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Pascale Ricard

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**Sovereignty and challenges of the future international legally binding instrument on marine biodiversity beyond national jurisdiction: how to reconcile the individual interests of States at sea and the ‘common interest of mankind’?**

Pascale RICARD,

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*CNRS researcher, Aix-Marseille University, University of Toulon, of Pau & Pays Adour, CNRS, DICE, Research center of European and international law of Aix-Marseille University (CERIC), Aix-en-Provence, France.*

**Abstract.** Although dealing with strictly international maritime areas, the future implementing agreement (ILBI) under UNCLOS currently negotiated raises important challenges as regards the combination and reconciliation of States’ individual and collective interests at sea. There is, indeed, a common interest for biodiversity in international maritime areas (biodiversity conservation being a ‘common concern of humankind’), which appears not entirely compatible with the individual interest of States at sea, as it focuses mainly on conservation of marine biodiversity, sharing of resources and benefits, access and global integrity of common spaces, rather than on exploitation and geostrategic or individual economical interests. How to concretely reconcile, then, in the international spaces, the individual interests of coastal and non-coastal States and the common interest of the international community? How could the future agreement take those interests into account?

The purpose of this article is to suggest a different prism for analysing the gaps and challenges regarding the current law of the sea regime in the field of marine biodiversity and the adoption and content of a new UNCLOS implementing agreement. Among all the available options under scrutiny in the context of the discussions related to the adoption of a new implementing agreement under UNCLOS, some are more likely to reconcile individual and common interests at sea than others. It appears necessary to place the cursor where the equilibrium between those interests is best preserved in order to ensure simultaneously a sufficiently voluntary conclusion and implementation of the future agreement and the effective and sufficient achievement of the treaty objectives.

Key words: marine biodiversity conservation, economic interests at sea, coastal States, UNCLOS, negotiations of a future ILBI, areas beyond national jurisdiction.

The geographical scope of the future international legally binding instrument (ILBI) implementing the United Nations Convention on the Law of the Sea (UNCLOS)<sup>1</sup>, currently negotiated in the frame of the “Intergovernmental Conference on an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (ABNJ)”<sup>2</sup> is comprehensive, as it gathers both the high seas and the Area. Indeed, the first feature of those two maritime areas is that they correspond, geographically but also legally speaking, to areas situated *beyond* national jurisdiction, which means beyond the sovereignty (or sovereign rights) of States.

<sup>1</sup> United Nations Convention on the Law of the Sea, adopted 10 December 1982 and entered into force 16 November 1994, 1833 UNTS 3.

<sup>2</sup> Convened by the United Nations General Assembly in its resolution 72/249 of 24 December 2017.

Article 86 of the UNCLOS defines thus the high seas as “*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State*” and UNCLOS Article 1 defines the Area as “*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*”.

The two areas, however, present fundamental differences: their opposite regime (common heritage of mankind status and regime for the Area versus the principle of freedom of the high seas for the water column), their different physical nature and their different size – the perimeter and surface of the Area being smaller than the one of the high seas because of the possibility for the coastal State to extend its continental shelf, reducing consequently the international part of the deep seabed.

Nonetheless, those two maritime areas, gathered as “ABNJ”, represent almost the half of the earth’s surface<sup>3</sup> and are above all international in character. Therefore, they also share some interesting similarities that are a factor of unity. First, the unconditional need to cooperate in regulating activities in these areas and protecting the environment, illustrated for instance in Article 197 as regards the protection and preservation of the marine environment<sup>4</sup>. Second, the principle of peaceful use, which is not a specific character of the common heritage of mankind regime: according to Article 88, “*The high seas shall be reserved for peaceful purposes*” and following Article 141 the same principle applies to the Area, as an integrated part of the common heritage principle: “*The Area shall be open to use exclusively for peaceful purposes by all States*”. Third, the principle of non-appropriation or claiming sovereignty, contained in UNCLOS Articles 89 for the high seas, according to which “*No State may validly purport to subject any part of the high seas to its sovereignty*”, and Article 137(1) for the Area: “*No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized*”, is also a common feature of both areas. Finally, the *residual* nature of these two areas, whose final geographical boundaries depend on the completion of the delimitation process of other maritime areas, the EEZ and the continental shelf, is also particularly important for the definition and understanding of their regime. As a consequence of this residual character, the final delimitation of the international maritime areas is not yet completed. The process of extension of the continental shelf is far from being finished, as well as the declarations and delimitations of EEZ by States.

Both the *residual* and the *dual* characteristics of ABNJ illustrate and exacerbate the confrontation between individual and common interests at sea. Those interests can be illustrated or defined as the confrontation between, on the one hand, the creeping jurisdiction of States and the search for individual economical and geo-strategic benefits in ABNJ, and on

<sup>3</sup> Indeed, the high seas represent 64% of the surface of the oceans and more than 46% of the Earth’s surface: see Glen Wright and others, ‘Protect the neglected half of our blue planet’, *Nature*, 2018.

<sup>4</sup> “*States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features*”.

the other hand the collective benefits of ABNJ as a whole for the international community in terms of peace, coordination, science, equity and environmental protection.

The identification of the different manifestations of this confrontation between individual and collective interests within ABNJ (I) will make it possible to highlight the tools available to reconcile these interests in the future ILBI (II). The purpose of this article is to suggest a different prism for analysing the gaps and challenges regarding the current law of the sea regime in the field of marine biodiversity and the adoption and content of a new UNCLOS implementing agreement.

