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The importance of soft law in the conservation of marine biodiversity

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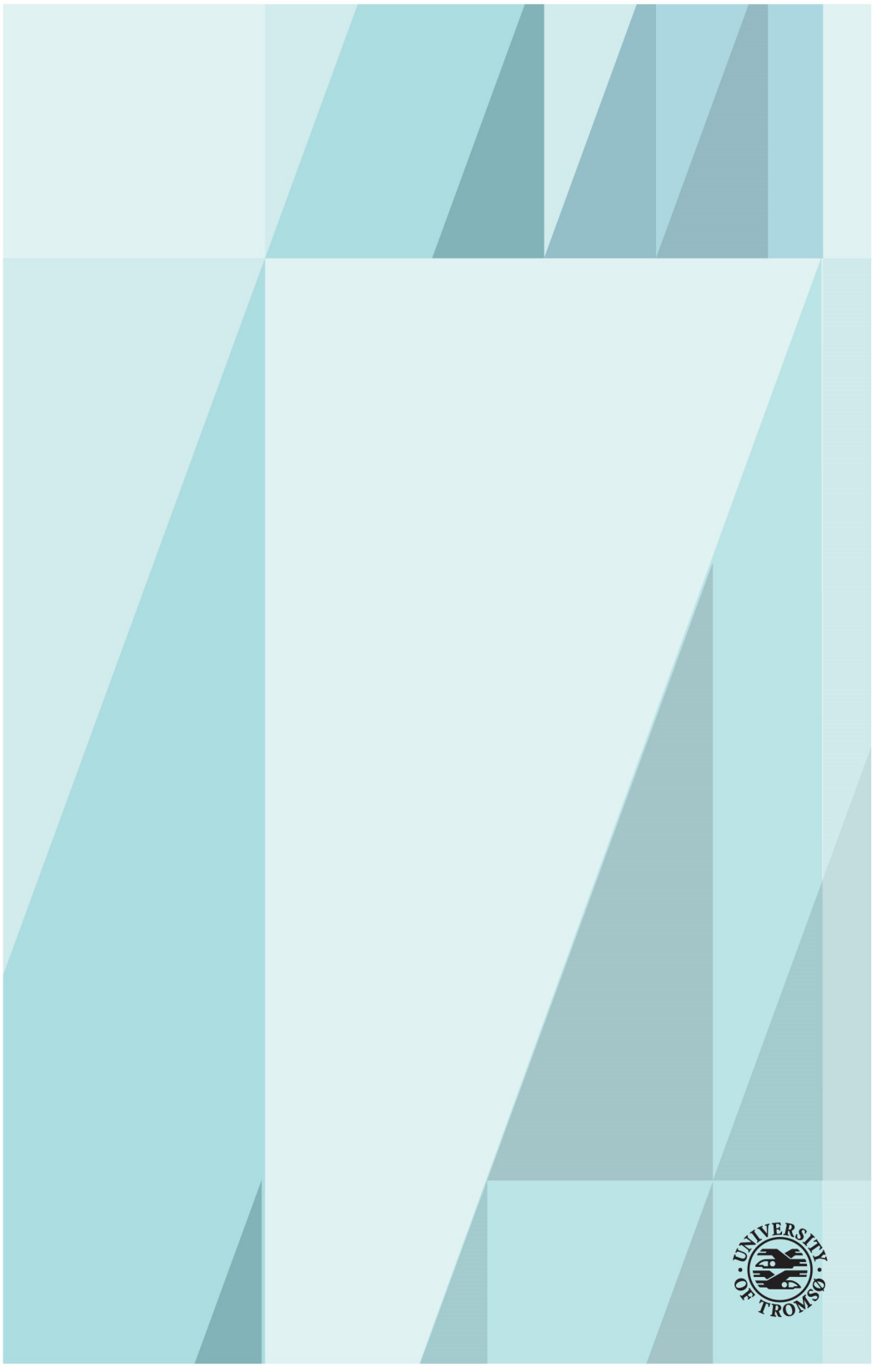

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1 Introduction

Soft law has become a popular method in international law because it constitutes more an advice towards states than an order[1], making it easier for states to agree upon[2]. Soft law constitutes a topic of interest in international law for multiple reasons, one of them is that its instruments can "operate without the secretariats or bureaucracies that frequently accompany legally-binding agreements"[3]. In other words, on one side these instruments are cheaper to adopt, so they can constitute an "appealing alternative to many developing states"[4], and on another side, they are easier to adopt, so of relevance if the matter at hand is urgent[5].

The increase in the use of soft law is also partly due to the fact that it is linked to "good faith"[6], and as in international environmental law for example, good relations between states are fundamental in order to face global challenges such as climate change[7] in an effective way[8]. In order to fulfill its objective, this paper will discuss the concept of soft law, its possible effects and its importance on international governance in view of the multiple shortcomings of hard law[9].

Before getting in-depth with the discussion, it is useful to define the terms present in the title of this thesis, thus *soft law* and *conservation of marine biodiversity*.

There is no clear definition of the term *soft law*, as "[its] concept […] and its significance are controversial"[10], but as for now, it is possible to say that soft law is composed of a variety of instruments having different forms and different levels of normativity[11].

Also, "Lord McNair coined the term 'soft law' to describe 'instruments with extra legal binding effect'"[12], but what does this imply?

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[1] DL Shelton, *Soft Law*, Handbook of International Law, 2008, p 3.
[2] Ibid, p 15.
[3] GL Lugten, *Soft Law with Hidden Teeth: The Case for a FAO International Plan of Action on Sea Turtles*, Journal of International Wildlife Law and Policy, vol. 9, 2006, pp. 162-163.
[4] Ibid, p 163.
[5] Shelton, n 1, p 15.
[6] D Thürer, *Soft Law*, Max Planck Encyclopedia of Public International Law, 2009, Part D. 1. 26.
[7] Shelton, n 1, pp. 14-15.
[8] Ibid, p 3.
[9] KW Abbott and D Snidal, *Hard and Soft Law in International Governance*, International Organization, vol. 54, no. 3, 2000, pp. 422-423.
[10] Thürer, n 6, Part A. 2. 5.
[11] Shelton, n 1, p 3.
[12] Thürer, n 6, Part A. 2. 5.

Soft law does not possess legal binding efffect, and then should be distinguished from hard law.[13] The most interesting element of this definition is that soft law creates results outside the realm of law, and could be seen as "moral and political commitments"[14].

What is the importance of *moral* and *politics* when it comes to results of soft law? And why is soft law important in the field of international law? Some answers will be given in chapter 2.

The objective of this paper does not however evolve around the topic of soft law as a general concept, but around the different roles of soft law in relation to the *conservation of marine biodiversity*. What is *marine biodiversity*?

In Article 2 of the the *1992 Convention on Biological Diversity* (or CBD), "'[b]iological diversity' means the variability among living organisms […] and the ecological complexes of which they are part"[15].

A link can arguably be drawn between *biological diversity* (or biodiversity[16]) and *environment*, as *environment* is the term used in Part XII of the *1982 United Nations Convention on the Law of the Sea* (or LOSC). As Article 22(2) of the CBD states that "[c]ontracting parties shall implement this Convention […] consistently with the rights and obligations of States under the law of the sea"[17], which means that even if the CBD is a more recent legal tool, it needs to comply with the LOSC.

And as Article 192 of the LOSC gives a general obligation on the "protection and preservation of marine environment"[18], it can be suggested that not only *conservation and protection* are closely linked, but the CBD and the LOSC as well.

This link is supported by the *Southern Bluefin Tuna case*, where it is stated that "the conservation of the living resources of the sea is an element of the protection and preservation of the marine environment"[19]. It may appear that, as a consequence, conservation has been included within the LOSC, some doctrine also supports this view[20].

This relationship is precised by the *Chagos Marine Protected Area Arbitration between Mauritius and the United Kingdom* (or *Chagos case*), where "environmental protection cannot

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[13] Shelton, n 1, p 1.
[14] Thürer, n 6, Part A. 1. 1.
[15] United Nations Convention on Biological Diversity, Rio de Janeiro, Jun. 5, 1992, 1760 UNTS 79, Article 2.
[16] "Biological diversity is often written in shorthand as 'biodiversity', and here the two terms are taken to be synonymous" (JS Gray, *Marine biodiversity: patterns, threats and conservation needs*, Biodiversity and Conservation, vol. 6, 1997, p 154), as it will also be in this thesis.
[17] CBD, n 15, Article 22 (2).
[18] United Nations Convention on the Law of the Sea, Montego Bay, Dec. 10, 1982, 1833 UNTS 3, Article 192.
[19] Southern Bluefin Tuna (Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports 1999, page 280, at p. 295, para. 70.
[20] KM Gjerde et. al., *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*, IUCN, Gland, Switzerland, p vii.

prevail over conservation"[21]. In other words, it may be suggested that there is no hierarchy between these norms, as they have to function together to have the best possible outcome.
The fact that the LOSC is open to evolutions and to improvements is a proof that it is still viewed and needed as "the Constitution for the Oceans"[22].

The main research question of this paper is, to which extent will soft law be a helpful instrument in the resolution of current challenges in the conservation of marine biodiversity?

In its first chapter, the thesis will outline the concept of soft law and the doctrinal debate in a first section (2.1). In a second section (2.2), this paper will discuss the differences between existing soft law instruments and in a third one (2.3), relations that might exist between soft law and hard law will be discussed.
The second chapter will include an overview on the topic of biodiversity in a first section (3.1), which will lead to a more in-depth focus on biodiversity in areas beyond national jurisdiction (or ABNJ) in a second section (3.2).
In a third section (3.3), this paper will discuss the role of soft law for the conservation of marine biodiversity in the context of international fisheries management, as multiple interconnections exist and as deep-sea fishing is of particular relevance.[23]
Then, as the fourth and final section of the second chapter (3.4), this paper will discuss the role of soft law for the conservation of marine biodiversity in the context of international shipping management, as shipping is of great importance[24] and as interconnections with the polar waters' regime appear to be helpful in the discussion.
To end, this paper will give some concluding remarks answering the research question, by considering the different natures and shapes of soft law instruments and also the positive effects of using both soft law and hard law in today's international governance (*see* section 2.3).

Starting with the core of this paper, soft law needs to be discussed in order to know its characteristics and its multiple assets in the process of helping international governance[25].

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[21] LN Nguyen, *The Chagos Marine Protected Area Arbitration: Has the Scope of LOSC Compulsory Jurisdiction Been Clarified?*, The International Journal of Marine and Coastal Law, vol. 31, 2016, p 138.
[22] TTB Koh, *A Constitution for the Oceans*, Remarks, Adapted from statements by the President on 6 and 11 December 1982 at the final session of the Conference at Montego Bay, p xxxiii.
[23] J Harrison et. al., *Review and analysis of international legal and policy instruments related to deep-sea fisheries and biodiversity conservation in areas beyond national jurisdiction*, Food and Agriculture Organization of the United Nations, 2017, p xii.
[24] J Ardron et. al., *The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?*, Marine Policy, vol. 49, 2014, p 101.
[25] Shelton, n 1, p 8.

2 Soft law

2.1 The concept of soft law

Keeping in mind what has previously been presented about soft law, the traditional scholarly debate is whether or not "the legal obligation [is] to be crucial"[26].

Scholars who think that way will prioritize hard law and will deny "the very concept of 'soft law'"[27]. However, this strict dual view between hard law and soft law is challenged by some doctrine[28], mainly because soft law does not appear to be "a uniform phenomenon"[29]. In other words, soft law and hard law cannot be seen as two inert concepts separated by strict delimitations.[30]

In light of the evolution of international law in recent years, it does not seem that the positivist view has to be looked upon "as a whole"[31], which means that the strict positivist vision does not appear to possess the same validity as it used to, mostly because of the important development of soft law. However, maybe "the positivist objection to soft law"[32] could be observed as a useful tool in order to understand the scholarly debate.

