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THE ART OF COUNTING FISH:

**AN ANALYSIS OF THE POTENTIAL REGULATION OF MARINE FISHERIES IN
AREAS BEYOND NATIONAL JURISDICTION**

UNIVERSITY *of the*

WESTERN CAPE

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ABSTRACT:

The 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) is ineffective in ensuring the conservation and long-term sustainability of marine fisheries in Areas beyond national Jurisdiction (ABNJ). This is a result of the *lacuna* in Part VII of the 1982 UNCLOS containing the framework provisions governing the conservation and management of marine living resources in ABNJ. The *lacuna* relates to the fact that the 1982 UNCLOS fails to address the threats posed by high seas fisheries to the long-term sustainability of the marine environment and the marine biological diversity found therein. The *lacuna* has not gone unnoticed by the international community as international laws and policies have been developed to address the issues plaguing the fisheries regime in ABNJ.

The progressive development of international fisheries law cannot be understated. Regulation has been formulated that goes far beyond the initial text of the 1982 UNCLOS and has led to objectives such as conservation and sustainable use of marine living resources and protection and preservation of marine biological diversity being in the foresight of any interpretation of the international fisheries regime in ABNJ. However, despite the amplification of the 1982 UNCLOS, marine fisheries in these areas have remained in an increasing state of despair. ABNJ represents one of the most threatened and overlooked ecosystems on earth regardless of its primacy and the constant regurgitation of global ambitions to conserve and sustainably use the oceans, seas, and marine resources both within and beyond ABNJ, the latest being the 2030 Agenda for Sustainable Development.

The objective of this thesis is to investigate how the *lacuna* within the 1982 UNCLOS has been addressed and to analyze the potential regulation needed to adequately fill the remaining regulatory gaps present in these areas. This study concludes that although the development of adequate regulation in ABNJ has proven to be a much more intricate problem, there is no doubt that the principles necessary to ensure conservation and long-term sustainability of marine fisheries in these areas are already present within the existing framework. However, numerous gaps exist within the international fisheries framework and none provide an all-encompassing agenda for the regulation of marine fisheries in ABNJ. This study then looks beyond the issue of analysis, to propose both criticism and recommendations to further strengthen the fisheries regime to ensure the conservation and sustainable use of marine living resources and the protection and preservation of marine biological diversity.

The information used and presented in this research is accurate and up to date on 11 November 2021. Any later legal developments have not been considered.



PLAGIARISM DECLARATION:

‘I declare that *The Art of Counting Fish: An Analysis of Potential Regulation for Marine Fisheries in Areas beyond National Jurisdiction* is my work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references’.



LIST OF ABBREVIATIONS:

ABNJ – Areas Beyond National Jurisdiction

CBD – Convention on Biological Diversity

COP – Conference of the Parties

EEZ – Exclusive Economic Zone

EIA – Environmental Impact Assessment

FAO – Food and Agricultural Organization

MBD – Marine Biological Diversity

MLR – Marine Living Resources

MPA – Marine Protected Areas

RFMO - Regional Fisheries Management Organizations

UN – United Nations

UNCED – United Nations Conference on the Environment and Development

UNCLOS – United Nations Convention on the Law of the Sea

UNCSD – United Nations Conference on Sustainable Development

UNFSA – United Nations Fish Stock Agreement

UNGA – United Nations General Assembly

WCED – World Commission on the Environment and Development

WSSD – World Summit on Sustainable Development



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CHAPTER 1

INTRODUCTION

1.1 BACKGROUND TO THE STUDY

Unsustainable use within marine fisheries is a leading culprit in the threats posed to the marine environment in ABNJ.¹ According to O’Leary BC et al, fisheries activities are among the key anthropogenic threats posed to the long-term sustainability of the ABNJ.² Freestone D explains that the demand for fish has accelerated fishing pressures and pushed fishing efforts in more extreme environments and deeper waters. Heavy exploitation of valuable deep sea species has meant that some stocks are on the verge of extinction.³ Subsequent the increased demand for marine living resources (MLR), fishing efforts have industrialized and expanded to ABNJ which, with ABNJ comprising the largest percentage of biomass on earth, constitutes a threat that could potentially compromise the ocean’s capacity to provide resources and services necessary for human survival.⁴ An estimate of 90 percent of global marine fish stock is already fully exploited, overexploited, or depleted.⁵ According to the United Nations Food and Agriculture Organization (FAO), many fisheries have shown increased biologically unsustainable levels of fish stock.⁶ Many populations of large open-ocean fish stocks have been reduced to 10 percent or less of their preindustrial levels and some species driven to the brink of extinction.⁷

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¹ See for instance Wright G, Ardon J and Gjerde K M et al ‘*Advancing marine biodiversity protection through regional fisheries management: A review of bottom fisheries closures in areas beyond national jurisdiction*’ (2015) Elsevier Marine Policy, Vol. 61(C), pp. 134-148. Gjerde K M, Curie D, Wolk K et al ‘*Ocean in peril: Reforming the management of global ocean living resources in areas beyond national jurisdiction*’ (2013) Marine Pollution Bulletin, Vol. 74(2), pp. 540-551. Areas beyond National Jurisdiction [Hereafter referred to as ABNJ].

² 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.

³ Freestone D ‘*International Governance, Responsibility and Management of Areas beyond National Jurisdiction*’ (2012). 27 Int’l J. Marine & Coastal L. 191.

⁴ Marine Living Resources. [Hereafter referred to as MLR]. Best described by Freestone D ‘*International Governance, Responsibility and Management of Areas beyond National Jurisdiction*’ (2012) The International Journal of Marine and Coastal Law, Vol. 27(2). See also FAO ‘*Deep-sea Fisheries in the High Seas: Ensuring sustainable use of marine resources and the protection of vulnerable marine ecosystems*’ (2009), and Thompson A, Sanders J and Tandstad M ‘*Vulnerable marine ecosystems: Processes and practices in the high seas*’ (2016) FAO Fisheries and Aquaculture.

⁵ Kituyi M and Thomson P ‘*90% of Fish Stocks Are Used up – Fisheries Subsidies Must Stop*’ (2018) UNCED.

⁶ FAO ‘*State of World Fisheries and Aquaculture*’ (2020). The United Nations Food and Agriculture Organization [hereafter the FAO].

⁷ Gjerde K M ‘*Ecosystems and biodiversity in deep waters and high seas*’ (2006) UNEP Regional seas reports and studies.

As will be shown in this dissertation, the framework governing marine fisheries in ABNJ has undergone progressive development if compared to the historic principle ‘freedom of the high seas.’⁸ Although authors such as Spijkers O argue that sustainable development is firmly entrenched within High Seas fisheries, the achievement of the norm, which has been a concern since the 1987 World Commission on Environment and Development, remains alarming (1987 WCED).⁹ The 1987 WCED emphasized that the international community cannot focus on economic development as its highest priority. Resources, in particular those found within ABNJ, should fall part of the ‘common heritage of humankind’ and therefore justifies the need for their conservation and protection.¹⁰

When reviewing the governing structure of the marine fisheries regime in ABNJ, it is maintained that the 1982 United Nations Convention on the Law of the Sea (1982 UNCLOS) is the principal instrument that sets out the rights and obligations of States in respect of the conservation and management of MLR for the ocean as a whole.¹¹ Multiple preambular objectives attempt to address environmental and developmental issues. These include promoting peaceful uses of the seas and oceans, equitable and efficient utilization, conservation of MLR, and the study, protection, and preservation of the marine environment.¹²

Despite the 1982 UNCLOS objectives, marine fisheries in ABNJ are in crisis and continue to represent one of the most threatened ecosystems on earth. It is for this reason that authors such as Scheiber HN hold that the crisis in marine fisheries and ocean environment stems from a crisis in ocean resources governance’.¹³ Partially due to the principle of freedom of the high seas, marine fisheries in ABNJ mirror ongoing trends of industrialization, and as a result, over exploitation and rapid depletion of fish stock is common-placed.¹⁴ This is counterproductive to the principle of sustainable development. Sustainable development seeks to balance the ideals

⁸ Grotius H *Mare Liberum: The Free Sea* (1609-2009).

⁹ Spijkers O and Jevglevska N ‘*Sustainable Development and High Seas Fisheries*’ (2013) *Utrecht Law Review*, Vol. 9(1), pp. 24–37. The World Commission on Environment and Development (1987). [Hereafter the 1987 WCED].

¹⁰ United Nations General Assembly Resolution ‘*Our Common Future: Report of the World Commission on Environment and Development*’ (1987) A/42/427. [Hereafter the Brundtland Report].

¹¹ United Nations Treaty Series ‘*The United Nations Convention on the law of the Sea*’ (1982) UNTS, Vol. 1833. [Hereafter the 1982 UNCLOS]. See for instance Part VII Section 2 of the 1982 UNCLOS relating to the Conservation and Management of Living Resources of the High Seas.

¹² Preamble to the 1982 UNCLOS par 4.

¹³ Scheiber H N ‘*Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation - and Frustration*’ (2001) *Environmental Law Journal*, Vol. 20(1), pp. 119- 137.

¹⁴ Article 87 of the 1982 UNCLOS. For a detailed description of high seas activities see Gjerde K M ‘*Ecosystems and biodiversity in deep waters and high seas*’ (2006) UNEP Regional seas reports and studies. FAO ‘*State of World Fisheries and Aquaculture*’ (2018).

of economic and social development with that of conservation. The overarching goal would be to meet the needs of the present without compromising the ability of future generations to sustainably utilize MLR for themselves.¹⁵

It may be argued that the 1982 UNCLOS is unable to ensure its objectives in respect of marine fisheries and is therefore inadequate in achieving the conservation and sustainable use of MLR, especially in ABNJ. Sands P et al, among many others, is of the opinion that the treaty does not providing coverage to all marine-related issues, most notably to the conservation of marine species and ecosystems, in particular marine biological diversity in ABNJ.¹⁶ The 1982 UNCLOS only creates a general obligation to conserve the marine environment and no reference can be found for the protection and preservation of marine biological diversity (MBD).¹⁷ The wording of Part VII relating to ABNJ contains no specific measures or processes to protect and preserve the marine environment in ABNJ nor the biological resources found therein, let alone harmonized standards for the conservation and sustainable use of fish stock found within ABNJ.¹⁸ It must be noted that the notion of sustainable development is not found within the initial text, nor does MLR fall within the notion of the ‘common heritage of humankind’. The freedom of the high seas has predominantly been left to its own devices.¹⁹

However, this *lacuna* runs much deeper than initially presumed. According to Vanderzwaag DL, legal principles have become critical in the global quest for sustainable seas, yet the 1982 UNCLOS does not such legal principles.²⁰ Without explicit recognition of the general principles of international environmental law, especially those of sustainable development found within the 1992 United Nations Conference on Environment and Development (1992 UNCED), it is difficult for States to determine whether fisheries exploitation in ABNJ is sustainable and ensure that environmental protection and MBD is given adequate consideration. In addition, the 1982 UNCLOS has left the development of measures for conservation and management of marine fisheries in ABNJ to be decided upon through the duty to cooperate which, as this dissertation will attempt to show, is itself a flawed endeavor.²¹

¹⁵ See the Bruntland Report.

¹⁶ Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed.

¹⁷ Marine Biological Diversity. [Hereafter referred to as MBD].

¹⁸ Part VII Section 2 Article 116 -119 of the 1982 UNCLOS.

¹⁹ Article 87 of the 1982 UNCLOS.

²⁰ See for instance Vanderzwaag D L ‘*Edging towards Principled Ocean Governance: Law of the Sea and Beyond*’ in *The Future of Ocean Governance and Capacity Development* (2019) Brill. The United Nations Conference on the Environment and Development (1992). [Hereafter the 1992 UNCED].

²¹ See Article 117 - 119 of the 1982 UNCLOS.

According to Freestone D, States fishing in ABNJ have continuously disregarded conservation measures and have refused to cooperate with other fishing States, especially where resources are shared.²² Similarly, Sands P et al argues that without effective international management regimes for ABNJ States do not impose conservation measures when it knows that its abstention will be replaced by the activities of fishing vessels from other States.²³ The 1982 UNCLOS has therefore done little to prevent a ‘tragedy of the commons’ from ensuing.²⁴

This does not imply that no effort has been made to address the shortcomings of the 1982 UNCLOS. In an attempt to address issues of sustainability as a whole, the 1992 UNCED elaborated upon the ideal of sustainable development through the formation of the first set of globally recognized principles for its achievement.²⁵ These principles embedded within the Rio Declaration on the Environment and Development (Rio Declaration), will fundamentally coordinate the direction in which the future of the fisheries regime will progress. Furthermore, the subsequent Agenda 21 ensured that the Rio Declaration and all ensuing principles are made applicable to marine fisheries in ABNJ.²⁶ Agenda 21 explicitly dealt with the inadequacy of marine fisheries in ABNJ, under the auspices of the 1982 UNCLOS, and recognized the regulatory gaps within its framework. Included within Agenda 21 were recommendations which, at the time, were novel to ocean governance.²⁷

Due regard must be given to the international community for its ongoing attempt to address the primacy of the environmental agenda within the international fisheries regime regulating ABNJ post-1982 UNCLOS. Through both the Rio Declaration and Agenda 21, there has been a multitude of developments that have brought fundamental changes to the face of the fisheries regime. Freestone D explains that following the Rio Declaration and the Agenda 21, there has been ‘a major effort to address one of the unfinished agendas of 1982.’²⁸ One of these

²² Freestone D ‘*The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime*’ (1994) Cambridge Law Review, Vol. 5, pp. 341.

²³ Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed.

²⁴ Clancy E A ‘*The tragedy of the Global Commons*’ (1998) Indiana Journal of Global Legal Studies, Vol. 5. Garrett Hardin ‘*Tragedy of the Commons*’ (1968).

²⁵ The United Nations Conference on the Environment and Development ‘*The Rio Declaration on Environment and Development*’ (1992) A/CONF.151/26, Annex 1. See principles 1, 2, 3, 4, 7, 9, and 15 of the Rio Declaration.

²⁶ The United Nations Conference on Environment and Development ‘*Agenda 21*’ (1992) A/CONF.151/26, Annex 2. [Hereafter Agenda 21].

²⁷ Article 17(45) and 17(48) of Agenda 21.

²⁸ Freestone D ‘*The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime*’ (1994) Cambridge Law Review, Vol. 5, pp. 341.

developments, arguably the only one of its kind, is the 1995 Agreement for the Implementation of the provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA).²⁹ The UNFSA recognized that the 1982 UNCLOS fails to provide binding regulation that can protect fish stock that straddles between the Exclusive Economic Zone (EEZ) of coastal States and ABNJ.³⁰ According to Munro GR: ‘The need for the Agreement rested upon the inadequacies of those articles of the 1982 UNCLOS pertaining to the management of high-seas fishery resources’.³¹ With this in mind the UNFSA provides much broader sustainability measures for marine fisheries in ABNJ as opposed the 1982 UNCLOS and, as pointed out by Freestone D and Makuch Z, is the ‘the first global fisheries treaty to acknowledge the importance of environmental aspects of the problems and to endorse a precautionary approach in addressing its solution.’³²

Indeed, the UNFSA ensured that sustainable development and the underlying principles contained in the Rio Declaration and Agenda 21 applied to these stocks. As will be shown, the UNFSA attempted to shift the conservation aim from ‘optimum utilization’ as found under the 1982 UNCLOS to one that would ensure the conservation and long-term sustainable use of these resources.³³ The agreement also set out to address the improvement of international cooperation, ensuring effective flag state action and, for the first time, promoting the protection and preservation of the marine environment and the MBD found therein.

It must be noted that although the UNFSA deals with marine fisheries in ABNJ, authors such as Birnie P point out that not all high-seas stocks necessarily fall within the ambit of the UNFSA.³⁴ It is not a comprehensive framework for regulating all high seas fisheries. The agreement is directed at the conservation and sustainable use of straddling and highly migratory stocks and not marine fisheries in ABNJ as a whole.³⁵ Perhaps the biggest difficulty presented

²⁹ United Nations Treaty Series ‘*Agreement for the Implementation of the provisions of the UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*’ (1995) UNTS, Vol. 2167. [Hereafter UNFSA].

³⁰ The Exclusive Economic Zone [Hereafter the EEZ].

³¹ Munro G R ‘*The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation*’ (2000) *Marine Resource Economics*, Vol. 15(4), pp. 265-280.

³² 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.

³³ 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.