## **I. Manifestations of the individual and common interests in ABNJ**

Although ABNJ are international in nature, the individual interests of States are far from being absent in these areas. It is not only the case for the coastal State (1), but also for all States, whether land-locked or geographically disadvantaged, through their fundamental right of access to international areas and resources, which is centralized and implemented through participation in two different kinds of regional or global institutions: fisheries organisations in the high seas and the International Seabed Authority (ISA) for the deep seabed (2).

### *1) The individual interests of the coastal State in ABNJ: the exercise of its creeping jurisdiction through the (extended) continental shelf*

First, coastal States continue to exercise creeping jurisdiction in ABNJ through the extension of their continental shelf. Indeed, the possibility of extending the continental shelf creates a “grey area”, as there is a geographical and vertical overlap between the high seas regime and the sovereign rights of the coastal State on its continental shelf for the exploration and exploitation of sedentary and mineral resources (Articles 76-77 of UNCLOS). Through their activities on the extended continental shelf, States are able to exercise a kind of indirect “right of supervision” over activities in superjacent waters, as the coastal State must have a guaranteed access to the high seas to carry out those activities<sup>5</sup>. In addition, since the two areas – the high seas and the extended continental shelf – are necessarily physically connected, as biodiversity knows no legal boundaries, activities on the extended continental shelf will undoubtedly have an impact on the environment of the high seas<sup>6</sup>.

One of the most controversial issues in the negotiations for the future ILBI is therefore related to the creation of marine protected areas (MPAs) in areas situated above or adjacent to

<sup>5</sup> See notably MOSSOP (J.), “Beyond delimitation: interaction between the outer continental shelf and high seas regimes”, pp. 753-768 in SCHOFIELD (C.), LEE (S.), KWON (M.S.) (Eds.), *The Limits of Maritime Jurisdiction*, Martinus Nijhoff Publishers, 2014, 794 p.

<sup>6</sup> CUYVERS (L.), BERRY (W.), GJERDE (K.), THIELE (T.), WILHEM (C.), *Deep seabed mining. A rising environmental challenge*. UICN and Gallifrey Foundation, 2018, 74 p. DYMENT (F.), LALLIER (N.), LE BRIS, (O.) et al. (Coord.), *Les impacts environnementaux de l'exploitation des ressources minérales marines profondes*, Expert Report, Collective research CNRS - IFREMER, June 2014, 939 p.

States' continental shelf. The designation of a high sea MPA in such a "grey area" appears indeed incompatible with the free exercise of its sovereign rights and powers by the coastal State in the deep seabed. While the coastal State must, in any case, respect certain obligations when exercising its rights on its continental shelf, as for instance the "due regard" obligation consecrated in UNCLOS Article 78(2)<sup>7</sup>, it remains sovereign and can decide on the conduct of activities in that area. The creation of a protected area above its continental shelf therefore constrains its possibilities.

Regional frameworks have already experienced such difficulties, as it is especially the case for the North-East Atlantic OSPAR Commission<sup>8</sup>. Indeed, in this region, in the context of the development of a network of MPAs in ABNJ since 2011, two propositions of high seas MPAs were overlapping the continental shelf of member States: the *Rainbow* MPA, overlapping the Portuguese continental shelf, and the *Charlie Gibbs North* MPA, overlapping the Icelandic continental shelf. Different solutions were finally developed for each situation: for the former, Portugal cooperated by adopting a national MPA in the overlapping continental shelf in order to harmonize the regimes of both areas<sup>9</sup>. As regards the latter, the Charlie Gibbs North protected area, Iceland refused such a solution and obtained a reduction of the size of the MPA in order not to overlap its *potential* sovereign rights over its extended continental shelf – *potential* as the Commission of the Limits of the Continental Shelf first had to elaborate recommendations on this extension's claim. As explained by David Jonshon, "[n]egotiations to designate the [Charlie Gibbs] MPA caused a tension between those Contracting Parties whose sovereignty, hence access to resources, might be affected and those whose main concern is the common goal of creating a representative and ecologically coherent MPA network"<sup>10</sup>. This situation is a clear illustration of the fact that the UNCLOS obligations of cooperation<sup>11</sup> and "due regard" with other States' activities, as consecrated notably in Articles 78(2) and 87(2)<sup>12</sup> at sea are not always sufficient to ensure a coherent and sustainable regime for the high seas or to prioritize each other's activities. A consultation and

<sup>7</sup> According to this Article, "*The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention*".

<sup>8</sup> The OSPAR Commission was created by the Convention for the protection of the marine environment of the North-East Atlantic, adopted on 22 September 1992 (Paris) and entered into force on 25 March 1998, 2354 UNTS 67.

<sup>9</sup> O'LEARY (B.C.) et al., "The first network of Marine Protected Areas (MPAs) in the high seas: the process, the challenges and where next", pp. 598-605, *Marine Policy*, vol. 36, 2012, p. 602. RIBEIRO (M.C.), "The 'Rainbow': the first national marine protected area proposed under the high seas", pp. 183-207, *The international journal of marine and coastal law*, Martinus Nijhoff Publishers, vol. 25, n 2, 2010, pp. 184-185 and p. 196.

<sup>10</sup> JOHNSON (D.E.), "Conserving the Charlie-Gibbs Fracture Zone : one of the world's first High Seas Marine Protected Areas", pp. 271-285 in MACKELWORTH (P.) (Ed.) *Marine Trans-boundary Conservation and Protected Areas*, Earthscan Oceans, 2016, p. 278.

<sup>11</sup> See Article 118 of the UNCLOS for instance: "*States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end*".