In other words, it seems that positivism can still be part of the debate, but it cannot be the main approach as it appears to be unable to take into account new phenomenons such as soft law[33], but a more nuanced approach possessing some of the positivism features can still be used, as long as it is "refreshed and modernized"[34].

Moreover, the increase in the use of soft law has brought "an upsurge in studies of international law"[35], in the sense that soft law produces "norms in the twilight between law and politics"[36].

In simple terms, the debate has evolved throughout time, but the opinion which states "that the most effective commitments are those which are legally binding"[37] still remains.[38]

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[26] IF Soltvedt, *Soft Law, Solid Implementation? The Influence of Precision, Monitoring and Stakeholder Involvement on Norwegian Implementation of Arctic Council Recommendations*, Arctic Review on Law and Politics, vol. 8, 2017, p 75.
[27] Ibid.
[28] Abbott and Snidal, n 9, p 422.
[29] Soltvedt, n 26, p 73.
[30] Shelton, n 1, p 7.
[31] J d'Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, The European Journal of International Law, vol. 19, no. 5, 2008, p 1075.
[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Soltvedt, n 26, p 75.
[36] Thürer, n 6, title of Part A.
[37] Soltvedt, n 26, p 75.
[38] Ibid.

What does effectiveness mean in this situation? Effectiveness can arguably be linked to a more practice-oriented angle of legal provisions. As it appears, even the best provisions need to be enforced and applied in order to be useful in the process of facing challenges.[39] So it has to be implemented and complied with in order for the negotiations' and adoption's processes not to have been in vain[40], and for "international commitments [to be] translated into action at the domestic level"[41].

What are the characteristics of these processes?

As seen in some treaty creation process such as the LOSC which "took almost 10 years to hammer out"[42], negotiations can be relatively long. Also, the result can "[contain] considerably less content than [what] had been included in earlier drafts"[43], which means, on one side, that negotiations can be tensed and difficult, and on the other side, that the matter that needed regulation has been narrowed in order to be agreed upon[44].

This narrowing could possibly lead to a weakened legal provision, as less ground is regulated. It is the reason why soft law can come into play, because even though it is a "complex of norms lacking binding force"[45], it is "producing significant legal effects nevertheless"[46].

But how can a non-binding legal instrument produce legal effects?

There are several answers, one of the main being that soft law's goal is to "draw attention to a problem, suggest appropriate behaviour"[47], soft law is a multi-faceted instrument, which has not only a legal nature, but also a social[48] and a political one[49].

Additionally, "international commitments usually require behavioral change at the domestic (national) level"[50], thus soft law is used to make states' mentalities evolve and to make modern challenges go smoothly towards solutions.[51] This notion of *states' mentalities* will be of great importance throughout the discussion, as this paper wishes to focus on the different angles within the legal perspective.

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[39] Shelton, n 1, p 22.
[40] R Blasiak and N Yagi, *Shaping an international agreement on marine biodiversity beyond areas of national jurisdiction: Lessons from high seas fisheries*, Marine Policy, vol. 71, 2016, p 212.
[41] Soltvedt, n 26, p 74.
[42] OR Young, *The Arctic in Play: Governance in a Time of Rapid Change*, The International Journal of Marine and Coastal Law, vol. 24, 2009, p 439.
[43] Ibid.
[44] Ibid.
[45] Thürer, n 6, Part F. 36.
[46] Ibid.
[47] Lugten, n 3, p 162.
[48] Shelton, n 1, p 3.
[49] Thürer, n 6, Part B. 1. 11.
[50] Soltvedt, n 26, p 74.
[51] Lugten, n 3, p 162.

Nonetheless, hard law instruments are traditionally seen as being able to get "state adherence, but are sometimes viewed as too general to address specific and immediate problems"[52]. This is often due to the relative vagueness of the provisions that states agree on in a binding instrument.[53]

And even when states agree, and despite its binding strength, hard law does not present "a high level of compliance"[54]. Also, despite what one may think, some doctrine suggests that compliance of a "soft norm can be significantly higher than the one of hard law norms"[55]. What is the cause?

In order to explain compliance, "reputational costs [are] significant"[56], and as soft law is linked to good faith (*see Introduction*), reputation may appear to be even more important within soft law than within hard law.

Furthermore, it may appear to be linked to the different nature of the negotiations' process, following soft law provisions' negotiations, states are adopting non-binding rules for which there are no sanctions in case of non-compliance[57]. Consequently, provisions in soft law often present a less narrow agreed content[58], not in the sense that its provisions are vague but rather meaning that its scope of regulation appears to be wider than the one of hard law. Thus, soft law offers a better-suited answer to face current challenges, "so the overall impact may still be more positive with a non-binding than a binding instrument"[59].

A good example of this phenomenon is the *1995 Food and Agriculture Organization* (or FAO) *Code of Conduct for Responsible Fisheries* (or Code of Conduct) which is soft law and in which is included the *1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas* (or Compliance Agreement) which is hard law.[60]

In fact, the Compliance Agreement is too narrow to result in positive effects while the Code of Conduct still has beneficial results today.[61] In what way is the Compliance Agreement *too narrow*? This answer will be given in section 3.3.

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[52] Lugten, n 3, p 172.
[53] Young, n 42, p 439.
[54] Thürer, n 6, Part A. 2. 6.
[55] Ibid.
[56] Shelton, n 1, p 19.
[57] Soltvedt, n 26, p 73.
[58] Shelton, n 1, p 19.
[59] Ibid, p 20.
[60] J Friedrich, *Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries*, German Law Journal, vol. 09, no. 11, 2008, pp. 1547-1548.
[61] Ibid.

Also, agreeing to soft law proves a certain willingness of the state, as being aware of the importance of challenges that need to be faced is fundamental and consitutes the first stage of the process. This is why "positive implementation outcomes"[62] can be the result of the use of soft law instruments. One might ask why hard law compliance is not always effective, since binding legal instruments bring a *legal obligation*[63]. The answer seems to be linked to national sovereignty or "sovereignty costs"[64] and "political will"[65], and this is what might make soft law even more useful in the future (*see* section 2.2).

In fact, in international law, the international community has to agree on what to adopt in order to meet new challenges.[66] So states negotiate and then agree to be bound by common rules.[67]

Even if there is no direct loss of sovereignty but rather a "diminution of sovereignty"[68], there is obviously an impact which "is tempered by states' ability to withdraw from international agreements"[69]. In other words, this indirect impact on national sovereignty is very subtle and sensitive, as a state is able to decide to leave a Treaty (e.g. withdrawal of the United States from the 2015 Paris Agreement[70]).

What is a possible consequence of this *protected* national sovereignty?

In a similar direction as the relative *vagueness* of binding provisions (*see* previously in this section), the consequence is arguably a softening in "governance, law-making, international organizations, enforcement"[71] as is not decided what is necessary to face challenges but what states decide to agree upon.

There is nevertheless a negative consequence for states withdrawing as they are "risking loss of recognition as members in good standing of the international community"[72] (this is what this paper has earlier referred to as *reputational costs*).

But overall, it could be argued that the certain predominance of national sovereignty over the needs of the international community seems to have resulted in the use of soft law.[73] However,

[62] Soltvedt, n 26, p 75.
[63] Ibid.
[64] Abbott and Snidal, n 9, pp. 436-437.
[65] Lugten, n 3, p 165.
[66] Shelton, n 1, p 10.
[67] Ibid, p 1.
[68] Abbott and Snidal, n 9, p 437.
[69] Ibid.
[70] HB Zhang et. al., *U.S. withdrawal from the Paris Agreement: Reasons, impacts, and China's response*, Advances in Climate Change Research, vol. 8, 2017, p 220.
[71] d'Aspremont, n 31, p 1075.
[72] Abbott and Snidal, n 9, p 437.
[73] Thürer, n 6, Part A. 2. 6.

the main element here is that soft law is easier for states to agree upon, as it does not bring binding provisions (as seen previously in section 2.1).

For what reason did it result in the use of soft law? If the process of negotiations is not going towards a positive outcome, "[t]he use towards soft law […] ensured that the negotiations were not deadlocked"[74]. In other words, soft law is very useful when negotiations towards hard law are about to reach a dead-end and where a positive outcome is highly unlikely.

Also, by producing "norms […] between law and politics"[75], which means that the political will of a member state is more carefully taken into account, soft law is able to make state mentalities' evolve[76] and also to "stimulate state practice"[77] without a *too steep* or rushed *hard law process*. By extension to this *effect on state practice* and brought as a nuance, one of the main characteristics of soft law is that it can be "leading to the formation of customary international law"[78]. However, while recognizing the importance of such a process, this paper does not aim to focus extensively on the transformation from soft law to hard law, as it wishes to show inherent assets of soft law, in the more traditional view of what soft law is.

It is fundamental to keep multiple options, as states are the deciding actors of international law content[79]. As a direct consequence, without political will from the states, international law cannot pursue its goal of good cooperation and of common effort in facing modern challenges. As a nuance of the power of states' political will, "non-binding commitments may be entered […] to reflect the will of the international community […] over the objections of one or a few states"[80]. In other terms, this allows necessary soft law instruments to be adopted, even if there is no unanimity on the matter at hand. This appears to be a good solution in order to let some scope of action and some legitimacy to international institutions.

After having discussed the concept of soft law, the next section will discuss the different types of soft law instruments, as well as their main characteristics.

2.2 Types of soft law instruments

[74] A Schäfer, *Resolving Deadlock: Why International Organisations Introduce Soft Law*, European Law Journal, vol. 12, no. 2, 2006, p 206. This source applies to labor law, but a similar dynamic exists in international law in general.
[75] Thürer, n 6, title of Part A.
[76] Lugten, n 3, p 162.
[77] Shelton, n 1, p 7.
[78] Ibid.
[79] Ibid, p 1.
[80] Shelton, n 1, p 15.

The aim of this section is to illustrate the different types of soft law instruments, and also to outline their differences and present some elements of comparison.

However, the aim is not to present a full catalogue of every existing soft law instrument.

As seen in the previous section, soft law should not be seen as an "uniform phenomenon"[81], which has been one of the traditional views with the "binary nature of law"[82].

The more modern view tends to undermine that dual vision due to the multiple existing natures within soft law and the different strengths of soft law instruments.[83] This will be further elaborated in this section.

In relation to soft law, some doctrine suggests that "two categories […] emerge: resolutions […] and non-binding parts of legally binding agreements"[84].

However, as "[s]oft law comes in an almost infinite variety"[85], this approach might be regarded as too narrow. Other doctrine gives a broader list of soft law instruments, and as soft law has known an increase in its use and in the wideness of its functions' effectiveness, it may be consider now that:

> Common forms of soft law include normative resolutions of international organizations, concluding texts of summit meetings or international conferences, recommendations of treaty bodies overseeing compliance with treaty obligations, bilateral or multilateral memoranda of understanding, executive political agreements, and guidelines or codes of conduct adopted in a variety of contexts.[86]

In this section will be presented the *United Nations General Assembly resolutions* (or UNGA resolutions), *non-binding parts of legally binding agreements*, *concluding texts of summit meeting or international conferences* and also *guidelines*.

These soft law instruments appear to be the most relevant for the purposes of this paper.

Following both of these doctrines, the first type of soft law is constituted of the *United Nations General Assembly resolutions* (or UNGA resolutions). Many UNGA resolutions of importance exist, so the focus will be put on more general characteristics.

First, UNGA resolutions can present very different legal forces[87], as "the language, the vote, the drafting history, and subsequent state practice"[88] have to be considered in the assessment on legal force.

