

are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes’.

However, unfortunately, although there was definite progress towards these targets, they were ultimately not fully achieved. For instance, although there were some successes in respect of Aichi target 6 in that the number of stocks fished within biologically sustainable levels has increased in certain regional areas, many of these stocks in other regional areas are still in decline.³⁰⁴ Carr H et al points out that the general trend for global fisheries is that the percentage of stocks fished at biologically unsustainable levels continues to increase.³⁰⁵ Similarly, for Aichi target 11, although there was progress, such progress has been predominantly slow. Most importantly, however, is the fact that the establishment of MPAs has been uneven as most are restricted to the EEZ as opposed to that of ABNJ.³⁰⁶

The 11th COP dealt with the voluntary guidelines for the consideration of biodiversity in EIA in marine and coastal areas, including ABNJ.³⁰⁷ The COP recalled the decision made within the 8th COP regarding guidelines for EIA but held that ‘marine areas have important ecological differences from terrestrial and coastal areas’.³⁰⁸ The COP encouraged States parties and RFMO to use these voluntary guidelines and to adapt and apply them, per the 1982 UNCLOS.³⁰⁹ In line with article 4 of the CBD regarding state responsibility and stewardship, the COP recognizing that the voluntary guidelines will be most useful for activities that are currently unregulated, in other words, ABNJ.³¹⁰

Finally, the downfall of the Aichi targets led to the COP 14 decision to commence with preparations for a post-2020 biodiversity framework.³¹¹ Following over two years of development by an open-ended inter-sessional working group, the first draft of this plan has

³⁰⁴ Carr H, Abas M and Boutahar L et al ‘*The Aichi Biodiversity Targets: achievements for marine conservation and priorities beyond 2020*’ (2020) PeerJ, Vol. 8.

³⁰⁵ Carr H, Abas M and Boutahar L et al ‘*The Aichi Biodiversity Targets: achievements for marine conservation and priorities beyond 2020*’ (2020) PeerJ, Vol. 8.

³⁰⁶ Carr H, Abas M and Boutahar L et al ‘*The Aichi Biodiversity Targets: achievements for marine conservation and priorities beyond 2020*’ (2020) PeerJ, Vol. 8.

³⁰⁷ The 11th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2012) Decision XI/18.

³⁰⁸ Par 2 of Part B of Decision XI/18.

³⁰⁹ Article 3 of Part B of Decision XI/18.

³¹⁰ Article 1 of Part B of Decision XI/18.

³¹¹ The 14th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2018) Decision XIV/34

been developed and is to be refined and decided upon at the future 15th COP.³¹² The framework has four long-term goals or visions for Biodiversity for 2050 and, significantly, 21 action-oriented targets that need to be initiated immediately and completed by 2030.

A number of these 2030 action targets are important for ABNJ. Target 1 holds that States are to ‘ensure that all land and sea areas globally are under integrated biodiversity-inclusive spatial planning’. Target 2 holds that States are to ‘ensure that at least 20 percent of degraded freshwater, marine, and terrestrial ecosystems are under restoration, ensuring connectivity among them and focusing on priority ecosystems’. Target 3 holds that States are to ‘ensure that at least 30 percent globally of land areas and of sea areas, especially areas of particular importance for biodiversity and its contributions to people, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes’.³¹³ With the shortcomings of the initial Aichi Targets for ABNJ, the renewed framework is most certainly critical. With the use of language such as ‘urgent action and immediate initiation’ it will be interesting to witness the steps taken by States to achieve these renewed targets once accepted at the 15th COP to the CBD.

4.7 THE DRAFT AGREEMENT FOR THE CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY BEYOND NATIONAL JURISDICTION:

An analysis of MBD in ABNJ would not be complete without a discussion on the proposed Draft BBNJ Agreement initiated pursuant to resolution 72/249 of the UNGA.³¹⁴ The Draft BBNJ Agreement has the potential to clear many of the ambiguities regarding the lack of binding principles found within ABNJ.³¹⁵ As it stands, the Draft BBNJ Agreement codifies numerous soft law provisions already found throughout the fisheries and biodiversity regimes under a single binding agreement. Due to the agreement being an implementing agreement to the 1982 UNCLOS, finding consensus would spell monumental changes for fisheries governance. The majority of the provisions within the proposed agreement have direct

³¹² Open Ended Working Group on the Post-2020 Global Biodiversity Framework ‘*First Draft of the Post-2020 Global Biodiversity Framework*’ (2021) CBD.

³¹³ See target 1, 2 and 3 of the Open Ended Working Group on the Post-2020 Global Biodiversity Framework ‘*First Draft of the Post-2020 Global Biodiversity Framework*’ (2021) CBD.

³¹⁴ Available at

https://www.un.org/bbnj/sites/www.un.org/bbnj/files/revised_draft_text_a.conf_.232.2020.11_advance_unedited_version.pdf. (Hereafter the Draft BBNJ Agreement).

³¹⁵ Rochette J, Wright G and Gjerde K et al ‘*A preliminary analysis of the draft high seas biodiversity treaty*’ (2020) IDDRI, Vol.01(20).

consequences to the conservation and management of marine fisheries in ABNJ and, in particular, restricting the freedom to fish on the high seas.

The Preamble of the Draft BBNJ Agreement stresses the need for a new global regime where the international community act as stewards of the ocean in ABNJ in the light of, *inter alia*, sustainable development.³¹⁶ The aim is simple and explicit, achieve the long-term conservation and sustainable use of MBD in ABNJ.³¹⁷ Upon analyses of the draft articles, the agreement stands out for several reasons. First, the reaffirmation of the general principles of international environmental law contained in article 5, and the emphasis on MPAs and EIA contained in Part III and IV respectively.

The general principles in article 5 includes, *inter alia*, the principle of non-regression, the principle of common heritage of mankind, the precautionary approach, an ecosystem approach, an integrated approach, and the use of the best scientific information available. Article 6 also recognized the necessity of international cooperation in achieving these principles, broadening the scientific understanding of these areas, and ultimately achieve the conservation and sustainable use of MBD in ABNJ. What can be deduced is that many of these principles are already present within the regime in one form or another. However, a comprehensive reaffirmation of general principles for ABNJ does not exist within ocean governance, especially not under one binding agreement. Part III and IV relating to MPAs and EIAs are discussed further in chapter 5. It must however be born in mind that the agreement is still in the draft stages of development. The provisions within the agreement are still faced with issues of consensus and therefore remain subject to change. As noted by Rochette J et al, ‘many of the key provisions are still in brackets and the level of ambition of the treaty will therefore depend on future negotiations and choices’.³¹⁸ Although no binding agreement exists, it does provide an indication of potential provisions applicable to marine fisheries in ABNJ currently negotiated by State parties.

4.8 CONCLUSION

International fisheries law governing the conservation and sustainable use of MLR is inadequate to ensure the protection and preservation of MBD in ABNJ, leaving much to be desired in both treaty and soft law. Although there exists both the obligation and ambition to

³¹⁶ See par 3, 4 and 6 of the Preamble to the Draft BBNJ Agreement.

³¹⁷ Article 3 of the Draft BBNJ Agreement.

³¹⁸ Rochette J, Wright G and Gjerde K et al ‘*A preliminary analysis of the draft high seas biodiversity treaty*’ (2020) IDDRI, Vol.01(20).

protect and preserve MBD in ABNJ, most developments represent a regurgitation of previous agreements, and actual progressive development through detailed, authoritative, and binding regulation has been slow and cumbersome. Given the primacy of MBD as a structural pillar within the marine environment, this chapter asserts that relying purely on existing fisheries-specific agreements is not an option for marine fisheries in ABNJ

The fact that the 1982 UNCLOS doesn't offer explicit regulation for MBD has only added to the *lacuna*, leaving the conservation and sustainable use of MLR even more inadequate as originally presumed and creating a greater potential for mismanagement. The argument that MBD in ABNJ is implicit in the 1982 UNCLOS is weak and unsubstantiated. In addition, although the UNFSA has included an explicit obligation to protect MBD, the agreement does not go into detail as to what this obligation would entail, nor does it specifically deal with ABNJ. Furthermore, as for binding fisheries-specific legislation, the UNFSA is where it ends.

The lack of regulation within international fisheries law has not gone unnoticed. The importance of MBD within ABNJ is recognized and a concerted effort has been made to balance the conservation and sustainable use of MLR and the protection and preservation of MBD. Through UN Declarations, the FAO, and UNGA resolutions, the focus has shifted towards including biological sustainability within marine fisheries in ABNJ. The protection and preservation of MBD have become part of the achievement of sustainable development. Ultimately, however, it is acknowledged that there is a clear need for the development of an implementing agreement to the 1982 UNCLOS that would not only govern MLR in ABNJ but also MBD as an integral part of the fisheries regime.

What this chapter illustrates is that the regime is not, and should not, be bound to purely fisheries-specific agreements. The 1982 UNCLOS permits other agreements to influence how the conservation and sustainable use of MLR is regulated. This has allowed for the CBD to make a profound impact towards biological sustainability within fisheries in ABNJ. Although the CBD focuses on biodiversity as a whole and does not explicitly refer to MBD, the CBD does include reference to the 1982 UNCLOS and is therefore created to be complementary thereto. From the preamble alone, the agreement addresses aspects of the *lacuna* within the 1982 UNCLOS and adds an entirely new outlook regarding the ambitions for the fisheries regime in ABNJ.

The CBD is not without downfall as there is no obligation to conserve and sustainably use components of biological diversity in ABNJ. It is only applicable to ABNJ where provisions

regulate the conduct and activity of States operating in these areas. In contrast, the agreement does however create a strong obligation of cooperation through the principles of common concern of humankind and state stewardship, and ensures that the protection and preservation of components of biodiversity are realized in ABNJ. Regardless, there are several provisions important for the fisheries regime in ABNJ. First, conservation and sustainable use of biological diversity is clearly defined. Second, although arguably not applicable to ABNJ, it includes detailed provisions regarding identifying and monitoring components of biodiversity and, most importantly, the creation of MPAs. Finally, the provisions regarding EIA of activities in both national jurisdiction and ABNJ are vital. These provisions would significantly reduce negative impacts of fisheries activities and they are either not included or have remained completely undefined in all binding fisheries agreements as of yet.

The *lacuna* within the CBD has to a large extent been addressed by the COP. The Jakarta mandate ensured that MBD was placed within the agenda of the CBD and from the 7th COP onwards state parties ensured that ABNJ was included in all ensuing discussions. These COP decisions have elaborated on those CBD provisions relating to identifying and monitoring components of biodiversity and the creation of MPA, making them explicitly applicable to ABNJ. These were also included in the Aichi Targets and the draft Post-2020 Biodiversity Framework which gave a much stronger foothold for these measures to be implemented. Furthermore, the COP also provided guidelines on how EIA would apply to MBD in ABNJ. The only problem with these COP decisions is that they are soft law. They are, as per their mandate, non-binding and voluntary documents that are not enforceable upon member States, serving as recommendations to its parties.³¹⁹

As a final conclusion, similar to that expressed in chapter 3, the addition of the CBD and its COP decisions have added an entirely new dimension to the existing complex plethora of regulations governing the conservation and sustainable use of MLR in ABNJ. This has only strengthened the argument that an additional instrument to the 1982 UNCLOS is needed, and can ensure a unified and consistent implementation of all the facets of the fisheries regime for ABNJ. An agreement such the Draft BBNJ Agreement, although not a fisheries agreement, will certainly aid in the achievement thereof as the majority of the provisions within the

³¹⁹ Drankier P 'Marine Protected Areas in Areas beyond National Jurisdiction' (2012) *The International Journal of Marine and Coastal Law*, Vol. 27, pp. 295 – 350.

proposed agreement have direct consequences for the conservation and management of marine fisheries in ABNJ and, in particular, restricting the freedom to fish in ABNJ.