<sup>12</sup> Following which "*These freedoms [of the high seas] shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area*".

coordination role for the coastal State is, at a minimum, necessary for any regime concerning MPA in ABNJ in the future ILBI (see *infra*).

Coastal States are indeed currently, in the context of the negotiations of an implementing agreement of the UNCLOS on marine biodiversity conservation and sustainable use in ABNJ within the Intergovernmental Conference (and before that, in 2016-2017 in front of the Preparatory Committee), not only recalling, whenever the opportunity arises, their sovereign rights resulting from the Convention, and the commitment not to undermine them, but also claiming the existence and implementation of a “*principle of adjacency*”, which would mean that their geographical proximity with the MPA on the high seas would allow them to participate, in a preferential manner, in the decision-making process to create and manage the MPA and that this situation would also be preferable at a global level<sup>13</sup>. What does this “adjacency principle” would imply? How far this participation to the designation process of MPA would go? Does the coastal States would have a real “veto power” as regards the creation of a MPA potentially overlapping its extended continental shelf, and what will be the consequences? These issues remain entire in the current discussions.

2) *The individual interest of all States in ABNJ through their participation to international organisations to access natural and biological resources*

Second, States in general (and not only coastal States) are also focusing on their individual interests in the ABNJ, through two principal mechanisms: participation in regional and global fisheries management organisations and the global International Seabed Authority (ISA or ISBA) exploration regime, in order to ensure that they have a privileged access to the resources of international areas. Participation in these international and regional organisations makes it possible to influence decision-making on the allocation of natural and biological resources and space.

This phenomenon is particularly clear when one observe the situation of the ISA. States are indeed currently engaging in a “*race for contracts*”<sup>14</sup> and at the same time, the first exploration contracts are arriving at their term and contracting States are willing to continue their exploration phase in order to be the “first served” when exploitation will be possible<sup>15</sup>. This general logic results partially from the fate granted to the Enterprise, initially conceived

<sup>13</sup> DUNN (D.C.) et al., “Adjacency: How legal precedent, ecological connectivity, and Traditional Knowledge inform our understanding of proximity”, Policy Biref, UN PrepCom 3, p. 8: “*extending the rights of coastal States to have the primary responsibility in the conservation of their migratory and straddling biodiversity in ABNJ is not only consistent with existing principles in international law (e.g. UNCLOS Articles 66 and 67 ; UNFSA Article 7) but would likely result in better stewardship of those resources given their interest in protecting the biodiversity and ecosystems within their EEZ*”.

<sup>14</sup> JARMACHE (E.), « Vingt ans après. Les fonds marins », pp. 191-203 in DOUMBÉ-BILLÉ (S.), THOUVENIN (J.-M.) (Dir.), *Ombres et lumières du droit international, Mélanges en l’honneur du Professeur Habib Slim*, Pedone, 2016, p. 195.

<sup>15</sup> Document ISBA/21/C/WP.1, *Procedures and criteria for the extension of an approved plan of work for exploration pursuant to section 1, paragraph 9, of the annex to the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, Legal and Technical Commission, 3 March 2015.

to ensure exploitation “in the interest of humanity” in the 1982 UNCLOS. It was finally forced to share this function with States in the version of Part XI adopted in 1994, having to confront the collective interest it will defend with that of its partners. The future *Regulations on the Exploitation of Mineral Resources in the Area* should consider the consequences of this phenomenon, with the possible setting of a “maximum” duration after which the contractor must renounce its rights, particularly if no activity has taken place, for instance. Indeed, monopolistic positions are prohibited by the UNCLOS<sup>16</sup>. Thus, we are faced with two opposing tendencies, such as Elie Jarmache formulates it: “[l]e sentiment de l’exception de ce qui se construit autour des fonds marins, et qui est sans précédent, le dispute à l’égoïsme habituel d’un contractant aux droits exclusifs garantis”<sup>17</sup>. The potential irreversibility of environmental damages is, finally, also to be taken into account while considering the granting of operating licences, as recalled in the advisory proceeding of the ITLOS, *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* of 1<sup>st</sup> February 2011<sup>18</sup>.

Similarly, regional fisheries management organisations (RFMOs) have been intended as the “key” of the access to fisheries beyond 200 nautical miles<sup>19</sup>. The purpose of RFMOs is indeed to allow different States to come together to cooperate in the management of fisheries in a maritime region<sup>20</sup>. Their creation is even, according to the 1995 New York Straddling Fish Stocks Agreement<sup>21</sup>, the *condition* for access to fish stocks. It is therefore a means of allocating the stocks concerned between these different States, depending on the total allowable catch volume (TAC) from which the stocks can be maintained and is able to continue producing fishes. States, within RFMOs, have therefore expectations in terms of access to fisheries, in accordance with the principle of freedom of fishing on the high seas. Access to fisheries in a region is, indeed, open to every States. Japan, for example, is a member of the General Fisheries Commission for the Mediterranean, and therefore participates in decisions and allocation of quotas between States in this area. UNCLOS Article 119(3) provides in effect that “*States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State*”. However, one can observe that there is not only a difficulty to reallocate fishing quotas with new entrants inside RFMOs once determined, States

<sup>16</sup> Article 150(g): “*Activities in the Area shall [...] be carried out in such a manner as to [...] ensuring : (g) the enhancement of opportunities for all States Parties, irrespective of their social and economic systems or geographical location, to participate in the development of the resources of the Area and the prevention of monopolization of activities in the Area*”. Indeed, the draft version of the Regulations on the Exploitation of Mineral Resources in the Area, currently provides that each renewal period of a contract shall not exceed ten years, the maximum period of the initial contract being thirty years, but with no limit on the number of renewed contracts (see *Draft regulations on the exploitation of mineral resources in the Area*, ISBA/24/LTC/WP.1/Rev.1, 9 July 2018, Art. 19 and 21).

