



ML in Law

Biodiversity Beyond National Jurisdiction

The Icelandic Perspective

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Útdráttur

Umfjöllunarefni þessarar ritgerðar er fyrirhugaður samningur undir Hafréttarsáttmála Sameinuðu Þjóðanna um verndun og sjálfbæra nýtingu líffræðilegrar fjölbreytni utan lögsögu ríkja og afstaða íslenskra stjórnvalda til slíks samnings. Verndun og sjálfbær nýting líffræðilegrar fjölbreytni utan lögsögu ríkja hefur verið eitt stærsta og umdeildasta mál undanfarinna ára er varða málefni hafsins. Vatnaskil urðu í júní 2015 þegar allsherjarþing Sameinuðu Þjóðanna samþykkti með ályktun 69/292 að gerður yrði nýr lagalega bindandi samningur og kom í þeim tilgangi á fót undirbúningsnefnd sem lýkur störfum sínum í júlí 2017. Tilgangur ritgerðarinnar er að rannsaka helstu ástæður þess að talin sé þörf á slíkum samningi, bakgrunn samningsviðræðnanna og tiltekin tómarúm í alþjóðalögum varðandi málefnið auk helstu deilumála í því samhengi. Þá verður leitast við að kanna horfur hins fyrirhugaða samnings og hvaða áhrif hann kann að hafa á íslenska hagsmuni.

Í öðrum kafla ritgerðarinnar verður litið til meginreglna umhverfisréttar er varða verndun líffræðilegrar fjölbreytni og sjálfbæra nýtingu utan lögsögu ríkja, auk þess sem fjallað verður um ástæður að baki því að talin sé þörf á hinum fyrirhugaða samning. Samhengisins vegna verður jafnframt fjallað um nokkra grunnþætti hafréttar, afmörkun hafsvæða og þróun haf- og umhverfisréttar. Þriðji kafli ritgerðarinnar fjallar um sögulegan bakgrunn haf- og umhverfisréttar auk þess sem ítarlega verður fjallað um ferlið sem hinn fyrirhugaði samningur hefur farið í gegnum. Fjórði kafli útlistar núgildandi regluverk og í fimmta kafla verða þau tómarúm sem bent hefur verið á í tengslum við álitaeefnið rædd.

Í lok ritgerðarinnar er dregin sú ályktun að telja megi langt í land til að úr hinum fyrirhugaða samning verði, og að þar af leiðandi megi telja ólíklegt að einhverra áhrifa muni gæta hérlends í náninni framtíð. Það er þó ekki útilokað að af samningum verði, og mun gildissvið samningsins þá skipta miklu máli, enda hafa íslensk stjórnvöld lagt megináherslu á að fiskveriðar falli utan gildissviðs samningsins.

Abstract

The topic of this thesis is the ongoing process of negotiating an implementing agreement to the United Nations Convention on the Law of the Sea on the conservation and sustainable use of biodiversity in areas beyond national jurisdiction, paying particular attention to the Icelandic perspective and attitude towards such an agreement. This topic has perhaps been the most contentious aspect of the law of the sea in recent years. A breakthrough in the issue was achieved in June 2015, when the United Nations General Assembly decided to develop an international legally binding instrument under the Convention. To that end, a Preparatory Committee was established to make substantive recommendations on the elements of such an agreement by the end of 2017. The purpose of this thesis is to research the rationale for adopting a new implementing agreement, the background of the discussions for the potential agreement as well as gaps which have been identified in the legal framework applicable to the issue. The thesis will aim to examine the prospects of the potential agreement as well as how, or whether, it will affect Iceland.

Chapter two will address principles of marine environmental law, contextual factors, and development of the law of the sea. Chapter three will outline relevant historical aspects as well as the process which led to the initiation of the negotiation process for a new implementing agreement. Chapter four will contemplate the existing legal framework and chapter five will discuss the gaps that have been identified in that legal framework.

The thesis concludes despite the long negotiation process, the existing divergence in opinions may still be too extensive to reach consensus on important issues and consequently, it is rather unlikely that the Preparatory Committee will recommend convening an intergovernmental conference for the negotiations of the agreement after its fourth, and as for now, final meeting. It is however not considered entirely impossible, in which case the scope of the potential agreement will be a decisive factor for Iceland.

Formáli

Ritgerð þessi er lokaverkefni til meistaraþrófs í lögfræði við Lagadeild Háskólans í Reykjavík. Ritgerðin var skrifuð á vorönn 2017 undir leiðsögn Dr. Bjarna Mús Magnússonar og var styrkt af Samtökum fyrirtækja í sjávarútvegi (SFS) í samræmi við samstarfssamning Háskólans í Reykjavík og SFS. Styrkurinn gerði höfundu meðal annars kleift að ferðast til London í þeim tilgangi að afla heimilda á bókasafni Institute of Advanced Legal Studies, sem reyndist afar gagnlegt, en bókasafnið er hluti af School of Advanced Study við University of London.

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The South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China) (Awarded 12 July 2016) Permanent Court of Arbitration Case No. 2013-19

List of abbreviations

ABNJ	Areas Beyond National Jurisdiction
ABS	Access and Benefit Sharing
ABMT	Area-based Management Tools
APEI	Areas of Particular Environmental Interest
BBNJ	Biodiversity Beyond National Jurisdiction
BWG	Ad-hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction
CBD	Convention on Biological Diversity
CHM	Common Heritage of Mankind
CLCS	Commission on the Limits of the Continental Shelf
COP	Conference of the Parties to the CBD
DOALOS	Division on Ocean Affairs and the Law of the Sea
EBSA	Ecologically or Biologically Significant Areas
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
G-77	Group of 77
GBO	Global Biodiversity Outlook
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
IMO	International Maritime Organization
INC	Intergovernmental Negotiating Committee
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LOSC	Law of the Sea Convention
MGR	Marine Genetic Resources
MPA	Marine Protected Area
MSR	Marine Scientific Research
NGO	Non-Governmental Organisation
nm	Nautical Mile
OSPAR	Oil Spill Prevention, Administration and Response
PrepCom	Preparatory Committee established by General Assembly Resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction
PSSA	Particularly Sensitive Sea Area
RFMO	Regional Fisheries Management Organisation
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SEA	Strategic Environmental Assessment
UN	United Nations
UNCLOS I	First Conference on the Law of the Sea

UNCLOS II	Second Conference on the Law of the Sea
UNCLOS III	Third Conference on the Law of the Sea
UNEP	United Nations Environmental Programme
UNFSA	United Nations Fish Stock Agreement
UNGA	United Nations General Assembly
UNICPOLOS	United Nations Informal Consultative Process on the Law of the Sea

1. Introduction

The ocean is a fundamental element of the earth's ecosystem and home to a majority of its life. Covering over 70 percent of the planet's surface, the ocean is vitally important for food security, oxygen, carbon capture, the economy etc. Despite our reliance on the ocean, it is estimated that only five percent of its realm has been explored.¹ Areas beyond national jurisdiction (ABNJ) and the deep oceans are by far the least explored regions on earth.² The vast genetic diversity in species and the range of different ecosystems in the oceans are all part of a biologically diverse realm about which there is very limited data, particularly in the deep oceans where conditions have led to highly adapted life forms.³ This biological diversity has, however, proven to be a source of novel genes and natural products with applications in pharmaceuticals, minerals, food, materials and energy across a wide array of bio-based industries.⁴ In the past decades, exploration and exploitation in ABNJ has increased as scientific knowledge and technological advancements have made human activities in ABNJ feasible. Marine genetic resources (MGRs) are now of great interest to scientists and potentially of enormous value "both for understanding the development and function of life itself, and for possible use in new medicines and commercial products."⁵

Concerns and awareness of threats to biodiversity in ABNJ due to human activities have escalated in recent years, and discussions concerning the issue have been prominent in the international community. Much of the focus has been on legal gaps in the regulatory framework, such as the absence of rules concerning MGRs and the lack of a global framework to establish marine protected areas (MPAs) in ABNJ. Most of these gaps can be traced to advances in technology and increases in scientific knowledge that are unaccounted for by the law as it stands. Implementation gaps in the existing regulatory framework have also been pointed out, especially as concern the conservation of marine biodiversity and high seas fisheries. In line with growing concerns, activities in ABNJ have become subject to an

¹ National Oceanic and Atmospheric Administration US Department of Commerce, 'How Much of the Ocean Have We Explored?' <<http://oceanservice.noaa.gov/facts/exploration.html>> accessed 8 February 2017.

² Marjo Vierros and others, 'Who Owns the Ocean? Policy Issues Surrounding Marine Genetic Resources' [2016] *Limnology and Oceanography Bulletin* 2 <<http://doi.wiley.com/10.1002/lob.10108>> accessed 18 February 2017.

³ 'Biodiversity | International Seabed Authority' (*International Seabed Authority*) <<https://www.isa.org/jm/biodiversity-0>> accessed 27 January 2017.

⁴ Vierros and others (n 2) 2.