CHAPTER 5

GENERAL PRINCIPLES FOR AN EFFECTIVE INTERNATIONAL FISHERIES REGIME IN ABNJ

5.1 INTRODUCTION

Since the adoption of the 1982 UNCLOS, principles and norms for the conservation and management of marine fisheries in ABNJ have been assembled in a manner that goes well beyond the initial text of the 1982 UNCLOS. These principles and norms are vital as they set out critical normative frameworks and guide both the formulation and interpretation of existing and future agreements within international fisheries law relevant to ABNJ. With this in mind, as stated in the previous chapters, the current regime for the exploitation of MLR in ABNJ constitutes a ‘patchwork’ of international governance and clear regulatory gaps exist. This dissertation argues that the regime is severely ad hoc and fragmented and therefore it is necessary to review and summarize these principles within a single chapter.

The formulation of a comprehensive set of principles is paramount for the fisheries regime in ABNJ as it would provide an unequivocal reconfirmation that the principles developed post-1982 UNCLOS are applicable to ABNJ.³²⁰ Thereby providing answers to the ambiguity of the regime and aiding in the creation of a basis for the development of a clear and adequate governance structure in these areas. Fortunately, these norms and principles are already contained within the existing framework discussed within the previous chapters, albeit in various degrees of applicability. Including, although not all, being summarized within the Draft BBNJ agreement currently under negotiation. Furthermore, authors and bodies such as Freestone D, Elferink AGO, and the International Union for Conservation of Nature (IUCN) have long since voiced the content of the principles required to develop a coherent regime for the governance of ABNJ, and this chapter will emphasize and build on this understanding.³²¹

This chapter will outline the development of general principles required for an effective international fisheries regime that will adequately ensure the conservation and long-term

³²⁰ Elferink A G O ‘*Governance Principles for Areas beyond National Jurisdiction*’ (2012) *International Journal of Marine and Coastal Law*, Vol. 27, pp. 205 -259.

³²¹ Greibe T ‘*An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction*’ IUCN. Elferink A G O ‘*Governance Principles for Areas beyond National Jurisdiction*’ (2012) *The International Journal of Marine and Coastal Law*, Vol. 27(2), pp. 205-259. Freestone D ‘*Modern Principles of High Seas Governance – The Legal Underpinnings*’ (2009) *Environmental Law and Policy*, Vol. 39(1), pp. 44-50.

sustainability of marine fisheries within ABNJ with due respect to both the marine environment and MBD.

5.2 RESPECT FOR THE LAW OF THE SEA IN ABNJ

The ‘freedom to fish’ on the high seas, granted under the 1982 UNCLOS, remains the single biggest threat to the conservation and sustainable use of fisheries resources in ABNJ.³²² This is evident despite the fact that the freedom to fish is not absolute. This right is subject to a number of duties and conditions within and beyond the 1982 UNCLOS that must be taken into account. However, due to the current state of marine fisheries in ABNJ, Freestone D points out that ‘these duties and conditions tend to be forgotten’.³²³ It is for this reason that multiple authoritative sources point to ‘Respect for the Law of the Sea’ as the most important principle with regard to ocean governance in ABNJ. Authors such as Elferink AGO, Greiber T, and Freestone D all hold that the 1982 UNCLOS and related instruments seek to balance the rights and duties of States in their conduct of activities.³²⁴

This dissertation asserts that not enough emphasis is placed on the framework that governs the fisheries regime in ABNJ. This does not merely entail the 1982 UNCLOS and the UNFSA. As the previous chapters have shown, the fisheries regime is driven by a multitude of soft law developments that, although non-binding, are principal instruments to international fisheries law governing ABNJ. This includes, *inter alia*, the CBD and all the relevant COP decisions. To deal with this issue, the principle of ‘respect for the law of the sea’ will provide an important legal basis from which the future of the international fisheries regime in ABNJ can be regulated.

The principle is based on the premise that the 1982 UNCLOS establishes the legal framework within which all activities in the ocean and seas must be carried out.³²⁵ However, emphasis must be placed on article 87 of the 1982 UNCLOS which holds that, not only must States exercise the freedom to fish in accordance with the conditions laid down by the convention, but also by the conditions laid down by other rules of international law and thus also includes

³²² Ásmundsson S ‘*The Freedom to fish on the high seas, and the Relevance of Regional Fisheries Management Organizations*’ (2016) CBD. See also O’Leary B C, Hoppit G and Townley A et al ‘*Options for managing human threats to high seas biodiversity*’ (2020) *Ocean and Coastal Management*, Vol. 187.

³²³ Freestone D ‘*Modern Principles of High Seas Governance: The Legal Underpinnings*’ (2009) *Environmental Law and Policy*, Vol. 39(1), pp. 44-50.

³²⁴ Greibe T ‘*An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction*’ IUCN. Elferink A G O ‘*Governance Principles for Areas beyond National Jurisdiction*’ (2012) *The International Journal of Marine and Coastal Law*, Vol. 27(2), pp. 205-259. Freestone D ‘*Modern Principles of High Seas Governance – The Legal Underpinnings*’ (2009) *Environmental Law and Policy*, Vol. 39(1), pp. 44-50.

³²⁵ This is included within the preamble to the 1982 UNCLOS.

rules developed after the adoption of the 1982 UNCLOS. This includes conditions provided under the 1982 UNCLOS, the UNFSA,³²⁶ the CBD,³²⁷ the multitude of soft law developments discussed in chapter 3 and 4,³²⁸ and those that may be provided under a future instrument. This principle will ensure that the 1982 UNCLOS and all relevant post-1982 UNCLOS developments are duly taken into account, and that the restrictions placed on the freedom to fish stay consistent and on par with developments within international fisheries law.

5.3 CONSERVATION AND SUSTAINABLE USE OF MARINE LIVING RESOURCES IN ABNJ

Sustainable development is the pinnacle ethic driving international environmental law and represents the underlying ideal upon which conservation and management within ABNJ, and all ensuing principles, should and must be based.³²⁹ The Brundtland report defined this principle as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.³³⁰ Certain authors have pointed out that in order to address the challenges in achieving the sustainable use of MLR in ABNJ, the international community would first have to confront the fundamental economic biases of high seas fishing States against sustainability, in particular, where they are conducting fishing activities under a management regime that closely resembles one that is open-access.³³¹ What this means is that in order to ensure the sustainable development of marine fisheries in ABNJ, the international community needs to confront the freedom to fish on the high seas and explicitly condition such freedom on the ideal of sustainable development.

As pointed out in chapter 2, the regulatory framework under the 1982 UNCLOS does not contain any explicit obligation to ‘sustainably use’ MLR in ABNJ. However, as shown in chapter 3, multiple post-1982 UNCLOS treaty and soft law developments have dealt with this issue and have explicitly called for the principle of conservation and sustainable use of MLR to be made explicitly applicable to these areas.³³² This does not entail a general obligation to

³²⁶ See for example article 116 – 120 of the 1982 UNCLOS discussed in Chapter 2 along with article 5, 6, 7, 8, 10 and 18 of the UNFSA discussed in Chapter 3 of this Study.

³²⁷ See chapter 4 on the CBD and the relevant COP decisions.

³²⁸ These include, *inter alia*, the FAO, the UNGA, UN Declarations and COP decisions.

³²⁹ See for instance the United Nations General Assembly Resolution ‘*Transforming our world: the 2030 Agenda for Sustainable Development*’ (2015) A/RES/70/1.

³³⁰ See the Brundtland Report.

³³¹ Rosenberg A, Fogarty M, Sissenwine M et al ‘*Achieving Sustainable Use of Renewable Resources*’ (1993) Science.

³³² This is particularly so for, *inter alia*, UN Declarations such as Agenda 21, the WSSD, UNCSD and more recently the 2030 Agenda for Sustainable Development.

conserve the marine environment, but rather to strengthen the wording of the 1982 UNCLOS to include specific measures and standards for the sustainable development of these resources in ABNJ.³³³

The inclusion of the ‘sustainable use’ principle will ensure progressive change for the regime as it brings with it the need to balance economic, social, and environmental values in the use of MLR in ABNJ, with due account of the ecological limitations of these resources.³³⁴ Commitments to sustainable development and the long-term ‘sustainable use’ of MLR as the overriding objective of conservation and management can be found in multiple post-1982 UNCLOS developments and include, *inter alia*, the UNFSA, the 1995 FAO Code of Conduct, and the UNGA resolution on sustainable fisheries.³³⁵

5.4 PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT AND MARINE BIOLOGICAL DIVERSITY IN ABNJ

The obligation to protect and preserve the marine environment is not new to the international fisheries regime. Both the preamble and article 192 of the 1982 UNCLOS specifically require States to do so. The 1982 UNCLOS also includes the obligation to protect and preserve rare and fragile ecosystems, as well as the habitat of depleted, threatened, and endangered species.³³⁶ According to Birnie P et al, the principle represents a strong measure of *opinio juris* and has thus ‘become part of customary law’.³³⁷

A number of policy instruments formulated post-1982 UNCLOS have extended this principle to specifically include the protection and preservation of MBD and the integrity of the marine ecosystems in which they are found. This is fundamental as the protection and preservation of MBD forms part of the *lacuna* within the 1982 UNCLOS and, as stated in chapter 4, is a critical regulatory gap forming part of the fisheries-specific framework for ABNJ. Important references to such obligations can already be found within the UNFSA and, in particular, the CBD and its COP decisions.³³⁸ Furthermore, the Draft BBNJ Agreement discussed in chapter

³³³ Specifically Part VII in the 1982 UNCLOS.

³³⁴ Rosenberg A, Fogarty M, Sissenwine M et al ‘*Achieving Sustainable Use of Renewable Resources*’ (1993) Science.

³³⁵ See for instance article 5(a) of the UNFSA. See for instance chapter 3.

³³⁶ See article 143 and 193 of the 1982 UNCLOS.

³³⁷ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

³³⁸ See article 5 (g) of the UNFSA. See also chapter 4, section 5 – 6 on the CBD.

4, specifically includes the obligation to conserve and sustainably use MBD in ABNJ and would actively address this *lacuna* in the 1982 UNCLOS.³³⁹

A reformulation of the principle giving explicit reference to the protection and preservation of the marine environment in ABNJ and, most importantly, an explicit obligation on States to protect and preserve MBD in ABNJ, would be highly beneficial. Not only does this principle strengthen the purpose and aim for formulating and interpreting regulation within the fisheries regime for ABNJ but it will also provide a foothold for other principles applicable to ABNJ, such as the establishment of MPAs. The primacy in protecting and preserving MBD must therefore be recognized alongside the conservation and sustainable use of MLR.³⁴⁰

5.5 THE PRECAUTIONARY APPROACH TO MARINE FISHERIES IN ABNJ

The precautionary approach has become firmly entrenched in international environmental law.³⁴¹ The Rio Declaration, among others, held that ‘in order to protect the environment, the precautionary approach shall be widely applied....where there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing...measures to prevent environmental damage’.³⁴² Although not included within the 1982 UNCLOS, nor defined in any development post-1982 UNCLOS, state parties are required to take the principle into account in implementing their obligations in respect of the exploitation of MLR and the protection and preservation of the marine environment in ABNJ by *opinio juris*.³⁴³

Although the precautionary approach can be found in multiple post-1982 UNCLOS developments, the UNFSA, as well as, *inter alia*, the 1995 Code of Conduct, are central examples of how the approach should be formulated when considering the conservation and sustainable use of marine fisheries in ABNJ.³⁴⁴ In this regard, particular attention must be paid

³³⁹ See article 2 of the Draft BBNJ Agreement.

