UNCLOS provide regarding the conduct of activities in the Area.

3.1.3 Environmental Impact Assessment

Third, although there is, in international law, a customary obligation to conduct environmental impact assessment⁵⁶ reiterated in Article 206 of the UNCLOS, those provisions have been interpreted as not being precise enough, necessitating the establishment of a concrete framework for the conduct of such assessments. Therefore, the future regime should encompass elements related to the conduct of environmental impact assessments by States for all activities that could possibly have a detrimental effect on marine biological diversity in areas beyond national jurisdiction. Nonetheless, uncertainty remains as regards the content of the future agreement: what should be the threshold of nuisance acceptable for activities at sea? Is a centralized institution gathering the environmental impact assessments and harmonizing all the criteria necessary? In addition, to what extent should public participation be requested? The EU, in this field, appears to be in favour of the determination of the threshold and criteria to decide on the conduct, by Parties to the agreement and not by a new body, of environmental impact assessment. The Union could agree to the reference to development of “strategic impact assessment” and of “transboundary impacts”, and “noted that the ILBI should provide for a public statement on the reasoning behind a decision.”⁵⁷ Nonetheless, the Union argued against any obligatory monitoring and review as regards EIA and “emphasized that States should decide monitoring and review modalities.”⁵⁸

3.1.4 Transfer of Marine Technology and Capacity Building

Finally, as regards transfer of marine technology and capacity building, in accordance with the equitable basis stipulated by the UNCLOS (in its Part XIV, and more especially Article 266), the future instrument would have to stress the obligations of developed States in this matter. The priority, according to the EU, would be to assist

⁵⁶As it has been recalled by the EU during the last PrepCom. Id. at pp. 12–13. See the *Pulp Mills case, Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para 204.

⁵⁷IISD Reporting Services, “Summary of the fourth session of the preparatory committee on marine biodiversity beyond areas of national jurisdiction: 10-21 July 2017”, Id. at p. 13.

⁵⁸Ibid.

States in fulfilling their ILBI obligations, developing their capacities by using, for instance, existing funding sources. As regards the institutional aspects of the future instrument, the EU could support the creation of a conference of the parties, but would prefer to use existing bodies and mechanisms, keeping a cautious approach. However, the Union would foster the creation of a clearing house mechanism, in order to promote transparency, exchange information and facilitate access to scientific data, especially in the field of marine genetic resources.⁵⁹

To conclude, so far, the EU's position on the foregoing issues has been underdeveloped, due to the difficulty to reaching an agreement in advance among the Union's member States. However, the EU has emphasized its desire of an "*early entry into force*" and "*universality*",⁶⁰ showing at least its strong support to the adoption of the new instrument. Other issues that may be of interest are the concrete consequences of Brexit on the discussions, as the UK remains part of the EU for those negotiations and has an influence in the definition of the EU's position. Indeed, the UK has often expressed strong antagonist positions concerning the content of the future instrument, leading to difficulties in reaching a common position. As a consequence, the Union does not have yet a strong role in the global discussions.⁶¹

3.2 Potential Consequences of the Future Instrument as Regards European Union's Maritime Policy

Finally, the future international legally binding instrument appears in total coherence with the EU's maritime policy and would then strengthen and complement it. The EU and its member States, according to their competences, have indeed been implementing, for about ten years, an "integrated maritime policy"⁶² which "seeks to provide a more coherent approach to maritime issues, with increased coordination between different policy areas"⁶³ and then to coordinate policies on specific sectors. This integrated maritime policy, based on an "ecosystem approach", aims at

⁵⁹Id. at pp. 15–16.

⁶⁰Id. at p. 18. Resolution 42/279 recalls indeed that "the conference shall exhaust every effort in good faith to reach agreement on substantive matters by consensus", stating the "need to ensure the widest possible and effective participation in the conference". UNGA Res 72/249 (2017), §17. Some States, like Russia, are indeed not convinced yet of the necessity of such a legally binding instrument.

⁶¹For a general study of the consequences of Brexit on the law of the sea, see Beslier (2016), pp. 15–24.