⁵ Louise Angélique de La Fayette, 'A New Regime for the Conservation and Sustainable Use of Marine Biodiversity and Genetic Resources Beyond the Limits of National Jurisdiction' (2009) 24 *The International Journal of Marine and Coastal Law* 221, 226.

extensive and ever-expanding legal framework, which has been described as an insufficient patchwork.⁶

First and foremost in that patchwork is the 1982 United Nations Convention on the Law of the Sea (LOSC, or the Convention),⁷ complemented by its two implementing agreements.⁸ The LOSC “provides the legal framework within which all activities in the oceans must be carried out, including the conservation and sustainable use of marine biodiversity in [ABNJ].”⁹ However, the LOSC contains no references to MGRs and only brief references to biodiversity as the concept is understood today.¹⁰ In addition to the LOSC and its implementing agreements, a number of instruments at global and regional levels are relevant to the issue.¹¹ Despite the comprehensiveness and durability of the LOSC over the past 35 years, it has been criticised for being unwieldy in responding to new developments, increases in scientific knowledge and concerns regarding the utilisation of marine resources and the deteriorating status of the marine environment and its biodiversity.¹² Nevertheless, the LOSC establishes the rights and duties of all maritime activities and is essential for the conservation and sustainable use of biodiversity beyond national jurisdiction (BBNJ). Recent developments in the law of the sea, however, illustrate how the LOSC as a framework for marine resource management can be interpreted and supplemented to respond to newly identified challenges.

In June 2015, the General Assembly of the United Nations (UNGA) decided to develop an international legally binding instrument under the LOSC on the conservation and sustainable use of marine biodiversity in ABNJ.¹³ To that end, the UNGA established a Preparatory Committee (PrepCom) to make substantive recommendations on the elements of such an

⁶ Elizabeth Wilson, ‘Protecting the High Seas Tops 2 Important Agendas’ (*The Pew Charitable Trusts - Research and Analysis*) <<http://pew.org/2bDIGOT>> accessed 1 February 2017.

⁷ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

⁸ Agreement relating to the implementation of Part XI of the Convention of December 10, 1982 (adopted 17 August 1994, entered into force 28 July 1996) 1836 UNTS 42 (Part XI Implementing Agreement); 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 December 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNFSA).

⁹ DOALOS, ‘Marine Biological Diversity beyond Areas of National Jurisdiction: Legal and Policy Framework’ (*United Nations: Oceans & Law of the Sea*, 9 September 2014) 1 <http://www.un.org/Depts/los/biodiversityworkinggroup/webpage_legal%20and%20policy.pdf> accessed 14 February 2017.

¹⁰ de La Fayette (n 5) 224.

¹¹ DOALOS, ‘Marine Biological Diversity beyond Areas of National Jurisdiction: Legal and Policy Framework’ (n 9) 1.

¹² Ronán Long and Mariamalia Chavez, ‘Anatomy of a New International Instrument for Marine Biodiversity beyond National Jurisdiction: First Impression of the Preparatory Process’ (2015) 23 *Environmental Liability - Law, Policy and Practice* 213, 213–214.

¹³ UNGA Res 69/292 (19 June 2015) UN Doc A/RES/69/292 para 1.

agreement prior to convening an intergovernmental conference.¹⁴ The PrepCom has convened three times since it was established. The fourth session is scheduled to run from 10-21 July 2017 and is expected to prepare recommendations to the UNGA on whether to convene an intergovernmental conference in order to finalise negotiations for a new international legally binding instrument.¹⁵

This thesis will focus on these significant developments, which will potentially result in a third implementing agreement to the LOSC, paying particular attention to the Icelandic perspective and attitudes towards such an agreement. Iceland has been unconvinced of the need for a new implementing agreement and has instead advocated for better implementation of existing instruments and increased regional efforts.¹⁶ Furthermore, Iceland has consistently stated its position that the existing legal instruments should not be undermined and that high seas fisheries should not be part of the scope of the potential implementing agreement.¹⁷

After outlining relevant principles of marine environmental law, chapter two will consider the reasons behind the pressure to adopt a new implementing agreement. Subsequently, relevant terms will be discussed and the basic context of the law of the sea relevant to the issues of conservation and sustainable use of marine biodiversity in ABNJ will be outlined. Furthermore, chapter two will also present general considerations relevant to the topic, such as an overview of the concept of implementing agreements, as well as developments and amendment procedures of the LOSC. Chapter three will provide some brief historical background on the law of the sea, particularly as regards the extension of jurisdictional rights, as well as modern international environmental law and the discussions and events which led to the initiation of the negotiation process for a new implementing agreement. In chapter four, the existing legal framework concerning the conservation and sustainable use of marine biodiversity in ABNJ will be discussed. Finally, chapter five will review the main gaps, which have been identified in the regulatory framework, as well as the potential implementing agreement itself and its prospects, and ask whether and how this agreement may affect Iceland.

¹⁴ *ibid* para 1(a).

¹⁵ IISD Reporting Services, 'Earth Negotiations Bulletin' (2017) Vol. 25 No. 129 1 <<http://enb.iisd.org/download/pdf/enb25129e.pdf>> accessed 10 April 2017.

¹⁶ 'Iceland's Ocean Strategy Introduced at the United Nations' (*Ministry for Foreign Affairs*) <<https://www.mfa.is/news-and-publications/nt/2280>> accessed 23 February 2017.

¹⁷ Matthías G. Pálsson, Counsellor, Icelandic MFA, 'General Statement' (*Statement at the meeting of the PrepCom, New York, 28 March 2016*) <<http://statements.unmeetings.org/media2/7656863/iceland.pdf>> accessed 28 February 2017.

2. Context and general considerations

Before considering the reasons behind the pressure to adopt a new international legally binding instrument under the LOSC, it is necessary to first examine the concept and principles of international marine environmental protection. Subsequently, definitions of terms and key concepts relevant to BBNJ will be discussed. This chapter will then outline state jurisdiction in the oceans, the locations of ABNJ, and how the LOSC divides the oceans into distinct maritime zones. Once these basic contextual factors have been dealt with, the chapter will consider the precise boundaries of ABNJ, non-traditional approaches in ocean management and the LOSC amendment procedures. Finally, developments of the Convention and the concept of implementing agreements will be contemplated.

2.1. Principles and concepts of Marine Environmental Protection Law

In academic literature, the concept of marine environmental protection generally focuses on the control and prevention of marine pollution and the attendant regulatory framework, while the management of marine living resources and the conservation of marine biodiversity are discussed separately.¹⁸ While these topics do admittedly differ somewhat in nature and are subject to different legal instruments, marine living resources and marine biodiversity must be considered as elements of marine environmental protection. In the *Bluefin Tuna Cases*, the International Tribunal for the Law of the Sea (ITLOS) specifically stated, “that the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment.”¹⁹ The concept of marine environmental protection therefore covers not only the marine environment per se, but also the conservation of both marine living resources and marine biodiversity.²⁰ In turn, the broad concept of marine biodiversity conservation can in fact be understood vice versa, that is, as entailing both the protection of marine living resources and the marine environment. This is because marine biodiversity conservation entails conserving both living organisms and their ecosystems, which can mean the living or non-living environment of that organism.

¹⁸ See for example; Yoshifumi Tanaka, *The International Law of the Sea* (Second edition, Cambridge University Press 2015); Donald Rothwell and Tim Stephens, *The International Law of the Sea* (Second edition, Hart Publishing 2016).

¹⁹ *Southern Bluefin Tuna Cases (No 3 and 4) (New Zealand v. Japan) (Australia v. Japan)* (Request for Provisional Measures Order of 27 August 1999) ITLOS, para. 70.

²⁰ Yoshifumi Tanaka, ‘Principles of International Marine Environmental Law’ in Rosemary Gail Rayfuse (ed), *Research handbook on international marine environmental law* (Edward Elgar Publishing Limited 2015) 31.

The LOSC provides for “the overarching legal framework for marine environmental protection, which is supplemented by a multitude of other treaties and soft-law instruments.”²¹ Despite its fundamental status in international marine environmental law, it is perhaps not the most important treaty for marine environmental protection in practice, due to its framework nature.²² Arguably of more importance are the range of principles which have developed through global and regional legal instruments and declarations adopted at conferences under the auspices of the United Nations, particularly the 1972 United Nations Conference on the Human Environment (the Stockholm Conference), which resulted in the Stockholm Declaration,²³ and the 1992 United Nations Conference on Environment and Development (Rio Conference), which resulted in the Rio Declaration.²⁴ Although the legal framework for BBNJ has been described as a patchwork, the “international law governing environmental protection is not merely a mosaic of specific rules; rather it must be considered as a *system* governing international relations among States and other entities in respect of their activities both on and in relation to the oceans.”²⁵ There is no commonly approved directory of principles applicable to marine environmental protection, and the legal status of these principles can vary significantly. Some are considered to reflect customary international law while others are merely seen as policy guidelines.²⁶ They do, however, provide valuable guidance in the application and interpretation of rules and “predictable parameters for environmental protection and, in appropriate circumstances, provide the orientation for the development of law.”²⁷ Therefore, it is necessary to consider these principles before turning to the rationale behind the potential implementing agreement. Six principles merit highlighting in this context.