³⁴⁰ Gjerde K M ‘*Ecosystems and biodiversity in deep waters and high seas*’ (2006) UNEP Regional seas reports and studies.

³⁴¹ For case law on the precautionary approach see *Trail Smelter Case (United States v Canada)* (1941) ICJ. *Gabčíkovo-Nagymaros (Hungary vs Slovakia)* (1997) ICJ. Rayfuse R ‘Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction’ in *The 1982 Law of the Sea Convention at 30 - Successes, Challenges and New Agendas* (2013) Brill Publishing. The approach is also discussed in detail by, *inter alia*, Boyle A and Freestone D *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) Oxford University Press and Fitzmaurice M, Ong D and Merkourism P *Research Handbook on International Environmental Law* (2010) Edward Elgar Publishing.

³⁴² Principle 15 of the Rio Declaration.

³⁴³ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

³⁴⁴ See for instance article 6 of the UNFSA. See also De Bruyn P, Murua H, Aranda M ‘*The Precautionary approach to fisheries management: How this is taken into account by Tuna regional fisheries management organizations*’ (2013) *Marine Policy*, Vol.38, pp. 397-406..

to Annex I of the UNFSA relating to the implementation and application of precautionary reference points. A reformulation of this principle to explicitly refer to marine fisheries in ABNJ is undoubtedly needed. To this end, as held by Freestone D et al, the precautionary approach would change the fisheries regime in ABNJ from being one that is reactive to environmental damage, to a regime that is proactive to environmental change.³⁴⁵

5.6 THE ECOSYSTEM APPROACH TO MARINE FISHERIES IN ABNJ

The ecosystem approach takes into consideration the relationships amongst different species as well as the interactions amongst species and their environment.³⁴⁶ The principle sets the stage for many other principles applicable to marine fisheries in ABNJ.³⁴⁷ Although it can be argued that the 1982 UNCLOS contains a number of elements that may indicate that an ecosystem approach is required, it is not explicitly included in the convention.³⁴⁸ For instance, there is no explicit obligation to account for MDB or the interdependence of stocks within and amongst themselves and the environment, especially not within ABNJ.

The goal of an ecosystem approach is to maintain an ecosystem in a healthy, productive, and resilient condition so that it can provide the services humans want and need. This can only be done through consideration of the cumulative impacts of all fisheries activities taking place in a particular marine area or ecosystem.³⁴⁹ Most, if not all, provisions relating to the conservation and management of MLR within the 1982 UNCLOS are based on a traditional single-species fisheries management approach.³⁵⁰ This approach has proved to be inadequate to sustainably manage MLR that are intrinsic components of highly complex marine ecosystems and has counterintuitively contributed to fish stocks' collapse.

³⁴⁵ See both Freestone D and Makuch Z 'The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement' (1997) Yearbook of International Law, pp. 3-51, and Freestone D and Hey E 'The Precautionary Principle and International Law: The Challenge of Implementation' (1996) International Environmental Law and Policy Series, Vol. 31.

³⁴⁶ Pinto D D P 'Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction' (2009) Edinburgh Research Archive. See also Garcia S M and Cochrane K L 'Ecosystem approach to fisheries: a review of implementation guidelines' (2005) ICES Journal of Marine Science, Vol. 62(3), pp. 311-318.

³⁴⁷ Belsky M 'Using Legal Principles to Promote the 'Health' of an Ecosystem' (1995) Tulsa Journal of Comparative and International Law, Vol. 3(2), pp. 183.

³⁴⁸ See for instance article 119 of the 1982 UNCLOS.

³⁴⁹ Morishita J 'What is the ecosystem approach for fisheries management?' (2007) Marine Policy, Vol. 32(1), pp. 19-26. Pinto D D P 'Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction' (2009) Edinburgh Research Archive.

³⁵⁰ Pinto D D P 'Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction' (2009) Edinburgh Research Archive. See also Link S J 'What does ecosystem-based fisheries management mean?' (2002) Fisheries, Vol. 27(4), pp. 10-17.

That being said, numerous post-1982 UNCLOS developments promote the adoption of the approach. This can for instance be found in Agenda 21, the WSSD Plan of Implementation, and the UNCSD.³⁵¹ Other important references for the approach can be found in the UNFSA which, although not using terms such as ecosystem-based management, provides for an obligation for States to adopt conservation measures that take into consideration the interdependence of stocks, as well as, habitat and biodiversity protection to maintain ecosystems integrity.³⁵² Similarly, the 1995 FAO Code of Conduct stressed the need for habitat and biodiversity protection, ecosystem integrity, and multi-species management.³⁵³ The most comprehensive formulation of the ecosystem approach can be found within the International guidelines provided by the 1995 FAO Code of Conduct,³⁵⁴ including the COP decisions of the CBD.³⁵⁵ The ecosystem approach also forms part of the general principles included within article 5 of the Draft BBNJ Agreement.³⁵⁶

What must be agreed upon is that decisions relating to marine fisheries in ABNJ, especially when considering the primacy of MBD, must be considered in the light of the integrity and functioning of the wider marine ecosystem in which these resources occur to ensure long-term conservation and sustainable use of those resources, and thus protecting not only a specific resource but the ecosystem as a whole.³⁵⁷ The ecosystem approach must therefore be made an explicit obligation to the marine fisheries regime in ABNJ.

5.7 THE SCIENCE-BASED APPROACH AND THE USE OF BEST SCIENTIFIC INFORMATION AVAILABLE

A notion that coincides with most, if not all, principles discussed in this chapter is the use of the ‘best scientific information available’ or rather a science-based approach to marine fisheries

³⁵¹ Agenda 21, Chapter 17(45). Article 32 of Chapter IV of the Plan of Implementation of the WSSD. Article 32 of Report of the UNCSD.

³⁵² See the preamble and Article 5 (d) (e) (g) of the UNFSA.

³⁵³ Article 6(2), 7(2) (3), 9(1) (2), 12(5) are some of the provisions under the 1995 Code of Conduct reflecting an ecosystem approach to fisheries management.

³⁵⁴ See the United Nations Food and Agricultural Organization ‘*Technical Guidelines on Fisheries Management*’ (1997) FAO, United Nations Food and Agricultural Organization ‘*Technical Guidelines on the Ecosystem Approach to Fisheries*’ (2003) FAO, and United Nations Food and Agriculture Organization ‘*Technical Guidelines on the Ecosystem Approach to Fisheries*’ (2009) FAO.

³⁵⁵ See the 5th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2000) Decision V/6 and The 7th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2004) Decision VII/11.

³⁵⁶ Article 5(f) of the Draft BBNJ Agreement.

³⁵⁷ Enright S R and Boteler B ‘*The Ecosystem Approach in International Marine Environmental Law and Governance*’ in *Ecosystem-Based Management, Ecosystem Services and Aquatic Biodiversity* (2020) Springer International Publishing.

management. The necessity of this principle for the achievement of sustainable development of marine fisheries cannot be understated, in particular ABNJ.³⁵⁸ There is an urgent need to increase the scientific understanding of the negative anthropogenic consequences of fishing activities in ABNJ and in finding the solutions required to meet its end, whether in the form of measures, standards, or otherwise.³⁵⁹ The principle holds that in order to effectively and sustainably manage MLR, and protect and preserve MBD, there needs to exist sufficient scientific knowledge regarding the resources being utilized as well as the ecosystem within which these resources are found.³⁶⁰ Sufficient evidence exists pointing towards the necessity of the approach both in treaty and soft law and must be made an explicit obligation to the marine fisheries regime in ABNJ. In fact, the principles relevant to this chapter would already implicitly require the approach in order to be duly executed.

Reference to a science-based approach within ABNJ can be found in article 119 of the 1982 UNCLOS as well as being implicitly required in other provisions such as article 194 relating to relating to the protection and preservation of rare and fragile ecosystems as well as the habitat of depleted, threatened or endangered species. Reference to the science-based approach can also be found in the Draft BBNJ Agreement, including the crucial role of international cooperation in this regard.³⁶¹

The UNFSA is perhaps the most appropriate formulation of the requirement of a scientific approach.³⁶² The UNFSA directly ties the use of ‘best scientific information available’ to both the implementation of the precautionary approach and as a primary objective to achieve conservation and long-term sustainable use. According to the UNFSA, States are required to improve decision making for fisheries resource conservation and management by obtaining and sharing the best scientific information available and implementing improved techniques for dealing with risk and uncertainty, as well as determine, on the basis of best scientific information available, stock-specific reference points for the implementation of the

³⁵⁸ Freestone D *‘Modern Principles of High Seas Governance – The Legal Underpinnings’* (2009) Environmental Law and Policy, Vol. 39(1), pp. 44-50. Elferink A G O *‘Governance Principles for Areas beyond National Jurisdiction’* (2012) The International Journal of Marine and Coastal Law, Vol. 27(2), pp. 205-259.

³⁵⁹ Lemons J, Brown D A *‘The Role of Science in Sustainable Development and Environmental Protection Decision making’* in Lemons J, Brown D A *Sustainable Development: Science, Ethics, and Public Policy* (1995) Environmental Science and Technology Library.

³⁶⁰ Greibe T *‘An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction’* IUCN.

³⁶¹ Article 5(i) and article 6 of the Draft BBNJ Agreement.

³⁶² See for instance Hoel A H *‘The importance of marine science in sustainable fisheries: the role of the 1995 UN Fish Stocks Agreement’* (2016) Legal Order of the World’s Oceans: UN Convention of the Law of the Sea.

precautionary approach and for action to be taken if they are exceeded. Should scientific information be unclear or insufficient, a precautionary approach would then apply.³⁶³

5.8 ENVIRONMENTAL IMPACT ASSESSMENT WITHIN MARINE FISHERIES IN ABNJ

The principle of EIA is widely accepted as essential to manage and control the negative impacts of human activities on the environment.³⁶⁴ In fact, there already exists a general obligation under customary international law to apply EIA, albeit a lesser-known principle in respect of marine fisheries in ABNJ.³⁶⁵ Nevertheless, the principle is most certainly a necessity when considering any future development of the fisheries regime in ABNJ. Many of the principles applicable to ABNJ cannot be adequately executed without implicitly requiring EIA to be conducted by State parties. In order for States to avoid those activities under their jurisdiction and control which cause significant damage to the environment of ABNJ, an EIA would need to be carried out.³⁶⁶ The 2002 WSSD, among others, called for the use of EIAs for projects or activities that are potentially harmful to coastal and marine environments and their resources.

The 1982 UNCLOS and the UNFSA do not contain explicit provisions on EIA dealing specifically with marine fisheries in ABNJ. Only broad references are referred to. Although arguably dealing with pollution, EIA is recognized by the 1982 UNCLOS under article 206.³⁶⁷ Furthermore, article 5(d) of the UNFSA refers to the assessment of the impacts of fishing, albeit in very broad terms. That being said, in terms of soft law, both the UNGA Resolutions on Sustainable Fisheries and the 2009 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas, have been very detailed in addressing EIA with regards to specific fisheries in ABNJ. A primary example of the approach can be found in article 14 of the CBD and, in particular, the COP decisions regarding Voluntary Guidelines on Biodiversity-inclusive EIA in ABNJ.³⁶⁸

³⁶³ See Article 5 and 6 of UNFSA.