³⁴ See Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

³⁵ Report of the International Institution for Sustainable Development ‘*Summary of the UN Fish Stock Agreement Review Conference*’ (2006) IISD.

remains to be the fact that while the UNFSA constitutes a strengthening of 1982 UNCLOS, as will be shown, the success thereof will depend upon the obligation of widespread participation by states fishing in ABNJ through their involvement in regional fisheries management organizations or arrangements (RFMO).³⁶

As for binding global treaties to regulate the fisheries regime, after the adoption of the UNFSA, the international community took an alternative route. Soft law and international policy have become the preferred method to regulate the regime and has played a pivotal role in the growth of international norms and principles aimed at environmental protection within ABNJ. As pointed out by Ahmed A, the international community has recognized that soft law is an effective instrument to balance the system established by binding legal instruments and custom.³⁷

A key element has been the declarations emanating from international conferences. These have had a profound effect on the international fisheries regime through, in particular, the creation of voluntary codes of conduct produced by global organizations and the formulation of non-binding United Nations General Assembly (UNGA) resolutions. It is important to note that these international conferences, despite being non-binding, reiterate global consensus and international community interests.³⁸

As with the Bruntland Report, the Rio Declaration, and Agenda 21 discussed above, although they have the legal status of soft law, they are a product similar to a codification of the fundamental elements of international environmental law. The 2002 World Summit for Sustainable Development (2002 WSSD) dealt with the sustainable development of the ocean through, *inter alia*, the conservation and sustainable use of MLR and the maintenance of MDB in ABNJ.³⁹ Similarly, the 2012 United Nations Conference on Sustainable Development (2012

³⁶ Kunoy B 'The Ambit of Pactum de Negotiatum in the Management of Shared Fish Stocks: A Rumble in the Jungle' (2012) Chinese Journal of International Law, vol. 11, pp. 689 – 726. Regional Fisheries Management Organizations [Hereafter RFMOs].

³⁷ Ahmed A and Mustofa J 'Role of Soft Law in Environmental Protection' (2016) Global Journal of Politics and Law Research, Vol.4, No.2, pp.1-18.

³⁸ See for instance Schechter M G *United Nations Global Conferences* (2005) Routledge, and Friedrich J 'Legal Challenges of Non-binding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries' in *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (2010) Springer.

³⁹ The World Summit on Sustainable Development (2002). The World Summit on Sustainable Development 'Johannesburg Declaration on Sustainable Development' (2002) A/CONF.199/20, Annex 1. [Here after the Johannesburg Declaration]. The World Summit on Sustainable Development 'Plan of Implementation of the World Summit on Sustainable Development' (2002) A/CONF.199/20, Annex 2. [Hereafter the 2002 WSSD Plan of Implementation].

UNCSD), renewed and broadened upon these commitments.⁴⁰ Both the 2002 WSSD and the 2012 UNCSD explicitly addressed the potential future of the marine fisheries regime in ABNJ. The most recent international conference, the 2030 Agenda for Sustainable Development, is the latest non-binding ‘plan of action’ to achieve, *inter alia*, the global objective of conservation and sustainable use of MLR and the protection and preservation of MBD in the ocean as a whole.⁴¹ The 2030 Agenda included multiple targets that reinforce international interests. The 2030 Agenda represents the most up-to-date reflection of the direction of future potential regulation for marine fisheries in ABNJ and is the current driving motive to achieve sustainable development.

The FAO is one of the institutions that have benefited from these international conferences and have paved the way for the achievement of responsible fisheries in ABNJ.⁴² As early as 1984, following the 1984 WCED, the FAO has served the function of developing international fisheries policy to ensure the full realization of the 1982 UNCLOS and ensure due respect for the law of the sea.⁴³ Apart from the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, all of its developments have been non-binding and voluntary.⁴⁴ Its most significant work has been the 1995 FAO Code of Conduct on Responsible Fishing (1995 FAO Code of Conduct).⁴⁵

The 1995 FAO Code of Conduct represents a comprehensive instrument of reference to aid both the flag state in its duties, as well the formulation and implementation of new and existing international and regional agreements. Important norms have been developed through the 1995 FAO Code of Conduct as the articles contained within were premised on securing the rational and sustainable exploitation of MLR within and beyond national jurisdiction. Its objective

⁴⁰ The United Nations Conference on Sustainable Development (2012). The United Nations Conference on Sustainable Development ‘*The future we want: outcome of the Conference on Sustainable Development*’ (2012)A/CONF.216/L.1. [Hereafter the 2012 UNCSD]

⁴¹ The 2030 Agenda for Sustainable Development (2015). United Nations General Assembly ‘*Transforming our world: the 2030 Agenda for Sustainable Development*’ (2015) A/RES/70/1.

⁴² The Food and Agricultural Organisation [Hereafter the FAO].

⁴³ The FAO World Conference on Fisheries Management and Development (1982). United Nations Food and Agriculture Organization ‘*The FAO World Conference on Fisheries Management and Development*’ (1984) ACC/1982/28.

⁴⁴ United Nations Treaty Series ‘*FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas*’ (1993) UNTS, Vol. 2221. [Hereafter the 1993 FAO Compliance Agreement].

⁴⁵ United Nations Food and Agricultural Organization ‘*Code of Conduct for Responsible Fisheries*’ (1995) Report of the Conference of the FAO, 28th Session, Annex 1. [Hereafter the 1995 Code of Conduct]. Hosch G ‘*Analysis of the implementation and impact of the FAO Code of Conduct for Responsible Fisheries since 1995*’ (2009) FAO Fisheries and Aquaculture Circular.

being to ensure the effective conservation, management, and development of MLR, with due respect for the ecosystem and biodiversity.⁴⁶

In addition, through the 1995 FAO Code of Conduct, other instruments created in its wake assisted in the implementation of the norms expressed within the document. These instruments include the formulation of international plans of action and, in particular, by providing international and technical guidelines such as the 2009 FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas, the 2009 FAO Technical Guidelines on the Ecosystem Approach the Fisheries and the 2011 FAO Technical Guidelines for the Marine Protected Areas and Fisheries. Finally, the Global Sustainable Fisheries Management and Biodiversity Conservation in ABNJ Program, the FAO has ensured that strengthening the regulation for, in particular, MDB in ABNJ, has thus become a key focus area of the FAO responsible fisheries policy.⁴⁷

As discussed above, another method for the formulation of soft law is UNGA resolutions. These UNGA resolutions represent an effective platform for member States to strengthen their collective efforts and ensure that States are aware of their responsibilities in line with international interests. UNGA resolutions play an imperative role in strengthening international policy dedicated towards environmental protection. Since 2006, the UNGA has provided resolutions aimed to advance the implementation of the 1982 UNCLOS.⁴⁸ These resolutions have focused on the achievement of sustainable fisheries and improving international cooperation, and have continuously called upon States to implement all post-1982 UNCLOS developments. Its most recent resolutions focused on the implementation of the 2030 Agenda for Sustainable Development, including the initiation of discussion to form an international legally binding instrument under the 1982 UNCLOS regarding the conservation and

⁴⁶ See the Introduction of the 1995 FAO Code of Conduct.

⁴⁷ The Sustainable Fisheries Management and Biodiversity Conservation of Deep-sea Ecosystems in the Areas beyond National Jurisdiction (ABNJ) Program. Visit www.commonoceans.org.

⁴⁸ United Nations General Assembly Resolution 'Oceans and the Law of the Sea' (2006) A/RES/61/222 and United Nation General Assembly Resolution 'Sustainable Fisheries' (2006) A/RES/61/105.

sustainable use of MBD in ABNJ.⁴⁹ These discussions have since evolved into a proposed Draft BBNJ Agreement initiated pursuant to resolution 72/249 of the UNGA.⁵⁰

Although the sustainable development of marine fisheries is addressed within the international fisheries regime,⁵¹ this dissertation asserts that it remains inadequate to ensure that the devastating impact of marine fisheries on MLR and MBD is prevented. The marine fisheries regime has failed to take into account the actual true value in protecting, restoring, and maintaining ocean life, and thus relying purely on existing fisheries-specific agreements is not an option. It is crucial to include the relevant developments under existing international environmental treaty regimes, particularly the 1992 Convention on Biological Diversity (CBD) and the relevant Conference of the Parties' (COP) decisions.⁵²

In agreement with Birnie P et al, the significance of the CBD is that States parties to the CBD cannot rely on the *lacuna* that exists within the 1982 UNCLOS to justify fishing activities that cause or threatens serious damage to MBD in ABNJ. The treaty addressed multiple factors that were undeniable shortcomings of 1982 UNCLOS. In addressing biological diversity as a whole, it can be argued that the CBD has both modified and enhanced the fisheries provisions of the 1982 UNCLOS relating to ABNJ.⁵³ Furthermore, albeit soft law developments, the COP decisions to the CBD ensured that the conservation and sustainable use of MBD within ABNJ, which is not explicitly included in the CBD, is at the forefront of both biodiversity and fisheries considerations.⁵⁴ In addressing biodiversity concerns in sustainable fisheries in ABNJ, the COP decisions included adopting scientific criteria for identifying ecologically or biologically

⁴⁹ See in particular United Nations General Assembly Resolution 'The 2020 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development' (2019) A/RES/73/292, United Nations General Assembly Resolution 'Our ocean, our future: call for action' (2017) A/RES/71/312, and United Nations General Assembly Resolution 'Modalities for the United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development' (2016) A/RES/70/303.

⁵⁰United Nations General Assembly 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2017) A/RES/72/249. Available at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/revised_draft_text_a.conf_.232.2020.11_advance_undited_version.pdf

⁵¹ Scheiber H N 'Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation - and Frustration' (2001) Environmental Law Journal, Vol. 20(1), pp. 119- 137.

⁵² United Nations Treaty Series 'The Convention on Biological Diversity' (1992) UNTS, Vol. 1760. [Hereafter the CBD]. Conference of the Parties [hereafter the COP].

⁵³ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

⁵⁴ The 2nd Meeting of the Conference of the Parties to the Convention on Biological Diversity (1995) Decision II/10. [Also known as the Jakarta Mandate].

significant areas in need of protection,⁵⁵ addressing the negative impacts of human activities in ABNJ through environmental impact assessment,⁵⁶ and finally, ensuring that the protection and preservation of MBD form part of the 2030 Agenda for Sustainable Development.⁵⁷

1.2 PROBLEM STATEMENT

When analyzing the 1982 UNCLOS, no explicit obligation can be found to conserve and sustainably use MBD nor protect and preserve MBD in ABNJ. No explicit recognition can be found for the ideal of sustainable development, nor the principles of international environmental law. The 1982 UNCLOS does not reflect the current understanding regarding environmental protection expressed within international policy and soft law. The provisions within the 1982 UNCLOS relating to ABNJ lack the measures, standards, and guidelines necessary to ensure the long-term sustainability of marine fisheries in ABNJ. It is doubtful whether the agreement will be able to ensure our ambitions for the 2030 Agenda for Sustainable Development are met. This is highly problematic as a *lacuna* exists within the framework agreement regulating the exploitation and utilization of MLR in these areas. Under the 1982 UNCLOS, the freedom to fish on the high seas has been left to rain supreme with little to no restrictions to combat the negative effects that may result from such freedom.

There is no doubt that the *lacuna* within the 1982 UNCLOS has been recognized by the international community and a concerted effort has been made to address these problems within international fisheries law and policy through a multitude of post-1982 UNCLOS developments. International commitments have led to principles and norms being developed that are tailored well beyond the initial text of the 1982 UNCLOS.⁵⁸ These developments set out important frameworks that guide both the formulation and interpretation of present and future agreements within international fisheries law relevant to ABNJ.⁵⁹ Conversely, evidence continues to suggest that the governance system in ABNJ has done little to prevent the threats

⁵⁵ The 9th meeting of the Conference of the Parties to the Convention on Biological Diversity (2009) Decision IX/20.

⁵⁶ The 10th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2010) Decision X/2.

⁵⁷ The 14th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2018) Decision 14/9.

⁵⁸ VanderZwaag D L 'Edging towards Principled Ocean Governance: Law of the Sea and Beyond' in *The Future of Ocean Governance and Capacity Development* (2019) Brill.

⁵⁹ 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.

posed by marine fisheries to the long-term sustainability of MLR and fails to recognize the primacy of MDB found within ABNJ.⁶⁰

As opposed to addressing the shortcomings of the 1982 UNCLOS as a whole, through the likes of an implementing agreement, international fisheries law and policy for ABNJ have been developed as the need arises and thus only addressing issues as they start to pose a serious threat.⁶¹ As will be shown, many regulatory gaps remain within the framework, in particular, adequately restricting the freedom to fish on the high seas, ensuring the conservation and sustainable use of MLR, and the protection and preservation of MBD in ABNJ.

Apart from the UNFSA, the remainder of the regime has taken the form of voluntary and non-binding soft law. Although there is no denying the relevance of soft law as a source of international law, lack of enforceability coupled with the fragment development of fisheries regulation, is most certainly at the source of the problems facing marine fisheries in these areas.⁶² Engaging with matters of jurisdiction, areas, species, along with overlapping treaties, and soft law, has made environmental protection in these areas somewhat unsuccessful.⁶³ What this dissertation will show is that there is a continuous regurgitation in global interests, but that actual enforceable provisions and obligations in ABNJ are few and far between, leaving the regime in a state of vagueness and ambiguity. The regulatory gaps within the regime are plentiful and no legally binding instrument exists that provides unification of the general obligations, norms, and principles that have developed thus far, to ensure the conservation and sustainable use of MLR, the protection and preservation of MBD, and the integrated coverage of marine fisheries in ABNJ.⁶⁴

1.3 RESEARCH QUESTION

What potential regulation is included within the framework governing marine fisheries in ABNJ, that will address the lacuna within the 1982 UNLCOS, and ensure the conservation and

⁶⁰ Ardron J A, Rayfuse R, Gjerde KM et al 'The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements?' (2014) Marine Policy, Vol. 49.

⁶¹ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

⁶² See, generally, Boyle A 'Soft Law in International Law-Making' in Evans M *International Law* (2018) Trove Law, 5th ed.

⁶³ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

⁶⁴ Gjerde K M 'Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction' (2008) IUCN Environmental.

sustainable use of marine living resources and the protection and preservation of MBD in these areas?

1.4 SIGNIFICANCE OF THE STUDY

The unsustainability of marine fisheries has been categorized as a crisis within our ocean. Lack of adequate regulation under the 1982 UNCLOS is at the root of this predicament. Current practice within marine fisheries in ABNJ jeopardizes our environmental ambitions for sustainable development, as expressed within the 2030 Agenda for Sustainable Development, and has placed the integrity of the ocean, and therefore also the future of human society, at risk. The exploitation of MLR is paramount for the current system for development and billions of people, either directly or indirectly, depend on it.⁶⁵ Socio-economic development and the achievement of global food security give strong reasoning for the utilization of these resources. However, to ensure a sustainable future within our ocean, the international community must strive to protect and preserve healthy marine ecosystems. The ocean represents more than 90 percent of all living biomass on our planet, with ABNJ being the largest reservoir thereof.⁶⁶

Conservation and sustainable use of MLR must be understood from the perspective that MBD are fundamental properties of the ecosystem in which they are found. The function of MBD is therefore comprised of the relationships among and between these marine organisms and the environments they inhabit, which in turn result in critical ecological processes and services.⁶⁷ From the analysis of Gjerde KM et al:

‘Ensuring the conservation and sustainable use of marine biodiversity in ABNJ will therefore require taking into account the ecological connectivity of the ocean beyond legal jurisdictions; the intricate ecological, biological and oceanographic links that make the ocean the dynamic and living environment that it is to ensure its benefits for future generations.’⁶⁸

These ecological processes and services are essential for all life on earth. Human activities, in particular marine fisheries, produce a range of pressures on marine ecosystems, some of which

⁶⁵ FAO ‘*World Review of Fisheries and Aquaculture*’ (2018) FAO Fisheries and Aquaculture.

⁶⁶ ‘*Regional Seas Report and Studies - Ecosystems and Biodiversity in Deep Waters and High Seas*’ (2013) UNEP.

⁶⁷ ‘*Regional Seas Report and Studies - Ecosystems and Biodiversity in Deep Waters and High Seas*’ (2013) UNEP.

⁶⁸ 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.

may lead to irreversible changes. The consequences of unsustainable fisheries are therefore much larger and deeper than the mere loss of commercial fish stock and it is therefore not simply marine fisheries that are in crisis. According to Crespo GO:

‘The world’s oceans are experiencing an unprecedented level of biotic exploitation, which is altering the abundance and population structure of many species, transforming the composition of biological communities, and threatening the integrity and resilience of entire marine ecosystems’.⁶⁹

What is required is a precocious and proactive approach in the light of sustainable development that will ensure the longevity of ocean resources. By improving regulation within marine fisheries that is focused on both the conservation and sustainable use of MLR and the protection and preservation of MBD, the fisheries regime will be able to safeguard the integrity of marine ecosystems in ABNJ.