First, the *no-harm principle*²⁸ has been described as the backbone of international environmental law and undoubtedly reflects customary international law.²⁹ The principle entails that States have the right to use and exploit their territory, or permit use or exploitation

²¹ Rothwell and Stephens (n 18) 369.

²² Robin Churchill, ‘The LOSC Regime for Protection of the Marine Environment - Fit for the Twenty-First Century?’ in Rosemary Gail Rayfuse (ed), *Research handbook on international marine environmental law* (Edward Elgar Publishing Limited 2015) 4–5; The LOSC is however not a framework treaty in the traditional meaning, as will be discussed later in this chapter.

²³ The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (Adopted 16 June 1972).

²⁴ Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–4 June 1992) Annex I: Rio Declaration on Environment and Development, UN Doc A/CONF.151/26.

²⁵ Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 31.

²⁶ *ibid* 33.

²⁷ *ibid* 32.

²⁸ Also called The principle of *sic utere tuo ut alienum non laedas* which means use your own property so as not to injure that of another; see *ibid* 37.

²⁹ *ibid* 33; Ved P Nanda and George W Pring, *International Environmental Law and Policy for the 21st Century* (2nd revised edition, Martinus Nijhoff Publishers 2013) 23.

of their territory subject to the obligation of not causing environmental harm to territories of other States.³⁰ Since its customary international law status was first recognised in the *Trail smelter case*,³¹ various versions of the principle have been codified in legal instruments.³² Principle 21 of the Stockholm Declaration, Principle 3 of the Rio Declaration and Article 3 of the Convention on Biological Diversity (CBD)³³ reflect the no-harm principle, specifically stating that it entails an obligation to ensure that activities do not harm the environment not only of other States but also of ABNJ. The International Court of Justice (ICJ) addressed and confirmed this formulation of the principle in its *Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons*.³⁴ Article 194(2) of the LOSC contains a limited version of the principle, which requires States to take all necessary measures to prevent, reduce and control pollution of the marine environment from any source.³⁵

Second, the *precautionary principle*, often referred to as the precautionary approach, is widely recognised, although its customary status is controversial. The Sea-Bed Disputes Chamber of the ITLOS stated in an advisory opinion in 2011 that the principle is trending towards being a part of customary international.³⁶ While definitions of this principle differ, it essentially “seeks to ensure the taking of early action in order to address serious environmental threats which may emerge in cases where there is on-going scientific uncertainty concerning proof of cause and effect.”³⁷ Principle 15 of the Rio Declaration stipulates that the approach shall be widely applied by States in order to protect the environment, and that where there are threats of severe or irreversible harm, lack of full scientific certainty shall not be used as rationale for delaying cost-effective measures to prevent environmental degradation. The principle emerged after the LOSC was adopted, and consequently the LOSC contains no references to the principle. However, both the UN Fish Stocks Agreement (UNFSA) and mining regulations adopted by the International Seabed Authority (ISA) contain explicit references to the principle.³⁸ Furthermore, Article 3 of the CBD contains a formulation of the

³⁰ Nanda and Pring (n 29) 23; Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 37.

³¹ *Trail smelter case (United States v. Canada)* (16 April 1938 and 11 March 1941) UN Reports of International Arbitral Awards vol. III pp. 1905-1982.

³² Nanda and Pring (n 29) 23–24.

³³ Convention on Biological Diversity, (adopted 22 May 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).

³⁴ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Reports 241-2, [29], See; Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 37.

³⁵ Robin Churchill (n 22) 7.

³⁶ Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (No 17) (Request for Advisory Opinion of 1 February 2001) ITLOS, para. 10.

³⁷ Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 40.

³⁸ Robin Churchill (n 22) 9–10.

precautionary approach.³⁹ Although the ITLOS held that the principle is trending towards customary law, the Tribunal has not explicitly endorsed the principle, despite being urged to do so in three provisional measures cases.⁴⁰ However, “the ITLOS in each case held that ‘prudence and caution’ required the parties to co-operate in taking certain actions and prescribed provisional measures reflecting that approach.”⁴¹

Third, the ubiquitous and ambiguous concept of *sustainable development* has been described as the most important trend in international environmental law in recent years.⁴² The Brundtland report defined the concept as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁴³

Sustainable development is a key concept which seeks, in essence, to reconcile the need for development with environmental protection. The basic idea of sustainable development is echoed by the ICJ in the *Gabčíkovo-Nagymaros Project* case, [44] stating that: ‘This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.’⁴⁵

It seems as though almost nothing is irrelevant when it comes to the concept of sustainable development, which has continually expanded ever since the Stockholm Conference and is increasingly referred to in legal instruments,⁴⁶ for instance in Article 2 and 5(h) of the UNFSA and in the preamble of the CBD. In 2015, the UNGA adopted an outcome document of the UN summit for the adoption of the post-2015 development agenda titled ‘Transforming our world: the 2030 Agenda for Sustainable Development’, which contains 17 goals for sustainable development referred to as the Sustainable Development Goals.⁴⁷ Directly relevant to BBNJ is goal 14, which aims to conserve and sustainably use the oceans, seas and marine resources for sustainable development. The goal is further elaborated with ten directly and indirectly relevant targets. For instance, target 14.c aims to enhance the conservation and sustainable use of oceans

³⁹ COP SBSTTA (22 February 2003) UN Doc UNEP/CBD/SBSTTA/8/INF/3/Rev.1 para 73.

⁴⁰ *Southern Bluefin Tuna Cases* (n 19) paras 77, 79 and 80; *The MOX Plant Case (No 10) (Ireland v. United Kingdom)* (Request for Provisional Measures, Order of 3 December 2001) ITLOS Reports 2001, para 84; *Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore)* (Provisional Measures, Order of 8 October 2003) ITLOS Reports 2003, para 99; See also Robin Churchill (n 22) 10.

⁴¹ *ibid.*

⁴² Nanda and Pring (n 29) 25.

⁴³ Gro Harlem Brundtland, ‘Report of the World Commission on Environment and Development: Our Common Future’ (United Nations 1987) 41 <<http://www.un-documents.net/our-common-future.pdf>> accessed 23 April 2017.

⁴⁴ *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), [1997] ICJ Rep 78, [140]

⁴⁵ Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 46.

⁴⁶ Nanda and Pring (n 29) 26; Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 47.

⁴⁷ UNGA Res 70/235 (15 March 2016) UN Doc A/RES/70/235.

and their resources by implementing international law as reflected in the LOSC,⁴⁸ while target 14.5 aims to conserve at least 10 percent of coastal and marine areas in consistence with national and international law and based on the best available scientific information.⁴⁹ It is noteworthy that Iceland objected to a numerical target for marine conservation, reasoning that a general target would be more effective and realistic than a box-checking objective.⁵⁰

Fourth, the notion of *common but differentiated responsibility* is an important concept in the making of international environmental law instruments and entails that “States take on different obligations depending on their socio-economic situation and their historical contribution to the environmental problem at stake.”⁵¹ The concept first emerged at the Third UN Conference on the Law of the Sea (UNCLOS III) and at least two provisions of the LOSC reflect the concept. Article 194(1) requires States to take measures for environmental protection in accordance with their capabilities, while Article 207(4) stipulates that States shall endeavour to establish rules and procedures to prevent, reduce and control pollution of the marine environment, taking into account characteristics, regional features, the economic capacity of developing States and their need for economic development. Furthermore, the principle is explicitly reflected in Principle 7 of the Rio Declaration and will likely be a significant challenge during the negotiations of the potential implementing agreement.

Fifth, the principle of *international cooperation* undoubtedly reflects customary international law and is clearly embodied in the LOSC, as well as a number of other legal instruments.⁵² For instance, Principle 24 of the Stockholm Declaration and Principle 27 of the Rio Declaration clearly reflect the principle. Furthermore, the ITLOS stated in the *MOX Plant Case* that “the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law [...]”⁵³

Finally, the principle of *conserving biological diversity* has emerged in a number of legal instruments over the past 25 years.⁵⁴ The Rio Declaration does not explicitly refer to the principle; however, Agenda 21, which is a non-binding action plan adopted at the Rio

⁴⁸ UNGA Res 70/1 (21 October 2015) UN Doc A/RES/70/1 24.

⁴⁹ *ibid.*

⁵⁰ Email from anonymous Senior Legal Counsel at the Icelandic Ministry of Industries and Innovation to author (8 May 2017).

⁵¹ Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 49.

⁵² *ibid* 33; Robin Churchill (n 22) 12.

⁵³ *The MOX Plant Case* (n 40) 25, Tanaka, ‘Principles of International Marine Environmental Law’ (n 20) 52.