³⁶⁴ Elferink A G O 'Environmental Impact Assessment in Areas beyond National Jurisdiction' (2012) The International Journal of Marine and Coastal Law, Vol. 27(2), pp. 449-480.

³⁶⁵ *Pulp Mills Case (Argentina v. Uruguay)* (2006) ICJ.

³⁶⁶ Elferink A G O 'Environmental Impact Assessment in Areas beyond National Jurisdiction' (2012) The International Journal of Marine and Coastal Law, Vol. 27(2), pp. 449-480. *Opinion on Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ.

³⁶⁷ See also Kong L 'Environmental Impact Assessment under the United Nations Convention on the Law of the Sea' (2011) Chinese Journal of International Law, Vol. 10(3), pp. 651-669.

³⁶⁸ The 11th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2012) Decision XI/18.

Although the above is evidence of the validity of this principle with regards to marine fisheries in ABNJ, the principle needs to be made an explicit obligation for States with interests in marine fisheries in ABNJ.³⁶⁹ The difficulty lies not necessarily in the obligation itself but rather in the negotiation and establishment of globally binding standards and measures for EIA applicable to these areas.³⁷⁰ This is why the Draft BBNJ Agreement would be such an important contribution to the fisheries regime. The provisions in part IV attempt to operationalize EIA by; establishing processes, thresholds and guidelines for conducting and reporting EIA; enabling the consideration of cumulative impacts of proposed activities in ABNJ; stipulating EIA for proposed activities in areas identified as ecologically or biologically significant or vulnerable; and providing the conditions for strategic EIA.³⁷¹ The provisions signify an attempt to create a binding and coherent EIA framework for activities in ABNJ by building on the COP decisions of the CBD and article 204 and 206 of the 1982 UNCLOS, and creating an express obligation upon states to assess the potential effects of planned activities under their jurisdiction or control in ABNJ.³⁷² The Draft BBNJ Agreement even goes as far as to create a threshold criterion for EIAs and the formation of a list of activities that require/or do not require EIA.³⁷³

5.9 ESTABLISHMENT OF MARINE PROTECTED AREAS IN ABNJ

An increasingly important mechanism for promoting the conservation and sustainable use of MBD is the establishment of MPAs.³⁷⁴ This has been a goal for the international fisheries regime since the 2002 WSSD and was again required in the 2030 Agenda for Sustainable Development.³⁷⁵ However, to date, no global convention or treaty has been able to establish the legal framework for MPAs, whether the EEZ or for ABNJ, and it is most certainly not included in the 1982 UNCLOS.³⁷⁶ What is required for the fisheries regime in ABNJ is for there to be an explicit obligation on States to negotiate and cooperate in both the identification

³⁶⁹ Warner R 'Oceans beyond Boundaries: Environmental Assessment Frameworks' (2012) *The International Journal of Marine and Coastal Law*, Vol. 27(2), pp. 481-499.

³⁷⁰ These difficulties are within Druel E 'Environmental impact assessments in areas beyond national jurisdiction: identification of gaps and possible ways forward' (2013) IDDRI.

³⁷¹ Article 21bis of the Draft BBNJ Agreement. See also Article 25, 27 and 28 of the BBNJ Agreement.

³⁷² Article 22 of the Draft BBNJ Agreement.

³⁷³ Article 24 and 28 of the Draft BBNJ Agreement.

³⁷⁴ International Union for the Conservation of Nature 'Issue Brief: Governing Areas Beyond National Jurisdiction' (2019) IUCN. See also Eichbaum W M, Crosby M P and Agardy M T et al 'The Role of Marine and Coastal Protected Areas in the Conservation and Sustainable Use of Biological Diversity' (1996) *Oceanography*, Vol. 9(1), pp. 60-70.

³⁷⁵ See Chapter 4, section 4.1.

³⁷⁶ See Drankier P 'Marine Protected Areas in Areas beyond National Jurisdiction' (2012) *The International Journal of Marine and Coastal Law*, Vol. 27, pp. 295 – 350.

of components of MBD in ABNJ important for its conservation and sustainable use and for the establishment of MPAs to protect and preserve the MBD found therein.³⁷⁷

This does not mean that no regulation exists as the principle has a strong standing for inclusion in the international fisheries regime. Although not within the ambit of this study, within the fisheries regime, four regional agreements make specific provisions for MPA's. These include the CCAMLR, the OSPAR, the Antarctic Treaty, and the Noumea Convention.³⁷⁸ As for fisheries soft law, the 2009 FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas sets out a criterion for identifying vulnerable marine ecosystems in ABNJ. In addition to the above-mentioned developments, article 7 of the CBD deals with the identification of components of biological diversity important for its conservation and sustainable use and article 8 specifically deals with the establishment of protected areas.

Importantly, as dealt with in chapter 4, the COP to the CBD also laid out detailed and scientific criteria for the identification, on an ecological or biological basis, of significant marine areas in need of protection in ABNJ.³⁷⁹ Furthermore, part III of the Draft BBNJ Agreement is also of critical importance, should they find consensus, as these contains explicit provisions for the establishment of MPA's in ABNJ. The provisions stipulate the process for identification of areas requiring protection, the expectations for international cooperation in the establishment of MPAs, and the management of MPAs in ABNJ.³⁸⁰ Part III also makes reference to a potential indicative criterion, contained in Annex I, to guide states in identifying and proposing areas requiring protection through the establishment of MPAs in ABNJ.³⁸¹ Although dealt with within the non-binding COP decisions, the articles on MPAs within the CBD are particularly vague as far as ABNJ is concerned. Binding provisions laying down measures and standards which build off of the COP decisions would therefore be welcomed addition to the regime established under the 1982 UNCLOS and the CBD.

³⁷⁷ For more on this obligation see Nevill P 'Area-Based Management Tools, Including Marine Protected Areas' (2017) Proceedings of the ASIL Annual Meeting, Vol. 111, pp. 247 – 25, and Kohona P T B 'Marine Biological Diversity beyond Areas of National Jurisdiction' (2010) Environmental Law and Policy.

³⁷⁸ United Nations Treaty Series 'The Antarctic Treaty' (1959) UNTS, Vol. 71. United Nations Treaty Series 'The United Nation Convention on the Conservation of Antarctic Marine Living Resources' (1980) UNTS, Vol. 1329. The Convention for the Protection of the Marine Environment of the North-East Atlantic (1992). United Nations Treaty Series 'The Convention for the Protection of Natural Resources and Environment of the South Pacific Region' (1972) UNTS, Vol. 33912.

³⁷⁹ The 9th meeting of the Conference of the Parties to the Convention on Biological Diversity (2009) Decision IX/20.

³⁸⁰ Article 14 -21 of the BBNJ Agreement.

³⁸¹ Article 16 of the BBNJ Agreement.

5.10 INTERNATIONAL COOPERATION WITHIN MARINE FISHERIES IN ABNJ

A well-established and basic principle of international environmental law is that States must cooperate.³⁸² The preamble to the 1982 UNCLOS recognizes the importance of international cooperation as the fundamental mechanism for the maintenance of peace and settlement of issues relating to the law of the sea. In fact, as pointed out by Elferink AGO et al, 'the convention is squarely premised on the assumption that the governance of the seas and oceans can only be effective if States cooperate'.³⁸³

With regards to marine fisheries in ABNJ, multiple references can be found throughout the 1982 UNCLOS calling upon the objective to cooperate.³⁸⁴ However, as pointed out in chapters 2 and 3 respectively, it is the content of the duty to cooperate and the requirements for satisfaction of the principle that needs to be clearly specified with regards to marine fisheries in ABNJ. Most, if not all, principles discussed above cannot be adequately executed without intensive cooperation between member States.³⁸⁵ Simply put, the conservation and sustainable use of MLR and the protection and preservation of MBD in ABNJ cannot be achieved without the explicit obligation upon States to cooperate. This is why the principle of international cooperation is once again made a primary obligation within the Draft BBNJ Agreement, including separate provisions dealing specifically with cooperation for the establishment of MPAs.³⁸⁶

Inspiration can be drawn from the UNFSA, among others, which elaborates on this principle in so far as straddling and highly migratory stocks are concerned. Of particular importance is that the UNFSA makes participation within RFMO a primary obligation that also conditions access to fisheries resources on such participation.³⁸⁷ Although perhaps not the most attractive approach, a starting point for the principle would be to explicitly require States to cooperate in the management and conservation of MLR resources and biodiversity in ABNJ through RFMO and making access to such resources dependent upon participation within such agreements or arrangements.

³⁸² Soto M V 'General Principles of International Environmental Law' (1997) ILSA Journal of International and Comparative Law, Vol. 3(1).

³⁸³ Elferink A G O 'Environmental Impact Assessment in Areas beyond National Jurisdiction' (2012) The International Journal of Marine and Coastal Law, Vol. 27(2), pp. 449-480.

³⁸⁴ See article 87 and 118 of the 1982 UNCLOS.

³⁸⁵ Freestone D 'Modern Principles of High Seas Governance – The Legal Underpinnings' (2009) Environmental Law and Policy, Vol. 39(1), pp. 44-50. IUCN (2012).

³⁸⁶ Part III, Article 15 of the BBNJ Agreement.

³⁸⁷ Article 8 of the UNFSA.

5.11 THE RESPONSIBILITY OF STATES AS STEWARDS OF THE MARINE ENVIRONMENT IN ABNJ

The principle of state responsibility is a well-accepted principle of international law.³⁸⁸ The Rio Declaration reflects that although States have the sovereign rights to exploit, there is a corresponding responsibility to ensure that such exploitation does not cause damage to the environment of other States or of ABNJ.³⁸⁹ Evidence of the utilization of this principle is contained in the 1982 UNCLOS,³⁹⁰ the UNFSA,³⁹¹ the 1995 FAO Code of Conduct³⁹², and the CBD.³⁹³ In essence, this principle would focus on the responsibility of States to ensure that fishing activities carried out in line with their jurisdictions or under their control, do not cause damage to the environment in ABNJ.³⁹⁴

As opposed to focusing on the responsibility and liability of States in respect of damage caused to the marine environment in ABNJ, through the introduction of the concept of ‘stewardship’ the principle becomes rather unique.³⁹⁵ The principle is primarily concerned with responsible use of MLR in ABNJ, such use is based on the premise that the protection and preservation of the marine environment in ABNJ and in particular, the MBD found therein, forms part of both the common concern and interest of humankind. The principle of state stewardship would create both ‘a legitimate interest in resources of global significance and a common responsibility to assist in their sustainable development’.³⁹⁶ This principle is therefore also fundamental when considering the obligation to cooperate laid out above. Accordingly, States are, therefore, collective stewards of the marine environment in ABNJ and must ensure responsible use of MLR, and cooperate thereto, in the interests of the international community and to the benefit of present and future generations.³⁹⁷

³⁸⁸ See for instance the 1947 Statute of the International Law Commission and the *Trail smelter case (United States of America vs Canada)* (1941) ICJ.

³⁸⁹ Principle 21 of the Stockholm declaration and Principle 2 of Rio Declaration.

³⁹⁰ Article 194(2) of the 1982 UNCLOS.

³⁹¹ Article 5(h) and 35 of the UNFSA.

³⁹² Article 6(3), 7(1)(8) of the 1995 FAO Code of Conduct.