<sup>17</sup> JARMACHE (E.), « Vingt ans après. Les fonds marins », *op. cit.*, p. 196.

<sup>18</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, paras 127-128 notably.

<sup>19</sup> LUCCHINI (L.), VOELCKEL (M.), *Droit de la mer, Navigation et pêche*, Pedone, 1996, p. 692.

<sup>20</sup> UNCLOS Article 117-118, and Article 8 of the United Nations Fish Stocks Agreement (UNFSA). Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, adopted on 4 August 1995 (New York), entered into force on 11 December 2001, 2167 UNTS 3.

<sup>21</sup> *Ibid.*

considering having a kind of “acquired right” on fisheries<sup>22</sup>, but also, moreover, that access to fisheries through RFMOs is often conditioned<sup>23</sup>. The compatibility with the principle of non-discrimination is, therefore, questionable, and the question of the compatibility between individual and collective interests is well illustrated<sup>24</sup>.

Individual interest of States, in a nutshell, is not reserved to coastal States but concerns all of them as access to ABNJ is a way to derive benefits and advantages from the biological and mineral resources they contain. The international nature of those areas is not an obstacle, then, for the concretisation of individual objectives, although one has to conciliate its activities in ABNJ with the rights of other States and of the international community as a whole.

3) *The common interests in ABNJ: consequences of the “common concern of humankind” “status” of biodiversity conservation*

The individual rights and powers of States at sea should be balanced with the rights and duties of other States, as the freedom of navigation, of conducting scientific research, laying pipelines and cable, according to the “due regard” obligation of States over other activities (*supra*), but also with their general obligation to protect and preserve the marine environment, provided by Article 192 and more generally Part XII of the UNCLOS, which is dedicated to the protection and preservation of the marine environment in the whole ocean. Finally, the current main challenge is both not to infringe the sovereign rights of States on their continental shelf or the right of access to international maritime areas, and at the same time not to undermine the rights and duties of other States in areas beyond national jurisdiction.

Biodiversity conservation in general is, according to the preamble of the Convention on Biological Diversity (CBD) of 1992<sup>25</sup>, “*the common concern of humankind*”. This expression creates a different “status” from that of the “*common heritage of mankind*” applicable to the Area. Certainly, the latter implies a stronger specific regime based on equity, sharing of

<sup>22</sup> HENRIKSEN (T.), HOEL (A.H.), “Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries”, pp. 66-93, *Ocean Development & International Law*, vol. 42, 2011, p. 70. According to the authors, “*Accommodating new entrants in an existing fishery may challenge established rights allocated between the existing states as well as bring increased pressure on the resources*”. The North East Atlantic Fisheries Commission (NEAFC), for instance, decided in 2003 that new entrants have not been able to obtain rights on stocks and therefore a specific quota for region’s fisheries, as the stocks were over-exploited. *Guidelines for the expectation of States considering to apply for membership in NEAFC and possible opportunities in the NEAFC regulatory area*, 22nd annual Meeting 2003, item 12.

<sup>23</sup> Article 11 of the 1995 UNFSA provides that “*In determining the nature and extent of participatory rights for new members [of a RFMO...] States shall take into account, inter alia: (a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery; (b) the respective interests, fishing patterns and fishing practices of new and existing members or participants; [...] (e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources [...]*”.

<sup>24</sup> HENRIKSEN (T.), HOEL (A.H.), “Determining Allocation: From Paper to Practice in the Distribution of Fishing Rights Between Countries”, *op. cit.*, p. 74. See also FUJITA (R.) et al., « Rationality or chaos? Global Fisheries at the Crossroads », pp. 139-149 in GLOVER (L.K.), EARLE (S.A.), KELLEHER (G.) (Eds.), *Defying ocean’s end. An Agenda for Action*, Island Press, 2009, p. 141. This situation is called, according to the authors, “*the race to fish*”.

<sup>25</sup> Convention on Biological Diversity, adopted 5 June 1992 and entered into force 29 December 1993, 1760 UNTS 79.

benefits of the exploitation of resources and institutionalized or centralized by an international organisation (UNCLOS, Part XI). However, the former is not totally without consequences for the management and conservation of biodiversity. First of all, the situation of the expression in the preamble of the Convention on Biological Diversity is an indication for the interpretation of the whole Convention, according to Article 31(1) of the 1969 Vienna Convention on the Law of Treaties<sup>26</sup>, and specially the determination of its object and purpose. Such an interpretation is well illustrated by the International Court of Justice *Whaling in the Antarctic* judgement of 2014. Indeed, the Court took into account, in order to interpret Article VIII of the 1941 Whaling Convention, the preamble of this Convention, where the parties explained for instance that the treaty was concluded in order “*to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry*”, in accordance then to the modern “sustainable development” requirements, both economical and environmental<sup>27</sup>.

Secondly, it also implies, indirectly, taking into consideration in a reinforced way the traditional principles of environmental law: cooperation, prevention – including the obligation to carry out environmental impact assessments<sup>28</sup> - and precaution. It also implies the implementation of other principles and approaches recently developed in international environmental law, such as the integrated or “ecosystem approach”, the best tools and scientific knowledge available and, last but not least, considerations of equity or social justice, for current and future generations.