⁵⁴ Aðalheiður Jóhannsdóttir, Ian Cresswell and Peter Bridgewater, ‘The Current Framework for International Governance of Biodiversity: Is It Doing More Harm Than Good?’ (2010) 19 *Review of European Community & International Environmental Law* 139, 281.

Conference, dedicates a chapter to the conservation of biodiversity.⁵⁵ Furthermore, this principle is the main objective of the CBD,⁵⁶ and Article 5(g) of the UNFSA requires States parties to protect biodiversity in the marine environment in order to conserve and manage straddling fish stocks and highly migratory fish stocks. Neither of these provisions defines the principle or describes its application. However, based on the substance of the CBD, one can conclude that the principle essentially entails using a variety of measures, for example marine protected areas (MPAs), the ecosystem approach and integrated approaches, in order to conserve biodiversity.⁵⁷

Other relevant principles when considering the potential implementing include the ecosystem approach and environmental impact assessments. Without further ado, it is necessary to consider the reasoning behind the need for a new implementing agreement on the conservation and sustainable use of BBNJ.

2.2. Why a new implementing agreement?

The short answer to the question of why there is a need for a new implementing agreement is, in brief, because technological advancements and increased scientific knowledge have increased human activities in the oceans, while at the same time, these advancements have developed and improved methods used for assessing the impacts of such activities on the marine environment and its biodiversity. Moreover, gaps have been revealed in the legal framework currently applicable to BBNJ. The conservation and sustainable use of BBNJ has been the most contentious issue concerning the law of the sea in recent years and “there exists a divergence in view of a legal, political and ideological nature.”⁵⁸ The most disputed issues on this subject can be split into two separate but related issues. The first, concerning the applicable legal regime for MGRs at the deep-seabed, is highly contentious, and its nature “concerns not only what the law should be, but also what the law is.”⁵⁹ The second issue is the adoption of marine environmental protection measures in ABNJ, which is perhaps less disputed

⁵⁵ ‘Agenda 21: United Nations Conference on Environment and Development’ (Rio de Janeiro, 3 - 14 June 1992) UN Doc A/Conf.151/26 (1992) 21.

⁵⁶ CBD art. 1.

⁵⁷ Aðalheiður Jóhannsdóttir, ‘Vernd Lifræðilegrar Fjölbreytni’ (2007) 4 *Tímarit Lögréttu* 269, 282–283.

⁵⁸ Dire Tladi, ‘Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Towards an Implementing Agreement’ in Rosemary Gail Rayfuse (ed), *Research handbook on international marine environmental law* (Edward Elgar Publishing Limited 2015) 259.

⁵⁹ *ibid.*

as the law is relatively clear. Nevertheless, gaps in the legal framework have been identified, leading to calls for both filling these gaps and strengthening the existing legal framework.⁶⁰

The momentum that the issue of BBNJ has gathered is doubtless an underlying factor in the reasons behind the potential implementing agreement. It would perhaps be far-fetched to say that BBNJ has been spoken of widely, or that it has gathered much media attention. However, it has been discussed at UN environmental conferences, most recently at the 2012 UN Conference on Sustainable Development (Rio+20) and the 2015 UN Sustainable Development Summit. This political momentum, along with the process which led the negotiations for a potential implementing agreement, did not evolve in a vacuum.

In its resolution 54/141, the UNGA decided to establish a regular process under the UN for global reporting and assessment of the state of the marine environment, including socio-economic aspects, based on the recommendations of the 2002 World Summit on Sustainable Development.⁶¹ In 2015, the Ad-Hoc Working Group of the Whole on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including Socioeconomic Aspects transmitted a summary of the first global integrated marine assessment to be issued as a document at the 70th session of the UNGA for final approval.⁶² In resolution 70/235, the UNGA welcomed with appreciation this first global integrated marine assessment (World Ocean Assessment) and approved its summary.⁶³ The World Ocean Assessment notes two contrasting messages that emerged in the examination of ocean biodiversity from several perspectives. First, an “immense amount remains to be learned about the ocean's biodiversity. Sampling has been insufficient to fully qualify patterns and relationships with potential drivers in most of the ocean, and even to describe the biodiversity in many parts of the oceans.”⁶⁴ Second, despite limited knowledge, the current levels of sampling allow much to be concluded concerning changes in the oceans over the past decades and centuries. Based on the current level of sampling, the Group of Experts of the Regular Process claims that “[t]hese past changes and current trends provide information about the sustainability of human interactions with marine biodiversity, whether those interactions take the form of direct use or indirect impacts.”⁶⁵ The Group therefore believes that while it is necessary to better quantify

⁶⁰ *ibid* 259–260.

⁶¹ UNGA Res 57/141 (21 February 2003) UN Doc A/RES/57/141 para 45.

⁶² UNGA (70th Session) ‘Letter of transmittal’ (22 July 2015) UN Doc A/70/112.

⁶³ UNGA Res 70/235 (15 March 2016) UN Doc A/RES/70/235 (n 47) para 266.

⁶⁴ Inniss Lorna, Alan Simcock and The Group of Experts of the Regular Process, ‘The First Global Integrated Marine Assessment: World Ocean Assessment I’ [2016] United Nations, New York 890 <http://www.un.org/depts/los/global_reporting/WOA_RPROC/WOACompilation.pdf> accessed 9 March 2017.

⁶⁵ *ibid*.

relationships between biodiversity variations and their drivers in almost all parts of the world, they “have sufficient knowledge to indicate which outcomes are likely to be more sustainable or less sustainable, and thus inform [their] choices.”⁶⁶ Nevertheless, the Group specifically acknowledged “that uncertainties will remain and surprises will be encountered.”⁶⁷ In rather blunt terms, the World Ocean Assessment points out “that the carrying capacity of the oceans is near or at its limit owing to human activities and calls on governments to adopt a more coherent approach, particularly in relation to controlling and regulating economic activities that impinge upon the health of the deep ocean.”⁶⁸

Aside from the World Ocean Assessment, there is a profusion of literature and research that points to the deteriorating health of the oceans. An analysis from 2008 found that increased human activities have led to compromised ecosystems and estimated that 40 percent of the oceans are severely degraded.⁶⁹ The analysis concluded that loss of marine biodiversity is increasingly weakening the ocean’s capacity to provide food and maintain water quality. There is no exhaustive list of threats to marine biodiversity, but the most commonly mentioned include illegal, unreported and unregulated fishing, destructive fishing practices, shipping, the introduction of invasive species, climate change and ocean acidification.⁷⁰ Despite various actions and many global and regional instruments concerning the protection of biodiversity having been concluded in recent decades, the fourth edition of the Global Biodiversity Outlook (GBO) pointed out that extrapolations suggest the Aichi marine target⁷¹ is not on course to be met. Progress is higher in coastal areas, while open ocean and deep sea areas, including the high seas, are covered to a far lesser extent.⁷² In this context it must be mentioned that “ABNJ provide a wealth of resources and vital ecosystem services. These services include the provision of: seafood; raw materials; genetic resources; medicinal resources; air purification; climate regulation; habitat services; and cultural services.”⁷³

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Long and Chavez (n 12) 183.

⁶⁹ B Worm and others, ‘Impacts of Biodiversity Loss on Ocean Ecosystem Services’ (2006) 314 *Science* 787; de La Fayette (n 5) 253.

⁷⁰ Glen Wright and others, ‘The Long And Winding Road Continues: Towards a New Agreement on High Seas Governance’ [2016] IDDRI, Paris 50, 13–15.

⁷¹ ‘Aichi Biodiversity Targets’ (*Convention on Biological Diversity*) <<https://www.cbd.int/sp/targets/>> accessed 9 March 2017 Target 11.

⁷² ‘Global Biodiversity Outlook 4: A Mid-Term Assessment of Progress towards the Implementation of the Strategic Plan for Biodiversity 2011-2012’ (Secretariat of the Convention on Biological Diversity 2014) 83 <<https://www.cbd.int/gbo/gbo4/publication/gbo4-en-hr.pdf>> accessed 9 March 2017.

⁷³ Wright and others (n 70) 13.

Finally, the governance of ABNJ has been referred to as the ‘final frontier’ and compared to the ‘Wild West’.⁷⁴ Furthermore, it has been pointed out that the “governance in ABNJ is also perhaps the final major issue still to remain unresolved under the regime of the [LOSC].”⁷⁵ Considering that there may currently be more existing knowledge about the surface of the moon than the deepest parts of the ocean,⁷⁶ resolving governance issues in ABNJ may prove to be a difficult task. Existing data and knowledge of ecosystems and biodiversity in ABNJ is rudimentary, particularly in the deep-seabed, “where extreme abiotic conditions including enormous pressures, eternal darkness and low ambient temperatures as well as a scarcity of nutrients has led to the evolution of highly adapted life forms in the abyss.”⁷⁷ What is fundamentally known is that there has already been a major negative impact upon oceans everywhere.⁷⁸ Evidently, there is no single reason for the recent developments; rather, they result from the emergence of scientific information, political perspectives and calls for a comprehensive framework for the conservation of BBNJ from the international community, including Non-Governmental Organisations (NGOs). Before elaborating further on the potential implementing agreement, it is necessary to consider some fundamental contextual factors.