³⁹³ Principle 3 of the CBD.

³⁹⁴ Freestone D ‘*Modern Principles of High Seas Governance – The Legal Underpinnings*’ (2009) *Environmental Law and Policy*, Vol. 39(1), pp. 44-50. IUCN (2012).

³⁹⁵ Henriksen T ‘*The Arctic Ocean, Environmental Stewardship, and the Law of the Sea*’ (2016) *UC Irvine Law Review*, Vol. 6(1), pp.61. Riding P ‘*Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction*’ (2018) *ICES Journal of Marine Science*.

³⁹⁶ See Rayfuse R and Warner R ‘*Securing a Sustainable Future for the Oceans beyond National Jurisdiction: The Legal Basis for an Integrated Cross-sectoral Regime for High Seas Governance for the 21st Century*’ (2008) *International Journal of Marine and Coastal Law*, Vol. 23(3), pp. 399-421.

³⁹⁷ See also Chapin S F, Kofinas G P and Folke C ‘*Principles of Ecosystem Stewardship: Resilience-Based Natural Resource Management in a Changing World*’ (2009) Springer Publishing.

As explained in chapter 4, the CBD is a primary example of this principle in use, albeit in other wording. Riding P et al has argued that should the principle of environmental stewardship be grounded in international environmental law; it could have the potential to aid in reconciling the principle of the common heritage of mankind and the freedom of the high seas in a future instrument for these areas.³⁹⁸ Hence the Draft BBNJ Agreements reference to both state-stewardship in the preamble to the agreement, and the principle of common heritage of mankind within the general principles contained in Article 5.³⁹⁹

5.12 CONCLUSION

Although the existing governance system for ABNJ is ad hoc and fragmented, the general principles necessary to adequately regulate marine fisheries in ABNJ are already present in various degrees of detail. The above chapter serves as both evidence and an overview of the principles required for an effective international fisheries regime in ABNJ. It must be noted that these principles are only general principles that have become well established within the fisheries regime through soft law and treaty developed post-1982 UNCLOS. However, what must be noted is that to deal with the persistent threats posed by marine fisheries in ABNJ, these principles have to be explicitly reiterated and made explicitly applicable to the marine fisheries regime within ABNJ as an obligation and, preferably, unified under a single binding document or implementing agreement to the 1982 UNCLOS. It can thus be argued that the Draft BBNJ Agreement, as an implementing agreement to the 1982 UNCLOS, would be a remarkable contribution to the regime. Although being focus on MBD in ABNJ, as opposed to marine fisheries, the agreement represents a binding codification of most of the principles necessary to regulate the conduct and activities of states in ABNJ and would spell monumental changes for marine fisheries activities in these areas.

These principles include respect for the law of the sea, conservation and sustainable use of MLR, the protection and preservation of the marine environment and MBD, the precautionary approach, the ecosystem approach, the science-based approach, EIA, the establishment of MPAs, international cooperation, and state-stewardship. As held by Elferink AGO et al ‘there is no need to develop these principles from scratch’.⁴⁰⁰ These principles can be found within, *inter alia*, the 1982 UNCLOS, the UNFSA, the CBD, or the plethora of soft law developments

³⁹⁸ Riding P ‘*Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction*’ (2018) ICES Journal of Marine Science.

³⁹⁹ Par 4 of the preamble and article 5(c) of the BBNJ Agreement.

⁴⁰⁰ Elferink A G O ‘*Environmental Impact Assessment in Areas beyond National Jurisdiction*’ (2012) The International Journal of Marine and Coastal Law, Vol. 27(2), pp. 449-480.

as detailed in chapters 3 and 4, including being referenced with the Draft BBNJ Agreement. These developments elaborate extensively on the interests of the international community in the regulation of marine fisheries in ABNJ moving forward.



CHAPTER 6

CONCLUSION

6.1 INTRODUCTION

Ocean governance of marine fisheries activities in ABNJ has been criticized as a major environmental problem and one that requires urgent attention from the international community. Beddington JR et al notes that ‘There is no doubt that there is a major problem with the world’s fisheries, and, despite serious attempts to improve management and to facilitate recovery of depleted stocks, the success has been limited’.⁴⁰¹ This statement is of particular importance if viewed in the light of SDG 14 of the 2030 Agenda for Sustainable Development, to conserve and sustainably use the oceans, seas, and marine resources. Broadly speaking, this dissertation pinpoints that the facets of this environmental problem revolve around restricting the freedom to fish on the high seas under the auspices of the 1982 UNCLOS, to ensure both the conservation and sustainable use of MLR and the protection and preservation of MBD in these areas.

However, enhancing the fisheries regime to prevent threats posed to the marine environment in ABNJ is not in the slightest an easy endeavor.⁴⁰² It requires continuous progressive development to remain in line with the industrialization of marine fisheries activities in ABNJ, and the evolution of both the scientific understanding of ABNJ and global community interest in its sustainable development. To address the breadth of the problem facing marine fisheries in ABNJ, and striving to clear the path to the achievement of SDG 14 of the 2030 Agenda for Sustainable Development, this dissertation sets out to answer the following research question: what potential regulation is included within the framework governing marine fisheries in ABNJ, that will address the lacuna within the 1982 UNCLOS, and ensure the conservation and sustainable use of marine living resources and the protection and preservation of marine biological diversity in these areas?

⁴⁰¹ Beddington J R, Agnew D J and Clark C W ‘*Current Problems in the Management of Marine Fisheries*’ (2007) Science.

⁴⁰² Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

6.2 CHAPTER RECOMMENDATIONS

6.2.1 CHAPTER 1: INTRODUCTION

Chapter one formed the introduction to this dissertation and included a background to the study, the problem statement and ensuring research question, the significance of this study, and finally, the research methodology and chapter outline to be followed.

What needs to be understood from this chapter is that the unsustainability of marine fisheries in ABNJ is an undeniable problem and has beleaguered the fisheries regime for centuries. This has been exacerbated by an increased demand for MLR which has led to heavy exploitation of valuable high seas stocks.⁴⁰³ However, the consequences of unsustainable fishing practices in ABNJ run much deeper than purely the collapse of commercial fisheries. Marine fisheries in ABNJ are threatening not only the sustainability of a particular stock but rather the integrity and resilience of the entire marine ecosystem.⁴⁰⁴

ABNJ represents the largest percentage of biomass on earth and thus this problem extends to the functioning of the entire marine environment. Fisheries resources in ABNJ form part of MBD, which are critical components of the marine environment. Unsustainable fishing practices would result in profound and irreversible damage. Broderick AC argues that due to the value of ecosystem services that the ocean offers and with much of the oceans considered overexploited and potentially beyond recovery, protecting and sustainably using the ocean's resources is a major issue for human well-being.⁴⁰⁵

Given the renewed importance initiated in the 2030 Agenda for Sustainable Development, it is critical to seek to answer the following research question; what potential regulation is included for marine fisheries in ABNJ, under the auspices of the 1982 UNCLOS, that will ensure the conservation and sustainable use of MLR and the protection and preservation of MBD in these areas?

This dissertation holds that the current state of marine fisheries in ABNJ is a direct result of a *lacuna* within the 1982 UNCLOS framework treaty. The first step taken in this dissertation was to indicate the extent of the regulatory gaps under the agreement and thereafter, critically

⁴⁰³ Freestone D 'International Governance, Responsibility and Management of Areas beyond National Jurisdiction' (2012) International Marine and Coastal Law, Vol. 27, pp. 191–204.

⁴⁰⁴ Crespo G O and Dunn D C 'A review of the impacts of fisheries on open-ocean ecosystems' (2017) ICES Journal of Marine Science. 'Report of the FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats' (2009) FAO Fisheries and Aquaculture.

⁴⁰⁵ Broderick A C 'Grand challenges in marine conservation and sustainable use' (2015) Frontiers.

analyze the developments that came about post -1982 UNCLOS that are aimed at both the conservation and long-term sustainability of MLR and the protection and preservation of MBD in ABNJ. As shown in the background to this study, there is no shortage of developments in treaty and soft law, all of which contain elements of the potential regulation necessary to answer the research question.

6.2.2 CHAPTER 2: HIGH SEAS FISHERIES AND THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA:

Chapter 2 critically analyzed the framework for marine fisheries in ABNJ under the 1982 UNCLOS to determine the severity of the regulatory gaps present within the agreement. The underlying question being whether the 1982 UNCLOS, as a stand-alone agreement, can ensure the conservation and sustainable use of MLR and the protection and preservation of MBD in ABNJ. Regrettably, the answer is no. This dissertation has shown that the 1982 UNCLOS does not provide coverage to all marine-related issues, and can confirm that a *lacuna* exists within the treaty concerning the conservation and management of marine fisheries in ABNJ.

The treaty leaves the marine environment in ABNJ subject to the freedom to fish on the high seas and provides minimal restrictions, if any, that prevent the potential negative effects resulting from such freedom. There is no shortage of regulatory gaps in both the duty to conserve and the duty to cooperate and the agreement does not contain the principles and rules on international environmental law necessary to ensure the conservation and sustainable use of MLR, nor the protection and preservation of MBD. Both the duty to conserve and to cooperate represent weak treaty provisions that are unable to prevent the negative consequences of unsustainable fishing practices, let alone ensure that the international community can meet its ambitions for the 2030 Agenda for Sustainable Development under SDG 14. The fisheries regime in ABNJ, under the 1982 UNCLOS, is reminiscent of an open-access regime granted under the freedom to fish on the high seas.

The recommendations for the chapter focus firstly on substantiating and defining the content and approach to the conservation and management of MLR in ABNJ. The international community must strive to condition the freedom to fish on the high seas in order to ensure that the ideal of sustainable development is met.⁴⁰⁶ The treaty cannot leave the creation of regulatory measures and standards purely on the duty to cooperate, without there being some

⁴⁰⁶ Rosenberg A, Fogarty M, Sissenwine M et al 'Achieving Sustainable Use of Renewable Resources' (1993) Science.

form of explicit underlying guidance for States fishing in ABNJ. Relying only on a general obligation to protect the marine environment is insufficient.

What is essential is the formulation of norms and principles to meet the obligation to conserve and that its means are defined. This does not merely entail making the limited existing requirements for the EEZ such as, *inter alia*, optimum utilization, and the prevention of over-exploitation, applicable to ABNJ as they will not be able to ensure the sustainable development of these resources. The fisheries regime in ABNJ requires norms and principles of international environmental law that are explicitly binding and, most importantly, premised on the sustainable development of MLR; the environment which they inhabit; and the MBD found therein. This will resolve any existing vagueness and ambiguity within the 1982 UNCLOS as a standalone declaration of principles for ABNJ does not yet exist.⁴⁰⁷

The second recommendation focuses on the duty to cooperate and the unified implementation of conservation and management measures. It is of critical importance that the 1982 UNCLOS specify the modus for cooperation to be followed. For instance, RFMOs must be made the primary vehicle of cooperation in respect of ABNJ and, if made an outright obligation, both unilateral and multilateral action must coincide with these measures established by such RFMO. In this sense, as held by Ásmundsson S, RFMOs must form one of the most important building blocks of fisheries management for the high seas.⁴⁰⁸

Finally, the 1982 UNCLOS needs to address the fact that it does not create a sense of stewardship over the marine environment in ABNJ that would encourage state responsibility to participate and negotiate in the conservation and management of MLR in ABNJ. High seas fisheries should be treated as global shared resource of common concern to be managed for the benefit of all those partaking therein.⁴⁰⁹ The 1982 UNCLOS does not contain an underlying principle for ABNJ similar to that of sovereign rights within the EEZ or the common concern of mankind over seabed resources. These principles ultimately incentivize and encourage the State to seek out further supervision over the utilization and conservation of these resources

⁴⁰⁷ Houghton K 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) Elsevier Marine Policy, vol. 49(C), pp. 118-126.