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[81] Soltvedt, n 26, p 73.
[82] d'Aspremont, n 31, p 1075.
[83] Ibid, p 1076.
[84] Thürer, n 6, Part B. 10.
[85] Shelton, n 1, p 3.
[86] Ibid, p 4.
[87] Ibid, p 7.
[88] Ibid, p 7.

Also, UNGA resolutions "not only show international support"[89], but also will put pressure for "the international community [to] urgently act to implement"[90] different adopted measures.

As previously evoked in section 2.2, some UNGA resolutions bring the question of a hierarchy within soft law, as some of these resolutions seem to have more normative force than other soft law instruments. One element might be enlightening in this regard, as UNGA resolutions "can be used to clarify and develop the meaning of the treaty itself"[91], "it can be argued that UNGA Resolutions are potentially binding on states"[92]. Treaties, by their nature and by the relatively wide scope of their measures, can have as a consequence to make unclear or confusing the wish of their drafters. Some far-reaching soft law, not directly connected to the Treaty at hand, will not be binding on States. However, as UNGA resolutions are linked with political will, it can be imagined that they have more strength because evolving closer to the binding legal instruments.

This is the reason why, concerning these *resolutions*, "state practice […] has signaled that compliance is expected"[93]. So, what is the place of these resolutions within soft law?

It can be suggested that these UNGA resolutions introduce the idea of a hierarchy within soft law with the fact that "[i]n the Nicaragua Case, the International Court of Justice gave a greater status to General Assembly Resolutions than merely soft law instruments"[94].

Is it only about legal force or should it be seen as "potentially binding"[95]?

One thing is for sure, with the growing popularity of soft law and compliance difficulties encountered by hard law, delimitation in the legal force and in the binding nature gets blurred.[96]

Arguably, it may appear that *the amount of possessed normativity* between a relatively weak hard law instrument (possessing narrow content and presenting compliance difficulties, as seen in section 2.1) and a strong soft law instrument (as UNGA resolutions) could show more normativity in the soft law instrument, and thus contradicting the traditional view (as seen in section 2.1).

Secondly, about *non-binding parts of legally binding agreements*, they seem to offer guidance and ease the process of national implementation.[97]

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[89] Lugten, n 3, pp. 170-171.
[90] Ibid.
[91] Thürer, n 6, Part D. 1. 28.
[92] Lugten, n 3, p 171.
[93] Shelton, n 1, p 1.
[94] Lugten, n 3, p 171.
[95] Ibid.
[96] Thürer, n 6, Part C. 1. 20-21.
[97] Ibid, Part B. 2. 17.

For example, the LOSC, a binding legal instrument, sometimes called "the Constitution for the Oceans"[98], has a framework nature and can consequently present imprecisions or ambiguities[99]. Accordingly, soft law can be useful to fill gaps left by hard law.[100] It can be explained by a need for "precision"[101], which means "that rules unambiguously define the conduct that is required"[102]. The term *unambiguously* is fundamental here, as it arguably shows that soft law needs to bring some clarifications to hard law provisions.

This appears to refer to an important notion of the law of the sea, which is the *generally accepted international rules and standards* (or GAIRS) which the LOSC refers to several times, such as in Article 211 concerning *Pollution from vessels*[103], which has been "one of the most active areas for GAIRS generation"[104].

Also, and more connected to the topic of this paper, GAIRS can also take the form of soft law, such as guidelines and codes of conduct.[105]

This element could thus potentially reinforce the status of soft law.

An important element here is the importance of legal protection, GAIRS even being capable of guaranteeing a minimum standard when the matter at hand is of great relevance with the use of the term *at least* in Article 211(2) of the LOSC[106] in order to avoid a devaluation of the provisions' normativity and to keep a relatively high legal protection.[107]

Article 192 of the LOSC could also be subject to the beginning of the interpretation made to the LOSC (*see* previously in this section), as it presents a general obligation, clearly has a framework nature and "[relies] on external rules and standards"[108] to evolve.[109]

Even if this seems to be far-reaching, this very last element directly constitutes one of the main reasons why soft law was able to develop so importantly.

Article 192 of the LOSC appears to be connected to what is now the *conservation of biodiversity*, not so much in the sense that the general obligation contained in this Article 192

[98] Koh, n 22, p xxxiii.
[99] Shelton, n 1, p 17.
[100] Thürer, n 6, Part D. 26, 28-29.
[101] Soltvedt, n 26, p 73.
[102] Ibid, p 75.
[103] LOSC, n 18, Article 211.
[104] C Redgwell, 'Sources of International Environmental Law: Formality and Informality in the Dynamic Evolution of IEL Norms' in J d'Aspremont and S Besson (eds), *The Oxford Handbook on the Sources of International Law* (Oxford University Press, 2017), Chapter 43, p 949.
[105] D König, *Marine Environment, International Protection*, Max Planck Encyclopedia of Public International Law, 2015, Part C. 1. 14.
[106] LOSC, n 18, Article 211 (2).
[107] Redgwell, n 104, p 949.
[108] Ibid, p 948.
[109] Ibid, p 948.

constitutes a genesis, but rather that the wideness of its scope kept it from being outdated with knowledge increasing.

This last element needs further explanations. It can be linked to "flexibility [which] is especially important when uncertainty […] threatens to upset a larger "package deal""[110] or could even "serve to codify good practices to improve national law-making […] while leaving flexibility to states"[111]. In other words, through the framework of the United Nations, soft law instruments have been used in order to face challenges and since they offer *more flexibility*, changes can occur as knowledge constantly evolves[112].

Soft law instruments, despite the variety of their natures, offer guidance and precision to the solid legal basis offered by hard law. Nevertheless, a nuance seems necessary here, not all soft law possesses practical-oriented rules, some are of a different nature[113], and will be discussed later in this section.

As *normative resolutions of international organizations* and *recommendations of treaty bodies overseeing compliance with treaty obligations* have been discussed previously in this section, the focus will now be put on *concluding texts of summit meeting or international conferences* and also *guidelines*.

Beginning with concluding texts of summit meetings (or declarations), they are "non-binding political instruments"[114]. The fact that they are linked to politics seem to refer to *political will* (*see* section 2.1) and to the importance of this *will* in the process of reaching objectives.

To support the argumentation, "[a] 1962 memorandum of the UN Office of Legal Affairs called a declaration "a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated""[115]. What is of most relevance in this definition? The idea of validity in a long-term perspective, with principles constituting overall objectives for different actors such as states and international organizations to aim for.

In the same direction, *declarations* "often reflect a deliberate ambiguity between actual and desired practice and are designed to develop the law"[116]. In other words, the establishment of overall objectives mean that the current shape of the law is not satisfactory, so there is a need for some legal change. Thus, declarations are instruments showing political will as well as defining goals to reach.

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[110] Abbott and Snidal, n 9, p 445.
[111] Harrison et. al., n 23, p 6.
[112] Thürer, n 6, Part A. 2. 6.
[113] Ibid, Part B. 1. 14.
[114] Shelton, n 1, p 1.
[115] Ibid, pp. 3-4
[116] Ibid, p 10.

Also, the fact that "the International Court of Justice has acknowledged the legal force of some UN declarations"[117] reinforces the scope of these declarations and allows soft law to have more legitimacy. It may appear by extension that state practice can be very active in showing limits and giving more precisions on both the legal force and the normativity of soft law instruments. By extension, two consequences seem to emerge, the first one is a better knowledge and a better assessment of the efficency of the different soft law instruments which seems to be a positive outcome, the second one is the fact that it appears to create a *certain heterogeneity* of normativity within a same type of soft law[118], so a more negative outcome.

One might further ask if this last element could have for effect to lower down legal certainty or to create confusion in an already complex system, but the answer to this does not fall within the scope of this paper.

The last discussed soft law instrument will be guidelines. A commentary to a UN legal text states that "guidelines contain no new norms, but instead reflect existing law"[119]. To nuance this last element, "[i]t is rare that an entire non-binding instrument is entirely codification or new norms"[120].

What are the characteristics of guidelines and what scope do they have?

Guidelines can be used to "bring about changes in social policy"[121], and then appear to be linked to the social nature of soft law[122]. Why is the social nature important?

Because it is linked to *public awareness*, which is a fundamental lever for future effective legal action (*see* section 3.3).

How guidelines can be enligthening regarding the possible hierarchy of soft law (as referred previously with UNGA resolutions)?

The "FAO adopted […] Guidelines to Reduce Sea Turtle Mortality in Fishing Operations, but COFI [Committee of Fisheries] has refused to support another IPOA [International Plan of Action] on the subject of sea turtles"[123]. This clearly shows differences on legal force possessed by different soft law instruments, International Plans of Action (or IPOAs) possessing more legal force than guidelines, mainly due to the lack of norm creation from guidelines[124].

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[117] Lugten, n 3, p 171.
[118] Shelton, n 1, p 7. This source applies to UN resolutions, but a similar dynamic appears to exist in the different political-oriented soft law instruments, such as *declarations*.
[119] Ibid, p 9.
[120] Ibid, p 9.
[121] Ibid, p 18.
[122] Ibid, p 3.
[123] Lugten, n 3, p 155.
[124] Shelton, n 1, p 9.

By extension to the cited text, an IPOA seems to be a legal upgrade compare to guidelines, which means this may appear as scales within soft law, and thus a possible hierarchy of norms, and not only in terms of characteristics, but in legal force.
Following the needs of the discussion, International Plans of Action can be defined as voluntary instruments[125] "focusing on specific problems in contemporary fisheries management"[126]. These FAO IPOAs can either focus on "global fisheries management"[127] or can be "subject-specific"[128].

Arguably, the idea of a hierarchy within soft law could have for consequence to bring soft law and hard law closer, by lowering down the traditional delimitation of their legal nature due to their characteristics (by extension to the blurring of the delimitation line[129] discussed previously in this section). One may thus wonder, what are the relations between soft law and hard law?

2.3 Importance of the interdependence between soft law and hard law

After having discussed the different types of soft law, relations between soft law (as a whole) and hard law will be discussed. As this section will show, these relations are important, as soft law, even if multi-faceted, does not possess all characteristics to ensure a good governance by itself.[130] Also, as lines between soft law and hard law get blurred[131], should transformation from soft law to hard law be discussed? This section wishes to focus on the interdependence rather than on the possible transformation from one to another. Why is that?
The main reason is to be able to present interrelations between two concepts having their own assets, and to avoid confusions when one might take the nature of the other.
In other words, the point of this section is to understand how soft law and hard law, thanks to their natures, function together and give more comprehensive legal responses thanks to their complementarity[132]. This *complementarity* will be demonstrated throughout this paper, as it is a fundamental notion.

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[125] Food and Agriculture Organization International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Rome, 2001, Part II. 4. This footnote applies to the IPOA-IUU but this characteristic applies to all IPOAs.
[126] Lugten, n 3, p 163.
[127] Ibid.
[128] Ibid.
[129] Thürer, n 6, Part C. 1. 20-21.
[130] Abbott and Snidal, n 9, p 455.
[131] Thürer, n 6, Part C. 1. 20.
[132] Shelton, n 1, p 22.

As written in the previous section (section 2.2), characterizing hard law as the solid legal basis while defining soft law as its guidance is oversimplifying the regime of hard and soft law, and is even somehow getting back to the traditional dual vision of law.

Does this really point back to the traditional vision of law or does it rather point at the blurring lines in the distinction between hard law and soft law[133]?

The answer is not obvious here, what can be said is that "international law should be understood as dynamic and a matter of gradation"[134]. In other words, hard law and soft law should not be seen as inert concepts, but rather as constantly evolving types of normativity possessing different effects and characteristics.

As seen previously, soft law can have different statuses, mainly due to the political will which could, or not, "support implementation"[135].