2.3. Definitions and use of terms

As the development of the potential implementing agreement is still at an uncertain and fairly early stage, use of terms and exact definitions remain to be determined. While there have been discussions and points of difference concerning definitions and the use of terms during the development of the potential implementing agreement, state representatives from Iceland and Argentina have pointed out that negotiations on the text of definitions and the precise wording of paragraphs are premature.⁷⁹ With reference to the Chair's understanding of cross-cutting issues, a non-paper on the elements of a draft text of an international legally binding

⁷⁴ David Freestone, ‘The Final Frontier: The Law of the Sea Convention and Areas beyond National Jurisdiction’ (2012) 15 <<https://www.law.berkeley.edu/files/Freestone-final.pdf>> accessed 13 March 2017; Greenpeace, ‘The Need for a High Seas Biodiversity Agreement: No more “Wild West” oceans’ (2013) <<http://www.greenpeace.org/international/en/publications/Campaign-reports/Oceans-Reports/High-Seas-Agreement/>> accessed 2 February 2017.

⁷⁵ Freestone (n 74).

⁷⁶ Rosemary Gail Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing Limited 2015) Foreword by David Freestone, p. x.

⁷⁷ ‘Biodiversity | International Seabed Authority’ (n 3).

⁷⁸ Rayfuse (n 76) Foreword by David Freestone, p. x.

⁷⁹ Matthías G. Pálsson, Counsellor, Iceland MFA, ‘Statement on Area Based Management Tools, Including MPA’s’ (*Statement at the meeting of the PrepCom, New York, 30 August 2016*) <<http://statements.unmeetings.org/media2/7659898/iceland.pdf>> accessed 28 February 2017.

instrument⁸⁰ provides that definitions in the potential implementing agreement should be consistent with terms and concepts contained in the LOSC and, where possible, the UNFSA, the CBD and other relevant international instruments concerning BBNJ.

As pointed out above, the concept of conserving marine biodiversity is very broad in scope, and can be understood to entail both the protection of the marine environment and the management and conservation of marine resources. The term *natural resources* is unpopular with environmentalists because it conflates both living and non-living resources; “the former are distinguished from the latter by the fact that they are renewable if conserved and destructible if not whereas the latter include non-renewable minerals such as oil, gas, coal and metals mined commercially on land and at sea, sometimes to the point of virtual exhaustion for human purposes.”⁸¹ While the LOSC does not provide for a general definition of *marine living resources*, the term is understood as referring “to marine organisms harvested for food, primarily fish.”⁸² As for *non-living resources*, Article 133 of the LOSC defines natural resources in the deep-seabed beyond national jurisdiction as all solid, liquid or gaseous mineral resources for the purposes of Part XI of the Convention. In other marine areas, non-living resources have been given a broader meaning, as aside from the obvious non-living resources, the term can include the energy harvested from waves and winds.⁸³

The term *biodiversity* is a contraction of *biological diversity*, which has been defined as “the variability of life in all forms, levels, and combinations.”⁸⁴ Biodiversity is vital for life on earth “because it provides essential services for the maintenance of the biosphere in a condition which supports human and other life.”⁸⁵ Article 2 of the CBD defines biological diversity as “the variability among living organisms from all sources, including, *inter alia*, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.” *Biological resources* are defined in the same provision as including “genetic resources, organisms or parts thereof, populations or any other biotic component of ecosystems with actual or potential use or value for humanity.” The CBD defines an *ecosystem* as a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

⁸⁰ DOALOS, ‘Chair’s Non-Paper on Elements of a Draft Text of an International Legally-Binding Instrument under the LOSC on the Conservation and Sustainable Use of BBNJ’ <http://www.un.org/depts/los/biodiversity/prepcom_files/Chair_non_paper.pdf> accessed 2 March 2017.

⁸¹ Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, Oxford University Press 2009) 586.

⁸² de La Fayette (n 5) 222.

⁸³ Rothwell and Stephens (n 18) 312–313.

⁸⁴ Birnie, Boyle and Redgwell (n 81) 588.

⁸⁵ Tanaka, *The International Law of the Sea* (n 18) 334.

Biodiversity is often used to refer to living organisms themselves, but strictly speaking the term refers to the variability among living organisms.⁸⁶

As for the definition of MGRs, it should be kept in mind that “while genetic material is a form of information, it is contained in the cells of a living organism. Consequently, the conservation of genetic resources necessarily entails the conservation of the living organisms in which they are contained.”⁸⁷ Furthermore, although fish and other edible marine organisms are referred to as *marine living organisms* in the LOSC, they fall within the definition of *biological resources*.

[B]y far the most interesting genetic and biochemical material for scientists is that found in extreme conditions of heat or cold and pressure, such as in extremely hot hydrothermal vents or in extremely cold habitats at the poles, and that found in micro-organisms, either in the water column, or more importantly, living in a symbiotic relationship with larger animals on the seabed, or even sediments on or under the ocean floor.⁸⁸

In this context, it is important to realise “that some organisms are firmly rooted in the seabed, while others live inside or around them in a symbiotic relationship.”⁸⁹ This complicates the conservation of biodiversity, and consequently the creation of the potential implementing agreement, with respect to the so-called zonal management approach. Relevant to MGRs is the term *bioprospecting*, which refers to the “scientific investigation of living organisms for commercially valuable genetic or biochemical resources.”⁹⁰

The terms *conservation* and *sustainable use* are commonly used together, making it important to note that they are in fact two distinct concepts. Article 2 of the CBD contains two definitions for conservation: *ex-situ conservation*, which means “the conservation of components of biological diversity outside their natural habitats”, and *in-situ conservation*, which means “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in the natural surroundings, and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.” There is no universally recognised legal definition for the term *conservation*, but with regard to (for example) Article 2 of the 1958 Geneva Convention on Fishing and Conservation of Living Resources, “conservation does not directly mean a

⁸⁶ de La Fayette (n 5) 227.

⁸⁷ *ibid.*

⁸⁸ *ibid* 229.

⁸⁹ *ibid* 230.

⁹⁰ *ibid* 228.

moratorium or prohibition of exploitation of marine living resources.”⁹¹ *Sustainable use* is essentially a scaled-down version of sustainable development. Article 2 of the CBD provides that it “means the use of components of biological diversity in a way and at a rate that does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.” Other necessary terms and concepts, such as ABNJ and terms originating from the LOSC, will be defined in the following sections of this chapter.

2.4. Marine areas under national jurisdiction

One of the primary functions of international law is the spatial distribution of jurisdiction of states.⁹² The LOSC plays an important role in this function, as it divides the oceans into distinctive jurisdictional zones both vertically and horizontally, defines their limits and provides for the rights and obligations within each zone. This is often referred to as the *zonal management approach* and is the basis for understanding both the geographical scope of the potential implementing agreement and the concept of ABNJ. These zones can be split into two main categories: ABNJ, which will be outlined in the subsequent chapter, and marine zones under national jurisdiction. As for the areas under national jurisdiction, these can be divided into two sub-categories: namely, marine spaces governed by territorial sovereignty and marine spaces beyond territorial sovereignty but under national jurisdiction.⁹³ The outer limits of these jurisdictional zones are measured from defined baselines in nautical miles (nm).

The first sub-category of areas under national jurisdiction, that is, areas governed by territorial sovereignty, comprises the territorial sea and internal waters. Internal waters are defined in Article 8 of the LOSC as the areas landward of the defined baselines. The territorial sovereignty of coastal states extends beyond internal waters to the airspace overhead, as well as the seabed and subsoil of the territorial sea, which coastal states have the rights to establish to a maximum of 12 nm from the baselines pursuant to Article 3 of the LOSC.⁹⁴ Territorial sovereignty principally entails exclusive and unlimited jurisdiction to exercise legislative and enforcement jurisdiction.⁹⁵ In reality, however, coastal States cannot act with complete freedom, as they are bound by international law, including the marine environmental principles outlined above. The legal framework and regulation of conservation and sustainable use of

⁹¹ Tanaka, *The International Law of the Sea* (n 18) 232.

⁹² *ibid* 4.

⁹³ *ibid* 5.

⁹⁴ LOSC arts. 2 and 3.