⁶²See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 10 October 2007 *on an Integrated Maritime Policy for the European Union* [COM(2007) 575 final—Not published in the Official Journal].

⁶³Definition available on the website of the Commission, maritime affairs: https://ec.europa.eu/maritimeaffairs/policy_en.

reconciling the economic and environmental aspects of sustainable development, which often contradict, exactly in the same spirit as the future ILBI, as the latter is dealing with “conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction”. The EU maritime policy is notably based on several concepts aimed at combining the environmental and economic aspects of activities linked to the sea, as the concepts of “blue growth”, “blue economy”, “sustainable development”, “ecosystem management”, or “sustainable exploitation.”⁶⁴ For instance, Article 1(1) of Regulation No 1380/2013 defines the scope of the common fisheries policy as “(a) the conservation of marine biological resources and the management of fisheries and fleets exploiting such resources [...]”,⁶⁵ with a conservationist *and* economic perspective.

The environmental policy and biodiversity strategy of the EU are also relevant, especially the protection of species and habitats through the establishment of protected areas: the Natura 2000 network,⁶⁶ extending to sea but only in the European maritime area (which means including in the EEZ of member States but not beyond). The future international agreement appears complementary and in continuity with this policy of creating protected areas, as it reinforces it, through the affirmation of principles such as the ecosystem approach or the prevention

⁶⁴See, for instance, the Communication from the Commission to the Council and the European Parliament, of 2 October 2002, *Toward a strategy to protect and conserve the marine environment* [COM(2002) 539 final] and the Communication from the Commission to the Council and the European Parliament of 24 October 2005 *Thematic Strategy on the Protection and Conservation of the Marine Environment* {SEC(2005)1290}, COM/2005/0504 final, and, more directly, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 September 2012, *Blue Growth opportunities for marine and maritime sustainable growth* COM/2012/494 final according to which ‘The blue economy needs to be sustainable and to respect potential environmental concerns given the fragile nature of the marine environment’, p. 5, and the 2014/89/EU Directive of the European Parliament and of the Council *establishing a framework for maritime spatial planning*, Art. 5(1): “When establishing and implementing maritime spatial planning, Member States shall consider economic, social and environmental aspects to support sustainable development and growth in the maritime sector, applying an ecosystem-based approach, and to promote the coexistence of relevant activities and uses.”

⁶⁵Moreover, the Art. 2 states that “1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term . . . 2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield. . . 3. The CFP shall implement the ecosystem-based approach to fisheries management so as to ensure that negative impacts of fishing activities on the marine ecosystem are minimised, and shall endeavour to ensure that aquaculture and fisheries activities avoid the degradation of the marine environment. . . 5. The CFP shall, in particular: . . . (j) be coherent with the Union environmental legislation . . .”.

⁶⁶See Directive 79/409 of the Council of 8 December 1975, OJEC n°L 31 of 5th February 1979, replaced by Directive 2009/147 of the European Parliament and of the Council of 30 November 2009 *on the conservation of wild birds*, OJEU of 26 January 2010, p. 7, and Directive 92/43 of the Council of 21 May 1992 on the conservation of natural habitats and the wild flora and fauna, OJEC n°L206 of 22 July 1992, p. 7.

principle, and extends it geographically to areas beyond national jurisdiction. This probably explains why the EU remained very attached to the issue of marine protected areas in the package deal. Similarly, the Marine Strategy Framework Directive (MSFD), 2008/56/EC requires EU member States to take all necessary measures in order to reduce the impacts of human activities on the marine environment and to reach or maintain a “good environmental status” by 2020.⁶⁷