In the hard law perspective, hard law instruments "are sometimes viewed as too general to address specific and immediate problems"[136]. This is due to the wide scope of their provisions on one side and to their "bureaucracies"[137] on the other side.

In other words, and by extension to section 2.1, concerning hard law, the time lapse between the recognition of a problem and the adoption of a legal solution suffers from multiple and lengthy steps in the process, as already mentioned in section 2.1.

Nevertheless, by reading section 2.2, soft law cannot be seen as the perfect solution for international law-making. Why is this?

This is to some extent due to sovereignty, in fact, "[s]tates can limit sovereignty costs through arrangements that are nonbinding or imprecise"[138], but this phenomenon will have for consequence to make "weaker legal institutions"[139]. In other words, the growing of the soft law concept is somehow problematic because if not counterbalanced by hard law, it could be the symbol of a diminution of the international community's scope of action and an increase of the national sovereignty of each state, and weakening the international community does not seem a sound solution to be able to resolve global challenges.

[133] Thürer, n 6, Part C. 1. 20-21.
[134] Soltvedt, n 26, p 75.
[135] Lugten, n 3, p 165.
[136] Ibid, p 172.
[137] Ibid, p 162.
[138] Abbott and Snidal, n 9, p 439.
[139] Ibid.

And, as it will be discussed in more details in the next section on biodiversity, challenges need to be faced using a global, common effort where cooperation and the international community prevail.[140]

Solutions have to be found, maybe a mix between soft law and hard law would be the best fit, as they have both proven to have their own efficiency but also disadvantages, as discussed previously.

What is the right balance in order to get the best governance? By extension, could "soft law with hidden teeth"[141] be the key?

First, what does *hidden teeth* mean? "[R]ecent developments in international law suggests a 'hardening' of [soft law instruments] status. That is, that the FAO IPOAs may be soft law, but with hidden teeth"[142]. For now, this refers to the status of soft law and also maybe to the wish of strengthening the effects that soft law can have, such as better compliance results maybe.

Also, his is arguably a symbol of the decrease of the distinction between hard law and soft law, and the recognition that soft law presents *different degrees of normativity*.

Some indications on the answer to this question will be given later on in this section.

Concerning soft law, what notions can have a role in its implementation?

Soft law has been previously linked with good faith (*see Introduction*), but it can, thanks to some doctrine, also be linked to *malignancy*, as "the absence of malignancy appears to be the most significant condition for achieving implementation"[143]. *Malignancy* can be defined as the "incentive to avoid following commitments"[144], which could have a direct effect on implementation and compliance, two fundamental topics regarding the effectiveness of legal instruments (*see* section 2.1).

So the fact that soft law is highly dependent on the will, the behavior, the good faith and the good practice of the different states appears to make global governance more soft[145].

But from another perspective, and as a nuance of the softening of global governance, two elements can be underlined. The first element is that hard law is also dependent on these factors, as states have the decision power, as they build international law[146]. The second element is the

[140] Harrison et. al., n 23, p 62.
[141] Lugten, n 3, p 166.
[142] Ibid.
[143] Soltvedt, n 26, p 174.
[144] Ibid, p 177.
[145] d'Aspremont, n 31, p 1075.
[146] Shelton, n 1, p 1.

fact that soft law can also be seen as the first step towards the adoption of hard law[147], which does not necessarily make soft law being the final stage of legal provisions.

Soft law allows a change in states' mentalities as a first step[148], permits the negotiations towards hard law to be less tensed and less difficult since it has shown to be necessary for the good evolution of international law as a second step[149]. And as a final step, it ensures that compliance will be more effectively respected, as states had a longer time to think a matter through.

Another important asset of soft law is that it might "provide a model for domestic legislation"[150], and thus become hard law at a domestic level[151]. This process helps to ensure compliance, as well as point in a good direction to resolve challenges.

By using the two last elements, so by both giving more time to states and by giving them a more *active role* in the application of international law, soft law brings some positive effects. Concretely, states feel less pressured, as they do not feel that their national sovereignty is being diminished. *Sovereignty* is of fundamental importance for states, as "a diminution of [it] makes states reluctant to accept hard legalization"[152].

Is there any concrete and modern legal instrument that could show some advantages of the interdependence between soft law and hard law?

The *International Code for Ships Operating in Polar Waters*[153] (or Polar Code) is a very good example. It has been created with the help of soft law and more precisely the use of Guidelines (2002 and 2009).[154]

The Polar Code is a very good example of this complementarity between hard law and soft law. This legal instrument contains both hard law provisions (cf. Parts I-A and II-A)[155] which offer a legal basis and brings legal certainty (*see* section 2.1) and soft law provisions (cf. Parts I-B and II-B)[156] which bring more direction and add a more practical side to the legal text (*see* section 2.1).

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[147] Lugten, n 3, p 162.
[148] Ibid.
[149] Shelton, n 1, p 8.
[150] Ibid, p 2.
[151] Ibid, p 2.
[152] Abbott and Snidal, n 9, p 437.
[153] International Code for Ships Operating in Polar Waters, International Maritime Organization, adopted separately by MSC Resolution 385(94) (Nov. 21, 2014) and MEPC Resolution 265(68) (May. 15, 2015).
[154] A Chircop, 'The IMO, Its Role under UNCLOS and Its Polar Shipping Regulation' in R Churchill and AO Elferink (eds) in *Governance of Arctic Shipping*, (Brill Nijhoff 2017) Section 4, pp. 135-136.
[155] *Adoption of an international code of safety for ships operating in polar waters*, Shipping in polar waters, International Maritime Organization, Polar Code summary.
[156] Ibid.

In the light of what has been discussed, to be resolved, global challenges such as climate change[157] cannot allow themselves to strictly select inputs or the nature of the law (either soft or hard), as long as the legal response (the moment between the need of a legal instrument and its adoption) can be shortened (*see* section 2.1) and that a certain amount of legal certainty (*see* section 2.1) is achieved, the international community will manage to have a more proactive approach rather than solely a reactive one[158].
And once again, in every step along the process concerning both the adoption of soft law and hard law, the political will of the international community will be of particular importance (concerning the regulation of shipping in the polar waters, the political will have been increased by disasters, such as the Exxon Valdez and the MV Explorer, but has also been augmented as shipping was expected to increase[159])[160].
As stated previously, more detailed discussion on the Polar Code will take place in section 3.4.

Having presented the concept of soft law, the main types of soft law instruments as well as the interdependence between soft law and hard law, this paper will now aim at applying these elements in the light of marine biodiversity conservation.

3 Importance of soft law addressing current challenges in the conservation of biodiversity

3.1 Overview

This section will focus on current challenges regarding the conservation of marine biodiversity, and what input soft law can bring in order to obtain a better conservation of marine biodiversity.
According to Article 2 of the CBD, "'biological diversity' means the variability among living organisms from all sources […] and the ecological complexes of which they are part"[161].
Why is the focus put on the CBD?
In fact, it could be argued that the focus should instead be put on the *1979 Convention on the Conservation of Migratory Species of Wild Animals* (or CMS) or on the *1973 Convention on*

[157] Shelton, n 1, pp. 14-15.
[158] König, n 105, Part F. 54.
[159] Ø Jensen, *The International Code for Ships Operating in Polar Waters: Finalization, Adoption and Law of the Sea Implications*, Arctic Review on Law and Politics, vol. 7, no. 1, 2016, p 78.
[160] Ibid, p 62.
[161] CBD, n 15, Article 2.

International Trade in Endangered Species of Wild Fauna and Flora (or CITES), as they constitute with the CBD the "three […] global agreements [which] are of particular relevance to ABNJ"[162]. But out of the three, the CBD is the most recent legal instrument and is the only one that "covers all aspects of biodiversity"[163], which is why this paper will focus on it.

Even though the term *biodiversity* seems to offer a more precise definition than the term *environment*, what does *biodiversity* really entail?

As stated in Article 2 of the CBD, it "includes diversity within species, between species and of ecosystems"[164], so the scope does not seem to have substantively been narrowed. Thus the term *biodiversity* does not explicitely indicate what states need to do, but rather appears to offer an enhanced and more modern shape over the term *environment*.

Nonetheless, the Preamble of the CBD offers some guidance and further precisions compared to the 1982 LOSC[165]. As it may be suggested, *Preambles*, *Prefaces* and *Introductions*, which are inherent parts of binding texts and treaties, are not the subject to a lot of writings, so this paper will try to define them using the characteristics present in section 2.2. It offers some guidance, recalls the main objectives and are arguably quite politically oriented. Their content appears to look like political declarations, such as the ones from UNGA. So it could be defined as a type of soft law, the only difference being that they are inherent parts of the binding text. As a nuance, the Polar Code has within its core two parts composed of soft law provisions, as previously discussed in the final part of section 2.3.

The types of soft law which are, in their content, recalling hard law's main objectives appear to lead to a softening of international governance.[166] However, these last elements could arguably be contradicted, is it governance that is *softening*, or is it soft law which is *hardening*?

Getting back to the CBD Preamble, it offers new vocabulary, an update on the aims and objectives to reach and reiterate the need for cooperation.[167] However, and as an important nuance, the CBD new inputs are for an important part due to the ten-year gap between the two conventions, as the CBD may seem to present a similar framework nature as the LOSC, one example among others is that the CBD "encourages the establishment of protected areas"[168], but "lacks the authority to do so itself"[169]. *Protected areas* will be further detailed in this section.

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[162] Ardron et. al., n 24, p 100.
[163] C Prip, *The Arctic Council and biodiversity – need for a stronger management framework?*, Nordic Environmental Law Journal, no. 2, 2016, p 44.
[164] CBD, n 15, Article 2.
[165] Ibid, Preamble.
[166] d'Aspremont, n 31, p 1075.
[167] CBD, n 15, Preamble.
[168] Ardron et. al., n 24, p 104.
[169] Ibid.

Once again, it is obvious here that the legal world is not a black and white system, where nuances would not exist. All framework rules are not contained in hard law provisions and all more practice-oriented rules are not constituting soft law.

There are often several layers of legal instruments, in order to provide solutions on a global level as well as on a more regional one[170]. This last element is not directly related to the topic of this paper, and will not be elaborated in details, but is quite useful as it will avoid confusion while going over different legal instruments in sections 3.3 and 3.4.

Concerning the matter at hand, biodiversity, the preamble of the *Convention on Biological Diversity* is highly enlightening, especially on where the focus needs to be put in order to conserve marine biodiversity[171].

The Preamble also affirms that "[s]tates are responsible for conserving their biological diversity"[172], which reinforces the need for states to actively participate (*see* section 2.3) , each and every state needs to take *active* actions and cannot let international institutions, such as the United Nations, act alone.

Also, and without getting too specific, it seems logical that conservation of biodiversity needs to be taken care of in *every maritime zone*. This thesis does not wish to focus on one particular zone, even if the importance of soft law is maybe more present in areas in need of regulation, such as polar waters' areas or areas beyond national jurisdiction. This does not mean however that areas within national jurisdiction are not relevant or that soft law is not of importance for them.

Why is the need of soft law more easily assessable in these areas beyond national jurisdiction? It may appear to be linked to both a more *proactive approach*[173] (rather than the more traditional reactive approach) and to a urgent need to find solutions before damages appear.

Concerning areas where damages have already been made and the main reason why, "[l]osses of marine diversity are highest in coastal areas largely as a result of conflicting uses of coastal habitats"[174], also, they are "only 1200 oceanic fish species against 13 000 coastal species"[175].