There is hope, however, for the future of the fisheries regime in ABNJ. Growing awareness of the dire need to ensure environmental protection of these vital resources has ensured that the international community keeps one foot in the door and providing the opportunity to start something new in an area of the law that has been particularly difficult to succeed in. The 2030 Agenda for Sustainable Development, among others, have since refreshed the urgency in the need for the international community to ensure the conservation and sustainable utilization of MLR and the protection and preservation of MBD in the oceans as a whole. However, as the most recent statement of global ambition, this dissertation dares not mention a sense of reassurance that there is already in place an adequate legal framework for the operation of Sustainable Development Goal 14 should it include ABNJ.

The current governing framework must be revamped in order to achieve sustainability in ABNJ. It is necessary to once again engage in discussions regarding marine fisheries in ABNJ, in particular, the gaps in the current regulatory framework. An analysis of potential regulation for ABNJ under the 1982 UNCLOS in the view of marine fisheries is therefore necessary.

⁶⁹ 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.

1.5 RESEARCH METHODOLOGY

This study makes use of a desktop study and does not employ any data collection techniques premised on empirical research. This study makes use of both primary and secondary sources of law. Primary sources include the sources of international environmental law as set out in Article 38(1) of the Statute of the International Court of Justice including other non-binding legal and policy instruments relevant to the topic. The sources of law set out within the Article 38(1) include the rules of law as decided within international conventions, evidence of general practice set out in international custom, the general principle of law recognized by civilized nations, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Included within these primary sources are non-binding legal and policy instruments which include United Nations Conferences and Declarations, the workings of the United Nations Food and Agriculture Organization, the Conference of the Parties Decisions of the 1992 Convention on Biological Diversity, and the United Nations General Assembly Resolutions relevant to the topic.

Secondary sources, such as scholarly journal articles and academic books are also utilized to substantiate the study. These journal articles and books discuss the conservation and management of high seas fisheries under the 1982 UNCLOS, the post-1982 UNCLOS developments aimed at strengthening the fisheries regime towards the long-term sustainability thereof within ABNJ, the protection and preservation and marine biological diversity in ABNJ and finally, the principles relevant to an effective fisheries regime in ABNJ. These journal articles and academic books contain the research conducted by authoritative sources of international law which will be utilized to substantiate and strengthen the arguments posed in this dissertation, and ultimately towards answering the research question posed therein. It is envisioned that this research method will enable the author to critically evaluate the potential regulation required for an effective fisheries regime in ABNJ.

1.6 CHAPTER OUTLINE

Chapter one forms the introduction of this study and discusses both the regulatory background and problems facing marine living resources in ABNJ in the view of marine fisheries.

Chapter two analyzes the 1982 UNCLOS as the framework agreement regulating marine fisheries in ABNJ and discusses, in particular, the *lacuna* within Part VII of UNCLOS relating to the High Seas.

Chapter three discusses the amplification of the fisheries regime in the light of post-1982 UNCLOS developments directed toward strengthening the conservation and sustainable use of marine living resources in ABNJ.

Chapter four analyzes the progressive development towards the achievement of conservation and sustainable use of marine biological diversity in ABNJ and concludes as to its adequacy for the fisheries regime in these areas.

Chapter five discusses the development of general principles required for an effective international fisheries regime that will adequately ensure the conservation and long-term sustainability of marine living resources in ABNJ.

Chapter six concludes as to the research question posed in this study and provides recommendations to further strengthen the marine fisheries regime in ABNJ under the auspices of the 1982 UNCLOS.



CHAPTER 2

HIGH SEAS FISHERIES AND THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

2.1 INTRODUCTION

The 1982 UNCLOS is the foundation of modern fisheries law and sets out the rights and obligations of States in respect of the conservation and exploitation of MLR, as well as the protection and preservation of the marine environment.⁷⁰ Often quoted as the ‘Constitution of the ocean’, the agreement clarifies the nature of jurisdictional rights over portions of the ocean and introduces some of the fundamental principles and duties of ocean governance.⁷¹ The 1982 UNCLOS is therefore classified as the principal instrument of international law regulating marine fisheries in ABNJ.⁷²

With the above in mind, this chapter questions whether severe regulatory gaps exist within the framework for marine fisheries in ABNJ under the 1982 UNCLOS and as a result, has left MLR unprotected from the potential harm posed by customary principles such as the freedom to fish on the high seas. This chapter aims to critically analyze the framework provided by the 1982 UNCLOS for high seas fisheries and determine whether, as a stand-alone agreement, it can ensure the conservation and sustainable use of MLR and the protection and preservation of the marine environment and the MBD found in ABNJ. In doing so, this chapter determine the norms and principles provided by the 1982 UNCLOS in respect of ABNJ and determine the rights and duties imposed upon States in respect of fishing activities in ABNJ.

FREEDOM TO FISH ON THE HIGH SEAS

Fishing activities in ABNJ have historically been subjected to the principle of freedom of the high seas.⁷³ This freedom of the high seas, which includes the freedom to fish, is well known in international custom.⁷⁴ In accordance, no single state can have exclusive jurisdiction over resources found in ABNJ, nor are they able to prevent another from joining in their exploitation.

⁷⁰ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed. Burke W ‘*The New International Law of Fisheries: UNCLOS 1982 and Beyond*’ (1994) *American Journal of International Law*, Vol. 89(3), pp. 674 – 677.

⁷¹ Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed. Page umbers??? Do the style requirements not indicate that page numbers must be provided?

⁷² See generally, Alexander P *United Nations Convention on the Law of the Sea (UNCLOS): A Commentary* (2017) Hart Publishing for a detailed layout of the 1982 UNCLOS. ABNJ is referred to as ‘the High Seas’ under Part VII of the 1982 UNCLOS.

⁷³ Grotius H *Mare Liberum: The Free Sea* (1609-2009).

⁷⁴ Phister M, Franck T, Fensterwald B et al ‘*Regime of the High Seas*’ (1956).

According to Munro GR: ‘The resources in the high seas were to be deemed *res communis*, the property of all, and thus open to exploitation by all’.⁷⁵ The fisheries regime for ABNJ has therefore traditionally been one of open access which is not without prejudice. As history has shown, an open-access regime that fails to provide adequate regulatory and management measures to restrict freedoms will almost certainly lead to overexploitation and ruin of the resource for all.⁷⁶ This situation is best characterized by Hardin G as a ‘tragedy of the commons.’⁷⁷

Early attempts to codify international fisheries law sought to place limitations on the freedom to fish. Discussions were exacerbated by matters of jurisdiction, and in particular, the deeper recognition of the need to conserve and cooperate in the management of high seas fish stock.⁷⁸ The 1958 United Nations Convention on the Law of the Sea undertook to settle these debates.⁷⁹ The agreements stipulated the founding objectives, obligations, and duties that would seek to constrain the absolute freedom to fish in ABNJ. Although being monumental for its time, the 1958 UNCLOS was not successful and did not receive universal adoption by the international community.

As the long-term sustainability of marine fisheries in ABNJ remained a concern, the third United Nations Conference on the Law of the Sea was opened, and parties negotiated and decided upon what is now the 1982 UNCLOS. According to Lee ML: ‘The 1982 UNCLOS is a successful attempt by the international community to codify and unify the law of the sea’.⁸⁰ The agreement embodies a codification of customary international law and received widespread ratification by United Nations member States. However, this thesis argues that despite the potential negative effects of open-access regimes, the principle of freedom of the high seas continues to represent a structural pillar in fisheries regulation under the new 1982

⁷⁵ Munro G R ‘*Game Theory and the Evolution of High Seas Fisheries Management Policies*’ (2007).

⁷⁶ See both Vicuna F O ‘*The Changing International Law of High Seas Fisheries*’ (2000) *British Yearbook of International Law*, Vol. 71(1), pp. 401–403, and Andersen P ‘*Fisheries Economics and Fisheries Management: A Reflective Note in Honor of Rögnvaldur Hannesson*’ (2013) *Marine Resource Economics*, Vol. 28(4), pp. 351–359.

⁷⁷ Hardin G ‘*Tragedy of the Commons*’ (1968) *Science* 162

⁷⁸ De Yturriaga J A *The International Regime of Fisheries: From UNCLOS 1982 to the Presential Sea* (1997) Martinus Nijhoff Publishers.

⁷⁹ See the United Nations Treaty Series ‘*Convention on the High Seas*’ (1958) UNTS, Vol. 450. [Hereafter the 1952 UNCLOS]. The 1958 UNCLOS adopted four separate conventions, of particular importance, the 1958 Convention on Fisheries and Conservation of Living Resources of the High Seas.

⁸⁰ Lee M L ‘*The Interrelation between the Law of the Sea Convention and Customary International Law*’ (2006) *San Diego International Law Journal*, Vol. 7, pp. 405.

UNCLOS.⁸¹ As the agreement divides the ocean into numerous different areas with different management and conservation regimes, this dissertation will look specifically at those provisions regulating the EEZ and the ABNJ. In the EEZ the principle of open access ceases to exist through the extension of coastal States' jurisdiction over the resources found within this area. MLR found with the EEZ fall under the jurisdiction and control of the coastal state concerned.⁸² Coastal States have sovereign rights for exploring and exploiting, conserving, and managing the natural resources as found in this area.⁸³ Coastal States also have jurisdiction concerning marine scientific research and the protection and preservation of the marine environment.⁸⁴ However, this coastal state sovereignty is conditioned as it is accountable to both the due regard of other States and other obligations in terms of the agreement.⁸⁵

On the other hand, following the provisions regarding the ABNJ, no state has jurisdiction over the resources found therein. ABNJ remains open for use by all States. The freedom of the high seas, including the freedom to fish, is maintained.⁸⁶ That being said, the freedom to fish on the high seas is not an obsolete right and is restricted by certain conditions. Member States must take the measures necessary for the conservation of the MLR and cooperate with other States in taking those measures.⁸⁷ Member States are also obliged to take into consideration the rights and obligations imposed by other rules of international law.⁸⁸ Whether or not these conditions are effective in restricting the potential negative effect of the freedom to fish on the high seas will ultimately depend on the regulatory content of these duties provided by the 1982 UNCLOS. If these are not sufficient, the fisheries regime is forced to turn to other rules and obligations in terms of international law.

2.2 THE DUTY TO CONSERVE: CONSERVATION AND MANAGEMENT OF HIGH SEAS FISHERIES UNDER THE 1982 UNCLOS

Through analysis of the text within the 1982 UNCLOS, the agreement provides several underlying goals or ambitions that would aid in the interpretation of the provisions relating to

⁸¹ Engler M C *'Establishment and Implementation of a Conservation and management Regime for High Seas Fisheries, With Focus on the Southeast Pacific and Chile: From Global Developments to Regional Challenges'* (2007).

⁸² Article 56 of the 1982 UNCLOS.

⁸³ Article 56 (1) (a) of the 1982 UNCLOS.

⁸⁴ Article 56 (1) (b) (ii) – (iii) of the 1982 UNCLOS.

⁸⁵ Article 56(2) of the 1982 UNCLOS.

⁸⁶ Article 87 and 116 of the 1982 UNCLOS.

⁸⁷ Article 63, 64, 117, and 118 of the 1982 UNCLOS.

⁸⁸ Article 116(a) of the 1982 UNCLOS.

the duty of conservation. These include efficient and equitable use, conservation of MLR, and protection and preservation of the marine environment.⁸⁹ The agreement does not provide any clear definition of the content of these goals, in particular, the actual meaning of conservation. The 1982 UNCLOS does, however, provide five requirements for the exploitation of MLR within marine fisheries and therefore also, presumably, the achievement of the goals discussed above. These include optimum utilization, the prevention of over-exploitation, the achievement of maximum sustainable yield (MSY), environmental impact assessment, and the necessity to take into consideration the effects of harvesting on associated or dependent species.

2.2.1 Optimum Utilization

According to De Klemm C, although the requirement of optimum utilization forms the basis upon which fishing States and fisheries bodies make decisions regarding the harvesting of stocks, it is not considered a principle of conservation.⁹⁰ The 1982 UNCLOS does not define optimum utilization, nor any detailed measures and standards towards its achievement. This dissertation can only assume that the requirement of optimum utilization relates to the achievement of the most favorable outcome and therefore also the objectives and ambitions mentioned in the preamble.⁹¹ Hollowed A et al brings some clarity stating that, 'The objective is to prevent overfishing while achieving, continually, the optimum yield for each... fishery'.⁹² Upon closer inspection, it is understood that the objective of optimum utilization is only applicable to the EEZ of coastal States.⁹³ This includes the duty to determine a total allowable catch in these areas, and in doing so, determine their capacity to utilize these resources.⁹⁴ There is no equivalent provision explicitly subjecting state fishing in ABNJ to apply the duty of optimum utilization, establish a total allowable catch, nor determine their capacity. Optimum utilization would only apply to ABNJ where resources are highly migratory.⁹⁵ For non- highly migratory stocks and those stocks only found in ABNJ, optimum utilization is not applicable.

⁸⁹ Preamble to the 1982 UNCLOS.

⁹⁰ De Klemm C 'Living Resources of the Ocean', in Douglas M. Johnston *the Environmental Law of the Sea* (1981) IUCN.

⁹¹ Hollowed A, Matlock G and Mason D et al 'Management of living marine resources in an ecosystem context' (2006) U.S. Department of Commerce.

⁹² Hollowed A, Matlock G and Mason D et al 'Management of living marine resources in an ecosystem context' (2006) U.S. Department of Commerce.

⁹³ Article 62(1) of the 1982 UNCLOS.

⁹⁴ Article 62(1) of the 1982 UNCLOS.

⁹⁵ Article 64 of the 1982 UNCLOS.

2.2.2 Prevention of Over-exploitation

The requirement of prevention of over-exploitation also presents an interesting scenario. For the EEZ, coastal states, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures, that the maintenance of MLR in the EEZ is not threatened by over-exploitation.⁹⁶ The 1982 UNCLOS does not provide any standards for the establishment of these measures and relies entirely on further negotiating through fisheries commissions and further agreement.⁹⁷ When reviewing the provisions relating to ABNJ, no explicit obligation exists to ensure that high seas stocks are not endangered by overexploitation. There is however a general obligation to protect the marine environment from harmful activities and should implicitly require the duty to prevent over-exploitation in ABNJ.⁹⁸ Though, relying purely on this provision seems a missed opportunity.

2.2.3 Maximum Sustainable Yield

Maximum sustainable yield is not a new principle and was included within the 1952 UNCLOS.⁹⁹ The 1982 UNCLOS holds that States shall take measures designed to maintain and restore populations of harvested species at levels that can produce maximum sustainable yield.¹⁰⁰ Maximum sustainable yield is therefore the standard set to achieve the goal of conservation. The agreement, once again, does not define nor provide any measure for its achievement. Furthermore, it must be noted that the principle is highly contested. Finley C points out that: ‘the concept has been widely criticized by scientists for ignoring several key factors in fisheries management and has led to the devastating collapse of many fisheries’.¹⁰¹ Many authors, from both the environmental and economic spheres, have raised questions about the adequacy thereof.¹⁰²

Maximum Sustainable Yield does not take into account broader environmental and economic factors and is tainted with scientific uncertainty. According to Birnie P et al:

⁹⁶ Article 61(2) of the 1982 UNCLOS.

⁹⁷ Article 61(2) of the 1982 UNCLOS.

⁹⁸ Article 145 of the 1982 UNCLOS.

⁹⁹ See article 2 of the 1958 UNCLOS.

¹⁰⁰ See Article 61(3) and Article 119(1) of the 1982 UNCLOS.

¹⁰¹ Finley C *All the Fish in the Sea: Maximum Sustainable Yield and the Failure of Fisheries Management* (2011) University of Chicago Press.

¹⁰² Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed. Larkin P ‘*An epitaph for the concept of maximum sustainable yield*’ (1977) Transactions of the American Fisheries Society, Vol. 106(1), pp. 1-11. Zabel R W, Harvey C J, Katz S L et al ‘*Ecologically Sustainable Yield: Marine conservation requires a new ecosystem-based concept for fisheries management that looks beyond sustainable yield for individual fish species*’ (2003) American Scientist, Vol 91, pp. 150 -157

‘it fails to take account not only of economic objectives but of the ecological relationships of species with each other and with their habitat and the quality status of that habitat, of the limits of the given area’s biomass, and of factors disturbing the environment.’¹⁰³

With this in mind, the principle of maximum sustainable yield, as included within the 1982 UNCLOS, is explicitly qualified. The article includes a list of factors to be taken into consideration. These contain environmental, economic, and social factors which include, the interdependence of stocks, the minimum standards of sub-regional and regional organizations, the needs of coastal communities, the special requirements of developing States, and fishing patterns.¹⁰⁴

The problem remains that the 1982 UNCLOS does not provide any guidance with regards to how and to what extent these are to be considered or taken into account. Should these factors and considerations be aimed at balancing the conflicting aims of conservation and development in the achievement of maximum sustainable yield, certain authors have pointed out that they remain open to interpretation and there is, therefore, no clear framework to assess whether States are holding to this obligation.¹⁰⁵

2.3.3 Environmental Impact Assessment:

As for the principle to undertake an environmental impact assessment (EIA) of the potential effects of human activities on the marine environment, it must be noted that it is not included within the provisions relating to the EEZ nor ABNJ. Instead, it falls under those relating to the protection and preservation of the marine environment as a whole.¹⁰⁶

Although a great addition to the 1982 UNCLOS as it includes ABNJ, there is doubt as to how effective this requirement truly is. The provision does not explicitly refer to marine fisheries and only mentions activities that may cause significant and harmful changes to the marine environment.¹⁰⁷ The provision does not guide the criteria and standards for EIA. Without clear instruction, there is no way to ensure that all essential factors that could potentially contribute

¹⁰³ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed

¹⁰⁴ Article 61(3) and Article 119(1) of the 1982 UNCLOS.