Moreover, the general obligation to protect and preserve biodiversity in ABNJ has also been explicitly consecrated as an *erga omnes* obligation by the International Tribunal for the Law of the Sea (ITLOS) in its first advisory opinion, on 1<sup>st</sup> February 2011, on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*<sup>29</sup>. The ITLOS stressed indeed the “*erga omnes character of the obligations related to preservation of the environment*” as being applicable both to the Area, as the advisory opinion dealt with this maritime zone, and the high seas, although there was no need to add it as regards the case. Freedoms and rights of States in the ABNJ are thus coexisting with freedoms and rights of other States, as well as with a general *erga omnes* obligation to conserve marine biodiversity in international spaces. This obligation is based on a due diligence obligation<sup>30</sup>, which is an obligation of means<sup>31</sup> that can be interpreted as a

<sup>26</sup> Convention on the Law of Treaties, adopted 23 May 1969 and entered into force 27 January 1980, 1155 UNTS 331.

<sup>27</sup> *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgement of 31 March 2014, ICJ Rep 226, para 56-58.

<sup>28</sup> As consecrated by the ICJ in the case *Pulp Mill on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20<sup>th</sup> January 2010, ICJ Rep 14, para 204, and reiterated in *Certain activities carried out by Nicaragua in the border area (Costa Rica v. Nicaragua)* and *Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgement of 16 December 2015, ICJ Rep 665, paras 101-105.

<sup>29</sup> *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, *ITLOS Reports 2011*, p. 10, para 180.

<sup>30</sup> See KERBRAT (Y.), MALJEAN-DUBOIS (S.), « La contribution en demi-teinte de la CIJ au droit international de l’environnement dans les affaires Costa-Rica / Nicaragua », pp. 1133-1154, *Journal du Droit International, Clunet*, n°4/2018, p. 1135.

positive obligation to actively take measures necessary to protect marine biodiversity in ABNJ and at the same time to prevent harmful practices to the marine environment<sup>32</sup>.

In other words, there is a common interest for biodiversity in international maritime areas, which appears not entirely compatible with the individual interest of States at sea as it focuses mainly on conservation of marine biodiversity, sharing of resources and benefits, access and global integrity of common spaces, rather than on exploitation and geostrategic or individual economical interests. How to concretely reconcile, then, in the international spaces, the individual interests of coastal and non-coastal States, deriving mainly from the development Law of the sea, and the common interest of the international community protected especially by the international environmental law, which has been developed later on? How could the future agreement take those interests into account?

## **II. Various options and tools available to reconcile and balance individual and common interests and concerns in ABNJ**

Among all the available options under scrutiny in the context of the discussions related to the adoption of a new implementing agreement under UNCLOS, some are more likely to reconcile individual and common interests at sea than others. Each option lies between the two “poles” of “individual interest” on the one hand and “collective interest” on the other. A balance is specifically needed in this context so that one of the extremes does not outweigh the other. It appears necessary to place the cursor where the equilibrium between those interests is best preserved in order to ensure simultaneously a sufficiently voluntary conclusion and implementation of the future agreement (which will be permitted thanks to the consideration of individual interests) and the effective and sufficient achievement of the treaty objectives, mainly of marine biodiversity conservation (collective interests and concerns).

The idea, then, is to suggest here a new prism of analysis leading to the identification of the most appropriate tools and options for the future instrument and ensure that the final propositions will be well-balanced. The proposed prism is, certainly, pragmatic: in the end, it is up to States to implement the future instrument, so that taking their interests into account is really important in reaching a compromise. In the meantime, one must not forget the objective of the future ILBI, which is the conservation and sustainable use of marine biodiversity, which must systematically compensate and rebalance its content.

A lot of instruments are available and some of them remain in the debate in the context of the adoption of a future implementing agreement under the UNCLOS. First of all, the future ILBI would not affect the sovereign rights of coastal States, which are already enshrined in UNCLOS and will be reiterated. To strengthen the obligation of cooperation, transparency

<sup>31</sup> *Pulp Mill on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20<sup>th</sup> January 2010, ICJ Rep 14, para 101: “State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”

<sup>32</sup> PCA Case N 2013-19, *In the matter of the South China Sea arbitration, before an arbitral Tribunal constituted under Annex VII to the 1982 United Nations Convention on the law of the sea, between the Republic of the Philippines and the People’s Republic of China*, Award, Permanent Court of Arbitration, 12 July 2016, paras 956-960.

and accountability would be additionally an important step in order to reinforce States' duties in ABNJ for the common interest. Each element of the package deal could also contribute to this objective (1). Other instruments are susceptible to contribute to the reconciliation of individual and common interests in other forum, outside the future ILBI, as for instance in front of the Commission on the Limits of Continental Shelf (CLCS) (2).

1) *Options in the future ILBI, through the elements of the "package deal"*

The 'package deal' is a series of elements gathering, 'together and as a whole', the potential gaps identified by States in 2011 within 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 in the general regime of marine biodiversity conservation. These elements are: the legal regime of marine genetic resources, the possibility to create marine protected areas or any other area-based management tool, the content and modalities of the obligation to conduct environmental impact assessments, and the obligation and modalities of the transfer of marine technology and capacity building<sup>33</sup>. They remain the constitutive elements of a future instrument. Only the first three will be examined here.

a. Area-based management tools, including marine protected areas

As regards area-based management tools, including MPAs, the main difficulty appears to be "not to undermine the existing regimes", especially at the regional level, where several frameworks dedicated to the protection of the marine environment and fisheries management organisations provide for the adoption of conservation measures and marine protected areas.