So, the first element of importance is the need to protect *habitats*, as it may appear as the key part of the maritime zone at hand, and can be defined as "the place or type of site where an

[170] A Hubert and N Craik, *Towards Normative Coherence in the International Law of the Sea for the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, 2018, p 1.
[171] CBD, n 15, Preamble.
[172] Ibid.
[173] König, n 105, Part F. 54.
[174] Gray, n 16, p 153.
[175] Ibid, p 156.

organism or population naturally occurs"[176]. Here is reaffirmed the fact that not only fish stocks need to be protected, but also the *site* they evolve in, so a more logical protection.

Then, the chosen solution is to create marine protected areas[177] (or MPAs) as well as International Plans of Action (IPOA-Sharks, IPOA-Capacity, IPOA-IUU and IPOA-Seabirds[178]).

Before moving on, it seems important to define the term *marine protected area*, as the term *International Plan of Action* has already been discussed in the last part of section 2.2.

A MPA is "a defined area within or adjacent to the marine environment […] with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings"[179]. What is the legal basis for the MPA solution?

It is Article 8 of the CBD on *In-situ Conservation* focusing, mainly in its paragraphs (a) until (e), on *protected areas.*[180]

As "[i]t has been estimated that <1% of the coasts are covered by marine protected areas"[181] and there are only four IPOAs under the FAO scope, it can be concluded that "there is a very limited public response to the needs for marine biodiversity conservation"[182].

Coming back to the matter of sea turtles (*see* section 2.2), "the COFI decision to not prepare IPOAs before there was better compliance with existing IPOAs"[183] is of relevance. This element is of importance as it highlights several notions.

First is highlighted the problem of IPOAs compliance, despite "recent developments in international law suggest[ing] a 'hardening' of their status"[184]. But, as a nuance and as seen in section 2.1, there is no direct relation between the status (hard or soft) and the level of compliance[185].

Second and most important, the refusal concerning the adoption of a new IPOA, as efforts need to go towards existing ones rather than in the creation of an additional one.[186]

This is a symbol of a modern approach, where less but more efficient legal instruments are preferred than a large number lacking effectiveness. Is that really a symbol of modern

[176] CBD, n 15, Article 2.
[177] Gray, n 16, p 168.
[178] Lugten, n 3, p 162.
[179] KN Scott, *Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas*, The International Journal of Marine and Coastal Law, vol. 27, 2012, p 850.
[180] CBD, n 15, Article 8.
[181] Gray, n 16, p 168.
[182] Ibid, p 167.
[183] Lugten, n 3, p 166.
[184] Ibid.
[185] Thürer, n 6, Part A. 2. 6.
[186] Lugten, n 3, p 166.

approach? To some extent, yes. However, as a nuance, it may appear that this difference of *prioritization* is logical and depends on the timeframe, as efforts towards compliance cannot be made if there are not enough legal instruments to regulate a certain topic.

How does this relate to soft law? As soft law is more suited to respond to specific matters[187] and is more adaptable[188], these characteristics permit more follow-up control over recently adopted soft law instruments, and thus a clear vision on what functions well or not, easier adjustments, and thus, could this lead to a better governance?

In parallel, there is a fundamental need for legal responses, in order to cover more areas, more species, and which could eventually lead to solutions applicable everywhere, to avoid emergency reactions in areas where it might be too late. It also seems important to try to find appropriate measures in order to protect coastal areas where populations are close by, in order for public awareness to grow as well as the political will, to increase protection of marine biodiversity as a whole[189].

Nonetheless, by reading the previous paragraph, one may think that global solutions have to be created and adopted. It appears to be a valid point, but as species and areas possess their own characteristics and can be extremely diverse[190] and thus cannot be protected in the same manner, multiple regional solutions capable of acting fast are of fundamental importance. This last element will be reassessed further in section 3.3.

On another note, there is obviously a link between *efficiency* of a legal tool and the *precision* brought to the provisions.[191] More it will be narrow and more precisions will be brought, conducting to an upgraded protection. But biodiversity shows that everything is linked in *ecosystems*, such as species and their habitats[192], and as an important link to marine protected areas, more efforts also need to be made in order to protect "areas adjacent to protected areas"[193].

Thus, regional solutions show their limits of effectiveness, because even if they are useful at first, they seem to be included in a *reactive approach* (where damages have already been made, *see* previously in this section). That is why more efforts need be to made towards a *proactive*

[187] Lugten, n 3, p 172.
[188] Friedrich, n 60, p 1540.
[189] Gray, n 16, p 167.
[190] Ibid, p 168.
[191] Abbott and Snidal, n 9, pp. 444-445.
[192] CBD, n 15, Article 2.
[193] Ibid, Article 8 (e).

approach, to prevent damages before they appear in order to have a positive outcome for future generations, and in order to stop the need to "rehabilitate and restore degraded ecosystems"[194].

As evoked previously, areas beyond national jurisdiction are of interest, as mankind does not wish to repeat the same mistakes as in coastal areas. This very last element can be supported by the example of the "threats from commercial fishing on biodiversity of coastal areas [which have] been neglected"[195]. Coming back to ABNJ, why has the regulation process been delayed in these areas? This is again a question of priority and what seemed to constitute the most urgent then (*see* previously in this section).

3.2 In areas beyond national jurisdiction

At first, areas beyond national jurisdiction seem to be the most challenging areas when it comes to conserve biodiversity. Indeed, the high seas and the Area are faraway from states, and could seem more difficult to control. Are difficulties to control due to distance or due to legal gaps in governance? Legal gaps in governance appear to be the correct answer[196], even though the faraway distance had the effect of ABNJ not being a priority of global governance[197]. The notion of biodiversity is wide, thus the "three […] global agreements […] of particular relevance to ABNJ"[198] evoked previously cannot protect biodiversity by themselves. Also, the CBD shows limited competence in ABNJ, as its Article 4 states that "the provisions of this Convention apply […] (a) in the case of components of biological diversity, in areas within the limits of its national jurisdiction"[199]. This lack of competence is however nuanced by paragraph (b) of Article 4, where "processes and activities"[200] are included, even in ABNJ.[201]
So there is a need for not only global but also regional instruments[202], and they can also be divided for more clarification "into two general groupings: […] the sectoral agreements […] and […] the conservation agreements"[203].

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[194] Ibid, Article 2 (f).
[195] Gray, n 16, p 167.
[196] Ardron et. al., n 24, p 101.
[197] R Rayfuse, *Protecting Marine Biodiversity in Polar Areas Beyond National Jurisdiction*, Review of European Community and International Environmental Law, vol. 17, Issue 1, 2008, p 3.
[198] Ardron et. al., n 24, p 100.
[199] CBD, n 15, Article 4.
[200] Ibid, Article 4 (b).
[201] Ibid, Article 4 (b).
[202] Ardron et. al., n 24, p 99.
[203] Ibid.

This is not here of direct relevance to soft law, but it permits more clarifications when international governance will be discussed, it also clarifies where soft law might be needed and offers an overall view on the global legal situation.

In fact, the different legal instruments can hardly be seen as independent, "[a]s several studies have shown, arrangements for inter-institutional and cross-sectoral coordination and cooperation are key to successful conservation and sustainable use in ABNJ"[204].

How are regional initiatives important and in what way are they connected to soft law?

The *biodiversity beyond national jurisdiction process* (or BBNJ process) will not be looked into extensive details, but it seems important here to assess the inputs of regional initiatives as well as the role of soft law evolving around this BBNJ process. First, for more clarity, this process needs to be defined. As efforts have to be made in the conservation of biodiversity and especially in ABNJ, the idea of creating an *Implementing Agreement* to the LOSC on biodiversity beyond national jurisdiction has been raised.[205]

However, this BBNJ process already appeared to be lengthy, as the matter has been discussed for more than a decade now.[206] Thus, in parallel, the importance of regional instruments must be noted, as they "support the development of scientific knowledge, regulatory practice and elaboration of management tools in ABNJ"[207]. These two quotations permit to understand the importance of regional instruments in ABNJ governance, as regional solutions allow more proximity with the matter at hand, and thus more practical scope of action when it comes to broaden the legal regime of a matter. It will also permit not to be dependent on "the outcome of the global discussions"[208], this independence between regional and global instruments may appear to represent a good solution, as it will permit to keep working on data assessment and will avoid a possible depletion of fish stocks (as a concrete example on this will be discussed in section 3.3).

One gap is of particular relevance and could also be linked to the BBNJ process, the gap on *marine protected areas*. As it is:

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[204] J Rochette et. al., *The regional approach to the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction*, Marine Policy vol. 49, 2014, p 115.

[205] E Druel and KM Gjerde, *Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations on the Law of the Sea*, Marine Policy, vol. 49, 2014, p 90.

[206] Ibid, p 91.

[207] Rochette et. al., n 204, p 116.

[208] Ibid.

> The concept of the MPA, […] not explicitly referred to in Part XII of the LOSC […] has been adopted and endorsed in Agenda 21, by the CBD […] Moreover, state practice also supports the designation of MPAs on the high seas[209].

Consequently, the gap seems to have been substantively filled, as both legal provisions and state practice (its importance having been assessed in section 2.2) stepped in[210].

More importantly for the purpose of this paper argumentation, a soft law instrument in the shape of a political declaration (as defined in section 2.2) falling under the scope of the LOSC[211] has permitted to fill the gap, namely the Chapter 17 of the Agenda 21.[212]

However, there is still an "[a]bsence of global procedures and standards for applying modern conservation tools"[213].

What is problematic in having only regional solutions? There is no framework instrument to offer both legal certainty and a less fragmented legal regime.[214] And some doctrine points to an obvious need for such a global legal tool[215] "as the *reconciliation* of competing environmental and other values (such as freedom of navigation and fishing) is challenging, to say the least"[216].

So, it may be suggested that there is an urgent need for protection in ABNJ, and not only concerning MPAs but globally, as it will be explained later on in this discussion.

As stated in the Preamble of the CBD, there is a "general lack of information and knowledge regarding biological diversity"[217], this lack appears to exist at a higher degree in areas beyond national jurisdiction. This lack of information and knowledge is representative due to a lack of human research activities, but is it also representing a lack of human activities as a whole?

Absolutely not, as "over the past decades, human activities in ABNJ have developed exponentially"[218].

Considering the topic of this paper, the fact that the *Implementing Agreement* will be adopted or not will have some consequences on soft law, but as it will be shown, these consequences will not be major. In fact, whether or not the Agreement is adopted, soft law through regional instruments will be important in order to ensure good results in the compliance process but also

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[209] Scott, n 179, p 851.
[210] Ibid.
[211] Agenda 21, *Chapter 17: Protection of the Oceans, All Kinds of Seas, Including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of Their Living Resources*, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992, 17.1.
[212] Ibid, 17.7.
[213] Druel and Gjerde, n 202, p 92.
[214] Gjerde et. al., n 20, p vii.
[215] Druel and Gjerde, n 202, p 96.
[216] Scott, n 178, p 851.
[217] CBD, n 15, Preamble.
[218] Druel and Gjerde, n 205, p 90.

and even on a more important basis, considering the lack of information and knowledge.[219] As stated previously and by interpretation, soft law offers more legal flexibility, as its compliance is not binding, thus it is easier to adapt to the constantly evolving knowledge mankind will have on areas beyond national jurisdiction once research activities such as "Identification and Monitoring"[220] will be taking place.

Different forms of soft law could be used, as several will be discussed in sections 3.3 and 3.4, including International Plans of Action (or IPOAs), UNGA Declarations and also Guidelines, among others. The effectiveness of these instruments will also be linked to the political will, which is a real game-changer when it comes to results and compliance (as discussed in section 2.1), regardless of whether it is soft law or hard law.