¹⁰⁵ Engler M C ‘*Establishment and Implementation of a Conservation and management Regime for High Seas Fisheries, With Focus on the Southeast Pacific and Chile: From Global Developments to Regional Challenges*’ (2007).

¹⁰⁶ Part XII of the 1982 UNCLOS.

¹⁰⁷ See article 206 of the 1982 UNCLOS. Elferink A G O ‘*Environmental Impact Assessment in Areas beyond National Jurisdiction*’ (2012) *The International Journal of Marine and Coastal Law*, Vol. 27, pp. 449 – 480.

to environmental damage are taken into account, nor is there an explicit obligation to refrain from such harmful activity. According to Craik N: 'States remain free to determine whether an environmental assessment is needed and for what activities EIA should be conducted'.¹⁰⁸

2.3.4 The Effects of Harvesting on Associated or Dependent species

As a final point for the duty to conserve is the requirement to take into consideration the effects of harvesting on associated or dependent species.¹⁰⁹ Generally speaking, the 1982 UNCLOS adopts a single-species approach to the conservation and management of MLR. According to Pinto DDP, the provisions within the 1982 UNCLOS are predominantly aimed at the conservation and maintenance of commercially exploited fish stocks and pay little attention to the relationships among species within an ecosystem or between the harvested species and its habitat.¹¹⁰

However, the 1982 UNCLOS does hold that States are obliged to take into consideration the effects on species associated with or dependent upon harvested species with the few to maintain or restore populations above levels at which their reproduction may become seriously threatened.¹¹¹ This provision applies to all species within the marine environment and is the only recognition given, although not explicitly, to the effects of marine fisheries on MDB in ABNJ. But once again, there is no way to ensure that all necessary factors are taken into account. According to De Klemm C: 'not all MLR fall under this classification'.¹¹² It can be disputed whether this provision is truly enforceable due to the use of wording such as 'take into consideration' and the fact that the 1982 UNCLOS does not guide in so far as a breach of this obligation.

Furthermore, the only other provision that might support the claim that the broader marine environment is taken into consideration within the agreement can be found in article 194(5) of the 1982 UNCLOS. The article holds that the measures taken by States shall include those necessary to protect and preserve rare and fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life.¹¹³ Although including ABNJ,

¹⁰⁸ Craik N *'The International Law of Environmental Impact Assessment'* (2008) Cambridge University Press.

¹⁰⁹ Article 61 and 119 of the 1982 UNCLOS.

¹¹⁰ In Pinto D D P *'Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction'* (2009) Edinburgh Research Archive.

¹¹¹ Article 119(1) (b) of the 1982 UNCLOS.

¹¹² De Klemm C *'Living Resources of the Ocean'*, in Douglas M. Johnston *the Environmental Law of the Sea* (1981) IUCN.

¹¹³ Article 194(5) of the 1982 UNCLOS.

the problem is that this provision relates to measures to prevent, reduce and control pollution of the marine environment and not necessarily the negative effects of marine fisheries.

2.4 THE DUTY TO COOPERATE: IMPLEMENTATION OF CONSERVATION AND MANAGEMENT PROVISIONS

A key point that must be considered in the interpretation of the 1982 UNCLOS provisions is those relating to the implementation of conservation and management measures and the duty to cooperate. The 1982 UNCLOS provides for two measures for the implementation of conservation and management measures. First, unilateral action through either a coastal state within its EEZ or a Flag state in ABNJ.¹¹⁴ Second, multilateral action through cooperation between member States.¹¹⁵ Although provision for unilateral action is discussed, the focus of the 1982 UNCLOS is on multilateral action in the form of cooperation. The duty to cooperate is also stipulated within the preamble. 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’.¹¹⁶

2.4.1 Unilateral Action

Within the EEZ, coastal States are granted exclusive jurisdiction to regulate fishing and adopt and enforce conservation measures in respect of their nationals and those of other States that are authorized to exploit in terms of their total allowable catch.¹¹⁷ The provision grants a long and non-exhaustive list that coastal States are entitled to apply that includes, *inter alia*, licensing, catch limitations on specific species, and the allocation of quotas.¹¹⁸ For ABNJ, all States must take, or cooperate in taking, measures for their respective nationals, as may be necessary for the conservation of MLR on the high seas. The 1982 UNCLOS is silent insofar as providing recommended measures to be applied and it is questionable how this duty would be satisfied.¹¹⁹

2.4.2 Multilateral Action

In consideration of the ambiguity set out within the duty to conserve above, the 1982 UNCLOS relies entirely on further negotiation to achieve its conservation aims. In this regard, it must be

¹¹⁴ Article 62(4) of the 1982 UNCLOS.

¹¹⁵ Article 117 of the 1982 UNCLOS.

¹¹⁶ Elferink A G O ‘*Governance Principles for Areas beyond National Jurisdiction*’ (2012) *International Journal of Marine and Coastal Law*, Vol. 27, pp. 205 -259.

¹¹⁷ Article 62(4) of the 1982 UNCLOS.

¹¹⁸ Article 62(4) (a) – (k) of the 1982 UNCLOS.

¹¹⁹ Article 117 of the 1982 UNCLOS.

noted that the duty to cooperate is not an outright obligation for the marine environment in ABNJ and is only applicable where member States engaged in the exploitation of the same fish stock or where multiple States engage in exploitative activities within the same area. There are three circumstances in which the duty to cooperate would apply.

The first situation deals with fish stocks that are considered straddling. These stocks occur both within the EEZ and in ABNJ or areas adjacent to it.¹²⁰ The article holds that the coastal state and the States fishing for such stocks in the adjacent area shall seek to agree, either directly or through appropriate international organizations, upon the measures necessary for the conservation of these stocks in the adjacent area. According to Ásmundsson S, participation within RFMOs is the most natural form of cooperation in this regard, however, it is not an outright obligation.¹²¹ It must be noted that Birnie P points out that the coastal States' interests are given much more importance than the interests of the state's fishing for the resource in ABNJ.¹²² In this scenario, a coastal State can require the high seas fishing state to take conservation measures, but states fishing for the same stocks in ABNJ cannot require the coastal state to take conservation measures in its EEZ.

The second situation deals specifically with those species that are highly migratory and is confined to those species mentioned in Annex 1.¹²³ It holds that coastal States and other States fishing for these resources shall cooperate, directly or through appropriate international organizations, with a view of ensuring the conservation and promoting the objective of optimum utilization of such species within and beyond the EEZ. According to Birnie P: 'this article gives cooperation priority over conservation'.¹²⁴ It goes on to state that in regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work. What exactly would be deemed as appropriate is not discussed in the text of the 1982 UNCLOS.

¹²⁰ Article 63(2) of the 1982 UNCLOS.

¹²¹ Ásmundsson S *The Freedom to fish on the high seas, and the Relevance of Regional Fisheries Management Organizations* (2016) CBD.

¹²² Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

¹²³ Article 64 of the 1982 UNCLOS.

¹²⁴ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

The final situation is aimed at cooperation between States in the conservation and management of living resources in ABNJ.¹²⁵ Article 118 provides that States are under the obligation to cooperate in the management and conservation of these resources and, more specifically, States whose nationals exploit identical resources, or different resources in the same area, must enter into a negotiation to take the measures necessary for the conservation of the living resources concerned. Article 118 goes on to hold that States, as appropriate, establish of RFMOs for this purpose.

2.5 CONCLUSION

When reviewing the duty to conserve under the 1982 UNCLOS, the first fundamental downfalls of the framework treaty begin to materialize. It becomes clear that the agreement leaves much to be desired. The agreement does not contain the principles and rules necessary to achieve the long-term sustainability of marine fisheries in ABNJ, nor would it be able to adequately protect the MBD found within these areas. First, the conservation of MLR remains undefined throughout the agreement. Second, most, if not all, of the requirements to achieve the objectives laid down in the preamble are either not applicable to ABNJ or lack detail as to their achievement. There is no obligation to ensure optimum utilization of MLR in ABNJ, there is no obligation to prevent over-exploitation of MLR in ABNJ, and the provisions regarding maximum sustainable yield, EIA, and the requirement to take into consideration the effects of harvesting on associated or dependent species are entirely unconvincing. The only provision that overs some form of control over marine fisheries in ABNJ is the general duty to protect the marine environment.

The provisions regarding implementation and cooperation in respect of ABNJ under the 1982 UNCLOS have raised concerns of their own. Regarding unilateral action in ABNJ, although States must take measures for their respective nationals, in comparison to the provisions on the EEZ, the 1982 UNCLOS does not stipulate any guidelines or recommended measures to be applied. Furthermore, when coupled with the issue concerning the duty to conserve above, it is difficult to understand what situation would be determined ‘as necessary’ under the 1982 UNCLOS.

As for the duty to cooperate itself, the 1982 UNCLOS requires cooperation where States fish for stocks that are straddling, for stocks that are highly migratory, or for either identical resources or different resources in the same area in ABNJ. This dissertation argues that the

¹²⁵ Article 118 of the 1982 UNCLOS.

1982 UNCLOS provisions on cooperation do not specify which modus of cooperation should be followed, making it difficult to determine what would classify a breach or satisfaction of this obligation.¹²⁶ For instance, although providing for RFMOs, States are in a sense given the option to choose which method of cooperation they wish to participate within. In particular for stocks found specifically in ABNJ, it seems as if participation within RFMOs would be a secondary obligation in the establishment of adequate conservation measures. Although cooperation through RFMOs can be seen as the most natural modus for cooperation, the 1982 UNCLOS does not make participation within such organization an outright obligation, should States fulfil their obligation to cooperate.¹²⁷ Yet, nor does the 1982 UNCLOS define the fulfilment thereof.

This dissertation asserts that the duty to cooperate has the potential to create a system of governance that only applies between specific states, regarding specific stocks, or a specific geographical area. This would particularly be the case should States wish to opt for other forms of multilateral cooperation that are not in the form of RFMOs. In addition, under the 1982 UNCLOS, there is not much guidance to identify what measures for conservation would satisfy the duty to cooperate.

This dissertation pinpoints that the duty to cooperate and conserve is primarily based on what Pinto DDP holds as a single species approach that does not specifically require States to cover the entirety of both MLR and MBD in ABNJ.¹²⁸ Due to the lack of guidance throughout the 1982 UNCLOS, it creates the potential for a regime where conservation measures are formulated on an ad-hoc and fragmented basis. Due to the regime not being specific as to the modus for cooperation required, the cooperation taken has the potential to not reflect the interest of the international community, nor may they be able to grant full coverage to all environmental considerations. Although the creation of and participation within RFMOs is provided for, the implementation and creation of detailed conservation measures are therefore entirely dependent on whether states decide to partake in them. Regardless, based on the weak formulation of the duty to conserve, the 1982 UNCLOS provides very little guidance through which states can negotiate the conservation measures required. The above is interesting as the

¹²⁶ Oda S 'Fisheries under the United Nations Convention on the Law of the Sea' (1983) American Journal of International Law, Vol. 77(4), pp. 739-755.

¹²⁷ Ásmundsson S 'The Freedom to fish on the high seas, and the Relevance of Regional Fisheries Management Organizations' (2016) CBD.

¹²⁸ Pinto D D P 'Towards Implementation of Ecosystem-based Fisheries Management in Marine Areas beyond National Jurisdiction' (2009) Edinburgh Research Archive.

1982 UNCLOS is 'premised on the assumption that the governance of the seas and oceans can only be effective if states cooperate'.¹²⁹

Ultimately, those provisions and clauses within the 1982 UNCLOS relating to the conservation and management of MLR seem to play more of a persuasive and symbolic role as opposed to providing content through the adoption of principles and the creation of rights and obligations that could adequately guide high seas fisheries. Ambiguity as to the conservation and management of high seas fisheries seem to be a general trend throughout these provisions. Fundamental goals such as efficient and equitable use, conservation of MLR, and protection and preservation of the marine environment remain undefined throughout the agreement and lack the substantive sustenance required for its achievement.

However, as will be shown within the preceding chapters in this study, the regulatory gaps in the 1982 UNCLOS runs much deeper than shown in this chapter.¹³⁰ Authors such as Scovazzi T have critically pointed out that there is a persistent legal vacuum under the 1982 UNCLOS regime in respect of high seas fisheries, and that the provisions within the treaty are only one aspect thereof.¹³¹ When considering the quality and standards of environmental principles that have developed within modern international environmental law, what this dissertation discovered is that the legal order for marine fisheries in ABNJ has become increasingly outdated. The agreement outright does not reflect the current understanding within global community interests and lacks fundamental principles of international environmental law, in particular, those pertaining to the conservation and sustainable use of MLR and the protection and preservation of MBD. It must however be borne in mind that these principles were only coined after the adoption of the agreement. The majority of principles such as, *inter alia*, sustainable use, the precautionary approach, the ecosystem approach, and the protection and preservation of MBD, which are firmly entrenched within international environmental law today, only became generally accepted within the international community as a post-development to the 1982 UNCLOS.

As a final point, this chapter confirms that a *lacuna* exists within the 1982 UNCLOS. As a standalone agreement, it is unable to ensure the conservation and sustainable use of MLR and

¹²⁹ Elferink A G O 'Governance Principles for Areas beyond National Jurisdiction' (2012) International Journal of Marine and Coastal Law, Vol. 27, pp. 205 -259.

¹³⁰ VanderZwaag D L 'Edging towards Principled Ocean Governance: Law of the Sea and Beyond' in *The Future of Ocean Governance and Capacity Development* (2019) Brill.

¹³¹ T. Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges' (2000) *Recueil des Cours*, Vol. 286, pp. 146

the protection and preservation of MDB found in ABNJ. Under the 1982 UNCLOS, the freedom to fish on the high seas has been left to rain supreme and leaves ABNJ in a predicament close to that of open-access. While the 1982 UNCLOS grants coastal States sovereign rights over their EEZ, in ABNJ high seas fisheries remain subject to the principle of freedom to fish which has limited if any restrictions.¹³² As this chapter has shown, the conditions aimed at restricting the potential negative effects of the freedom to fish on the high seas are insufficient and evidently, as held by Freestone D and Sands P et al, States fishing in ABNJ have either disregarded establishing conservation measures or have refused to cooperate with other fishing States.¹³³ Ultimately, this dissertation is left to turn to post- 1982 UNCLOS developments to determine how and in what manner these issues have been addressed.



¹³² Takei Y 'Filling Regulatory Gaps in High Seas Fisheries: Discrete High Seas Fish Stocks, Deep-sea Fisheries and Vulnerable Marine Ecosystems' (2008) University of Utrecht.

¹³³ Freestone D 'The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime' (1994) Cambridge Law Review, Vol. 5, pp. 341.

CHAPTER 3

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

3.1 INTRODUCTION

Following the adoption of the 1982 UNCLOS, the international community has seen progressive development towards strengthening environmental regulation within international fisheries law. Boyle A and Freestone D classify this progression as a: ‘revolution in international fisheries law’.¹³⁴ It has become trite that the environmental significance of fishing activities must be recognized on a primary level, beyond just a mere factor to be considered in the exploitation of MLR. The *lacuna* within the 1982 UNCLOS regarding conservation and management fisheries in ABNJ is undoubtedly a part thereof. A multitude of developments has sought to fill the regulatory gaps presented in chapter 2 regarding the duty to conserve and cooperate and have taken the form of a combination of both binding treaty and non-binding voluntary soft law. This chapter aims to assess the amplification of 1982 UNCLOS through developments that strengthening the conservation and sustainable use of MLR in ABNJ. This chapter showcases the shift in global community interests towards ambitions for long-term sustainability within marine fisheries in ABNJ and determines whether and to what extent these developments ensure the conservation and sustainable use of MLR in these areas.