⁴⁰⁸ Ásmundsson S 'Regional Fisheries Management Organizations (RFMOs): Who are they, what is their geographic coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialized RFMOs?' (2016) CBD.

⁴⁰⁹ Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed. Crothers G and Nelson L 'High Seas Fisheries Governance: A Framework for the Future?' (2007) Marine Resource Economics, Vol. 21, pp. 341–353.

which, in the case of ABNJ, could potentially entail strengthening compliance with the duty to cooperate, in particular, through RFMOs.

6.2.3 CHAPTER 3: THE AMPLIFICATION OF THE 1982 UNCLOS: TOWARDS STRENGTHENING CONSERVATION AND MANAGEMENT WITHIN MARINE FISHERIES IN ABNJ

Chapter 3 of this dissertation focused on the treaty and soft law that developed post-1982 UNCLOS in light of the regulatory gaps presented in chapter 2 of this study. This chapter assessed how these fisheries-specific developments have amplified the 1982 UNCLOS to achieve the conservation and long-term sustainability of marine fisheries in ABNJ. The underlying question being whether the regulatory gaps in both the duty to conserve and the duty to cooperate under the 1982 UNCLOS has been recognized and whether a concerted effort has been made to address the threats posed by the freedom to fish on the high seas. The answer to this chapter is both affirmative and negative. Yes, there has been a concerted effort within the international fisheries regime to deal with the *lacuna* within the 1982 UNCLOS in what has been called a revolution in international fisheries law to address one of the unfinished agendas of 1982.⁴¹⁰ However, in contrast to this progress, these developments are not without fault as this chapter has argued that clear limitations exist.

This dissertation confirms that there has been a clear change in global community interests for the future of the fisheries regime in ABNJ and the environmental significance of fishing activities in ABNJ is recognized as a primary concern. In doing so, these developments have strengthened the duty to conserve and cooperate in the conservation and management of marine fisheries in ABNJ, and have further restricted the freedom to fish in these areas. New norms and principles have been put forward to secure the conservation and sustainable use of MLR and ensure the protection of the marine environment in ABNJ.

Generally speaking, post-1982 UNCLOS developments do not address marine fisheries in ABNJ specifically. Where they do address ABNJ, they either do so partially, such as with the UNFSA, or form part of a broad policy agenda, such as with the UN Declarations. Where post-1982 UNCLOS developments are detailed, such as the FAO Code of Conduct and guidelines, these address specific issues facing ocean governance as a whole and not necessarily ABNJ

⁴¹⁰ Boyle A and Freestone D *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) Oxford University Press. Freestone D 'International Governance, Responsibility and Management of Areas beyond National Jurisdiction' (2012) *International Marine and Coastal Law*, Vol. 27, pp. 191–204.

directly. Thus, although they are progressive, they have in turn resulted in the regime becoming a legal labyrinth. In agreement with authors such as Ardron JA et al, the legal framework currently governing ABNJ is very complex.⁴¹¹ There are too many developments that together provide a system of ad-hoc and fragmented regulation with little to no integration or coordination between them. Birnie P et al and Gjerde KM reaffirm that the legal problem posed is that there are so many marine initiatives and instruments, yet no integration or coordination of this regulation.⁴¹² Ultimately, this has made mismanagement and unsustainable fisheries practices rather predictable as those dealing with regulation of the fisheries regime have to make sense of a plethora of developments that vary in content, applicability, complicity, enforceability, and purpose. There is ultimately no clear-cut regime for marine fisheries in ABNJ under these agreements.

The first step to address these issues is to develop an instrument that will build on the 1982 UNCLOS and the UNFSA in a manner that is specific to the fisheries regime in ABNJ. Second, such an instrument needs to unify and coordinate all the above-mentioned developments making them explicitly applicable to marine fisheries in ABNJ, with a focus on moving away from challenges brought about by the current uneven governance structure. Norms and principles such as sustainable use, the ecosystem approach, and the precautionary approach are not yet binding upon the entirety of ABNJ, nor are States obliged to participate in international cooperation through RFMOs. As both the 1982 UNCLOS and the UNFSA are inadequate to solely regulate marine fisheries in ABNJ this instrument should be an implementing agreement to the 1982 UNCLOS.

Furthermore, given the supplemental nature between treaty and soft law, the fisheries regime must focus on further developing international policy that is explicitly meant for marine fisheries in ABNJ as opposed to the marine environment as a whole. Although it can be argued that the content of the regime in ABNJ has already been created, there is evidential reason to believe that the majority of existing soft law follow the broad approach to the marine environment and is therefore not specific to ABNJ.

⁴¹¹ Ardron J A, Rayfuse R, Gjerde K et al *'The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?'* (2014) 49 Elsevier Marine Policy Vol. 49, pp. 98-108.

⁴¹² Gjerde K M, Harm D and Molenaar et al *'Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction'* (2008) IUCN Environmental. Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

Ultimately, however, the fisheries regime lacks both the legal basis that is specific to ABNJ and a unified format that simplifies the implementation of all future and existing treaty and soft law developments. The latter being one single unified and globally recognized document that sets out how the fisheries regime in ABNJ must be regulated and where international policy for ABNJ should be focused. This dissertation asserts that under the current post-1982 UNCLOS fisheries regime, although progressive, the duty to conserve and cooperate has remained somewhat inadequate, and therefore the freedom to fish in ABNJ continues to deter any efforts to ensure the long-term sustainability of MLR in these areas.

6.2.4 CHAPTER 4: CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY IN ABNJ

Chapter 4 of this dissertation analyzed another critically pressing issue facing the marine environment in ABNJ defined as the impact of marine fisheries in ABNJ on the MBD found in these areas. This chapter analyzed the progressive development in both treaty and soft law to provide enhanced measures for the protection and preservation of MBD in ABNJ and in doing so further combat unsustainable fishing practices in these areas. The underlying question being whether the international community can rely purely on fisheries-specific agreements to protect and preserve MBD in ABNJ or whether other biodiversity-specific agreements such as the CBD are necessary. The answer to this question falls on the latter. The fisheries regime in ABNJ is not, and should not, be confined to purely fisheries-specific agreements.

The *lacuna* within the 1982 UNCLOS includes the fact that the treaty does not explicitly provide for the protection and preservation of MBD in ABNJ. In addition, the UNFSA, the only other fisheries-specific treaty, although providing an obligation to protect MBD, was not intended to do so either as it is focused on straddling and highly migratory stocks. With this in mind, through the soft law developments discussed in chapters 3 and 4 respectively, the focus within international policy has shifted towards the inclusion of MBD as an essential aspect to the fisheries regime ABNJ.

The problem is that in comparison to the soft law focusing on the conservation and sustainable use of MLR, there is very minimal explicit reference when searching for detailed standards and measures for MBD in ABNJ. Sure, many of the principles and norms for the achievement of conservation and sustainable use of MLR will aid in the protection and preservation of MBD, but as a standalone objective, the regime offers very little guidance as to its achievement. Hence why authors such as Ardron JA hold that although the adoption of a wide range of legal and

policy instruments is seen as progressive, it is counterbalanced by the lack of ecological success stories, particularly in ABNJ.⁴¹³ The fisheries regime becomes forced to rely on other agreements, as permitted by the 1982 UNCLOS, to aid in the achievement of biological sustainability within fisheries in ABNJ.

The CBD in particular addresses aspects of the *lacuna* within the 1982 UNCLOS which adds an entirely new outlook regarding the ambitions for the fisheries regime in ABNJ. The significance of the CBD is that State Parties to the agreement cannot rely on the regulatory gaps within the 1982 UNCLOS to validate fishing activities that cause or threatens serious damage to MBD in ABNJ.⁴¹⁴ There are several paramount provisions for the fisheries regime in both the duty to cooperate and the duty to conserve that could significantly reduce the negative impacts of fishing activities in ABNJ. However, the agreement is not without limitations as certain provisions are arguably not applicable. First, it is not necessarily specific to MBD in ABNJ. Second, although States are bound to control any of the processes and activities carried out under their jurisdiction or control, there is also no obligation to sustainably use the component of MBD in ABNJ. That being said, if the lack of explicit reference within the CBD for MBD in ABNJ remains a serious concern, the COP decisions have undoubtedly eased potential disputes in this regard as multiple COP decisions discuss the application of the agreement specifically to MBD in ABNJ. It must be borne in mind, as held by Drankier P, that the COP decisions are non-binding and voluntary, serving only as recommendations to its parties.⁴¹⁵ The CBD therefore has a *lacuna* of its own in so far as MBD in ABNJ is concerned.

As for the recommendations for this chapter, the fisheries regime in ABNJ needs to ensure that the primacy of MBD is fully realized in conjunction with the conservation and sustainable use of MLR. This must be done through further addressing the *lacuna* within the 1982 UNCLOS by developing fisheries-specific soft law aimed at recognizing the balance required between the conservation and sustainable use of MLR and the protection and preservation of MBD in ABNJ. These soft law agreements must focus on developing and elaborating new and existing principles and norms within the fisheries regime in an attempt to explicitly connect them to MBD in ABNJ, regardless whether they are already addressed within the CBD and COP

⁴¹³ Ardron J A, Rayfuse R, Gjerde K et al ‘*The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?*’ (2014) 49 Elsevier Marine Policy Vol. 49, pp. 98-108.

⁴¹⁴ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

⁴¹⁵ Drankier P ‘*Marine Protected Areas in Areas beyond National Jurisdiction*’ (2012) The International Journal of Marine and Coastal Law, Vol. 27, pp. 295 – 350.

decisions. In fact, reference must be taken from the CBD and the relevant COP decisions as a primary source of regulation regarding biodiversity protection in ABNJ.

The second recommendation is to develop a binding implementing agreement under the auspices of the 1982 UNCLOS that not only focuses on the conservation and sustainable use of MLR but also fundamentally the protection and preservation of MBD in ABNJ. As held by Elferink AGO, this does not entail creating an entirely new regime. Most, if not all, of the regulation required, is already present under the existing fisheries and biodiversity framework.⁴¹⁶ The fisheries regime in ABNJ is clearly in need of an instrument that will unify and coordinate the above-mentioned developments, both fisheries and biodiversity specific, making them explicitly applicable to marine fisheries in ABNJ under a single agreement. This would also prevent additional confusion or negligence brought about by additional over-complication of the fisheries regime, as well as creating a sound foundation for further development in soft law. One option currently under development is the Draft BBNJ Agreement pursuant to resolution 72/249 of the UNGA. The Draft BBNJ Agreement codifies many of the soft law provisions already found throughout the fisheries and biodiversity regimes under a single binding agreement and, being a potential implementing agreement to the 1982 UNCLOS, finding consensus would spell monumental changes to the balance between the freedom to fish on the high seas and the conservation and sustainable use of MBD in ABNJ.