⁹⁵ Jan Klabbbers, *International Law* (Cambridge University Press 2013) 91.

marine biodiversity is up to each coastal state in the areas governed by territorial sovereignty. For instance, the Icelandic internal waters and territorial seas are heavily regulated under Icelandic fisheries legislation and have been said to be *de facto* MPAs,⁹⁶ while the fisheries management system has been structured “to ensure responsible fisheries, focusing on the sustainable utilization of the fish stocks and good treatment of the marine ecosystem.”⁹⁷

The second sub-category of areas under national jurisdiction, namely areas beyond territorial sovereignty but under national jurisdiction, comprises the contiguous zone, the exclusive economic zone (EEZ) and the continental shelf. The LOSC provides for certain sovereign rights in each zone, allowing coastal states to exclusively exercise legislative and enforcement jurisdiction. These sovereign rights are sometimes referred to as limited spatial jurisdiction, as in accordance with the Convention coastal states may only exercise their jurisdiction within these specific zones. The contiguous zone provides for increased jurisdictional rights for coastal states in relation to preventing infringement of their customs, fiscal, immigration or sanitary laws and regulations, and can extend to a maximum of 24 nm from the baselines or 12 nm from the outer limits of the territorial sea.⁹⁸

Of more relevance in this context are the continental shelf and the EEZ, which can be considered as resource-oriented zones that are, “essentially the result of the aspiration of coastal States for their need to control offshore natural resources.”⁹⁹ The EEZ can extend to a maximum of 200 nm from the baselines. Within these zones, coastal states enjoy jurisdiction over environmental protection, including the conservation of biodiversity, as well as the exploration and exploitation of natural resources.¹⁰⁰ Furthermore, coastal states enjoy exclusive rights to conduct marine scientific research (MSR) and establish artificial islands and structures.¹⁰¹ The continental shelf comprises the seabed and subsoil of the submarine areas, and coastal states enjoy sovereign rights for the purpose of exploring and exploiting its natural resources. All coastal states are granted the right to establish a continental shelf to a distance of 200 nm from the baselines and are entitled to an extended continental shelf in certain cases, as will be contemplated after outlining the concept of ABNJ.

⁹⁶ Email from anonymous Senior Legal Counsel at the Icelandic Ministry of Industries and Innovation to author (5 May 2017).

⁹⁷ The Minister of Fisheries, Einar K. Guðfinnsson and others, Statement on responsible fisheries in Iceland 2007.

⁹⁸ LOSC art 33.

⁹⁹ Tanaka, *The International Law of the Sea* (n 18) 123.

¹⁰⁰ LOSC art. 57

¹⁰¹ LOSC art. 56

2.5. Areas beyond national jurisdiction

Although the scope of the potential agreement is yet to be determined, its geographical scope has already been delimited, as it will deal with the conservation and sustainable use of biodiversity in *areas beyond national jurisdiction*, which comprise the high seas and the Area (defined below). The term ABNJ is not specifically defined in the LOSC, “but in the evolving lexicon of the law of the sea [it] is understood to refer to both the Area and the high seas.”¹⁰² This leaves an estimated 64 percent of the surface of the oceans and 95 percent of their volume beyond national jurisdiction.¹⁰³

2.5.1. The High Seas

All parts of the oceans not included in the territorial sea, internal waters, contiguous zone or EEZ are the high seas.¹⁰⁴ The definition entails that the high seas consist of the water column in ABNJ. Pursuant to customary international law and the Convention, the high seas are governed by the principle of freedom, which makes environmental protection in the high seas particularly problematic. Article 87 provides inexhaustibly that the freedom of the high seas comprises the freedoms of navigation, overflight, fishing and scientific research, as well as the freedoms to lay submarine cables and pipelines and to construct artificial islands.¹⁰⁵ However, the “freedoms are not absolute rights, and are subject to a number of limitations and corresponding duties.”¹⁰⁶ The laying of submarine cables and construction of artificial islands is for example restricted by Part XI, and the freedom of fishing is restricted by Article 116 and regulated by the UNFSA, which “defines some guiding principles for the conservation and management of highly migratory and straddling fish stocks, including the application of the precautionary principle and ecosystem approaches and the protection of biodiversity in the marine environment.”¹⁰⁷ Restrictions to the freedom of the high seas have become particularly apparent in recent years with the expanding legal framework concerning BBNJ.¹⁰⁸

Although no state or entity has jurisdiction over the high seas, the principle of the exclusive jurisdiction of the flag state provides that “the State which granted the ship the right

¹⁰² Long and Chavez (n 12) 214.

¹⁰³ ‘Common Oceans: Overview’ (*Common Oceans*) <<http://www.commonoceans.org/about/en/>> accessed 27 January 2017.

¹⁰⁴ LOSC art. 86.

¹⁰⁵ LOSC art 87.

¹⁰⁶ Wright and others (n 70) 11.

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

to sail under its flag, has the exclusive jurisdiction over vessels flying its flag.”¹⁰⁹ Article 90 of the LOSC provides that every state, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas, and Article 91 stipulates that States must fix the conditions for the grant of its nationality to ships and for the right to fly its flags. Additionally, there must exist a genuine link between the State and the ship. Flag state responsibility and the genuine link issue are among the gaps in the legal framework surrounding the governance of the high seas, as will be discussed in chapter five.

2.5.2. *The Area*

The seabed beyond the continental shelf is referred to as the Area in the Convention, which defines it as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.¹¹⁰ Pursuant to Article 136, the Area and its resources are governed by the principle of the common heritage of mankind (CHM), which essentially entails that resources as defined in Article 133(b)¹¹¹ are not to be exploited by any state or entity.¹¹² Part XI provides for the legal regime, which ensures along with the ISA, “that the benefits from the exploitation and exploration of the resources of the deep-seabed are shared by all humanity.”¹¹³

The ISA has jurisdiction for legislative and enforcement purposes concerning activities in the Area, pursuant to Article 17(1) of Annex III of the LOSC, which provides that the ISA shall adopt and uniformly apply rules, regulations and procedures in accordance with Article 160(2)(f)(ii) and Article 162(2)(o)(ii) for the exercise of its function as set forth in Part XII on a list of matters. It is important to note that the ISA does not have authority over the deep-seabed as a whole, but only as concerns its mineral resources.¹¹⁴ The regulations adopted by the ISA thus far mainly relate to deep-seabed mining and are gathered in what is referred to as the Mining Code.¹¹⁵ Furthermore, the ISA has been working on a Draft Framework for the Regulation of Exploitation of Activities and is increasingly evolving in relation to the protection of the Area environment.¹¹⁶ Another example of increased environmental consideration on the part of the ISA is the “ongoing work to consider a proposal to establish a

¹⁰⁹ Tanaka, *The International Law of the Sea* (n 18) 157.

¹¹⁰ LOSC art 1(1)

¹¹¹ The provision defines resources as all solid, liquid or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules.

¹¹² Tanaka, *The International Law of the Sea* (n 18) 180.

¹¹³ Tladi (n 58) 261.

¹¹⁴ Rothwell and Stephens (n 18) 143.

¹¹⁵ ‘The Mining Code | International Seabed Authority’ <<https://www.isa.org.jm/mining-code>> accessed 25 April 2017.

¹¹⁶ Wright and others (n 70) 10; Rothwell and Stephens (n 18) 148.

network of ecologically related areas in the Clarion-Clipperton Zone, described as ‘areas of particular environmental interest’ [APEIs], where there would be no exploration or other mining activity.”¹¹⁷

It is worth noting that Part XI was the most controversial issue at UNCLOS III. Changes in the US political landscape led to objections on behalf of the US and associated industrialised states to the provisions concerning the International Seabed Area.¹¹⁸ Eventually, these states did not consent to be bound by the LOSC as it was adopted in 1982, and “[c]onsequently, it became apparent that apart from Iceland, all States Parties to the Convention were developing States.”¹¹⁹ In order to avoid the LOSC entering into force without the adherence of important and powerful industrialised states, and to promote universal participation, the UN Secretary-General initiated informal consultations between 1990 and 1994 to address controversial issues and search for solutions. This resulted in the Part XI Implementing Agreement.¹²⁰ The agreement modified the original regime significantly¹²¹ and stipulates that its provisions shall be interpreted and applied together as a single instrument with the LOSC.¹²² Furthermore, the implementing agreement provides that ratification or formal confirmation of the LOSC shall also represent consent to be bound by the Part XI Implementing Agreement.¹²³

2.5.3. Precise Boundaries of Areas beyond National Jurisdiction

An interesting aspect concerning the geographical scope of the potential implementing agreement is the fact that “the precise boundaries of the [EEZ] and continental shelves of many states remain undetermined worldwide.”¹²⁴ It would be imprudent to state that this aspect is likely to affect discussions at the PrepCom or future negotiations of a new implementing agreement in a significant way, as the scope of the agreement will cover ABNJ at any given time. Nonetheless, it is an interesting point of note as the exact “geographical scope of ABNJ

¹¹⁷ Rothwell and Stephens (n 18) 149.

¹¹⁸ After Reagan took office, the US announced that it had instructed its delegation to ensure that negotiations would not end at the present session, pending a US policy-review. In 1982, the US announced it would not sign the treaty without modifications, based mainly on objections concerning Part XI. A policy change in favor of ratifying the LOSC began under Bush and until 2016, all US presidents have been in favour of acceding to the LOSC. Furthermore, the U.S. Navy and the uniformed services are in favor of ratification, See: Neal Coates, ‘The United Nations Convention on the Law of the Sea, the United States, and International Relations’ (2005) <http://citation.allacademic.com/meta/p_mla_apa_research_citation/0/7/0/2/9/p70299_index.html> accessed 13 March 2017.