3.2 THE UNITED NATIONS CONFERENCE ON THE ENVIRONMENT AND DEVELOPMENT

Post-1982 UNCLOS saw a monumental change in the global community interest in the utilization and exploitation of MLR in ABNJ. The most significant of these developments being the Rio Declaration.¹³⁵ The Rio Declaration, treating the 1982 UNCLOS as a codification of existing law, embraced the ideal of sustainable development and further defined the ideal through a multitude of sustainability principles. These principles were entirely novel, with the aim being to clarify the implementation of sustainability throughout the international legal regime moving forward.¹³⁶

¹³⁴ Boyle A and Freestone D *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) Oxford University Press.

¹³⁵ See Sinclair M and Valdimarsson G *Responsible Fisheries in the Marine Ecosystem* (2003) CABI Publishing for a general overview.

¹³⁶ Schneeberger K et al ‘*Review of Implementation of the Rio Principles*’ (2011) Stakeholder Forum for a Sustainable Future.

The principles and commitments it contained shed new light on the progression required to bring the regulation within the fisheries in ABNJ on par with the model for the future of environmental law as decided upon within the UNCED. The overarching objective being to reduce and eliminate unsustainable patterns of production,¹³⁷ a problem undoubtedly connected to fishing activities in ABNJ. State parties decided upon the following principles, the ideal of sustainable development, the principle of state responsibility through global stewardship, the principle of intergenerational equity, the principle of sustainable use, the duty of ongoing co-operation between and among States, the principle of best scientific information, the precautionary principle, and conducting EIA.¹³⁸

Although the Rio Declaration does not deal explicitly with how these principles are to be applied to the management of fisheries in ABNJ,¹³⁹ they continue to shape how the international community must view the future thereof. According to Ringbom H et al: ‘the subsequent development of environmental principles cannot be ignored when UNCLOS is applied today.’¹⁴⁰ Noted these principles are either deficient in content and/or absent from the 1982 UNCLOS framework.¹⁴¹ These principles form the basis for the general principles required to regulate fisheries in ABNJ.

3.3 AGENDA 21: REPORT OF THE UNITED NATIONS CONFERENCE ON THE ENVIRONMENT AND DEVELOPMENT

Agenda 21 was more specific in its expectations for the fisheries regime in ABNJ set the stage, as expressed by the international community, for national and international policy and legal developments in the governance of the ocean's living resources.¹⁴² It explicitly highlighted issues that would need to be addressed in the future development of ABNJ.¹⁴³ It recognized for the first time, on a global level, the regulatory gaps within the 1982 UNCLOS concerning

¹³⁷ See generally Porras I ‘*The Rio Declaration: A New Basis for International Co-operation*’ (1992) Review of European Community and International Environmental Law, Vol 1(3), pp. 245- 253.

¹³⁸ Principle 1, 2, 3, 4, 7, 9, 15 and 17 of the Rio Declaration.

¹³⁹ Spijkers O, Jevglevska N ‘*Sustainable Development and High Seas Fisheries*’ (2013) Utrecht law Review, Vol. 9(1), pp. 24–37.

¹⁴⁰ Ringbom H and Henriksen, T ‘*Governance Challenges, Gaps and Management Opportunities in Areas Beyond National Jurisdiction*’ (2017) Global Environment Facility – Scientific and Technical Advisory. Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed, 378.

¹⁴¹ The principles relevant to the high seas fisheries regime is discussed in detail in chapter 5 of this dissertation.

¹⁴² Juda L ‘*Rio Plus Ten: The Evolution of International Marine Fisheries Governance*’ (2002) Ocean Development and International Law, Vol. 33(2), pp. 109-144. See also Gjerde KM ‘*Challenges to protecting the marine environment beyond national jurisdiction*’ in *The 1982 Law of the Sea Convention at 30: Successes, Challenges and New Agendas*’ (2013) Martinus Nijhoff Publishers.

¹⁴³ Agenda 21, para. 17 (45).

ABNJ and that has inevitably lead to over-exploitation.¹⁴⁴ New approaches to marine and coastal area management and development needed to be adopted.¹⁴⁵ Although non-binding and voluntary, it represents the underpinning shift in commitments and interest of the international community to achieve sustainability within ABNJ and is a foundation for future developments in soft law.

According to Kusuma-Atmadja M et al: ‘this aforementioned implementation poses new challenges for the legal framework provided for by the 1982 UNCLOS’.¹⁴⁶ Being a plan of implementation to the 1992 UNCED, Agenda 21 makes the principles of the Rio Declaration directly applicable to the interpretation of the 1982 UNCLOS provisions regarding ABNJ. As Sands P explains Agenda 21 represents the ‘Roadmap’ for the future development of the 1982 UNCLOS.¹⁴⁷ Within its program areas, the report deals specifically with conservation and sustainable use and makes it a primary objective to be achieved. Notice must be taken to the following specifics emphasized by Agenda 21. The first specific is aimed at achieving long-term sustainability in ABNJ through the adoption of precautionary and multi-species management approaches. Secondly, there is a need to strengthen international cooperation within ABNJ through bilateral and multilateral agreements.¹⁴⁸ It is indeed noted that multispecies management would lay the foundation for what will later become an ecosystem-based approach to marine fisheries.

THE 1995 STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS AGREEMENT

The UNFSA is of particular importance to this study as it represented the only other fisheries-specific treaty level effort to aid in the implementation of the 1982 UNCLOS as of yet. According to Juda L, the UNFSA provides a significant attempt by the international community to deal with the problems associated with the failures of the 1982 UNCLOS in respect of resources found in both the EEZ and ABNJ.¹⁴⁹ The Agreement provided norms and rules that

¹⁴⁴ Agenda 21, Chapter 17(45).

¹⁴⁵ Agenda 21, Chapter 17(1).

¹⁴⁶ Kusuma-Atmadja M, Mensah T A and Oxman B H ‘*Sustainable Development and Preservation of the Oceans: The Challenges of UNCLOS and Agenda 21*’ (1999) *Netherlands International Law Review*, Vol. 46(2), pp.256 -260.

¹⁴⁷ See Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed, 407.

¹⁴⁸ Agenda 21, Chapter 17(45) and (48).

¹⁴⁹ Preamble to the UNFSA par 5. See Juda L ‘*The 1995 United Nations Agreement on Straddling Fish Stock and Highly Migratory Fish Stock: A Critique*’ (1997) *Ocean Development & International Law*, Vol. 28(2), pp. 147-166.

were entirely novel to the fisheries regime.¹⁵⁰ The objective of the UNFSA was to develop an effective regime that would ensure the long-term conservation and sustainable use of stocks, improve cooperation through bilateral and multilateral agreements and ensure effective flag state action by member States,¹⁵¹ bearing in mind that the UNFSA was focused on straddling and highly migratory stocks and not ABNJ as a whole.

3.3.1 The Duty to Conserve: Conservation and Sustainable Use of Marine Living Resources

The UNFSA ties the ideal of sustainable development, including the underlying principles contained in the Rio Declaration and Agenda 21, to these particular stocks. In doing so it provided much broader provisions for conservation and long-term sustainability within ABNJ.¹⁵² The agreement represents the first treaty level introduction of principles such as sustainable use, ecosystem-based marine fisheries management, and the precautionary approach, explicitly into the fisheries regime for ABNJ.¹⁵³ In addition, commitments are found that are aimed to ensure responsible fisheries, maintaining ecosystem integrity, avoiding adverse impacts on the marine environment, the preservation of MBD, and minimizing the risk of long-term or irreversible effects of fishing operations.¹⁵⁴

Of paramount importance is the change in wording from the initial conservation and management as held under the 1982 UNCLOS to conservation and sustainable use under the UNFSA. The UNFSA fundamentally broadened the duty to conserve through a further objective of sustainable use.¹⁵⁵ Although the agreement does not define sustainable use, in line with Agenda 21 it is a significant development. Despite being vague and ambiguous, the principle of sustainable use is made a primary goal to be achieved for these stocks and must be born in mind in any interpretation of the UNFSA, including the 1982 UNCLOS.

¹⁵⁰ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed, 734.

¹⁵¹ Preamble to the UNFSA par 1 - 3. 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.

¹⁵² Juda L 'The United Nations Fish Stocks Agreement' (2002) Yearbook of International Co-operation on Environment and Development, pp. 54 -58.

¹⁵³ Davies G and Redgwell C 'The international legal Regulation of Straddling Fish Stock' (1997) British Yearbook of International Law, Vol. 67, pp. 199-274.

¹⁵⁴ Preamble to 1995 Fish Stock agreement par. 6-7.

¹⁵⁵ Article 2 of the UNFSA. See generally Davies G and Redgwell C 'The international legal Regulation of Straddling Fish Stock' (1997) British Yearbook of International Law, Vol. 67, pp. 199-274. Freestone D 'The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime' (1994) University of Canterbury Law Journal.

3.3.1.1 The Ecosystem Approach to Fisheries Management:

The UNFSA does not use terms such as an ecosystem approach. However, it does do so implicitly. In comparison to the 1982 UNCLOS which only requests States to “take into consideration” the effects of conservation and management measures of harvested species on associated or dependent species, the UNFSA broadens this approach. The UNFSA specifically requires States to assess the impact of human activities and environmental factors on all the MLR in the ecosystem including dependent or associated species.¹⁵⁶ States must adopt specific conservation and management measures for those dependent or associated species.¹⁵⁷ Explicit recognition is also given to protecting MBD and maintaining ecosystem integrity found in the marine environment.¹⁵⁸ Recognition of these broader environmental objectives is found throughout the agreement.¹⁵⁹ They are strong indications of the need for an ecosystem approach within fisheries management and to a certain extent embraced the request for multispecies management made by Agenda 21.¹⁶⁰

3.3.1.2 The Precautionary Approach to Fisheries Management:

Perhaps the most important aspect of the UNFSA is the explicit recognition of the precautionary approach.¹⁶¹ States shall ensure that cautious conservation and management measures shall apply to all fisheries, whether new or existing, throughout their range. According to Freestone D et al: ‘the principle changes the regime from being reactive to environmental problems to one that is proactive’.¹⁶² The agreement does not define the approach but goes to some extent in explaining its content.¹⁶³ According to article 6, a fundamental prerequisite to implementing the precautionary approach lies in the requirement of ‘best scientific information available’.¹⁶⁴ In contrast, where information is uncertain,

¹⁵⁶ Article 5 (d) of the UNFSA.

¹⁵⁷ Article 5 (e) of the UNFSA

¹⁵⁸ See the preamble and Article 5 (9) of the UNFSA

¹⁵⁹ The Preamble and Articles 5 (b), (c), (d), (e), (f), (g); 6 (1) (d), (5); and 7 (2) (f) of the UNFSA.

¹⁶⁰ See Davies G and Redgwell C ‘*The international legal Regulation of Straddling Fish Stock*’ (1997) British Yearbook of International Law, Vol. 67, pp. 199-274. See more generally, Pinto D D P ‘*Towards Implementation of Ecosystem-Based Management in Marine Areas Beyond National Jurisdiction*’ (2010) Edinburg Research Archive. Parsons S A ‘*Ecosystem Considerations in Fisheries Management: Theory and Practice*’ (2005) The International Journal of Marine and Coastal Law, Vol. 20, pp. 381-422.

¹⁶¹ Article 5(c) of the UNFSA. Freestone D ‘*Modern Principles of High Seas Governance – The Legal Underpinnings*’ (2009) Environmental Law and Policy, Vol. 39(1), pp. 44-50. For general information on the relevance of the approach see Fitzmaurice M, Ong D and Merkourism P *Research Handbook on International Environmental Law* (2010) Edward Elgar Publishing, pp. 203.

¹⁶² See 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..

¹⁶³ Article 6 of the UNFSA.

¹⁶⁴ Article 6 of the UNFSA.

unreliable, or inadequate States are obliged to be more cautious.¹⁶⁵ The UNFSA held that the absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.¹⁶⁶

3.3.1.3 The Establishment of Precautionary Reference Points under the UNFSA:

The UNFSA operationalizes the precautionary approach by providing guidelines for the application of precautionary reference points, which are ultimately those intended to, *inter alia*, prevent overfishing.¹⁶⁷ According to Annex II (4) of the UNFSA: ‘Management and conservation strategies for these stocks shall seek to maintain or restore harvest stocks and dependent species at levels consistent with the agreed precautionary reference points and shall include measures that can be implemented when these reference points are approached.’ These reference points enable the adoption of boundaries that constrain fisheries to remain within safe biological limits that produce Maximum Sustainable Yield. Reference points also enabled States to adopt conservation and management objectives that will achieve long-term sustainability of the target stocks, as well as the conservation of associated or dependent species.¹⁶⁸ Furthermore, when reference points are approached, States must take measures to ensure they are not exceeded.¹⁶⁹ If the case, States are obliged to take immediate action.¹⁷⁰

3.3.2 The Duty to Cooperate: Implementation of conservation and sustainable use under the UNFSA

3.4.2.1 Strengthening Cooperation through Regional Fisheries Management Organizations

According to Munro GR: ‘The heart of the UNFSA is found in Article 8’.¹⁷¹ The UNFSA reiterates Articles 63 (2) and 64 of the 1982 UNCLOS by providing that ‘the obligation of States to cooperate for the conservation and management of straddling fish stocks and highly migratory fish stocks shall be discharged either directly or through the appropriate sub-regional

¹⁶⁵ Article 6(2) of the UNFSA.

¹⁶⁶ Article 6(2) of the UNFSA.

¹⁶⁷ Article 6(3) (b) of the UNFSA. Rosenberg A A and Restrepo V R ‘Precautionary Management Reference Points and Management Strategies’ FAO. See also Lodge M W and Nandan S N ‘Some Suggestions towards Better Implementation of the United Nations Agreement on Straddling Fish Stocks and Highly Migration Fish Stocks of 1995’ (2005) International Journal of Marine and Coastal Law, Vol. 20, pp. 345.

¹⁶⁸ Annex II (2) of the 1995 Fish Stock Agreement. For a detailed discussion on precautionary reference points see Caddy J F and Mahon R ‘Reference Points for Fisheries Management’ (1995) FAO Fisheries Technical Paper, No. 347.

¹⁶⁹ Article 6(4) of the UNFSA.

¹⁷⁰ Article 6(4) of the UNFSA.

¹⁷¹ See Munro G R ‘The United Nations Fish Stocks Agreement of 1995: History and Problems of Implementation’ (2000) Marine Resource Economics, Vol. 15, pp. 265-280

or regional fisheries management organizations or arrangements.’¹⁷² How it differs in that it extends this obligation by making RFMOs be the primary vehicle for cooperation between coastal States and high seas fishing States. The UNFSA requires States to become members of these RFMOs or to agree to apply the conservation measures they decide upon.¹⁷³ Notably, access to fisheries resources is limited to those States which are members of the fishery bodies or arrangements, or to those which agree to abide by the conservation and management measures established by such fisheries bodies or arrangements.¹⁷⁴ Unlike the 1982 UNCLOS, the UNFSA also includes a detailed description of both the scientific and management functions of RFMOs,¹⁷⁵ strengthening both their role and function by making them more effective and reliable.

3.4.2.2 The Duties of the Flag State:

The UNFSA provides a detailed list of the responsibilities flag States are required to undertake that goes far beyond the 1982 UNCLOS.¹⁷⁶ Of particular importance, a fishing vessel is only allowed to operate in ABNJ where it has been duly authorized by a flag State. Such authorization is given only where the flag state can effectively exercise its responsibilities over the vessel and abide by RFMOs,¹⁷⁷ noting that the UNFSA specifies that the duties included in Article 94 of the 1982 UNCLOS include the obligation for States to ensure that vessels flying their flag comply with measures established by RFMO and do not engage in any activity which undermines the effectiveness of such measures.¹⁷⁸

3.4 THE WORKINGS OF THE FOOD AND AGRICULTURE ORGANIZATION IN THE CONSERVATION AND SUSTAINABLE USE OF MARINE FISHERIES IN ABNJ

The FAO plays a unique role in fleshing out and filling gaps within the 1982 UNCLOS and the UNFSA concerning ABNJ. According to Friedrich J:

¹⁷²Article 8(1) and article 21 of the UNFSA.

¹⁷³ Article 8(2)-(3) of the UNFSA.

¹⁷⁴. Article 8(4) of the UNFSA.

¹⁷⁵ Article 10 of the UNFSA.

¹⁷⁶ Article 18 (3) (a) – (g) of the 1995 Fish Stock Agreement.

¹⁷⁷ Article 18(2) of the 1995 Fish Stock Agreement.

¹⁷⁸ Article 18(1) of the 1995 Fish Stock Agreement.

‘The institutional machinery of the FAO further resorts to numerous subtle ways through which States are drawn into flexible and discursive learning processes that often trigger important paradigm shifts...towards more sustainable practices’.¹⁷⁹

Apart from the 1993 Compliance Agreement, the FAO has predominantly made use of non-binding and voluntary soft law documents, as discussed in detail below. Although these lack enforcement capabilities, they reflect important progressions in international policy towards more sustainable practices within marine fisheries in ABNJ.