In order to reconcile the interests of coastal States with the international community rights and duty to protect and preserve the marine environment in the high seas, a reinforced obligation of coordination and cooperation would allow a constructive debate for the creation of marine protected areas in the high seas above the extended continental shelf (see *supra*). An obligation of result to reach an agreement, possibly provisory, and a coherent management plan for the two areas could be a way of improving the good implementation of the future agreement. At least, the implementing agreement must state that marine protected areas should be created "*with due regard to the rights and legitimate interests of any coastal State*", as provided by Article 142 of the UNCLOS regarding the conduct of activities in the Area. However, this due regard obligation does not appear precise enough and more specific guidelines could be elaborated, based on the existing practice.

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, with a sort of "international recognition" of already existing

<sup>33</sup> 'Oceans and the law of the sea', UNGA Res 66/231 (24 December 2011) 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', para (a).

regional MPAs, in order to compensate the principle of relative effect or treaty<sup>34</sup>. It could also be designed according to a regional approach, only encouraging the development of the regional framework, or to a “hybrid approach”, comprising both global and regional perspectives<sup>35</sup>. The “global approach” to MPAs would in priority ensure a harmonised treatment for coastal States, and a systematic process of cooperation where the overlap of interests is rising. Clear requirements of reporting and the setting and monitoring of precise environmental, sociological and economic objectives regarding the management of the MPAs could also appear as a means to reconcile common and individual interests.

#### b. Marine genetic resources

As far as marine genetic resources are concerned, a compromise between the principle of the freedom of the high seas and the common heritage of mankind regime, with a balanced and pragmatic solution including an access and sharing of benefits, is needed. One of the main disagreements rests indeed on the modalities of the sharing of benefits of the exploitation of genetic resources<sup>36</sup>. The group of African States, and the “G77 and China”, are defending an extension of the common heritage status for marine genetic resources and an equitable sharing of benefits of their exploitation, or at least a consecration of a “common heritage principle”<sup>37</sup>. However, it seems that other States would be more in favour of free access or a balanced regime for the genetic resources of the Area and potentially that of the high seas, including for the question of the type of benefits shared.

A balanced regime could be inspired by the *Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity*<sup>38</sup>, adopted in 2010, which creates a mechanism of bilateral negotiation and agreement on the terms of the sharing of benefits between the State of origin of the resource and the State asking for access. Although this Protocol does not apply in areas beyond national jurisdiction, its core principles – such as the principles of equity, benefit sharing and information (through the obligation of “prior-informed consent”) – could be relevant for the construction of a specific regime for marine genetic resources

<sup>34</sup> According to Article 34 of the Vienna Convention on the Law of Treaty, *op. cit.*

<sup>35</sup> See notably IISD 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, and “Summary of the Third 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: 19-30 August 2019”, *Earth Negotiation Bulletin*, vol. 25, n°218, pp. 9-10.

<sup>36</sup> ‘Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the UNCLOS on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’, UN Doc A/AC.287/2017/PC.4/2, para 3.

<sup>37</sup> IISD Reporting service, “Summary of the Third 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: 19-30 August 2019”, *Earth Negotiation Bulletin*, vol. 25, n°218, p. 5.

<sup>38</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, Nagoya, adopted 29 October 2010, entered into force 12 October 2014, UNEP/CBD/COP/DEC/X/1.

beyond national jurisdiction. This “access and benefit sharing” (ABS) regime is aimed at redirecting the benefits of the exploitation to conservation, which could be an interesting model. Such a specific regime could also, according to some participants to the discussions, be inspired by Article 82 UNCLOS, dealing with the sharing of benefits of mineral resources of the continental shelf beyond 200 nautical miles<sup>39</sup>. However such a proposal would be very difficult to implement as this regime was imagined in the specific context of mineral resources exploitation of a hybrid area, the extended continental shelf, to compensate the consequential narrowing of the Area.

During the first meeting that took place in September 2018, the G77 and China “supported an ABS [access and benefit sharing] drawing on the Nagoya Protocol, the International Seabed Authority (ISA), and the ITPGRFA [International Treaty on Plant Genetic Resources for Food and Agriculture]”<sup>40</sup>, showing an openness for compromise but still in the common interest of developing States. This last Agreement, the ITPGRFA, adopted in 2001, would be of very interesting inspiration if one seeks to create an intellectual property rights regime which benefits the whole community of States. Indeed, after recalling in the preamble that plant genetic resources for food and agriculture are “a common concern of all countries”, its Article 12(3)(d) implements a system of “common pool” of patents, meaning that the patents obtained thanks to the resources must fall in the public domain: “Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System”. A reduced duration of patent rights could also lead to a combination between an incentive regime and a common pool of patent project. The principle of facilitated access rests on the utilisation of a standard material transfer agreement containing the terms and conditions on access to and utilisation of the crops<sup>41</sup>.

Putting the marine genetic resources regime in relation with the scientific research dispositions of the UNCLOS, as Article 244 dealing with *Publication and dissemination of information and knowledge*, would, finally, be another way to promote the sharing and transfer of scientific and technical knowledge. A system of notice-based access, including a disclosure of origin and purpose, is another option that was introduced in the discussion by Brazil.<sup>42</sup> This notification process is also favoured, by China and Norway, in addition to a

<sup>39</sup> UNCLOS Art 82: ‘1. The coastal State shall make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. 2. The payments and contributions shall be made annually with respect to all production at a site after the first five years of production [...] 4. The payments or contributions shall be made through the Authority, which shall distribute them to States Parties to this Convention, on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and the land-locked among them’.