6.2.5 CHAPTER 5: GENERAL PRINCIPLES FOR AN EFFECTIVE INTERNATIONAL FISHERIES REGIME IN ABNJ

Chapter 5 dealt with the developments of general principles of international environmental law for an effective international fisheries regime in ABNJ. These principles have been elaborated in both treaty and soft law and are undoubtedly required to ensure the conservation and sustainable use of MLR and the protection and preservation of MBD within ABNJ. The underlying questions being what exactly these principles are, where evidence can be found of their inclusion within the fisheries regime, and what their content can be expected to look like in the context of ABNJ. What this dissertation found was that all of the general principles necessary to regulate and ensure the conservation and long-term sustainability of marine fisheries in ABNJ are already present within the fisheries regime in various degrees of detail and enforceability. This includes both the 1982 UNCLOS, the UNFSA, the CBD, and all the relevant soft law created in their wake. These principles have become well known within the

⁴¹⁶ Elferink A G O 'Governance Principles for Areas beyond National Jurisdiction' (2012) International Journal of Marine and Coastal Law, Vol. 27, pp. 205 -259.

context of international fisheries law and need to be perceived from the perspective of how they strengthen the limitation of the freedom to fish in ABNJ through the duty to conserve and cooperate, aiding in the achievement of the 2030 Agenda for Sustainable Development.

The principle of respect for the law of the sea, as an overarching principle, will ensure that member States are cautious of the belief that an open-access regime exists for marine fisheries activities in ABNJ. This is paramount as there is a plethora of regulation in both treaty and soft law that could, and must, be utilized to effectively regulate the regime. On the other hand, principles such as the protection and preservation of the marine environment and MBD, and the conservation and sustainable use of MLR, provide the fundamental objectives or aims to be pursued by member States in limiting the freedom to fish in ABNJ through the duty to conserve and cooperate. As for the principles to achieve these objectives, these either fall under those belonging to conservation and those belonging to cooperation. The principles of conservation include sustained use, the precautionary approach, the ecosystem approach, the science-based approach, EIA, and the establishment of MPAs. The principles of cooperation include state stewardship and international cooperation. Together, these principles ultimately provide the basis for a system of governance in ABNJ that is unrecognizable in comparison to the initial text of the 1982 UNCLOS.

There are however certain issues that need to be addressed. Many of these principles, at least in their most preferred interpretation, are not explicitly binding upon marine fisheries in ABNJ, or have not been elaborated in the context of marine fisheries in these areas. However, this does not mean that they are not applicable. This dissertation agrees with authors such as Houghton K et al and Gjerde KM et al who point out that a large number of principles and overarching objectives are already potentially applicable to ABNJ.⁴¹⁷

The first recommendation for this chapter comes from the perspective that these principles have not yet been 'codified' under a single text governing marine fisheries in ABNJ. Thus, what needs to be done, similar to previous recommendations, these principles have to be reiterated and made explicitly applicable to the marine fisheries regime within ABNJ as an obligation and, preferably, unified under a single binding implementing agreement to the 1982 UNCLOS. As held by Elferink AGO, by formulating a comprehensive set of principles the fisheries

⁴¹⁷ Gjerde K, Boteler B et al 'Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction: Options for Underpinning a Strong Global BBNJ Agreement through Regional and Sectoral Governance' (2018) STRONG High Seas. Houghton K 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) Elsevier Marine Policy, vol. 49(C), pp. 118-126.

regime would provide unequivocal reconfirmation that the principles developed post-1982 UNCLOS are applicable to ABNJ. Thereby providing answers to the ambiguity of the regime and aiding in a foundation for the development of a clear and adequate governance structure in ABNJ.⁴¹⁸ This could fundamentally be done through the Draft BBNJ agreement, regardless of the fact that it is not necessarily a fisheries specific treaty. The majority of the provisions within the proposed agreement have direct consequences to the conservation and management of marine fisheries in ABNJ, and although no binding agreement exists as of yet, provides a clear indication of potential provisions applicable to marine fisheries in ABNJ currently negotiated by State parties. These principles would undoubtedly place restrictions on the absolute freedom to fish, as state parties need to conform to those provisions within the BBNJ agreement in so far as fisheries activities are concerned. The following recommendation would be to ratify these principles as the underlying framework for ABNJ and focus on the development of soft law to clarify any detailed measures and standards for their achievement in so far as marine fisheries are concerned.

6.3 CONCLUDING REMARKS ON THE POTENTIAL REGULATION OF MARINE FISHERIES IN ABNJ

In the light of the research question posed in this dissertation, and driven by global ambitions for the 2030 Agenda for Sustainable Development, it is essential to review why the potential regulation for marine fisheries are those aimed at the conservation and sustainable use of MLR and the protection and preservation of MBD. What must be understood is that utilizing MLR are vital components forming part of global development and serve as critical resources for both social, economic, and immediate human development.⁴¹⁹ The problem is that these resources are under serious stress which is a direct result of unsustainable fishing practices and ultimately, over-exploitation. However, it is equally important that the fisheries regime understand that the threat of unsustainable fisheries practices extend far beyond anthropocentric advances.⁴²⁰ MLR form part of MBD which plays extremely important

⁴¹⁸ Elferink A G O 'Governance Principles for Areas beyond National Jurisdiction' (2012) International Journal of Marine and Coastal Law, Vol. 27, pp. 205 -259.

⁴¹⁹ Food and Agriculture Organization 'World Review of Fisheries and Aquaculture' (2018) FAO Fisheries and Aquaculture.

⁴²⁰ Report of the FAO/UNEP Expert Meeting on Impacts of Destructive Fishing Practices, Unsustainable Fishing, and Illegal, Unreported and Unregulated (IUU) Fishing on Marine Biodiversity and Habitats' (2009) FAO Fisheries and Aquaculture. Gjerde K M 'Ecosystems and biodiversity in deep waters and high seas' (2006) UNEP Regional seas reports and studies

functions within the marine ecosystem.⁴²¹ Without these ecological functions the conservation and sustainable use of MLR would be futile. To ensure a sustainable future for marine fisheries in ABNJ, it is paramount that the international community seek to balance attempts to achieve the conservation and sustainable use of MLR by turning its focus towards the integrity and functioning of the marine environment and its ecosystems. This can only be done through an active attempt to protect and preserve MBD, and by ensuring that the measures taken to conserve and sustainably use within marine fisheries coincide with this notion.

What can be concluded is that the potential regulation for marine fisheries in ABNJ must follow three distinct and interdependent paths. These include fundamentally restricting the freedom to fish in ABNJ, strengthening the underlying duty to conserve in ABNJ, and enhancing the obligation to actively participate in cooperation. These are the primary facets that must be borne in mind as they are central to an adequate regime that will ensure the conservation and sustainable use of MLR, the protection, and preservation of MBD, and ultimately the achievement of SDG 14 of the 2030 Agenda for Sustainable Development.

It is critical for the international fisheries regime to conform to the fact that the freedom to fish on the high seas remains one of the biggest threats posed in ABNJ and is one of the underlying reasons why the sustainable development of MLR and MBD is proving so difficult to achieve. This dissertation asserts that this freedom continues to obstruct the achievement of our ambitions for the 2030 Agenda for Sustainable Development. A prerequisite for potential regulation for ABNJ must be a restriction of this right to achieve the long-term sustainability of these resources. The basis for these restrictions lies in the duties to conserve and cooperate in ABNJ.

States have as a founding obligation, the duty to conserve and manage marine fisheries in ABNJ to achieve the conservation and sustainable use of MLR and the protection and preservation of MBD. MLR and MBD must not be perceived as separate notions but rather one harmonious motive that is imperative to the long-term sustainability of marine fisheries in these areas.⁴²² Thus when deciding upon the potential regulation for marine fisheries in ABNJ it is paramount to look towards those aimed at strengthening the underlying duty to conserve. As for the obligation to cooperate, the potential regulation needs to anticipate the scale of ABNJ and the primacy of the resources and MBD found therein. Conservation and management

⁴²¹ *Regional Seas Report and Studies - Ecosystems and Biodiversity in Deep Waters and High Seas* (2013) UNEP.

⁴²² Article 158 of the UNCSD.

cannot be effective without widespread global cooperation that is based on the understanding that MLR and MBD found in ABNJ are not merely free to use by all States but essentially form part of a network of shared resources. Consequently, with adequate modus and motive, all States would benefit therefrom should they cooperate towards long-term sustainability.

The next task would be to determine what potential regulation should be included under both these obligations. This dissertation concludes that, at least on a basic level, the post- 1982 UNCLOS regime, whether fisheries or biodiversity specific, has developed to the point that with aid of further codification and explicit reference to ABNJ, the content for these obligations have already been created. From a global perspective, through analysis of treaties such as the 1982 UNCLOS, the UNFSA, and the CBD, and soft law developed by the UN Declarations, the UN FAO, the UNGA, and the COP decisions to the CBD, a framework can be deduced that may be of adequacy to regulate these areas, provide guidance for the future potential regulation of the regime, and achieve our ambitions for the 2030 Agenda for Sustainable Development.

From these agreements, in both treaty and soft law, it can be argued that the notion of sustainable development is the underlying ideal guiding the conditioning of the freedom to fish in ABNJ, the duty to conserve in ABNJ, and the duty to cooperate to this end. This is particularly so if view in light of the United Nations Conference and Declarations. The sustainable development of marine fisheries and the marine environment in ABNJ is thus the fundamental rationale behind both the conservation and sustainable use of MLR and the protection and preservation of MBD in ABNJ. In doing so, States fishing in ABNJ should strive to sustain the ability of marine ecosystems in ABNJ to provide the resources and ecosystems services on which economic, social, and human development depends. Fortunately, the regime has developed to a point where States are not left uninformed with regards to the methodology behind the ideal of sustainable development and its application to marine fisheries.

In achieving this ideal, the international community must first and foremost remain proactive to environmental problems resulting from fishing activities. The regime needs to be able to foresee the potential harm that may be caused by fishing activities in ABNJ and create a system where the action is taken well in advance of environmental damage. Freestone D and Makuch Z explained that this would require regulation that ensures the exercise of utmost precaution where fishing operations have the potential to undermine our ambitions for sustainable

development.⁴²³ The fisheries regime in ABNJ needs to be forward-thinking and, by relying on good scientific information, establish reference points for States to follow where the need arises. The framework needs to be developed in a manner that anticipates environmental problems and creates the necessary measures for them to be prevented, not developed to combat problems once a threat is posed.

In addition to the above, adequate regulations for marine fisheries in ABNJ are those provisions that do away with the near-sighted single-species approach to marine fisheries management that neglects other species, biodiversity, and the functioning of the broader marine ecosystem. Instead, as taken from Morishita J and Pinto DDP, the potential regulation chosen is those that follow an approach that can take account of the relationships amongst different species as well as the interactions amongst species and their environment.⁴²⁴ This can only be achieved should the impact of marine fisheries be viewed in the light of the integrity and functioning of the wider marine ecosystem. The potential regulation must focus on conserving not only a specific fish stock but rather its ecosystem as a whole and its role as MBD.

When reviewing the potential regulation for marine fisheries in ABNJ it is paramount that the international community focuses on those provisions ensuring that available science on the conservation and sustainable use of MLR and the protection and preservation of MBD finds an adequate place within the fisheries regime for ABNJ. The fisheries regime in ABNJ needs to focus on increasing its reliance on scientific information, and basing its development on the scientific understanding of the negative consequences of fishing activities in ABNJ and in finding the solutions required to meet its end. Even so, as is the opinion of Birnie P et al: 'if rational management requires good science, it also requires decision-makers to follow scientific advice, which in this field they often do not do, for short-term reasons, with inevitable consequences.'⁴²⁵ Without the use of the best scientific information available, the development of proactive and precautionary measures would not be satisfactory, nor would the fisheries regime be able to fully take into consideration the cumulative impacts of marine fisheries on the marine environment and its MBD. As for the second point, States, as a prerequisite, must assess the

⁴²³ Freestone D and Makuch Z *The New International Environmental Law of Fisheries: The 1995 United Nations Straddling Stocks Agreement* (1997) Yearbook of International Environmental law, Vol. 7, pp. 3-51.