3.4.1 The 1995 FAO Code of Conduct for Responsible Fisheries

The 1995 FAO Code of Conduct has and continues to make remarkable contributions to the international fisheries regime in ABNJ.¹⁸⁰ The 1995 Code of Conduct is founded upon the understanding that fisheries resources can no longer sustain the current patterns of rapid and often uncontrolled exploitation and development.¹⁸¹ Its objectives distinguish the ideal of sustainable development and recognize the environmental importance of fisheries resources, alongside global food security, and social and economic development.¹⁸² Advocating that new approaches to fisheries management are urgently needed.¹⁸³ The 1995 FAO Code of Conduct affirms that certain parts are based on international law, and are to be interpreted and applied in conjunction with the 1982 UNCLOS, the UNFSA, the Rio Declaration, and Agenda 21.¹⁸⁴

The function of the 1995 FAO Code of Conduct is to set international principles and standards of behavior for responsible fisheries practices and includes ABNJ.¹⁸⁵ The Code aims to ensure the effective conservation, management, and development of MLR with due respect for the ecosystem and MBD.¹⁸⁶ The Code represents a comprehensive instrument of reference and

¹⁷⁹ Friedrich J ‘Legal Challenges of Nonbinding Instruments: The Case of the FAO Code of Conduct for Responsible Fisheries’ (2008) German Law Journal, Vol. 9(11), pp. 1539-1564.

¹⁸⁰ Doullman DJ ‘Coping with the extended vulnerability of marine ecosystems: implementing the 1995 FAO Code of Conduct for Responsible Fisheries’ (2007) SAGE Publications. Pitcher T, Daniela K and Pramod G et al ‘Not honoring the code’ (2009) Nature.

¹⁸¹ See the Preface to the Code. See also Coll M, Libralato S and Pitcher T J et al ‘Sustainability implications of honoring the Code of Conduct for Responsible Fisheries’ (2012) Global Environmental Change, Vol. 23(1), pp. 157-166

¹⁸² Article 64 of the 1995 FAO Code of Conduct.

¹⁸³ See the preface to the 1995 FAO Code of Conduct.

¹⁸⁴ Article 1 of the 1995 FAO Code of Conduct.

¹⁸⁵ See the Introduction of the 1995 FAO Code of Conduct.

¹⁸⁶ See the Introduction of the 1995 FAO Code of Conduct

guidance to aid both the flag state in its duties, as well the formulation and implementation of new and existing international and regional agreements and other legal instruments.¹⁸⁷

At the heart of the Code lies the following commitments. To conserve and manage MLR,¹⁸⁸ to ensure their sustainable development,¹⁸⁹ the ecosystem-based approach to marine fisheries,¹⁹⁰ the requirement of sustained use,¹⁹¹ the application of the precautionary approach,¹⁹² and the requirement of best scientific information.¹⁹³ The 1995 FAO Code of Conduct includes principles on the protection of MBD,¹⁹⁴ including the start of provisions relating to the creation of marine protected areas (MPAs) which was an entirely new field of interest.¹⁹⁵

The duty to cooperate through RFMO to achieve this is once again made a primary objective.¹⁹⁶ The 1995 FAO Code of Conduct goes into extensive detail concerning the requirements and expectations of States and RFMOs for the management of all fisheries¹⁹⁷ and provides specific management objectives. Long-term sustainable use and the achievement of maximum sustainable yield is made the overriding objectives for the conservation and management of fisheries resources.¹⁹⁸

What should be noted is that the Code accounts for the precautionary approach, drawing reference from the UNFSA.¹⁹⁹ In particular, in that target and limit reference points, a key feature to the precautionary approach within the UNFSA is made applicable to all stocks and not only straddling and highly migratory stocks.²⁰⁰

3.4.2 The FAO International Plans of Action and International Guidelines

An important feature of the 1995 FAO Code of Conduct is that it also functions as a series of instruments that assist both individual States and RFMOs in taking the necessary practical steps

¹⁸⁷ Article 2 of the 1995 FAO Code of Conduct.

¹⁸⁸ Article 6 (1) of the 1995 FAO Code of Conduct.

¹⁸⁹ Article 6 (2) of the 1995 FAO Code of Conduct.

¹⁹⁰ Article 6 (2) of the 1995 FAO Code of Conduct.

¹⁹¹ Article 6 (3) of the 1995 FAO Code of Conduct.

¹⁹² Article 6 (5) of the 1995 FAO Code of Conduct.

¹⁹³ Article 6 (4) of the 1995 FAO Code of Conduct.

¹⁹⁴ Article 6 (6) of the 1995 FAO Code of Conduct.

¹⁹⁵ Article 6 (6) of the 1995 FAO Code of Conduct.

¹⁹⁶ Article 6 (12) of the 1995 FAO Code of Conduct.

¹⁹⁷ Article 7 of the 1995 FAO Code of Conduct.

¹⁹⁸ Article 7 (2) (1) of the 1995 FAO Code of Conduct

¹⁹⁹ Article 7 (5) of the 1995 FAO Code of Conduct.

²⁰⁰ Article 7 (5) (2) and 7 (5) (3) of the 1995 FAO Code of Conduct.

to implement 'responsible fisheries'. These include formulating international plans of action and providing international and technical guidelines. The 1999 International Plan of Action for the Management of Fishing Capacity and the 2001 International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported, and Unregulated Fishing, among others, deal extensively with matters which have plagued the fisheries regime.²⁰¹ Its most recent developments, international and technical guidelines, have focused on elaborating certain parts in fisheries conservation which have remained notoriously vague and ambiguous. These include, *inter alia*, the ecosystem approach to fisheries,²⁰² the management of deep-sea fisheries,²⁰³ and the establishment of MPAs.²⁰⁴ Although soft law instruments, all are paramount and novel in their own right, and without going into detail on their content, these represent a codification of vital policy interests for the governance of the fisheries regime in ABNJ moving forward.

3.5 The 2002 WORLD SUMMIT FOR SUSTAINABLE DEVELOPMENT

Building on the Rio Declaration and Agenda 21, the 2002 WSSD was yet another universal attempt to deal with the implementation of sustainable development. The international community once again argued for a global consensus on the need for immediate action towards the achievement of sustainability of global fish stock and ocean resources.²⁰⁵ The objective being to 'eliminate unsustainable patterns of production and consumption and the protection and preservation of natural resources'.²⁰⁶ It reaffirmed that sustainable development of the oceans was desperately needed and that this could only be achieved through coordination and cooperation at both global and regional levels.²⁰⁷ In doing so it held that Agenda 21 would continue to form the program of action moving forward. In addition, the first reference was

²⁰¹ A set of four additional voluntary instruments attached to the Code address specific fisheries management challenges. Fishing overcapacity and IUU fishing are currently viewed as two of the most important sources of problems frustrating the sustainable management of world fisheries resources. Hosch G, Ferraro G L, Failler P 'The 1995 FAO Code of Conduct for Responsible Fisheries: Adopting, implementing or scoring results?' (2008) Marine Policy, Vol. 35(2), pp.185-200.

²⁰² See the United Nations Food and Agricultural Organization 'Technical Guidelines on Fisheries Management' (1997) FAO, the United Nations Food and Agricultural Organization 'Technical Guidelines on the Ecosystem Approach to Fisheries' (2003) FAO, and the United Nations Food and Agriculture Organization 'Technical Guidelines on the Ecosystem Approach to Fisheries' (2009) FAO.

²⁰³ See the United Nations Food and Agriculture Organization 'International Guidelines for the Management of Deep-sea Fisheries in the High Seas' (2009) FAO.

²⁰⁴ The United Nations Food and Agriculture Organization 'Technical Guidelines for Marine Protected Areas and Fisheries' (2011) FAO.

²⁰⁵ Eichenberg T and Shapson M 'The Promise of Johannesburg: Fisheries and the World Summit on Sustainable Development' (2004) Environmental law Journal Symposium.

²⁰⁶ Chapter III and IV of the WSSD.

²⁰⁷ Article 30 of chapter IV of the WSSD.

given for the ecosystem-based approach to marine fisheries in a United Nations Conference and Declaration.²⁰⁸

To achieve sustainable fisheries States are to achieve Maximum Sustainable Yield and were encouraged to ratify or accede to relevant agreements, in particular, the UNFSA. They were to implement the 1995 FAO Code of Conduct including its relevant International Plan of Actions and technical guidelines.²⁰⁹ Furthermore, its article on the conservation and management of MLR dealt explicitly with the protection and preservation of MBD. It called for the maintenance of productivity and biodiversity in ABNJ and the use of diverse approaches and tools to its achievement. This would include the ecosystem approach, the establishment of MPAs and reliance on ‘the best available scientific information’.²¹⁰

3.6 THE 2012 UNITED NATIONS CONFERENCE ON SUSTAINABLE DEVELOPMENT

With the 2012 UNCSA, the international community renewed and broadened upon the commitments that have already been made to achieve sustainable development. States committed themselves to, *inter alia*, ‘protect, and restore, the health, productivity, and resilience of oceans and marine ecosystems, maintain MBD, enable conservation and sustainable use for future generations, and effectively apply an ecosystem approach and the precautionary approach in the management’.²¹¹ Urgent and decisive action needed to be taken to implement existing commitments and take additional steps to ensure the health and sustainability of the marine environment. The outcome document expressly recognizes the importance of conservation and sustainable use of not only marine fisheries but also MBD in ABNJ including the further development of regulation for these areas.²¹²

3.7 THE 2030 AGENDA FOR SUSTAINABLE DEVELOPMENT

The Agenda 2030 for Sustainable Development, is the latest non-binding global ‘plan of action’ to bring the international community one step closer to ensuring ‘lasting protection and sustainable management of the planet and its natural resources’.²¹³ As a soft law development of global consensus, it reflects the most recent paradigm shift in international interests and therefore has the ability to progressively shape the future of marine fisheries regulation for

²⁰⁸ Article 30 (b) of chapter IV of the WSSD.

²⁰⁹ Article 31 (a) – (c) of the Chapter IV of the Plan of Implementation of the WSSD.

²¹⁰ Article 32 of Chapter IV of the Plan of Implementation of the WSSD.

²¹¹ Article 32 of Report of the UNCSA.

²¹² Article 161 of the UNCSA outcome document.

²¹³ Article 3 of the Agenda 2030 for Sustainable Development.

ABNJ. As opposed to its predecessors, it does not focus on ‘planning or strategies’ but rather clear statements of intention through the adoption of goals and target points to their achievement. There is therefore no reference to, *inter alia*, the precautionary and ecosystem approach to the management of the marine environment.

SDG 14 is of particular importance for the fisheries regime in ABNJ as it has reinforced the importance of conservation and sustainable use of MLR as part of its global objective. Although SDG 14 addresses ocean governance as a whole, it contains multiple targets that are implicit in marine fisheries in ABNJ. The 2nd target holds the ambition to ‘by 2020, sustainably manage and protect marine and coastal ecosystems to avoid significant adverse impacts, including by strengthening their resilience, and taking action for their restoration to achieve healthy and productive oceans’.²¹⁴ The 4th target states that ‘by 2020, there should be effective regulation of harvesting and ending of overfishing, illegal, unreported and unregulated fishing and destructive fishing practices and the implementation of science-based management plans, to restore fish stocks in the shortest time feasible, at least to levels that can produce maximum sustainable yield as determined by their biological characteristics’.²¹⁵ The 5th target holds that ‘by 2020, there should be conservation of at least 10 percent of coastal and marine areas, consistent with national and international law and based on the best available scientific information’.²¹⁶

Having past its dead-line of 2020, the fact remains that although there has been significant progress, it is doubtful whether these targets have been met in ABNJ. This is particularly so for the 2nd and 4th target. When faced with the magnitude of these areas, and given the status of the regulatory framework currently applicable to ABNJ, it seems that these targets may have been too ambitious. The achievement of, *inter alia*, sustainable management, the protection of marine and coastal ecosystems, the effective regulation of harvesting and the ending of overfishing are very complex issues that have plagued ABNJ since the adoption of the 1982 UNCLOS and cannot be achieved without an effective management regime. Unfortunately, the current framework for marine fisheries in ABNJ isn’t of standard to meet these targets. At least not at a level where the international community can assert with certainty that, despite not having met these SDG 14 targets by 2020, that the conservation and sustainable use of the oceans, seas and marine resources for ABNJ will be achieved by the ultimate goal of 2030. It

²¹⁴ Goal 14(2) of the Agenda 2030 for Sustainable Development.

²¹⁵ Goal 14(4) of the Agenda 2030 for Sustainable Development.

²¹⁶ Goal 14(5) of the Agenda 2030 for Sustainable Development.

is for this exact reason that the 2030 Agenda for Sustainable Development is of such importance for the progressive development of the fisheries regime in ABNJ. Although the 2030 Agenda for Sustainable Development does not deal explicitly with ABNJ, it is the most up to date reflection of international community interests in the future of ocean governance, and any thought that includes the sustainable development of ocean resources must fundamentally also include the primacy that is ABNJ.

3.8 UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

The United Nations General Assembly Resolutions are an additional and reinforcing example of soft law instruments being used to reflect the up-to-date interests of the international community in the regulation of marine fisheries. These are non-binding documents or reports that, since the adoption of the 1982 UNCLOS and the UNFSA, have continuously addressed issues relating to the conservation and sustainable use of marine fisheries in ABNJ.²¹⁷ As mentioned earlier, the influence of the use of soft law of this kind should not be underestimated. They have the ability to shape and interpret current and future regulatory measures whether global, regional, or national.

What must be noted is that although not containing detailed and comprehensive policy, they express the immediate and prevailing interests of the international community within the future of the fisheries regime. The 2006 General Assembly Resolution marked the start of progressive development in elaborating and adopting a broader environmental approach to marine fisheries both within and beyond national jurisdiction.²¹⁸ These UNGA resolutions started with the implementation of a precautionary and ecosystem approach to achieve sustainable fisheries in ABNJ and have since evolved as far recognizing and committing to the fact that to achieve the SDG 14 of Agenda 2030, developing binding regulation dealing specifically with conservation and sustainable use within marine fisheries in ABNJ is inherently necessary.²¹⁹ The workings of the UNGA resolutions are discussed further in Chapter 4

²¹⁷ Ardron J A, Rayfuse R, Gjerd 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.

²¹⁸ United Nations General Assembly Resolution *'Oceans and the Law of the Sea'* (2006) A/RES/61/222 and United Nations General Assembly Resolution *'Sustainable Fisheries'* (2006) A/RES/61/105.

²¹⁹ United Nations General Assembly Resolutions *'The 2020 United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development'* (2019) A/RES/73/292, United Nations General Assembly Resolutions *'Our ocean, our future: call for action'* (2017) A/RES/71/312, and United Nations General Assembly Resolution *'Modalities for the United Nations Conference to Support the Implementation of*

3.9 CONCLUSION

There has been a clear paradigm shift within the global community interest to ensure that the *lacuna* within the 1982 UNCLOS regarding marine fisheries in ABNJ is addressed. The significance of the marine environment in ABNJ has become an increasingly important focus of activities for the United Nations. The United Nations Conferences and their ensuing declarations are perhaps the most noticeable attempts within the international community to forge a global common outlook on how to address the challenges of preserving and enhancing the human environment, which includes marine fisheries ABNJ.

These declarations have reiterated and enforced the evolution of principles and norms necessary to ensure the long-term sustainability of the marine environment in ABNJ and are therefore an authoritative contributor to the fisheries regime. These declarations include provisions that either reflect or build on customary international law or are expected to shape future normative expectations for the regime. With the above in mind, the drawback of these developments is that they mostly include broad environmental policy goals and objectives which, although ambitious, remain non-binding and unenforceable. This dissertation argues that there is a continuous regurgitation of provisions and ambitions, yet progress towards dealing with actual complications such as over-exploitation remains far and few between.

When reviewing the UNFSA, what becomes clear is its limitation in scope. The UNFSA only covers those transboundary stocks that are straddling and/or highly migratory. Although due recognition is given to broader environmental principles such as sustainable development, the precautionary approach, and ecosystem-based fisheries management, the agreement is aimed primarily at straddling and highly migratory fish stock and not marine fisheries in ABNJ as a whole. Not all high-seas stocks and marine ecosystems necessarily fall within the ambit of the UNFSA. It is therefore not a comprehensive framework for regulating fisheries in ABNJ.²²⁰ Perhaps the biggest difficulty presented remains to be the execution of the duty to cooperate. While the Agreement constitutes a strengthening of the 1982 UNCLOS, it, in turn, will require further strengthening and implementation by States through the establishment of and participation within RFMOs. This includes the effectiveness of the implementation of unilateral action through flag state responsibilities. Furthermore, the UNFSA is also the only

Sustainable Development Goal 14: Conserve and sustainably use the oceans, seas and marine resources for sustainable development (2016) A/RES/70/303.