<sup>40</sup> 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. 4.

<sup>41</sup> See also, on this field, VOIGT-HANSEN (G.), “Current ‘Light’ and ‘Heavy’ options for Benefit-Sharing in the context of the United Nations Convention on the Law of the Sea”, pp. 683-705 and BROGLIATO (A.) et al., “Mare Geneticum: Balancing Governance of Marine Genetic Resources in International Waters”, pp. 3-33, *The International Journal of Marine and Coastal Law*, vol. 33, 2018.

<sup>42</sup> *Ibid.*

code of conduct or guidelines on access.<sup>43</sup> Moreover, the Intergovernmental Oceanographic Commission (IOC) of the United Nations Education, Science and Culture Organisation (UNESCO), which is competent as regards marine scientific research and transfer of marine technologies, could play an important role in the fields of coordination and capacity building. Such a role was highlighted during the third session of discussions in August 2019<sup>44</sup>.

### c. Environmental impact assessment

Concerning environmental impact assessment, an important way to take into account the interests of future generations in the conduct of environmental impact assessments would be to integrate “strategic” and “cumulative” impacts assessment into the future agreement, in addition to the traditional requirement to conduct environmental impact assessments, including in several international conventions and consecrated as a customary law principle by the International Court of Justice<sup>45</sup>.

The concept of “strategic environmental assessment” has been developed and defined in the framework of the Convention on Biological Diversity, with the CBD *Voluntary guidelines on biodiversity-inclusive impact assessment* and the *Guidelines on biodiversity-inclusive Strategic Environmental Assessment* endorsed in 2006<sup>46</sup>. Strategic environmental assessment is defined as a systematic and comprehensive assessment, at the programme or policy level whereas traditional environmental assessment is implemented only at the project level, which is much more specific. It consists in an identification and evaluation of environmental consequences of the proposed policies, plans or programmes to ensure that they are fully included and appropriately addressed at the earliest possible stage of the decision-making. It also takes into account sociological and economical considerations. The 2003 Kiev Protocol to the Espoo Convention on environmental impact assessment in a transboundary context<sup>47</sup> deals especially with strategic environmental assessment, and could thus be an important source of inspiration in the current discussions and an important complement to the traditional impact assessment approach.

In the meantime, there exists a clear gap in international law regarding “cumulative impact assessments”, which are conducted at the project level, but take into consideration the relevant past and present activities that occurred in the same area, in order to assess the cumulative and temporal effect of the activity and not its limited impacts individually. Such

<sup>43</sup> *Ibid.*

<sup>44</sup> IISD Reporting service, “Summary of the Third 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: 19-30 August 2019”, *Earth Negotiation Bulletin*, vol. 25, n°218, p. 4 and p. 18.

<sup>45</sup> See UNCLOS, Article 206; CBD, Article 7; *Pulp Mill on the River Uruguay (Argentina v. Uruguay)*, Judgement of 20<sup>th</sup> January 2010, ICJ Rep 14, para 204.

<sup>46</sup> Decision VIII/28 COP 8, 2006, document UNEP/CBD/COP/8/31. See also the *Refined guidelines on biodiversity considerations in EIA and SEA (Part 2: SEA) prepared in response to decision VI/7-A*, para 3, Version 7 July 2005.

<sup>47</sup> Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, adopted on 25 February 1991, entered into force 10 September 1997, 1989 UNTS 309. Protocol on Strategic Environmental assessment to the Convention on Environmental Impact Assessment in a Transboundary Context, Kiev, Ukraine, adopted on 21 May 2003, entered into force on 11 July 2010, 2685 UNTS 140.

an approach could allow taking into account the effects of climate change or other diffuse processes on ecosystems, such as transboundary pollution, affecting some ecosystems more than others. Moreover, a transparent and participative procedure for the realisation of the impact assessments, strategic or not, is needed. Whether centralized or national the procedure is, the consultation of every potentially interested group or entity and more generally the civil society, and the possibility to have access to all the relevant information in a transparent way represents the most direct and obvious means of public participation, taking into consideration all expressed interests, both individual and common. The publication of evaluations or reports, the creation of a ‘clearing house mechanism’, as well as, importantly, the decision-making following the environmental impact assessment, remain in the discussions<sup>48</sup> and will definitely influence the reconciliation between the various interests in the ABNJ.

Another important tool would rest in the creation of rules addressing conflicts of use between different activities, which could integrate either the process of creating MPAs or the conduct of environmental and cumulative impacts assessment. The 2014/89/EU *Directive of the European Parliament and of the Council establishing a framework for maritime spatial planning* constitutes in this field a useful means aiming at reconciling and organizing activities at sea, which have 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, currently emerging in different regional frameworks, has been referred to by several states during the discussions on BBNJ (as for instance Fiji, Seychelles and Thailand)<sup>49</sup>, but it has not been fully integrated into the negotiations. Nevertheless, the spirit and principles guiding the marine spatial planning policy are 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 costal States 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. Marine spatial planning, combined with MPAs and environmental impact assessments, has the potential to add an important level of collection of information and data and would help to reach a much more transparent, collectively agreed and coherent organization of maritime space.

<sup>48</sup> IISD Reporting service, “Summary of the Third 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: 19-30 August 2019”, *Earth Negotiation Bulletin*, vol. 25, n°218, pp. 13-14.

<sup>49</sup> For instance 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, pp. 6-8 and p. 16.