¹¹⁹ Tanaka, *The International Law of the Sea* (n 18) 147; See also James Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 47.

¹²⁰ Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Martinus Nijhoff Publishers 2012) 41.

¹²¹ Tanaka, *The International Law of the Sea* (n 18) 193.

¹²² Part XI Implementing Agreement art. 2(1).

¹²³ *Ibid* art. 4(1).

¹²⁴ Long and Chavez (n 12) 214.

will only be settled when coastal states establish their territorial sea, EEZ and continental shelf limits and when these are undisputed by other states, which is particularly problematic in many ocean regions.”¹²⁵ Two issues are of particular relevance in this context: namely, the concept of creeping jurisdiction and the establishment of continental shelves beyond 200 nm.

A few variations of the concept of creeping jurisdiction exist in academic literature.¹²⁶ The concept is however usually understood as referring to either claiming excessive sovereign rights within national jurisdiction or claiming extensive maritime zones.¹²⁷ The latter is relevant in this context, that is, “the gradual encroachment by coastal states over their adjacent maritime domain.”¹²⁸ It should be kept in mind that even though the majority of coastal states have claimed an EEZ, none of those claims exceed the 200 nm maximum limit provided by the LOSC.¹²⁹ However, due to the ability of states to interpret the LOSC unilaterally, extensive maritime claims are possible, for example with respect to the drawing of straight baselines and by claiming an EEZ around islands and rocks.¹³⁰ It is relatively common for states to draw straight baselines where it is likely that normal baselines should be drawn, and the straight baseline system has had “expansionary effects in enclosing ocean space within internal waters.”¹³¹ Scholars have pointed out ambiguities concerning certain aspects of Article 7 of the LOSC, which provides for the straight baseline system.¹³² Furthermore, a study conducted by the International Law Association in 2016 identified straight baseline claims made by 80 coastal states, out of which 39 have been objected to by other states as not being in accordance with international law.¹³³

Probably less common, but perhaps significantly more effective for excessive EEZ claims, is the practice of claiming an EEZ “around islands which could conceivably be regarded as uninhabitable rocks [...]”¹³⁴ Article 121(3) of the LOSC provides that rocks that cannot sustain human habitation or economic life of their own cannot generate an EEZ. The provision

¹²⁵ *ibid.*

¹²⁶ Erik Franckx, ‘The 200-Mile Limit: Between Creeping Jurisdiction and Creeping Common Heritage’ (2007) 39 *467*, 467.

¹²⁷ Rothwell and Stephens (n 18) 27.

¹²⁸ *ibid.*

¹²⁹ *ibid.* 88.

¹³⁰ *ibid.* 27.

¹³¹ *ibid.* 45.

¹³² David Joseph Attard and others (eds), ‘Coastal Waters’, *The IMLI manual on international maritime law* (First edition, Oxford University Press 2014) 1–8.

¹³³ International Law Association Committee on Baselines under the International Law of the Sea, ‘ILA Straight Baselines Study - Protests’ <https://cil.nus.edu.sg/wp/wp-content/uploads/2015/10/ila_study_-_protests.pdf> accessed 3 October 2017.

¹³⁴ Robin Rolf Churchill and Alan Vaughan Lowe, *The Law of the Sea* (Third Edition, Juris Publishing 1999) 165.

and its application was analysed word by word in the recent *South China Sea Arbitration*, where the Arbitral Tribunal unanimously held that none of the features of the so-called Spratly Islands generated an EEZ.¹³⁵ In its conclusion on the interpretation of Article 121(3), the Arbitral Tribunal noted that the word ‘rock’ does not limit the provision to features composed of solid rock and that the geological and geomorphological characteristics of a high-tide feature are not relevant to its classification.¹³⁶ The Tribunal emphasised the physical conditions of the features in question and stated that “the status of a feature is to be determined on the basis of its natural capacity, without external additions or modifications intended to increase its capacity to sustain human habitation or an economic life of its own.”¹³⁷ After delving further into definitions such as human habitation and economic life, the Tribunal stated that the capacity of a feature to sustain human habitation or economic life on its own must be assessed on a case-by-case basis.¹³⁸ Furthermore, “the Tribunal directed that where the physical conditions did not determine clearly whether a feature is a rock or island then the historical use will be relevant.”¹³⁹ On this point, the Tribunal concluded, “that a feature that has never historically sustained a human community lacks the capacity to sustain human habitation.”¹⁴⁰

Another interesting case in this respect is Japan’s EEZ claim around Okinotorishima, an uninhabitable atoll encased by concrete located south of Japan.¹⁴¹ In this context, it should be noted that although almost all aspects of the EEZ have been studied since it emerged, it “continues to provoke a wide range of cases, discussions and international disputes [...]”¹⁴² Because of different types of creeping jurisdiction, difference in state practices and other factors, “the EEZ is to be seen as a concept in a state of permanent flux.”¹⁴³

The outer continental shelf can potentially affect the precise boundaries of ABNJ much more significantly than any issues concerning the delimitation and delineation of EEZs. Part VI of the Convention addresses the continental shelf and contains one of the lengthiest and most complex provisions of the Convention, Article 76. The provision provides for the legal

¹³⁵ *The South China Sea Arbitration (The Republic of the Philippines v. The People’s Republic of China)* (12 July 2016) Permanent Court of Arbitration Case No. 2013-19 paras 475-626.

¹³⁶ *Ibid* 540.

¹³⁷ *Ibid* 541.

¹³⁸ *Ibid* 564.

¹³⁹ Ted L McDorman, ‘The South China Sea Arbitration’ 20 *American Society of International Law* <https://www.asil.org/insights/volume/20/issue/17/south-china-sea-arbitration#_ftn28> accessed 25 April 2017.

¹⁴⁰ *The South China Sea Arbitration* (n 135) 549; See also *ibid*.

¹⁴¹ See for example; Yann-huei Song, ‘Okinotorishima: A “Rock” or an “Island”?’ Recent Maritime Boundary Controversy between Japan and Taiwan/China’ in Seoung-Yong Hong and Jon M Van Dyke (eds), *Maritime boundary disputes, settlement processes, and the law of the sea* (Martinus Nijhoff Publishers 2009).

¹⁴² Gemma Andreone, ‘The Exclusive Economic Zone’ in Donald Rothwell and others (eds), *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 159.

¹⁴³ *ibid* 178.

definition of the continental shelf and sets forth a criterion for determining its outer limits, which is a highly complex legal and scientific issue. It is worth noting that in the *Nicaragua v. Colombia* case in 2012, the ICJ found that the definition of the continental shelf in Article 76(1) represented customary international law.¹⁴⁴ As for the remaining paragraphs of the provision, the ICJ specifically noted that it was unnecessary to rule on their customary status at that stage.¹⁴⁵

The wording of Article 76(1) provides that coastal states have the right to establish a continental shelf through two different methods. First is the method of establishing a continental shelf throughout the natural prolongation of land territory to the outer edge of the continental margin, which is referred to as the geological criterion. Second is the distance from the baseline method, or the distance criterion.¹⁴⁶ The latter method is used in circumstances where the outer edge of the continental margin does not exceed 200 nm and is therefore not of particular relevance for the boundaries of ABNJ: “[i]n those instances it is a geometrical measurement which creates the entitlement to the continental shelf.”¹⁴⁷ In other words, coastal states are entitled to sovereign rights over the seabed and subsoil of the submarine areas out to a distance of 200 nm, as measured from the baselines, regardless of the physical presence of a continental shelf. The former method entails the complicated issue of establishing a continental shelf beyond 200 nm, where states must prove their entitlement to the relevant area based on complex formulas.¹⁴⁸ Article 76(8) provides that coastal states shall submit information concerning the outer limits of the continental shelf to the Commission on the Limits of the Continental Shelf (CLCS) for its recommendations, while Article 7 of Annex II provides that coastal states shall establish the outer limits of the continental shelf in conformity with the provisions of Article 76(8), which arguably indicates that the outer limits cannot be established without submitting information to the CLCS. However, the CLCS “is not empowered to assess whether a coastal State has established the outer limits of the continental shelf on the basis of its recommendations.”¹⁴⁹ The CLCS is responsible for making recommendations on the submissions and the limits of the outer continental shelf established by a coastal State on the basis of these recommendations shall be final and binding. Article 76(4) is the key provision in respect of the entitlement to the outer continental shelf. It provides for two options regarding

¹⁴⁴ *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgement) [2012] ICJ Rep 624, [118].

¹⁴⁵ *Ibid*; See also Rothwell and Stephens (n 18).

¹⁴⁶ Bjarni Már Magnússon, *The Continental Shelf beyond 200 Nautical Miles: Delineation, Delimitation and Dispute Settlement* (Brill Nijhoff 2015) 18.

¹⁴⁷ *ibid*.

¹⁴⁸ *ibid* 19–20.