²²⁰ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

other fisheries-specific agreement providing binding regulation for the regime in ABNJ which, from a governance perspective, constitutes an obvious disadvantage.

Apart from the 1982 UNCLOS and the UNFSA, most if not all developments post-1982 UNCLOS have taken the form of non-binding soft law. Apart from the UN Declarations which deal with the human environment as a whole, fisheries specific soft law developments include the FAO Code of Conduct and the UNGA resolutions on sustainable fisheries. What this infers is that although, as an example, the FAO Code of Conduct represents a very comprehensive framework document of international fisheries policy in ABNJ, it is incomed by soft law status.²²¹ In portraying the interests of the international community towards broader environmental objectives within marine fisheries, and providing a platform of guidance and reference for the implementation of the regime, with limited enforcement capabilities there is no way to ensure that States, including RFMOs, are holding to the objectives and ambitions expressed. Nevertheless, these developments are powerful and evolutionary legal tools to be used when interpreting both existing and future binding instruments.²²² They were created in consensus with of all States and relevant bodies to the United Nations and negotiated in a process almost identical to that of treaties. The same can be said for the UNGA resolutions, although not containing as detailed and comprehensive policy per se, they express the immediate and prevailing interests of the international community within the future of the fisheries regime in ABNJ.

The provisions within the UNFSA, the multitude of UN Conference Declarations, including the workings of the FAO, and UNGA resolutions, are all evidence of the effort made towards achieving the goal of long-term sustainable use and conservation of the fisheries resources found within ABNJ. The wording and commitments of these documents go well beyond the initial text of the 1982 UNCLOS and provide important limitations on the freedom to fish, in both the duty to conserve and to cooperate. However, the question remains, especially from the perspective of Agenda 2030, whether ABNJ is given adequate protection and whether all the regulatory gaps are acknowledged and covered. There remain noticeable limitations in the scope and potential effectiveness of these agreements in both treaty and soft law and raises considerable doubt as to the whether the goals and ambitions for the 2030 Agenda for

²²¹ As noted by Birnie et al 'these agreements underline FAO's importance in the process of law-reform relating to international fisheries.' Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed, pp. 714.

²²² Korseberg L 'The Law-Making Effects of the FAO Deep-Sea Fisheries Guidelines' (2018) *International and Comparative Law Quarterly*, vol. 67(4).

Sustainable will be met under the current fisheries framework. From the 2nd and 4th target alone this dissertation can successfully argue that the above-discussed framework has not been enough.

Ultimately, however, with so many initiatives and instruments, certain authors such as Birnie P have pointed out that the existing governance system for marine fisheries in ABNJ has become ad-hoc and fragmented.²²³ In understanding the regime, one would have to consider *inter alia*, the 1982 UNCLOS, the UNFSA, including the proliferation of soft law, not to mention the developments within RFMOs and other agreements. The difficulties lie in the fact that no instrument exists that can ensure a unified and consistent implementation of all the facets of the fisheries regime for ABNJ already created, in particular, the development and reaffirmation of the principles and norms of international environmental law applicable to ABNJ.



²²³ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

CHAPTER 4

CONSERVATION AND SUSTAINABLE USE OF MARINE BIOLOGICAL DIVERSITY IN ABNJ

4.1 INTRODUCTION

The long-term sustainability of MBD in ABNJ is facing serious threats and marine fisheries lie at the core.²²⁴ Marine fisheries cause dangerous and irreversible damage to both the marine environment and the critical MBD found therein. Noting that ABNJ represents the largest habitable space on Earth, the primacy of conservation and sustainable use of MBD within these areas cannot be understated.²²⁵ Unfortunately, as with most other ideals and principles of international environmental law, the protection and preservation of MBD does not find an explicit reference within the 1982 UNCLOS. This does not indicate that MBD does not find a place within the framework agreement. As will be shown, the realization of the significance of MBD by the international community through soft law has been plenty fold. New and existing norms have been elaborated by various institutions and agreements post-1982 UNCLOS, not to mention the development of biodiversity-specific legislation and policy through the CBD and its COP decisions. The aforementioned have made remarkable contributions to the fisheries regime for ABNJ.²²⁶ This chapter will analyze the progressive development towards the achievement of conservation and sustainable use of MBD in ABNJ and will conclude as to its adequacy for the fisheries regime.

4.2 THE IMPORTANCE OF MARINE BIOLOGICAL DIVERSITY IN ABNJ

The consequences of unsustainable fishing practices transcend far beyond the collapse of commercially exploited fish stocks.²²⁷ Hitherto, the international community is still in the process of comprehending the role of MBD within the marine environment and this is especially so for ABNJ.²²⁸ The UNEP held that ‘what was once regarded as featureless,

²²⁴ Fisheries and Aquaculture Department ‘*Global sustainable fisheries management and biodiversity conservation in Areas beyond National Jurisdiction*’ (2017) FAO. 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.

²²⁵ Eichbaum W M, Crosby MP et al ‘*Role of Marine and Coastal Protected Areas in the Conservation and Sustainable Use of Biological Diversity*’ (1996) Oceanography, Volume 9(1), pp. 60 -70.

²²⁶ See also Warner R M ‘*Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea*’ (2014) Frontiers in Marine Science.

²²⁷ ‘*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.

²²⁸ O’Leary B C and Roberts C M ‘*The Structuring Role of Marine Life in Open Ocean Habitat: Importance to International Policy*’ (2017) Frontiers in Marine Science.

unchanging and inexhaustible is now known to be complex, dynamic and finite'.²²⁹ Gjerde KM describes the importance of MBD stating that: 'The variety and abundance of marine life is essential to the health and resilience of the oceans, for balanced ecosystems are better able to respond to changing conditions.'²³⁰

Rapid development in the exploitation of MBD in ABNJ has left a detrimental footprint on the ocean. However, the same progress cannot be held for the legal regime governing these areas. The transition of the fisheries regime to include adequate governance for conservation and sustainable use of MBD has been criticized as being considerably slow, and has struggled to keep up with the rapid increase of human activities within ABNJ.²³¹ As a result, fishing operations in ABNJ continue to have detrimental effects towards the reduction of MBD as opposed to creating the opportunity for biological sustainability.

The protection and preservation of MBD must play a primary role in the future conservation and sustainable use of MBD in ABNJ. According to the UNEP, the ocean represents more than 90 percent of all living biomass on our planet, with ABNJ as its the largest reservoir. MBD and the critical ecological processes and services of the oceans are highly interconnected and it is this variety and abundance of marine life, among others, that enables the ocean to function.²³² The fisheries regime needs to ensure that MBD, especially in ABNJ, is adequately balanced following the principle of sustainable development. This can only be done through managing human activities in a manner that takes into account the actual true value in protecting, restoring, and maintaining ocean life.

4.3 INTERNATIONAL FISHERIES LEGISLATIVE FRAMEWORK AND MARINE BIODIVERSITY IN ABNJ

4.3.1 The 1982 United Nations Convention on the Law of the Sea

The conservation and sustainable use of MBD in ABNJ falls under the mandate of UNCLOS. There is, however, a substantial lack of regulatory framework within the agreement for marine fisheries in ABNJ and unfortunately, this also includes provisions relating to the protection and

²²⁹ 'Regional Seas Report and Studies - Ecosystems and Biodiversity in Deep Waters and High Seas' (2013) UNEP.

²³⁰ Gjerde K M 'Ecosystems and biodiversity in deep waters and high seas' (2006) UNEP Regional seas reports and studies. Page numbers?

²³¹ Gjerde K M 'Ecosystems and biodiversity in deep waters and high seas' (2006) UNEP Regional seas reports and studies.

²³² 'Regional Seas Report and Studies - Ecosystems and Biodiversity in Deep Waters and High Seas' (2013) UNEP.

preservation of MBD. MBD does not find an explicit reference within the 1982 UNCLOS whether for the EEZ or ABNJ.

This does not suggest that MBD does not find a place within the framework of the 1982 UNCLOS, as multiple provisions remain ‘open-ended and ripe for further evolution and implementation’.²³³ The protection and preservation of MBD is arguably already conceivable through the 1982 UNCLOS. This is evident in the general provision in part XII relating to the protection and preservation of the marine environment which was never intended to be confined to purely marine pollution, including the protection and preservation of ‘rare or fragile ecosystems’, and the habitat of ‘depleted, threatened or endangered species.’²³⁴ Furthermore, in respect of article 87 of the 1982 UNCLOS, the ‘freedom to fish’ is conditioned not only by the provisions within the 1982 UNCLOS but also by other rules of international law and thus also agreements such as the CBD that explicitly relate to biological diversity.

4.3.2 The 1995 Straddling Fish Stocks and Highly Migratory Fish Stocks Agreement

It is trite that the UNFSA broadened the scope of the 1982 UNCLOS and strengthened regulation concerning ABNJ. Although the agreement has limitations, the UNFSA included a notable change for MBD both in and beyond national jurisdiction. The preamble refers to ‘the need to avoid adverse impacts on the marine environment, preserve biodiversity, maintain the integrity of marine ecosystems and minimize the risk of long-term or irreversible effects of fishing operations.’²³⁵ This is valuable as it is the first reference to MBD and the broader marine environment in a binding fisheries agreement.

Apart from the preambular objectives, the general principles of the UNFSA create an explicit obligation to ‘protect biodiversity in the marine environment’.²³⁶ Other principles such as article 5(d) and (e) are further evidence of the broader marine environment being taken into consideration for impact assessment and the adoption of conservation and management measures.²³⁷ Further reference can be found that is aimed at keeping fisheries harvest within ‘safe biological limits’ although this is aimed at target stocks.²³⁸

²³³ Warner R M ‘*Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea*’ (2014) *Frontiers in Marine Science*.

²³⁴ Part XII of the 1982 UNCLOS.

²³⁵ See par 7 of the preamble to the UNFSA.

²³⁶ Article 5 (g) of the UNFSA.

²³⁷ Article 5 (d) and 5 (e) of the UNFSA.

²³⁸ See Annex II, Article 2 of the UNFSA.

4.4 INTERNATIONAL FISHERIES POLICY AND MARINE BIOLOGICAL DIVERSITY IN ABNJ

4.4.1 United Nations Conference and Declarations

Both the Rio Declaration and Agenda 21 marked the start of broader environmental objectives for ABNJ that would later evolve into fisheries' specific commitments to conserve and sustainably use MBD. The Rio Declaration recognized the integral and interdependent nature of the Earth and the importance of conserving, protecting, and restoring the environmental integrity of its ecosystems.²³⁹ Although not referring to MBD per se, this understanding closely borders the protection and preservation thereof and is implicitly linked to achieving biological sustainability. It will be repeated in all ensuing developments including Agenda 21, the WSSD, the UNCSD, and Agenda 2030.²⁴⁰

Agenda 21 brought more specific commitments for MBD. Addressing activities within the EEZ, States are encouraged to adopt 'measures to maintain the biological diversity and productivity of marine species and habitats.'²⁴¹ For ABNJ, Agenda 21 requires States to take cooperative action that addresses, among others, inadequacies in biological knowledge.²⁴² Although not giving MBD in ABNJ the primacy it deserves the emphasis of Agenda 21 is on 'multi-species management and other approaches that take into account the relationships among species', moving away from the single-species approach that is notorious for being unable to account for MBD and the broader marine environment.²⁴³

The WSSD Plan of Implementation held that States are to 'maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, including in ABNJ.'²⁴⁴ This includes improving scientific understanding and assessment of these ecosystems and conducting EIA.²⁴⁵ However, what makes the 2002 WSSD unique is that it includes recommendations to implement agreements, such as the CBD, to strengthen the marine fisheries regime.²⁴⁶

²³⁹ Principle 7 of the Rio Declaration.

²⁴⁰ See Article 17(1) of Agenda 21. Part IV, Article 30 of the WSSD plan of Implementation. Article 158 of the UNCSD.

²⁴¹ Article 17(7) of Agenda 21.

²⁴² Article 17(45) of Agenda 21.

²⁴³ Article 17(45) of Agenda 21.

²⁴⁴ Part IV, Article 32 (a) of the WSSD plan of Implementation.

²⁴⁵ Part IV, Article 35 of the WSSD plan of Implementation.

²⁴⁶ Part IV, Article 32 of the WSSD plan of Implementation

The 2012 UNCSD stressed the need for balance between the 'conservation and sustainable use of MLR' and the 'protection and preservation of biodiversity and the marine environment', urging these conflicting spheres to go hand in hand and explicitly recognizing the obligation of States to protect and restore the oceans and marine ecosystems, and to maintain their biodiversity.²⁴⁷ In doing so it also explicitly recognized the lack of binding regulation for these areas by holding that 'States are to decide on the development of an international instrument under the 1982 UNCLOS to address these issues.'²⁴⁸

The most recent development, Agenda 2030, although not being as vocal on MBD in ABNJ as other similar policy instruments, also provides reference thereto. In addressing the marine environment as a whole, target 2 of SDG 14 implicitly requires the protection and preservation of MBD in all of the ocean, including ABNJ, to achieve its objective. The same can be said for target 5 and target (a) of SDG 14, which would require both the establishment of MPAs and the protection and preservation of MBD.

4.4.2 The United Nations Food and Agriculture Organization

The FAO has provided consistent updates on the state of global fisheries within the EEZ and ABNJ, voicing its concern regarding the over-utilization of these resources and the effect thereof on the broader marine environment and MBD.²⁴⁹ The FAO Code of Conduct, its most influential contribution, was formulated in due respect for the ecosystem and biodiversity, and its international and technical guidelines have elaborate on subjects that are particularly beneficial to the conservation and sustainable use of MBD in ABNJ, all of which revolve around the conservation and sustainable use of MBD in ABNJ and beyond. These include the mitigation of adverse impacts, vulnerable and/or ecological significant marine areas, and MPAs.²⁵⁰

Worthy of mention is the recent development of the FAO, the 'Global Sustainable Fisheries Management and Biodiversity Conservation in the ABNJ Program'.²⁵¹ As the title suggests the Common Oceans ABNJ program aims to achieve efficient and sustainable management of fisheries resources and biodiversity conservation in ABNJ. Strengthening the regulation of

²⁴⁷ Article 158 of the UNCSD.

²⁴⁸ Article 162 of the UNCSD.

²⁴⁹ United Nations Food and Agriculture Organization *'The State of World Fisheries and Aquaculture 2020 - Sustainability in action'* (2020) FAO. United Nations Food and Agriculture Organization *'The State of World Fisheries and Aquaculture 2018 – Meeting the Sustainable Development Goals'* (2018) FAO.

²⁵⁰ Refer to chapter 3.

²⁵¹ [Hereafter the Common Ocean ABNJ program]. Visit www.commonoceans.org

MBD in ABNJ has thus become a key focus area of the FAO responsible fisheries policy. Although beyond the scope of this study, its most recent publication emphasized multiple successes of the program.²⁵² These include, *inter alia*, enhanced implementation of conservation and management measures in ABNJ, reducing the negative impacts of fishing activities in ABNJ, protecting vulnerable ecosystems in ABNJ, advocating the ecosystem approach in ABNJ, and improving scientific understanding of ecosystems and species in ABNJ.

4.4.3 United Nations General Assembly Resolutions on Sustainable Fisheries

The UNGA has continuously expressed concern regarding the biologically unsustainable levels of global fisheries and has called upon States to play an active role in its contribution to MBD.²⁵³ To achieve this the UNGA has continuously encouraged the utilization of, *inter alia*, the binding legislation of the 1982 UNCLOS, the UNFSA, and the soft law provided by UN Declarations and the FAO. It has also called upon States to adopt the CBD and, in particular, its COP decisions.²⁵⁴ The CBD and the COP will come to play a fundamental role in guiding biodiversity considerations within marine fisheries. The UNGA resolutions have also called upon States and RFMOs to strengthen and reform their mandate and measures, increase reliance on the best scientific information available, and apply the precautionary and ecosystem approach in all management and biodiversity considerations.²⁵⁵ These considerations include the conservation and management of ecologically related and dependent species and the protection of their habitats.²⁵⁶ States are to conduct EIA of marine fisheries on the marine environment and biodiversity and actively attempt to mitigate adverse impacts.²⁵⁷ These articles are paraphrased in multiple UNGA resolutions.

For MBD in ABNJ specifically, the UNGA has recognized the importance and value of deep-sea ecosystems in ABNJ and the biodiversity they contain. The UNGA has called upon States to take action to sustainably manage fish stocks and protect vulnerable marine ecosystems

²⁵² 'Not a drop in the Ocean - Key successes Common Oceans ABNJ Program 2014-2019' (2021) FAO.

²⁵³ See for instance United Nation General Assembly Resolution 'Our ocean, our future: call for action' (2017) A/RES/71/312.