Although the EU has not yet put forward marine spatial planning in the BBNJ negotiations, the “marine spatial planning” policy of the EU, enshrined in the 2014/89/EU Directive of the European Parliament and of the Council *establishing a framework for maritime spatial planning*, is of great importance, as it constitutes a useful means to reconcile and organize activities at sea, having potentially diverse impacts on biodiversity or the environment. Marine spatial planning is defined by Article 3 of the Directive as “a process by which the relevant Member State’s authorities analyse and organise human activities in marine areas to achieve ecological, economic and social objectives.” This policy has been referred to by several states during the discussions on BBNJ (as for instance Fiji, Seychelles and Thailand),⁶⁸ but it has not yet been fully integrated into the negotiations. Nevertheless, the spirit and principles guiding the marine spatial planning policy are also coherent with the future agreement, and the EU marine spatial planning Directive could be a model in this field in case this question is considered further. Indeed, the sea is a considerable source of growth for the EU and incorporates a high number of activities and users including: shipping, port activities, oil and gas, energy, aquaculture, trade, fisheries and many others. In addition to the reconciliation of environmental and economic objectives, there are other elements that must be taken into consideration in developing the instrument such as freedom of navigation, trade and security of navigation. However, one can question the efficacy of a policy of marine spatial planning on the conservation and preservation of the marine environment. Indeed, the objective of systematically reconciling economic and environmental aims does not give the latter priority over the former, and may result in irreconcilable tensions⁶⁹ between economic dependence and strategic importance of the sea for the EU on issues such as trade, shipping, oil and gas, energy, biotechnology and military activities that are not included in the scope of application of the marine spatial planning Directive.

⁶⁷Marine Strategy Framework Directive (MSFD), 2008/56/EC, §6. See on this policy Long (2017), pp. 662 and 665.

⁶⁸IISD Reporting service, “Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018”, *Earth Negotiation Bulletin*, vol. 25, n° 179, pp. 6–8 and p. 16.

⁶⁹See Seddik (2017), p. 8 and 15. See also, the study of the Centre d’études stratégiques de la marine (2014) *Union européenne: le défi maritime*, Études marines n°7 available at: <https://cesm.marin.defense.gouv.fr/index.php/publications/etudes-marines/94-etudes-marines-n-7-union-europeenne-le-defi-maritime>.

Depending, of course, on the precise and final content of the future instrument, it seems that the new obligations are in conformity and coherence with the existing EU law, with a specific view to the objective of sustainable development consecrated in Article 3(5) of the TUE. The principles and concepts stressed in the future ILBI, which is mainly focused on the utilitarian sustainable development objective, are already part of the EU legal framework, and the international obligations will simply be reaffirmed, detailed, and their implementation reinforced, in order to reach efficiency.

4 Conclusion and Way Forward

All in all, it is noteworthy that the participation of the EU in current discussions on international law of the sea raises very controversial and technical issues. The repartition and articulation of institutional but also substantive competences, which are deeply interlinked, remain ambiguous and lead to internal controversies detrimental to the effective application of the law of the sea and marine biodiversity conservation, as demonstrated by the CCAMLR's MPA case.

However, one can also underline the important contribution of the EU as regards the substantive law of the sea: establishment of marine protected areas networks, implementation of a concrete marine spatial planning policy, and the search for a sustainable use of marine resources in general, with the concept of "blue growth". The EU is a singular actor for the law of the sea, and, save for some internal difficulties, its contribution to the development of the law of the sea is important and instructive in the context of the future ILBI.

References

- Arnaud-Haond S (2018) La différence essentielle entre échantillon biologique et ressource génétique: apprendre des écueils terrestres pour une meilleure gouvernance pour les ressources génétiques marines. In: INDEMER, La connaissance des océans au service du développement durable – Les grands domaines de la recherche scientifique marine, aspects scientifiques et juridiques. Actes de la Conférence internationale de Monaco de 27 et 28 avril 2017. Pedone, Paris, pp 51–60
- Beslier S (2016) Brexit et droit de la mer. INDEMER. Annuaire du droit de la mer XXI:15–24
- Chiarolla C (2014) Intellectual property rights and benefit sharing from marine genetic resources in areas beyond national jurisdiction: current discussions and regulatory options. *Queen Mary J Intellect Prop* 4(3):171–194
- Churchill R (2017) The 1982 United Nations Convention on the law of the sea. In: Rothwell DR, Oude Elferink AG, Scott KN, Stephens T (eds) *The Oxford Handbook on the law of the sea*. Oxford University Press, pp 24–45
- Churchill R (2018) The European Union as an actor in the law of the sea, with particular reference to the arctic. *Int J Mar Coast Law* 33(2):290–323