As biodiversity is a wide notion where many different elements are involved, hard law seems to be useful, and not only a framework legal instrument, as the 1982 LOS Convention or the CBD can be (*see* section 3.1 on the framework nature of both). There is a need for a more precise legal instrument (as seen previously in this section). Then, it would seem appropriate to have more regionally-based instruments, for better-suited solutions. And there is obviously a need for soft law, on a first level to help implementing hard law, on a second to fill legal gaps even if it might change in recent future due to new discoveries or better knowledge and on a third level to give a legal basis on topics that States might not fully agree on now, but could in a midterm future, and could be transformed into binding law.[221]

Why is there a fundamental need for cooperation "to safeguard our global commons"[222] and for what reason does it seem important to "include and incorporate the concerns of the international community"[223]? In matters for which the knowledge is either non sufficient or non existent, every State and institution needs to work in the same direction, as the main goal is more challenging since there is not a need to repair damages, but to conserve, as per say to anticipate damages, not in every State territory, but in what is either called "common heritage of mankind"[224] in the LOS Convention or "common concern of humankind"[225] in the CBD. By extension, the link between both notions is not as obvious as it could seem, as common heritage only covers a geographical area, while common concern is related to the conservation of

[219] KM Gjerde et. al., *Ocean in peril: Reforming the management of global ocean living resources in areas beyond national jurisdiction*, Marine Pollution Bulletin, 2013, p 8. This source applies to the regional approach in general, but can be extended to soft law regional instruments.
[220] CBD, n 15, Article 7.
[221] Shelton, n 1, p 8.
[222] Druel and Gjerde, n 205, p 96.
[223] Ibid.
[224] LOSC, n 18, Preamble.
[225] CBD, n 15, Preamble.

biodversity itself. Anyway, the link is made to show the change in the international community mentalities.

With the 1993 Compliance Agreement that was mainly regarding flag State duties, it has been shown that matters faraway from the coasts were hardly complied with, due to the lack of both political and economic will which has also a direct influence on *prioritization* (*see* section 3.1). During the years before this possible adoption of an *Implementing Agreement* (BBNJ process), "regional initiatives appear to be of major relevance"[226]. But the "major disadvantage though is the limited legal scope of regional agreements"[227], the solution would be that "[t]hrough developing regional initiatives in ABNJ, States would be able to address urgent conservation measures in ABNJ today and buy time whatever the outcome of the global discussions"[228]. Reinforcing local agreements would mean an increase in the need of soft law, as well as an evolution of its regime. In fact, depending of the urgency of the matter at hand, it is logical to think that the strength of the soft law instruments would be of different natures.

The solution seems to rely on a strengthening of regional agreements while counting on a high political will, as well as the adoption, in a mid- or long-term future, of an overall Agreement, allowing legal security and ensuring constant cooperation of the different actors of the international community.[229]

Regional solutions or regional initiatives have been evoked multiple times in this paper, but examples have not been presented yet. Some precisions will be given now, but this paper will offer a detailed discussion in section 3.3.

Regional solutions need global instruments to avoid a fragmented governance, where it is very difficult to assess the effectiveness of legal measures because there is no global framework organizing a genuine and efficient regime[230].

In this view of a need of global instruments, it might important to work from existing instruments[231] in order to have some *continuity*, and because creating legal tools *from a blank page* is a long process (due to multiple stages, e.g., n*egotiation process*, *adoption process*, *entry into force*).

[226] Rochette et. al., n 204, p 116.
[227] Ibid.
[228] Ibid.
[229] Rochette et. al., n 204, p 116; Druel and Gjerde, n 205, p 96.
[230] Gjerde et. al., n 20, p vii.
[231] Ardron et. al., n 24, p 101.

But without deep knowledge of the matter at hand (as evoked previously) and thus, without precise ideas on how to fix the situation, there is an obvious and logical need for practice, research and data collection[232].

Cooperation is the key, but agreeing on something as wide as the *conservation of biodiversity* is difficult and will take time and expertise, as discussed previously in section 2.1. That is why soft law comes into play.

Consequently to what have been previously discussed throughout this paper, *International Plans of Action*, *Guidelines*, *Codes of Conduct*, and other non-binding agreements facilitate the adoption of conservation measures, and will permit for solutions to be found without impinging on national sovereignty or lowering down political or social will.

To summarize, regional as well as global instruments have the characteristics to function well on their own, but, as seen previously in this section, they present their respective gaps and weaknesses, thus it may appear that global and regional solutions have to work together in order to offer a good protection to ABNJ. Concerning a global agreement, and in order to offer a safe legal regime, "the over-arching legal framework of the UNCLOS"[233] seems absolutely fundamental, as its scope is "including [the] high seas and deep seabed regimes and a variety of global treaties and competent international organizations regulating specific activities in ABNJ such as fishing, shipping and dumping"[234].

In the next two sections, two of these three "key sectoral activities"[235] will be studied, and examples, trends as well as solutions will be presented and analysed.

3.3 Biodiversity conservation and fishing

Due to space limitations and in order to go into details, this paper will limit its analysis to two of the three "sectoral activities with the greatest potential to affect marine biodiversity"[236]. This section will address fishing and the next one shipping.

[232] Rayfuse, n 197, p 3.
[233] Ibid, p 7.
[234] Ibid, p 7.
[235] Ardron et. al., n 24, p 101.
[236] Ibid, p 99.

The third activity is *mining* and, even if it is of relevance, it seems to be the least related to this conservation of biodiversity, as the "commercial exploitation of deep seabed minerals has yet to occur"[237].

Concerning fishing, it has always been of fundamental importance to humankind[238], and oceans' shape is known to be directly "linked to the survival of the planet"[239], which makes this topic central in the conservation of biodiversity in general.

However, fishing is still a wide topic, so the focus will be mainly put on *deep-sea fishing*, which is logical due to the focus of section 3.2 on areas beyond national jurisdiction.

Before starting with the analysis, it is useful to address two subsidiary questions. Why is fishing a useful topic when it comes to biodiversity conservation? And also, what are the main characteristics of deep-sea fishing?

First, fishing is of great interest because it may greatly affect biodiversity.[240] Concerning the characteristics of ABNJ, as previously discussed in the previous section (section 3.2), one of the main elements is the lack of knowledge concerning these areas[241].

With limited knowledge over fish stocks, how is it possible to know that biodiversity in these areas need to be conserved?

There is limited knowledge but it is known that "the percentage of overexploited and depleted stocks is far worse for many fish stocks caught largely in the high seas"[242], so the matter is becoming a "growing international concern"[243], as it is not known how much pressure deep sea biodiversity can handle[244].

It must be noted before going any further that there is a difference between ABNJ and high seas, but ABNJ includes both the high seas and the Area[245], so the previous quote referring to fish stocks in *high seas* is usable.

As for characteristics concerning deep-sea fish stocks, "slow growth and low productivity"[246] are two elements that make these stocks "vulnerable to overfishing"[247].

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[237] Ardron et. al., n 24, p 105.
[238] Food and Agriculture Organization Code of Conduct for Responsible Fisheries, Rome, 1995, Preface.
[239] Scott, n 179, p 849.
[240] Ardron et. al., n 24, p 101.
[241] Rayfuse, n 197, p 3.
[242] Gjerde et. al., n 219 , p 1.
[243] Harrison et. al., n 23, p 11.
[244] Rayfuse, n 197, p 3.
[245] Gjerde et. al., n 219, p 2.
[246] Harrison et. al., n 23, p 1.
[247] Ibid.

Getting back to the lack of knowledge over fish stocks, it might be necessary to encourage the research and data collection of these maritime zones[248], such as *monitoring* which is the main topic of Article 7 of the CBD[249]. Without knowledge, legal protection cannot be optimal as it is hardly possible to copy other areas' regulations, due to the wide diversity of characteristics present in the different areas[250]. However, how to encourage exploration[251] while ensuring the best possible conservation?

This is a tough balance to find, especially in areas where marine biodiversity "ha[s] long been both literally and metaphorically 'out of sight and out mind'"[252].

Where does the protection have to take place and what should be prioritized?

There are two main answers to this question supported by two concrete examples.

First, "scientists estimate that millions of species exist in the oceans, many of which have not yet been documented or assessed"[253]. To protect fish stocks and ecosystems, there is a fundamental need to know what there is to protect, as precise data will also be in relation with political and social will[254], source of every major legal change (*see* section 2.2 on states' influence over the content of international law). As for now, "there is a very limited public response to the needs of marine biodiversity conservation"[255], in fact, "most people are familiar with terrestrial habitats and can relate to a walk in the woods. Few, however, have experienced the wonders of a coral reef"[256]. By extension, it is fundamental to grow public awareness to be able to broaden knowledge. This increase in public awareness will consequently allow for more resources, as for now, programmes work "with limited human and financial resources"[257].

What could happen if resources are not adopted and if more budget is not released?

To give an answer to this question, this paper will use a particularly enlightening chosen piece of writing showing both new elements of particular relevance and elements that have been discussed in previous sections.

> The fishery was depleted by a rush to fish, both while an agreement for a South Pacific Regional Fisheries Management Organization (SPRFMO) was under negotiation, as well as after the Convention had been signed, but had not yet entered into force. In less than two decades – while the

[248] Harrison et. al., n 23, p 3.
[249] CBD, n 15, Article 7.
[250] Gray, n 16, p 168.
[251] Harrison et. al., n 23, p 21.
[252] Rayfuse, n 197, p 3.
[253] Ibid.
[254] Lugten, n 3, p 165.
[255] Gray, n 16, p 167.
[256] Ibid, p 166.
[257] Rochette et. al., n 204, p 116.

> Convention was under negotiation and interim measures were in place – stocks dropped from an estimated 30 million metric tons to less than 3 million metric tons.[258]

The length of the adoption process concerning hard law instruments (*see* section 2.1), the need to avoid legal gaps in governance (*see* section 3.2) as well as, by extension, the usefulness of soft law in these situations[259] are all elements which have been discussed previously.

Before getting in further details, *Regional Fisheries Management Organizations* (or RFMOs) should be defined. First, RFMOs can be conducted within the scope of the FAO[260], which is a subsidiary body of the United Nations (cf. full name of the FAO, The *Food and Agriculture Organization of the United Nations*).

RFMOs is a subsidiar form of *Regional Fisheries Bodies* (or RFBs) which are "a mechanism through which States or organizations that are parties to an international fishery agreement […] work together, towards the conservation, management and/or development of fisheries"[261].

To be defined as a RFMO, a RFB has to "have a management mandate"[262].

What does that bring to the example quoted at length previously?

It appears that RFMOs did not contribute in this case to result in a shortened negotiation process or to a better knowledge of the zone using assessments on the shape of fish stocks, such as constant monitoring for example[263], which would have helped to protect fish stocks. So it may be suggested that in order to have a closer relation to knowledge as well as to avoid fish depletion, regional soft law instruments have to be used rather than regional instruments as suggested in the beginning of the previous section (*see* section 3.2). An important nuance has to be brought, as this paper does not argue that soft law should replace hard law, but rather that soft law should be used instead of hard law in the case of *urgent* matters.

Also, and importantly so, it may be suggested that, other than the adoption of more legal instruments, there is a need for mentalities to evolve (the notion has already been discussed through chapter 2).

In fact, "the default position is that States can fish until they reach agreement not too fish […] This consideration implies that there is a built-in incentive not to reach an effective agreement"[264].

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[258] Gjerde et. al., n 219, p 2.
[259] Shelton, n 1, p 8.
[260] Rochette et. al, n 204, p 109.
[261] *What are Regional Fishery Bodies (RFBs)?,* Food and Agriculture Organization of the United Nations.
[262] Ibid.
[263] Blasiak and Yagi, n 40, p 214.
[264] Gjerde et. al., n 219, p 5.

Could this be on its own linked to Grotius' vision stating that "the oceans like the air were available for all to use freely"[265]? It appears to be linked, as mentalities' nature is, from the beginning, quite the opposite to the conservation of marine biodiversity.