²⁵⁴ See United Nations General Assembly Resolution 'Sustainable fisheries' (2016) A/RES/71/123, United Nations General Assembly 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2017) A/RES/72/249, United Nations General Assembly Resolution 'Sustainable fisheries' (2018) A/RES/73/125, and United Nations General Assembly Resolution 'Sustainable fisheries' (2019) A/RES/74/18.

²⁵⁵ See article 164 of A/RES/74/18.

²⁵⁶ See article 164 of A/RES/74/18.

²⁵⁷ See article 191 of A/RES/74/18.

found within these areas from fishing practices with significant adverse impacts.²⁵⁸ As a final point, the UNGA has on several occasions voiced its concerns regarding the lack of binding regulation to protect MBD in ABNJ, and has called for the development of an international legally binding instrument on the auspices of the 1982 UNCLOS to achieve conservation and sustainable use of MBD in ABNJ (Draft BBNJ Agreement).²⁵⁹ This will be discussed further below.

4.5 THE CONVENTION ON BIOLOGICAL DIVERSITY: AN OVERVIEW

The CBD is a binding framework treaty covering the conservation and sustainable use of biological diversity'. Dealing with biological diversity as a whole, it lacks specific articles on MBD, in particular ABNJ. Nevertheless, the CBD is vital to the protection and preservation of MBD for ABNJ, especially through its non-binding COP decisions. Attention must be drawn to the fact that the CBD is not a fisheries-specific treaty and its agenda differs substantially from the 1982 UNCLOS.

The CBD explicitly recognized the value placed in biological diversity and its importance to the maintenance of life-sustaining systems.²⁶⁰ It acknowledges that lack of scientific information on biological diversity is a plague to achieve sustainability.²⁶¹ The treaty attempts to regulate anthropogenic impacts on the reduction of biological diversity and is founded upon the responsibility to conserve and sustainably use biological diversity as the common concern of mankind.²⁶² The fundamental requirement of the treaty is the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings.²⁶³ These preamble references are clearly of utmost significance for ABNJ as they explicitly address aspects of the *lacuna* within the 1982 UNCLOS and completely change the trajectory of how the fisheries regime should be interpreted.

4.5.1 The Jurisdiction and scope of the Convention on Biological Diversity

There are limitations to the treaty's application in so far as MBD in ABNJ is concerned.²⁶⁴ The CBD only applies to 'components of biodiversity' that fall within national jurisdiction and not

²⁵⁸ See article 192 (2), (3) and (4) of A/RES/74/18.

²⁵⁹ See United Nations General Assembly 'International legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction' (2017) A/RES/72/249.

²⁶⁰ Par 1 and 2 of the preamble to the CBD.

²⁶¹ Par 7 of the preamble to the CBD.

²⁶² Par 21 and 24 of the preamble to the CBD.

²⁶³ Par 10 of the preamble to the CBD.

²⁶⁴ Article 4 of the CBD.

ABNJ.²⁶⁵ The CBD is only applicable to ABNJ in so far as processes and activities related to biodiversity carried out within and beyond national jurisdiction are concerned.²⁶⁶ The extent to which the provisions concerning conservation and sustainable use within the CBD have relevance for ABNJ depends on whether they are aimed at ‘components of biological diversity’. If this is the case they would consequently fall outside the jurisdictional scope of the CBD.²⁶⁷

4.5.2 The relationship between the 1982 UNCLOS and the Convention on Biological Diversity

Both the CBD and the 1982 UNCLOS have varied mandates. The CBD deals with conservation and sustainable use of biological diversity and the 1982 UNCLOS dealing with matters concerning conservation and management of MLR. These can be considered conflicting as the CBD provides regulations that may go against the right and obligations of States in terms of the 1982 UNCLOS. The CBD does account for this scenario. State parties shall ‘implement the CBD concerning the marine environment consistently with the rights and obligations of States under the 1982 UNCLOS.’²⁶⁸ The CBD is thus complementary to the 1982 UNCLOS, as long as it remains in line with the rights and obligations contained within the treaty.

The regulation of MBD depends principally on the 1982 UNCLOS and not the CBD. But, as pointed out by Birnie P et al, ‘This does not mean that the CBD gives blanket priority to UNCLOS.’²⁶⁹ Although the 1982 UNCLOS represents the framework for fisheries activities, States parties to the CBD cannot rely on any *lacuna* within UNCLOS that would justify actions that could potentially cause or threaten serious damage to biodiversity.²⁷⁰ This interplay between UNCLOS and the CBD is further solidified by article 87 of the 1982 UNCLOS, as fisheries in ABNJ are also conditioned by other rules of international law, and thus also the provisions of the CBD.

²⁶⁵ Article 5(a) of the CBD.

²⁶⁶ Article 4(b) of the CBD.

²⁶⁷ For more on the jurisdictional scope of the CBD 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, and Walton D W H ‘*Marine biological diversity beyond areas of national jurisdiction*’ (2015) *Antarctic Science*, Vol. 27(4), pp. 325-325.

²⁶⁸ Article 22 (2) of the CBD.

²⁶⁹ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed.

²⁷⁰ Article 22(1) of the CBD.

4.5.3 Cooperation, State stewardship and the common concern of mankind

Although state parties have the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of ABNJ, the CBD contains no explicit obligation on States to conserve and sustainable use 'components of biodiversity' in ABNJ.²⁷¹ However, the CBD does provide for state stewardship to ensure its realization and achievement. The treaty affirms, as a preamble reference, that the conservation of biological diversity is a 'common concern of humankind'.²⁷²

Noting the nature of ABNJ and the limitation set out above, the designation of the 'the common concern of humankind' principle is paramount. Problems affecting MBD in ABNJ, such as over-fishing, have the potential to cause long-lasting and devastating effects that transcend the boundaries of a single state and require cooperative action. As mentioned, such damage goes beyond the mere collapse of commercial fish stock but rather the sustainability of the ocean as a whole and thus also the health of humankind. Conservation and sustainable use of MBD in ABNJ is clearly a shared concern and, coupled with the duty to cooperate in respect of ABNJ in article 5, would instigate important advancements to solidify state stewardship and create a strong foundation to protect and preserve MBD in ABNJ.²⁷³

4.5.4 Conservation and sustainable use of marine biological diversity under the convention on biological diversity

The main objectives of the CBD are the conservation of biological diversity and the sustainable use of its components.²⁷⁴ These objectives are clearly defined. First, conservation is defined as 'the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings'.²⁷⁵ Second, sustainable use is defined as 'the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations'.²⁷⁶ Finally, biodiversity is defined as 'the variability among living organisms from all sources including, *inter alia*, terrestrial,

²⁷¹ Article 3 of the CBD.

²⁷² Par 3 of the preamble to the CBD.

²⁷³ Bowling C, Pierson E, Ratté S 'The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas'

²⁷⁴ Article 1 of the CBD.

²⁷⁵ Par 13, Article 2 of the CBD.

²⁷⁶ Par 16, Article 2 of the CBD.

marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.....'²⁷⁷

These terms have persistently been criticized as vague and ambiguous and are either not included or defined in any of the binding agreements governing marine fisheries. Given the association between the 1982 UNCLOS and the CBD explained above, these have the power to be highly beneficial.

4.5.5 The identification and monitoring of components of biological diversity important for conservation and sustainable use

Article 7 of the CBD holds that state parties must identify components of biological diversity important for its conservation and sustainable use.²⁷⁸ These components must be identified with particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable development.²⁷⁹

According to article (4) (a) of the CBD, components of biological diversity are not applicable for ABNJ and therefore article 7 does not apply to ABNJ. However, in line with article 4(b), state parties are still obliged to identify processes and categories of activities in ABNJ, which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity. States could therefore be implicitly obliged to apply article 7 to ABNJ, in so far as monitoring their effects, and maintaining and organizing these activities.²⁸⁰

4.5.6 Measures necessary for the conservation and sustainable use

Article 8 represents the foundation for the establishment of MPAs.²⁸¹ Read with article 7, article 8 obliges States to establish a system of protected areas or areas where special measures need to be taken'.²⁸² Activities and processes that have the potential to threaten or damage MBD within these areas would then naturally have to be regulated or managed.²⁸³ The establishment of these areas would ensure that other vital objectives are achieved and include

²⁷⁷ Par 1, Article 2 of the CBD.

²⁷⁸ Article 7(a) of the CBD.

²⁷⁹ Article 7(b) of the CBD.

²⁸⁰ According Annex I of the CBD, these component include 'ecosystems and habitats: containing high diversity, large numbers of endemic or threatened species, or wilderness; required by migratory species; of social, economic, cultural or scientific importance: or, which are representative, unique or associated with evolutionary or other biological processes'. United Nations Treaty Series '*The Convention on Biological Diversity*' (1992) UNTS, Vol. 1760, Annex 1.

²⁸¹ [Hereafter MPAs].

²⁸² Article 8 (a) of the CBD.

²⁸³ Article 8(k) and (l) of the CBD.

conservation and sustainable use; the rehabilitation and restoration of degraded ecosystems, the recovery of threatened species, and the protection of ecosystems, natural habitats, and the maintenance of viable populations of species in their natural surroundings.²⁸⁴ Unfortunately, this article does not state whether it applies to ABNJ and, furthermore, it can be argued that due to regulating certain aspects of ‘components of biodiversity’ it does not apply.

4.5.7 Environmental Impact Assessment and Minimizing Adverse Impact

Article 14 holds that States have to introduce appropriate procedures requiring EIA of their proposed projects that are likely to have significant adverse effects on biological diversity, including those which are likely to adversely affect biological diversity of other States or ABNJ.²⁸⁵ States are furthermore obliged to cooperate to this end and to ensure that the environmental consequences of these activities are duly taken into account.²⁸⁶ In the case of imminent or grave danger or damage to biological whether within or beyond national jurisdiction, States must notify and initiate action to prevent or minimize such danger or damage.²⁸⁷ This article explicitly refers to ABNJ. The 1982 UNCLOS is not nearly as extensive and is therefore highly beneficial for the achievement of conservation and sustainable use of MBD in ABNJ.

4.6 CONFERENCE OF THE PARTIES DECISIONS TO THE CONVENTION ON BIOLOGICAL DIVERSITY

The COP is the supreme body of the CBD and serves the function of adopting non-binding decisions to achieve the objectives of the CBD.²⁸⁸ These COP decisions have played an active role in the realization and achievement of the conservation and sustainable use of MBD in ABNJ.

4.6.1 The 1995 Jakarta Mandate on Marine and Coastal Biological Diversity

Perhaps the most important development remains to be the 1995 Jakarta Mandate on Marine and Coastal Biological Diversity.²⁸⁹ In the 2nd COP state parties recognized that the lack of explicit reference to MBD within CBD provisions could be detrimental. State parties were deeply concerned with the serious threats to MBD caused by marine fisheries, that there is a

²⁸⁴ Article 8 (c), (d) and (f) of the CBD.

²⁸⁵ Article 14 (a) of the CBD.

²⁸⁶ Article 14 (b) of the CBD.

²⁸⁷ Article 14 (d) of the CBD.

²⁸⁸ Article 23(4) of the CBD.

²⁸⁹ The 2nd Meeting of the Conference of the Parties to the Convention on Biological Diversity (1995) Decision II/10.

critical need for the COP to address the conservation and sustainable use of MBD, and support the implementation of the CBD, the 1982 UNCLOS, the UNFSA, and the FAO Code.²⁹⁰ Although neither the Jakarta Mandate nor its working program explicitly dealt with MBD in ABNJ, it did deal with marine and coastal diversity as a whole and paved the way towards a new global consensus.²⁹¹

The Jakarta Mandate working program was founded upon several principles and includes, *inter alia*, the ecosystem approach, the precautionary principle, the importance of science, and cooperation at all levels of governance.²⁹² The program areas dealt with the holistic management approach through ecosystem processes, the conservation and sustainable use of MLR through the application of the ecosystem approach, and the establishment of MPAs.²⁹³

4.6.2 The Conference of the Parties and Marine Biological Diversity in ABNJ

It was only until the 7th COP meeting that State Parties began to address the applicability of the CBD to MBD in ABNJ.²⁹⁴ It held that there is an urgent need for international cooperation to improve conservation and sustainable use of MBD in ABNJ through, in particular, the ‘establishment of MPAs’.²⁹⁵ The 7th COP highlighted several objectives for ABNJ, *inter alia*, the maintenance of productivity and biodiversity of important and vulnerable marine areas, addressing threats and risks to vulnerable and threatened marine ecosystems and biodiversity in ABNJ, addressing threats resulting from processes and activities in ABNJ, the implementation of the precautionary and ecosystem approach, and the use of existing treaties and instruments consistent with international law and the CBD.²⁹⁶

The 8th COP dealt with, *inter alia*, the conservation and sustainable use of deep seabed ecosystems in ABNJ and the establishment of voluntary guidelines on biodiversity-inclusive impact assessment.²⁹⁷ The exploitation of deep seabed ecosystems in ABNJ had become an

²⁹⁰ See Par 2, article 2, article and 4 of Decision II/10.

²⁹¹ Birnie P, Boyle A and Redgwell C *International Law and the Environment* (2009) Oxford University Press, 3rd ed. See The 4th Meeting of the Conference of the Parties to the Convention on Biological Diversity (1988) Decision IV/5.

²⁹² Miljö A ‘*The Jakarta Mandate – from global consensus to global work*’ (2000) CBD. The 4th Meeting of the Conference of the Parties to the Convention on Biological Diversity (1988) Decision IV/5..

²⁹³ The 4th Meeting of the Conference of the Parties to the Convention on Biological Diversity (1988) Decision IV/5.

²⁹⁴ The 7th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2004) Decision VII/5.

²⁹⁵ Article 30 and 11 of Decision VII/5.

²⁹⁶ Article 57 – 62 of Decision VII/5.

²⁹⁷ See the 8th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2006) Decision VIII/21 and decision VIII/28.

area of increased international concern. In doing so it recognized that these ecosystems provide valuable ecosystem services.²⁹⁸ Parties recognized that these resources are incredibly vulnerable and given the lack of scientific knowledge, there is an urgent need to enhance scientific research and cooperation and to provide for the conservation and sustainable use thereof in the context of the precautionary approach.²⁹⁹ Furthermore, although the text does not explicitly deal with MBD in ABNJ, the establishment of voluntary guidelines on biodiversity-inclusive impact assessment would later become a valuable resource for further development of guidelines for EIA of activities in ABNJ.

The 9th COP referenced the importance of the Rio Declaration as forming the foundation for conservation and sustainable use of MBD in ABNJ. It reiterated the fact that State parties are bound to the provisions of the CBD and have a responsibility to ensure that ‘activities within their jurisdiction or control, do not cause damage to the environment of other States or of ABNJ’.³⁰⁰ However, what made the 9th COP of particular importance is how it aimed to support the establishment of MPAs. This was done through the development of scientific criteria to enable the identification of ecologically or biologically significant marine areas in ABNJ that require protection.³⁰¹

The 10th COP marked a new strategic plan for biodiversity, namely the Aichi Biodiversity Targets.³⁰² The objective of the plan was to take action to halt the loss of biodiversity and to ensure that ecosystems are resilient and continue to provide essential services.³⁰³ Two of the goals and related targets specifically relay to MBD in ABNJ. Target 6 of goal B holds that ‘By 2020 all fish and invertebrate stocks and aquatic plants are managed and harvested sustainably, legally and applying ecosystem-based approaches, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits’. Target 11 of goal C holds that ‘By 2020, at least 17 percent of terrestrial and inland water areas, and 10 percent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services,

²⁹⁸ Article 1 of Decision VIII/21.

²⁹⁹ Article 2 of Decision VIII/21.

³⁰⁰ See par 3 and 4 of the 9th meeting of the Conference of the Parties to the Convention on Biological Diversity (2009) Decision IX/20.

³⁰¹ Par 5 of Decision IX/20. For a detailed explanation of the criterion see Annex 1 of Decision IX/20

³⁰² The 10th Meeting of the Conference of the Parties to the Convention on Biological Diversity (2010) Decision X/2.

³⁰³ Article 12 of Decision X/2.

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.

⁴³³ Sands P and Peel J *Principles of International Environmental Law* (2012) Cambridge University Press, 3rd ed.

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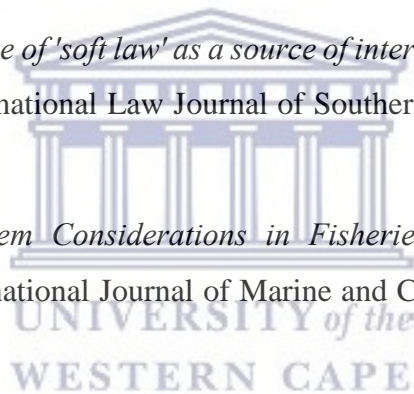
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