2) *An example outside the future ILBI: the procedure in front of the CLCS*

The interests of the international community could usefully be integrated, outside the future instrument, before the Commission on the Limits of the Continental Shelf (CLCS), with regard to the claim of coastal States on the extension of the continental shelf. Indeed, every extension of States' continental shelf implies simultaneously a reduction of the perimeter of the Area. As the Tribunal stated in the *Delimitation of maritime areas between Canada and France* arbitration, “Any decision by which the Tribunal would grant the Parties rights on the set beyond 200 nautical miles or discard such rights would constitute a decision involving a delimitation not between the Parties' but between each of them of them and the international community, represented by the administrative bodies and the protection of the international seabed area”<sup>50</sup>. Here again, this is a confrontation between the individual interest of the coastal State to extend its continental shelf and the common interest of the international community to protect and share the benefits of the common heritage of mankind.

According to Tullio Treves, the extension of the continental shelf beyond 200 nautical miles could have an important impact on the perimeter and surface of the international deep seabed, and reveals that it “could not be carried out without participation in the authority of the bodies responsible for the administration and protection of the latter, although it is not clear whether the Tribunal is considering the International Authority in this regard or the Commission on the Limits of the Continental Shelf”<sup>51</sup>, in order to promote a genuine representation of the interests of the international community of the States. However, the body responsible for the representation and protection of the Area it is the ISA, not the CLCS, which has a purely scientific and technical role. The CLCS is not empowered to take into account the effects of the demands of extension on the Area and on the interests of the international community. The ISA, at the same time, does not have the following legal basis for intervening in the process of recommendation conducted by the CLCS or for contesting an unilateral extension of the continental shelf in the legislation of a coastal State, that would “damage” to the common heritage of mankind<sup>52</sup>.

In a document submitted in 2009, China proposed, in this context, that the CLCS, in the context of the delimitation of the extended continental shelf of the States, take into account “the overall interest of the international community”, and should not “encroach upon the Area as the common heritage of mankind”<sup>53</sup>. In addition, the United Nations General Assembly in its 2016 *omnibus* resolution on the *Oceans and the Law of the Sea* recalls “the importance of the Commission's work for coastal States and the international community”. Taking into

<sup>50</sup> *Case concerning the delimitation of maritime areas between Canada and France*, Decision of 10 June 1992, Report of International Arbitral Awards, vol. XXI pp. 265-341.

<sup>51</sup> TREVES (T.), « La communauté internationale et la délimitation du plateau continental au-delà des 200 milles marins », pp. 311-315 in *L'État souverain dans le monde d'aujourd'hui*, Mélanges en l'honneur de J.-P. Puissechot, Pedone, 2008, p. 312 (translated by the author) and TREVES (T.), “Judicial Action for the Common Heritage”, pp. 113-133 in HESTERMEYER (H.), MATZ-LÜCK (N.), SEIBERT-FOHR (A.), VÓNEKY (S.) (Eds.), *Law of the Sea in dialogue*, Springer, 2011, p. 122 and following.

<sup>52</sup> See JARMACHE (E.), « La pratique de la Commission des limites du plateau continental », pp. 429-441, *AFDI*, vol 54, 2008, p. 441.

<sup>53</sup> SPLOS/196 22 May 2009, para 1 et 6 79.

account the interests of the international community of States could involve adding in the CLCS decision-making process new criteria regarding the evaluation of requests for extension. In this sense, landlocked and geographically disadvantaged States have called for that a criterion of equitable distribution be considered by the Commission, in order to exercise some control over the establishment of the boundaries of the Area<sup>54</sup>.

Additionally, despite the fact that the Authority is not involved in the delimitation procedure, having an “*eminently passive role, not being aware of the extension and its consequences, the narrowing of the area of competence, the Zone, that when the coordinates and outer limits are published*” by the State and the Secretary-General,<sup>55</sup> and that there is no judicial remedy within this framework<sup>56</sup>, it could nevertheless be envisaged that the Assembly or Council of the Authority could request an advisory opinion from the Chamber for the settlement of seabed disputes, in accordance with article 191, which may cover all “*legal issues arising in the course of their activities*”. Apart from these assumptions, States appear to be the only ones in a position to challenge a recommendation to the CLCS or proceedings before an international court, pursuant to the Part XV of UNCLOS.

As a conclusion, although dealing with strictly international maritime areas, the future ILBI raises important challenges as regards the combination and reconciliation of States’ individual and collective interests at sea. Noteworthy, options and tools to ensure that the individual and common interests are well balanced, and that the new agreement is not exploited to feed the creeping jurisdiction of States at sea, do exist. However, those options and tools are not always sufficiently highlighted and are even sometimes discarded from the discussions, despite a promising potential. The equilibrium between a voluntary conclusion and application of a future instrument and the efficiency of its ambitious objectives is, therefore, a tricky and sensitive exercise.

<sup>54</sup> DE MARFFY MANTUANO (A.), « La fixation des dernières limites maritimes : le rôle de la Commission des limites du plateau continental », pp. 399-419 in *La Mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Pedone, 2003, p. 411.

<sup>55</sup> UNCLOS Articles 76(9) and 84(2) on publicity of the limits.

<sup>56</sup> WOLFRUM (R.) “The Role of the International Dispute Settlement Institutions in the Delimitation of the Outer Continental Shelf”, pp. 19-41 in VIGNES (D.), LAGONI (R.) (Eds.), *Maritime delimitation, Publications on Ocean Development* vol. 53, Martinus Nijhoff Publishers, 2006, p. 25.