However, the presence of specific knowledge and/or the presence of legal provisions do not remove problems, as:

> The challenges facing a modern RFMO with state-of-the-art science (e.g., the race to fish, the lack of cooperation, and the failure to follow scientific advice, resulting in collapsed fish stocks) show that significant reforms are needed to strengthen the legal and institutional framework for high-seas fisheries.[266]

Taken from another angle, the fact that "[f]isheries [are] not being assigned a high national priority because of their small economic contribution"[267] reveals a problem of vision, as fisheries have a direct impact on the life of entire populations[268] (see *beginning of this chapter*).

Also, "[n]early all RFMOs are comprised primarily of States with a direct economic interest in a fishery"[269]. Even if it does not seem possible to completely dissociate economic and environmental considerations, there is a need for mentalities to evolve in order for environmental interests to prevail, as "global fisheries are in crisis"[270].

And it is due to this need for behavioral evolution that soft law comes into play.

As deep-sea fishing governance is regulated by "over 19 international instruments and eight regional conventions"[271] and, as the aim of this paper is not to present a catalogue of legal instruments, the focus will be mostly put on soft law instruments of particular relevance.

This discussion will aim to show the different roles of soft law instruments in the topic of deep-sea fishing.

Some precisions have to be made concerning the different categories of legal instruments.

The institution from which presented legal instruments come from is the United Nations[272], and some of its subsidiary bodies like the Food and Agriculture Organization (or FAO) which "has also been central in developing the international policy and legal framework for deep-sea fisheries"[273].

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[265] DR Rothwell and T Stephens, *The International Law of the Sea*, Second Edition (Hart Publishing 2016), p 157.
[266] Gjerde et. al., n 219, p 2.
[267] Lugten, n 3, p 165.
[268] Code of Conduct, n 238, Preface.
[269] Gjerde et. al., n 219, p 4.
[270] Ibid, p 1.
[271] Harrison et. al., n 23, p xii.
[272] Ibid, p 3.
[273] Ibid, p 3.

This part of the discussion will start with the *1995 FAO Code of Conduct for Responsible Fisheries* (or Code of Conduct), which was adopted "subsequent[ly] to the Compliance Agreement"[274].

This instrument is enlightening regarding the application of soft law instruments and their possible efficiency compare to hard law instruments (cf. section 2.1 with the link made with the 1993 Compliance Agreement).

This instrument is also enlightening in many other regards. First, its name is composed of both *conduct* and *responsible*, which appears to be a symbol of the need for a change of behaviors of the different actors, as evoked earlier. Thanks to the *Preface* of the Code of Conduct, this change could be linked to fishing habits, and the need for a transition from considering fish stocks as "an unlimited gift of nature"[275] to understanding that they "are not infinite and need to be properly managed"[276] and that "new approaches […] [are] urgently needed"[277].

However, change of mentalities is a relatively long-term process, as soft law instruments point in one direction but the outcome is hardly predictable, as every process possessing a social angle is.

For example, Article 7.2 of the Code of Conduct on *Management objectives* refers to the "maximum sustainable yield"[278] and form part of the continuing process of "the efficient management and sustainable development of fisheries"[279].

However, practice has shown that "maximum sustainable yield [was] being understood as an upper target rather than a management target"[280].

In more simple terms, States take quotas contained in measures as the objective rather than taking it as a maximum. So in this case, States comply with measures on a strict minimum, instead of aiming for the best. This is where soft law technical guidelines can be of great use[281], by paving the way towards "how these objectives can be achieved and enhanced"[282].

Also, this refers to the difficulties of implementation of legal instruments, both binding and non-binding. This is why it seems important to keep adopting soft law, in order for States' mentalities to evolve and to have a more proactive approach to fisheries management, and also to biodiversity conservation in general.

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[274] Rothwell and Stephens, n 265, p 340.
[275] Code of Conduct, n 238, Preface.
[276] Ibid.
[277] Ibid.
[278] Code of Conduct, n 238, Article 7.2.
[279] Ibid, Preface.
[280] Gjerde et. al., n 219, p 1.
[281] Friedrich, n 60, p 1550.
[282] Ibid.

The Code of Conduct is innovative and unique because its provisions "are addressed […] to all persons involved in some way or another with conservation […] of fisheries"[283], so it prioritizes a common effort in order to face challenges.

The second soft law instrument that would be discussed is the *FAO Voluntary Guidelines for Flag State Performance* (or Flag State Guidelines), as it is arguably the closer instrument to the Code of Conduct.

The 1993 Compliance Agreement , which covers a similar topic, and which is a binding legal instrument, is "an integral part of the International Code of Conduct"[284], and has not proved to be the most effective[285]. In comparison, the Flag State Guidelines present a broader and more modern content, as they "contain procedures […] encouraging compliance and deterring non-compliance, and assistance to developing countries"[286]. The Flag State Guidelines are also important in the fight against IUU fishing[287], as this paper will elaborate on it later in this section.

Overall, these Guidelines seem to present more practice-oriented provisions, while avoiding to repeat the Compliance Agreement's lack of effectiveness and trying to copy the success of the Code of Conduct.[288] The main reason for this lack of effectiveness of the Compliance Agreement is that, while the Code of Conduct "can be implemented at the national level without specific legislation"[289], the Compliance Agreement, as a hard law instrument, require national implementing legislation. The Compliance Agreement presents a lack in its core of some "timetables for the adoption of national plans of action"[290], which are included in the Code of Conduct.

The next legal instrument of interest is the *Guidelines for the Management of Deep-Sea Fisheries in the High Seas*.

These are technical guidelines which are helpful to present what needs to be done in order to manage the deep-sea fisheries in the best way possible.

[283] Friedrich, n 60, p 1547.
[284] Food and Agriculture Organization Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Rome, Nov. 24, 1993, 2221 UNTS 91, Preamble.
[285] Friedrich, n 60, pp. 1547-1548.
[286] Harrison et. al., n 23, p 31.
[287] Ibid.
[288] Friedrich, n 60, pp. 1547-1548.
[289] Ibid, p 1558.
[290] Ibid, p 1549.

These guidelines are pointing towards implementation efforts, and their success is directly connected to the collection of data[291], to the improvement of knowledge, in fact, a more in-depth knowledge will facilitate legal implementation.

By putting some pressure on more knowledge, guidelines "constitute an instrument of reference to help States and RFMOs"[292] in the most effective way possible.

Now will be discussed another instrument of importance, the *International Plan of Action on illegal, unreported and unregulated fishing*, also called IPOA-IUU. This IPOA, as three other mentioned in section 2.2, is linked to the Code of Conduct, as it is one of "its implementing instruments"[293]. One of the main characteristics of IPOAs is their "higher degree of specificity"[294].

Why is it a fundamentally important soft law instrument?

Illegal, unreported and unregulated fishing is known to be "a major threat to fisheries conservation and marine biodiversity"[295]. This phenomenon can, by itself, be the direct cause "to a collapse of a fishery"[296] and is of relevance in ABNJ as it is "estimated that up to half of illegal fish catches in terms of value take place in the high seas"[297].

Stopping international governance from having significant effects on IUU, "a lack of political will, priority, capacity and resources"[298] have been the main reasons, three out of these four elements have been previously referred to, as causes for obstacles in international governance are often based on similar key-points.

The aim of IPOA-IUU is to "prevent, deter and eliminate IUU fishing"[299]. In the abstract of the IPOA-IUU, "all State responsibilities"[300] and "flag State responsibilities"[301] are first ones on the list. A possible interpretation could be that it translates a main wish of drafters to both prioritize a global cooperation and a common effort by referring to *all,* and also efforts to make when it comes to a more effective control of vessels flying the flag of the respective states. The topic of illegal, unreported and "estimated that up to half of illegal fish catches in terms of value take place in the high seas"[302].

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[291] Harrison et. al., n 23, p 24.
[292] Ibid.
[293] Friedrich, n 60, p 1546.
[294] Ibid.
[295] Harrison et. al., n 23, p 27.
[296] Ibid.
[297] Gjerde et. al., n 219, p 2.
[298] IPOA-IUU, n 125, Abstract.
[299] Ibid.
[300] Ibid.
[301] Ibid.
[302] Gjerde et. al., n 219, p 2.

Now that an assessment on the relevant soft law instruments concerning deep-sea fishing has been made, this paper will redirect its focus in order to try to establish a few similarities and maybe an overall trade occuring in both marine biodiversity conservation and deep-sea fishing. To answer this question, both regimes and their respective governance will be discussed.

As evoked in this section, "an ecosystem approach to resource management rather than a species-by-species approach"[303] is preferred, echoing Article 2 of the CBD which uses the term *ecosystem* which needs to be seen as a "functional unit"[304].

It is the symbol on the need for governance to adopt different legal instruments presenting different natures, in order to be effective. In fact, this *unit* is hard to conserve, at every element of the *unit* needs to be individually protected as well as the *unit* as a whole.

Thus the legal response cannot be fragmented, as the result would be multiple gaps. The legal answer has to be homogeneous, consistent and valid under the different geographical scopes[305]. But the most important is for UNCLOS to be the framework to all of it[306], as it ensures legal certainty, legal security and permits more cohesion within legal regimes.

To focus on soft law, there are still substantial problems concerning implementation and the lack of sanctions in case of non-compliance.

However, more recent soft law instruments seem to have some provisions where non-compliance is highly discouraged, as "states have been asked to submit reports on compliance with declarations and action programs, in a manner that mimics if it does not duplicate the compliance mechanisms utilized in treaties"[307], as "reputational costs"[308] in case of non-compliance might not be enough. *Reputational costs* are not specific to soft law, but are "generalizable to all legal commitments"[309]. In deep-sea fisheries governance or in biodiversity conservation governance, multiple factors and interests have to be balanced, which makes compliance a very difficult and subtle topic, both regarding soft law and hard law.

As the second discussed topic after fishing, shipping is one of the three "key sectoral activities"[310] that are the most challenging in order to regulate biodiversity conservation[311], so

[303] Gjerde et. al., n 219, p 3.
[304] CBD, n 15, Article 2.
[305] Gjerde et. al., n 219, p 10.
[306] Rayfuse, n 197, p 7.
[307] Shelton, n 1, p 3.
[308] Abbott and Snidal, n 9, p 428.
[309] Ibid.
[310] Ardron et. al., n 24, p 101.
[311] Ibid, p 99.

it is important to discuss the actual governance of shipping to understand biodiversity conservation in general.

3.4 Biodiversity conservation and shipping

Shipping is regulated by the International Maritime Organization (IMO)[312], one of the main United Nations' subsidiary bodies.

"[A]round 90% of world trade is now carried out by the shipping industry"[313], which puts more pressure on the oceans and can cause serious damages if not carefully regulated.

However, the most important legal instrument to support this paper's argumentation concerning shipping is the *International Convention for the Prevention of Pollution from Ships* (or MARPOL) which "was adopted on 2 November 1973 at IMO"[314], supplemented by "[t]he Protocol of 1978 [which] was adopted in response to a spate of tanker accidents in 1976-1977"[315]. This link between *adoption* and *accidents* is not a coincidence, as it is relatively frequent (e.g Polar Code negotiation process will be discussed later in this section).

Its Preamble states that a "deliberate, negligent or accidental release of oil or other harmful substances from ships constitutes a serious source of pollution"[316].

The adjective *serious* in addition to the equivalence made between types of spill indicates a relatively higher awareness, and that all kinds of spills need to be avoided, in order to protect biodiversity.

The main weakness of MARPOL is the fact that it still leaves gaps in shipping governance regime, because even if its name includes the term *prevention*, MARPOL always seems to have a reactive approach rather than a proactive one. Why is that? It might be due to the inherent nature of hard law to be less easily adaptable, which could make it more distant from new incoming information (scientific reports, etc), that is why soft law can be seen as so valuable for prevention of pollution.