⁴²⁴ Pinto D D P *Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction* (2009) Edinburgh Research Archive and Morishita J *What is the ecosystem approach for fisheries management* (2007) Marine Policy, Vol. 32(1), pp. 19-26.

⁴²⁵ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

potential impacts of their operations. Such an assessment must be based on the best available science and scrutinized against the notion of sustainable development of MLR and MBD.

Amongst these provisions, it is essential that the potential regulation in ABNJ be aimed at reducing the capacity of fishing activities in ABNJ as a whole. This does not necessarily entail abstinence from fishing practices and cessation of the freedom to fish in ABNJ. Instead, the international community can start by recognizing and establishing areas within the marine environment in ABNJ that are of biological importance and strengthening their conservation and preservation through the establishment of MPAs. Although certain authors such as Smith D et al argue that MPAs represent a complex, slow and challenging process,⁴²⁶ this is by far the most proactive approach to ensure the sustainable development of marine fisheries.

The final point that must be sought out in the potential regulation for marine fisheries in ABNJ is the dire need of the international community to revamp its approach to cooperation in ABNJ. For the potential regulation to be in any way effective, the international community needs to address both the modus and motive for cooperation. First, it is vital that the potential regulation in ABNJ gives the duty to cooperate a format and that such format is a primary obligation. One such format is cooperation through RFMOs. Although cooperation through RFMOs can be seen as the most natural modus, apart from the UNFSA, States are not obliged to take part in RFMOs should they have fulfilled their duty to cooperate. Simultaneously, the 1982 UNCLOS is not specific as to the fulfillment of this obligation in general.⁴²⁷ This modus of cooperation will be able to ensure a unified and consistent implementation of conservation and management measures that are in line with the approaches discussed above. Cooperation through RFMOs will also ensure that conservation and management measures reflect the legitimate international interests of those participating therein.

As for the motive behind cooperation, potential regulation needs to focus on creating a rationale for cooperation that generates both a legitimate interest in the MLR and MBD in ABNJ and a common responsibility to assist in their sustainable development.⁴²⁸ This could primarily be done through inciting an environmental ethic such as state stewardship in ABNJ based on the premise that the conservation and sustainable use of MLR and the protection and preservation

⁴²⁶ Smith D and Jabour J 'MPAs in ABNJ: lessons from two high seas regimes' (2018) ICES Journal of Marine Science.

⁴²⁷ Ásmundsson S 'The Freedom to fish on the high seas, and the Relevance of Regional Fisheries Management Organizations' (2016) CBD.

⁴²⁸ Riding P 'Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction' (2018) ICES Journal of Marine Science.

of MBD in ABNJ form part of the common concern and interest of humankind.⁴²⁹ States would therefore be ethically obliged to participate in cooperation as the resources found in ABNJ are shared between those participating in, for instance, RFMOs.

In reviewing these treaty and soft law developments this dissertation can conclude that the above reflects the consensus on the future potential regulation for ABNJ and is a direct pathway to achieve the 2030 Agenda for Sustainable Development and beyond. However, with this optimistic reflection in mind, it would be naive to speculate that the current regulation for marine fisheries in ABNJ is sufficient as the central conclusion of this dissertation dictates otherwise. The fisheries regime for ABNJ has not been effective in ensuring the conservation and sustainable use of MLR in ABNJ nor the protection and preservation of MBD in these areas, and is not sufficient to ensure that the ambitions for the 2030 Agenda for Sustainable Development will be met.

Although this dissertation is able to conjure and manipulate the principles and norms integral to an adequate fisheries regime, it is exactly this manipulation that's casting doubt over the adequacy of the current fisheries framework for ABNJ. Neither of the three treaties reviewed provides an all-encompassing framework, whether individually or collectively, that can regulate the regime. The lack of guidance for ensuring the duty to conserve and cooperate, and the difficulty in finding clear and concise measures that are binding on marine fisheries in ABNJ, ultimately indicates that the framework provides an exceedingly vague and ambiguous bare bone structure with minimal, if any, provisions with explicit reference to marine fisheries in ABNJ.

In short, the 1982 UNCLOS provisions on ABNJ are limited and do not contain a remotely similar outlook as expressed within developing community interests. The UNFSA, although progressive, only deals with specific stocks in ABNJ. Finally, the CBD, although widening the scope of the fisheries regime, represents a broad framework for the governance of biological diversity as a whole and does not specifically deal with marine fisheries in ABNJ. Although it's difficult to look past these regulatory gaps, it would be a wasted opportunity to discard the validity of these treaties as they contain the primary obligations that are the conservation and sustainable use of MLR, the protection, and preservation of MBD, and fundamentally to cooperate to these ends.

⁴²⁹ Henriksen T 'The Arctic Ocean, Environmental Stewardship, and the Law of the Sea' (2016) UC Irvine Law Review, Vol. 6(1), pp. 61.

Furthermore, it is through the framework of these agreements that the international community is enabled to develop soft law and international policy to fill these regulatory gaps and reach these obligations. The fisheries regime must preserve and ensure the upkeep of respect for the law of the sea because, without this structure, international policy would have very little basis from which to build. In both fisheries and biodiversity orientated, it is amongst these soft law developments that the majority of norms and principles forming part of the potential regulation for marine fisheries in ABNJ are found. These soft law developments are important sources of international fisheries law that function as interpretative tools that expand and strengthen existing treaties and represent the first steps towards further binding regulation for the governance of marine fisheries in ABNJ.⁴³⁰

This opinion would not be complete without a discussion on the status of these soft law developments. One cannot forget that they serve as non-binding sources of international fisheries law. They are not the type of legal commitments that place binding restrictions on the freedom to fish in ABNJ. They are duties of aspiration that, by nature, express the global community interest in the future of the fisheries regime and also serve as evidence of *opinio juris* on applying and interpreting the treaties regulating marine fisheries in ABNJ.⁴³¹ It is with these aspirational goals or voluntary commitment that, if forming part of binding potential regulation in ABNJ, that the international community will be able to achieve the best-case scenario for marine fisheries in these areas i.e. its sustainable development.

However, there are also further issues that need to be addressed with these soft law developments that goes beyond their status as soft law. These developments are plenty-fold and form part of the agenda of various institutions developing international policy dedicated towards conservation and sustainable use of MLR and the protection and preservation of MBD. They have so to say developed on a very fragmented and ad-hoc basis and vary in content, applicability, complicity, enforceability, and purpose. The majority of these developments do not deal with marine fisheries in ABNJ in particular, but rather the entire fisheries regime as a whole. Where they do deal with ABNJ it is either very brief or forms part of the ad-hoc developments discussed above in that they only address certain specifics. In addition, many of the principles and norms created by these soft law developments have not been made expressly applicable to ABNJ as of yet, and only certain of these norms and principles have been

⁴³⁰ Olivier M 'The relevance of 'soft law' as a source of international human rights' (2002) The Comparative and International Law Journal of Southern Africa, Vol. 35(3), pp. 289-307.

⁴³¹ Boyle A 'Soft Law in International Law-Making' in Evans M *International Law* (2018) Trove Law, 5th ed.

developed and elaborated upon in the context of ABNJ. These problems are not limited to fisheries-specific agreements but also those focused on MBD.

Turning back to the issue where the current regime must be manipulated for it to become applicable to ABNJ, this is not a practical, nor an effective, solution and most certainly a contributing factor in the slow progress in achieving the sustainable development of resources in ABNJ. If the international community are to meet its ambitions for the 2030 Agenda for Sustainable Development, the potential regulation for the fisheries regime in ABNJ cannot be based on assumption. For the norms and principles to be in any way effective, the regime requires codification. The international community cannot deal with complexity but rather an approach that can be sustained.

As this dissertation has stated the potential regulation for the regime has already been created. Nothing needs to be developed from scratch. All that needs to be done is to take that which has already been formulated and harmonize it under a single document expressly created for the management of marine fisheries in ABNJ. Not only will this harmonize all the soft law developments under the regime, but it will also ease the struggle in attempting to read these soft law developments into the limited framework of the 1982 UNCLOS and give these norms and principles explicit applicability to ABNJ. The best possible solution for this would be to unify all of these developments through an implementing agreement to the 1982 UNCLOS, which is why the Draft BBNJ Agreement, if finding consensus, would be monumental. The Draft BBNJ Agreement, building on the COP and relevant ocean governance framework, would codify many of the principles and norms of international environmental law, making them explicitly binding within ABNJ. In addition, seeing as fisheries resources are fundamental aspects of MBD, the freedom to fish on the high seas would undoubtedly form apart thereof. However, as certain authors have pointed out, it remains uncertain whether the current draft treaty would be sufficient to deliver an effective governance framework.⁴³² The agreement, as it stands, is not intended to regulate marine fisheries in ABNJ, nor does it highlight the threats facing ABNJ through unsustainable fishing practices and the freedom to fish on the high seas. However, if the 1982 UNCLOS is what Sand P holds as a 'constitution for the sea' then an implementing agreement would be its corresponding bill of rights for marine fisheries in

⁴³² Rochette J, Wright G and Gjerde K et al 'A preliminary analysis of the draft high seas biodiversity treaty' (2020) IDDRI, Vol.01(20).

ABNJ.⁴³³ Once this framework has been created and consensus has been found, it is advised that the international community continues with the development of soft-law dedicated to elaborating on this framework by providing further detail and measures to the norms and principles expressed therein. As maintained in this dissertation, soft law plays an imperative function in both the creation and supplementation of new and existing binding agreements.

6.4 CONCLUSION

What this dissertation has illustrated is that the fisheries regime in ABNJ is certainly not complete, nor has the regime reached a level of adequacy where the international community can be satisfied that the ambitions for the 2030 Agenda for Sustainable Development and beyond are met. This is not to say that the regime has not progressed since the adoption of the 1982 UNCLOS framework agreement. As this dissertation has shown, there has been a fundamental change in the interests of the international community towards the long-term sustainability of marine fisheries in these areas, which have resulted in a plethora of developments aimed at strengthening the fisheries regime in ABNJ. The international fisheries regime has witnessed the creation and adaption of norms and principles that go far beyond the initial text for the conservation and management of high seas fisheries first provided by the 1982 UNCLOS.

However, on the contrary, there are far too many regulatory gaps for marine fisheries in ABNJ that continue to hamper the achievement of sustainable development of MLR and MBD in these areas. Not only are there clear regulatory gaps, but simultaneously, the regime has also become extremely complex to navigate. States have to adhere to a number of treaties and conventions, including an overabundance of ever-increasing soft law, yet no single instrument is of adequacy to regulate marine fisheries in ABNJ.

Indeed, to fill these regulatory gaps it is paramount that the international community strive towards further regulation of the regime, however, even more important is that it must be done in a manner that expressly codifies the potential regulation for marine fisheries in ABNJ. This dissertation holds that the best and most appropriate manner in which this can be done is through an implementing agreement to the 1982 UNCLOS. Such an agreement would provide a sustainable future for marine fisheries in ABNJ both towards the 2030 Agenda for Sustainable Development and its future beyond.

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WORD COUNT: 30 984 (Excluding footnotes and bibliography)

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