- De Baere G (2012) Mercury rising: the European Union and the international negotiations for a globally binding instrument on mercury. *Eur Law Rev* 37(5):640–655
- Dross N (2014) L'Union européenne dans les organisations régionales de pêche In: INDEMER Droit international de la mer et droit de l'Union européenne. Cohabitation, Confrontation, Coopération? Colloque international, Musée Océanographique de Monaco, 17–18 octobre 2013. Pedone, Paris, pp 97–103
- Flaesch-Mougin C (2013) Représentation externe et compétences de l'Union européenne: quelques réflexions à propos des arrangements généraux du Conseil relatifs aux déclarations de l'Union dans les organisations multilatérales. In: Boutayeb C (dir) *La Constitution, l'Europe et le droit, Mélanges en l'honneur de Jean-Claude Masclet*. Publications de la Sorbonne, pp 571–591
- Heliskoski J (2013) EU declarations of competence and international responsibility In: Evans M, Koutrakos P (eds) *The international responsibility of the European union, European and international perspectives*. Hart, Oxford, pp 189–212
- Jarmache E (2014) Fondements juridiques de l'action de l'Union européenne et application spatiale. 'L'espace maritime communautaire'. In: INDEMER Droit international de la mer et droit de l'Union européenne. Cohabitation, Confrontation, Coopération? Colloque international, Musée Océanographique de Monaco, 17–18 octobre 2013. Pedone, Paris, pp 17–24
- Long R (2017) North-East Atlantic and the North Sea. In: Rothwell DR, Oude Elferink AG, Scott KN, Stephens T (eds) *The Oxford handbook on the law of the sea*. Oxford University Press, pp 647–671
- Michel V (2003) *Recherches sur les compétences de la communauté*. L'Harmattan, Paris
- Michel V (2006) Les compétences externes implicites: continuité jurisprudentielle et clarification méthodologique. *Europe*, pp 4–8
- Morin M (2015) L'affaire n° 21 du Tribunal International du Droit de la Mer et l'Union européenne. *Neptunus, e revue, CDMO*, 21(4):8 p
- Oanta GA (2017) Some recent questions regarding the European Union's Public access fisheries agreements In: Andreone G (ed) *The future of the law of the sea. Bridging gaps between national, individual and common interests*. Springer, Berlin, pp 45–64
- Oude Elferink AG (2018) Coastal States and MPAs in ABNJ: ensuring consistency with the LOSC. *Int J Mar Coast Law* 33:437–466
- Payne C (2017) Biodiversity in high seas areas: an integrated legal approach. *ASIL Insights* 21(9)
- Ribeiro MC (2017) The protection of biodiversity in the framework of the common fisheries policy: what room for the shared competence?" In: Andreone G (ed) *The future of the law of the sea. Bridging gaps between national, individual and common interests*. Springer, Berlin, pp 65–86
- Rochette J et al (2015) A new chapter for the high seas? Historic decision to negotiate an international legally binding instrument on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction. *IDDRI Study* 02/15
- Seddik W (2017) La stratégie maritime de l'Union européenne en Méditerranée. To be published In: *La gouvernance internationale de la Méditerranée, questions et évolutions contemporaines, Actes du colloque organisé par le CERIC et Sciences-Po Aix le 9 novembre 2017*
- Voigt-Hanssen G (2018) Current 'light' and 'heavy' options for benefit-sharing in the context of the United Nations Convention on the law of the sea. *Int J Mar Coast Law* 33(4):683–705

Pascale Ricard CNRS (French National Centre for Scientific Research) permanent researcher at the Aix-Marseille University (CERIC), in general public international law and more specially law of the sea and environmental law. Post-doctoral fellow in 2019 at the University of Angers on the ZOMAD project, which is dedicated to the regime applicable to activities in maritime disputed areas. PhD in 2017 in Paris 1 Panthéon Sorbonne, with a research about Marine Biodiversity Conservation Beyond National Jurisdiction (published by Pedone).