An example of these gaps left out by global instruments, with both duties of flag states and the "genuine link"[317] which is needed between the State and the ship flying its flag but which is not clearly regulated, as "activities carried out by entities without the effective control of the State

[312] Ardron et. al., n 24, p 100.
[313] Druel and Gjerde, n 205, p 90.
[314] International Convention for the prevention of pollution from ships, International Maritime Organization, London, 1973, Abstract.
[315] Ibid.
[316] Ibid.
[317] Druel and Gjerde, n 205, p 96.

of nationality might significantly impact marine biodiversity in ABNJ, through for example pollution incidents, IUU fishing"[318].

Gaps in the shipping governance and lack of State control can cause great damage, so every link in the chain needs to cooperate and make efforts, as these gaps in one sector can have significant consequences on other sectors.

That is why soft law instruments are adopted within the scope of IMO such as the *2005 Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas* (or PSSA Guidelines). These PSSA Guidelines, adopted in 1991, were created to fill in the gap of "spatial rules for specific vulnerable areas"[319], in order to bring additional measures to "source-focused […] rules"[320]. Their importance was consolidated by an other soft law instrument, which is the Agenda 21, and more precisely the point 17.30(a)(iv) which states that States should be "[a]ssessing the state of pollution caused by ships in particularly sensitive areas identified by IMO and taking action to implement applicable measures"[321].

This PSSA could also lead to "navigational measures"[322] and "applicable to all ships, including fishing vessels"[323].

As for now, there is a need to have a vision of biodiversity as a "unit"[324], where everything is intertwined and connected together. What does that imply? If there is no connection between regulatory measures on fishing and shipping, there will be gaps in the protection of "ecosystems"[325], thus a less effective biodiversity conservation.

As evoked earlier, there is always a link to political will, which became a central topic of this paper, why? A topic as shipping has seen its development influenced by big disasters and oil spills that have marked history.

However, with the multiple number of challenges humankind is facing, disasters and ecological tragedies cannot become the lever of giving budget or more financial resources to the protection of the environment.

Examples can be given concerning shipping, as the "flag states with a larger stake in the industry […] have greater say in decision-making affecting the industry"[326]. This does not seem

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[318] Ibid.
[319] MJ Kachel, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas,* International Max Planck Research School for Maritime Affairs at the University of Hamburg (Springer 2008), page 2.
[320] Ibid.
[321] Agenda 21, Chapter 17, n 211, 17.30 (a) (iv)
[322] Harrison et. al., n 23, p 56.
[323] Ibid.
[324] CBD, n 15, Article 2.
[325] Ibid.
[326] Ardron et. al., n 24, p 105.

to go towards a more proactive approach in the future, as this mismanagement allow some States to fulfill their own economic interests[327].

However, this last element needs to be nuanced, as "single-sector measures […] are a necessary beginning"[328] but "only multi-sectoral, integrated, cooperative management […] can ensure the conservation […] of marine biodiversity in ABNJ"[329].

About research, cross-sectoral data collection can be imagined, as several factors could indicate the need for regulatory measures on another sector. The present example on the marine Arctic, which can sometimes be seen as a model in term of governance, in the same time as:

> sea areas [marine areas of heightened ecological and cultural significance] were identified as sensitive to shipping activities, they were selected on the basis of their ecological importance to fish, birds and/or mammals. Thus, the assessment could serve as the basis for identifying sea areas in need of protection from impacts beyond shipping as well.[330]

In regard of the advancement of international governance on the subject, it does not seem timely to hope for a *full achievement* of conservation objectives. It seems necessary *to perfect single-sectoral measures* first and to let the process goes smoothly towards solutions.

In fact, having a too-rush process could lead to important stepbacks.

Also, regarding both PSSAs and MPAs as management measures a whole, efforts are put into place, as "the protection of vulnerable ecosystems; the management of co-located activities; and the development of resilience against threats such as shipping, over-fishing and climate change"[331], so MPAs seem more open for shipping that it seems, but as every legal evolution, it takes time to mature.

This discussion on approaches of international governance could seem far-fetched in a section on shipping, but it is not.

This complicated balance between economic and environmental interests, the utopy of being able to left aside economic interests for a while in order to save the environment[332], the problems of compliance of both soft and hard law as well as the rapid decrease in biodiversity state could make one wonder if some positive outcomes are imaginable[333].

And it seems that "there is insufficient regulation of the increasing impacts from shipping"[334], is there any areas in which these gaps have (even partially) been filled?

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[327] Ardron et. al., n 24, pp. 105-106.
[328] Ibid, p 106.
[329] Ibid, p 106.
[330] Prip, n 163, p 42.
[331] Scott, n 179, p 850.
[332] Ardron et. al., n 24, pp. 105-106.
[333] Ibid, p 98.
[334] Rayfuse, n 197, p 7.

It would seem so, as the Polar Code has been adopted in the polar areas, but as it entered into force in early 2017, there is not much writings about it, so state practice will tell to which extent the Polar Code was useful.

Furthermore the Polar Code is an inherent part of this discussion, as it found its origin in the adoption of two sets of guidelines (2002 and 2009)[335], which themselves were influenced by two disasters, the Exxon Valdez and the MV Explorer.[336] The same is true for land-based pollution, where significant actions are taken when public awareness is increased (e.g. Amazonian forest destruction).[337]

More closely concerning background information on the Polar Code[338], its process as a whole is enligtening, as it shows multiple qualities but also presents some shortcomings. This discussion will aim at bringing some elements from section 2 and applying them to the Polar Code.

First, about the reasons that initiated the process (e.g. the disasters, as stated previously), it refers to a reactive approach, which, in the light of what has already been discussed in this paper, has to be abandoned.

The second element is that it may be suggested that the use of two consecutive sets of guidelines allow the international community to take the time to assess different solutions[339] before going to the next stage of the process, which is a positive element. The negative counter-element is the length of the process, as it has lasted "25 years"[340], which does not necessarily means that other IMO instruments did not function meanwhile, but it could be argued that the workload towards this Polar Code did not go towards efforts regarding *effectiveness* or *compliance efforts* of already existing instruments.

The third element is that soft law (through *guidelines*) has shown its multiple assets within the process, regarding its *adaptability*[341], both as an independant instrument and as a first-step towards "future development"[342] and the *graduality of its process*, as it is an easier instrument for states to agree upon and it is not a very stringent instrument, even in a soft law perspective (cf. idea of a normative hierarchy within soft law in section 2.2).

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[335] Chircop, n 154, pp. 135-136.
[336] Jensen, n 159, pp. 62-63.
[337] Gray, n 16, pp. 166-167.
[338] *see* Jensen, n 159, pp. 61-64
[339] Ibid, p 62.
[340] Ibid, p 77.
[341] Ibid, p 62.
[342] Ibid, p 63.

The fourth and final element is related to the shape of the Polar Code in which *soft law parts* (I-B and II-B) have been "singled out as "recommendatory only""[343], which weakens soft law provisions and appears to remove some of their *force*, as the focus is then solely put on hard law provisions. Moreover, in a process where soft law has been fundamental and has shown the way, the different parts of the *Treaty* should be keeping their own respective normative natures, but should be mixed, as guidelines does not contain "new norms"[344] within a binding *Treaty* but rather wants to pave the way for an effective compliance.

With the ice-melting phenomenon, the polar bear crisis and the new maritime zones to delimit in the polar areas, it is what can be called a *hot topic*.

Arctic areas are a symbol of a certain consciousness on the importance of conserving the environment, as "a low dissipation rate prevails for a pollutant such as oil"[345], thus "even a small discharge of a pollutant such as fuel oil can cause significant damage"[346].

As Arctic has not suffered from the same amount of human activities than other areas yet, there is still a possibility to adopt a *proactive* approach and try to avoid doing the mistakes already made.

Some concluding remarks will be addressed now, as this paper wishes to summarize the main points raised in the discussion.

4 Conclusion

The aim of this paper was to analyze the role of soft law for the conservation of marine biodiversity.

As discussed throughout the paper, soft law, through its multiple roles[347], is able to complement, supplement, anticipate and stimulate hard law.[348] In particular, both soft law and hard law show an important complementarity[349], which permits to fill in gaps and to have the best *efficiency* possible.

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[343] Jensen, n 159, p 74.
[344] Shelton, n 1, p 9.
[345] A Chircop, *The Growth of International Shipping in the Arctic: Is a Regulatory Review Timely?*, The International Journal of Marine and Coastal Law, vol. 24, 2009, p 361.
[346] Ibid.
[347] Shelton, n 1, p 8.
[348] Ibid.
[349] Ibid, p 22.

Despite this fundamental *complementarity*, it is important to present the main points of comparison between soft law and hard law, in order to underline the specific characters and advantages of soft law.

In general, soft law permits the adoption of more easily applicable provisions, due both to the easier method for states to agree upon[350] and due to the possible direct implementation at the national level[351].

Additionally, soft law offers more *flexibility*, as it is more *adaptable* to changes, e.g. evolving knowledge[352], and is more suited for *urgent* matters[353].

These elements make soft law more dynamic and makes it more favorable to answer to the "complexity and high level of uncertainty"[354] present in fisheries management, but also in general within international law, as zones where human activities occur are in need of proactive measures[355], before damages appear (i.e. to avoid what happened to coastal areas where conservation measures were not sufficient[356]).

As every legal concept, soft law does not solely have advantages, as shortcomings and/ or negative outcomes outside its scope of action makes its full implementation in the legal realm difficult.

First, an element counterbalances the flexibility of soft law, which is the lack of sanctions in case of non-compliance[357], making soft law quite highly dependent on the political will[358] of states. However several elements nuance this last phenomenon, such as the different types of soft law instruments, making some more difficult not to comply with, and bringing soft law compliance system closer to the hard law one[359], which brings an other nuance. Even if soft law would have the same compliance system as hard law, no positive outcome is guaranteed, and might even be opposite.[360]

As states created international law, and are the deciding actors[361], a change has to occur in prioritization of interests (*economic* and *environmental*), or at least a stronger legitimacy has to be given to environmental interests, as self-interest is blocking the process of conserving marine

[350] Ibid, p 15.
[351] Friedrich, n 60, pp. 1547-1548.
[352] Thürer, n 6, Part A. 2. 6.
[353] Shelton, n 1, p 15.
[354] Friedrich, n 60, p 1540.
[355] König, n 105, Part F. 54.
[356] Gray, n 16, p 153.
[357] Soltvedt, n 26, p 73.
[358] Lugten, n 3, p 65.
[359] Shelton, n 1, p 3.
[360] Thürer, n 6, Part A. 2. 6.
[361] Ibid.

biodiversity[362]. Also, some binding legal rules might also be too close of the scope of states' decisions (e.g. RFMOs)[363], soft law is here to put constant pressure.

Interests considerations concerning states are important, but *public awareness* too.

This public awareness will allow for social change, which will consequently affect politics, and deliver some results, as unlocking more important "human and financial resources"[364] for example. In fact, resources are needed in order to have more knowledge and to protect *ecosystems* in a better way (e.g. *ecosystem* approach[365]).

However, it does not appear that soft law use will be diminished, as there are examples of soft initiatives of good quality (e.g. the Polar Code, etc.).

Only time will tell how these initiatives will result, as they are recent, but at least they are trying to move the lines of the former, *slow* and *hardly amendable* governance when it comes to *urgent* matters[366].

[362] Ardron et. al., n 24, p 105.
[363] Gjerde et. al., n 219, pp. 4-5.
[364] Rochette et. al., n 204, p 116.
[365] Gjerde et. al., n 219, p 3.
[366] Shelton, n 1, p 15.

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