¹⁴⁹ Tanaka, *The International Law of the Sea* (n 18) 145.

the establishment of an outer continental shelf, and must be interpreted from geomorphological perspectives as it focuses on geomorphology.¹⁵⁰ Importantly, Article 76(5) sets forth constraints on the limit of the outer continental shelf as it stipulates that the shelf shall not exceed 350 nm from the baselines or 100 nm from the 2500 metre isobath.

There are two main features regarding the establishment of a continental shelf beyond 200 nm: establishing boundary lines between continental shelves and the international seabed, referred to as the *delineation* of the continental shelf, and the establishment of boundary lines between the continental shelves of adjacent or opposite coastal states, referred to as the *delimitation* of the continental shelf.¹⁵¹ The delimitation procedure does not affect the boundaries of ABNJ as significantly as the delineation of the continental shelf. However, it has been pointed out that the procedures for extending the continental shelf beyond 200 nm are likely to affect the water column above, which inevitably would affect ABNJ.¹⁵² As the two features “overlap profoundly [they] cannot be viewed in complete isolation from each other.”¹⁵³ Essentially, delimitation is a simple act, but at the same time a fundamentally political process, as the process is seen as delimiting “the existence of a political order by means of its separation from others.”¹⁵⁴ In this context it is worth noting that Article 76 is not applicable to the delimitation of the continental shelf pursuant to Article 76(10). Article 83 of the LOSC provides that the delimitation of the continental shelf between opposite or adjacent coastal states shall be determined by an agreement between coastal states, on the basis of international law as defined in Article 38 of the Statute of the ICJ.¹⁵⁵ Article 83(2) of the LOSC stipulates that in circumstances where no agreement can be reached within a reasonable period of time, the concerned states shall resort to the dispute settlement procedures provided in Part XV of the Convention. Importantly, this guidance “designates a law-making role for international courts and tribunals.”¹⁵⁶ Furthermore, Article 9 of Annex II to the Convention stipulates that the actions of the CLCS shall not prejudice matters concerning the delimitation of boundaries between states with opposite or adjacent coasts. Moreover, the CLCS does not consider or qualify submissions by states in cases where a dispute exists pursuant to Annex I, Rule 5 of the Rules of Procedure of the CLCS. The delimitation procedure is therefore not a

¹⁵⁰ Magnússon (n 146) 20; Rothwell and Stephens (n 18) 115.

¹⁵¹ Magnússon (n 146) 2.

¹⁵² Andreone (n 142) 162.

¹⁵³ Magnússon (n 146) 2–3.

¹⁵⁴ *ibid* 118; See also; JRV Prescott and Clive H Schofield, *The Maritime Political Boundaries of the World* (2nd ed, M Nijhoff 2005).

¹⁵⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi.

¹⁵⁶ Magnússon (n 146) 3.

scientific or a technical process, but a process with the purpose of achieving an equitable solution.¹⁵⁷

The process of delineating the continental shelf is, on the other hand, a complicated legal, scientific and technical procedure. Space does not permit discussion of the delineation procedure and the formulas used. However, it should be mentioned that “the CLCS plays a pivotal role in curtailing the territorial temptations of broad margin states and protecting the area beyond the limits of national jurisdiction [...]”,¹⁵⁸ as confirmed by the ICJ in the preliminary objections part of the pending *Nicaragua v. Colombia* case concerning the delimitation of the continental shelf between the States beyond 200 nm.¹⁵⁹ Through its Rules of Procedure, the CLCS has developed and “arguably also de facto amended some of the provisions of Article 76 relating to the delineation of the continental shelf beyond 200 nm.”¹⁶⁰

In the context of creeping jurisdiction and the precise boundaries of ABNJ, it is noteworthy that at UNCLOS III, negotiators believed the number of coastal states entitled to an outer continental shelf to be no more than 30 to 35.¹⁶¹ At the present time, however, it is believed that around 85 coastal states will be able claim an outer continental shelf, which amounts to half of all coastal states. To date, 77 states have made a total of 82 submissions or partial submissions of data to the CLCS.¹⁶² The CLCS has made recommendations on less than half of those submissions. Despite the significant progress regarding the delimitation of maritime boundaries worldwide, more than half of the world remains undetermined and “there remains a long way to go before a comprehensive network of agreed maritime boundaries and limits is achieved.”¹⁶³ Nonetheless, as several states have received recommendations from the CLCS, the interest of academics and the international community will likely shift in the near future from issues concerning delimitation and delineation towards considerations of how to

¹⁵⁷ *ibid.*

¹⁵⁸ Bjarni Már Magnússon, ‘Is There a Temporal Relationship between the Delineation and the Delimitation of the Continental Shelf beyond 200 Nautical Miles?’ (2013) 28 *The International Journal of Marine and Coastal Law* 465, 466.

¹⁵⁹ *Question of the delimitation of the continental shelf between Nicaragua and Colombia beyond 200 nautical miles from the Nicaraguan coast (Nicaragua v. Colombia)* (Preliminary objections) [2016] [109]-[112]

¹⁶⁰ Robin Churchill, ‘The 1982 United Nations Convention on the Law of the Sea’ in Donald Rothwell and others (eds), *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 43.

¹⁶¹ Tuerk (n 120) 28–29.

¹⁶² DOALOS, ‘Submissions to the CLCS’

<http://www.un.org/depts/los/clcs_new/commission_submissions.htm> accessed 3 May 2017.

¹⁶³ Clive H Schofield, ‘The El Dorado Effect: Reappraising the “Oil Factor” in Maritime Boundary Disputes’ in Clive H Schofield, Sög-u Yi and Moon-Sang Kwon (eds), *The limits of maritime jurisdiction* (Martinus Nijhoff Publishers 2014) 114.

regulate and manage activities on the outer continental shelf.¹⁶⁴ In this context it is worth noting that on the outer continental shelf, coastal states have exclusive sovereign rights over their living resources; however, their rights over non-living resources are subject to payments of contributions pursuant to article 82 of the LOSC.¹⁶⁵ A Special Chamber of the ITLOS addressed the rights of coastal states over the continental shelf in a 2015 ruling on a request for the prescription of provisional measures in a *case concerning delimitation between Ghana and Côte d'Ivoire*. The tribunal stated that “the rights of the coastal State over its continental shelf include all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf and that the exclusive right to access to information about the resources of the continental shelf is plausibly among those rights.”¹⁶⁶ To conclude discussions of the precise boundaries of ABNJ, it is important to keep in mind that the issue does not intrinsically affect the negotiations for a new international legally binding instrument, which will be applicable in ABNJ as determined at any given time.

2.5.4. Integrated approach in ocean management

Considering the uncertainties and apparent lack of consensus concerning how exactly the future implementing agreement should deal with BBNJ, a note should be made of the concept of integrated management approaches, which have been referred to as the new frontier in marine environmental law.¹⁶⁷ Integrated approaches to ocean management “have become a regular and, increasingly, a prominent theme within both the annual [UNGA] resolutions on the law of the sea and the accompanying Secretary-General reports as well as in the work of the UN Open-ended Informal Consultative Progress on the Law of the Sea.”¹⁶⁸ In his 2011 report to the UNGA, the Secretary-General noted that “[i]ntegrated management and ecosystem approaches are essential to mitigate the cumulative impacts of sectoral activities taking place beyond areas of national jurisdiction.”¹⁶⁹ The concept is referred to in many legal instruments dating back several decades. For example, paragraph 17.1 of Agenda 21 states that the marine

¹⁶⁴ Joanna Mossop, ‘Beyond Delimitation: Interaction between the Outer Continental Shelf and the High Seas Regimes’ in Clive H Schofield, Sŏg-u Yi and Moon-Sang Kwon (eds), *The limits of maritime jurisdiction* (Martinus Nijhoff Publishers 2014) 753.

¹⁶⁵ Rothwell and Stephens (n 18) 124.

¹⁶⁶ *Dispute Concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Coast (Ghana v. Côte d'Ivoire)* (Provisional measures of 25 April 2015) ITLOS Reports 2015 [94].

¹⁶⁷ Karen N Scott, ‘Integrated Oceans Management: A New Frontier in Marine Environmental Protection’ in Donald Rothwell and others (eds), *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 464.

¹⁶⁸ *ibid* 465.

¹⁶⁹ UNGA (66th Session) ‘Oceans and the Law of the sea: Report of the Secretary-General’ (22 March 2011) UN Doc A/66/70 32.

environment - including the oceans and all seas and adjacent coastal areas - forms an integrated whole that is an essential component of the global life-support system and a positive asset presenting opportunities for sustainable development. Furthermore, the paragraph states that new approaches to marine management are required to pursue the rights and obligations concerning the protection and sustainable development of the marine environment provided by the LOSC.

The zonal management approach has been criticised for having certain limitations, especially as concerns the conservation of marine living resources and biodiversity.¹⁷⁰ The reasoning behind the criticism, stems from the fact that the ocean, in a physical sense, is one body which has been divided by States from a legal point of view. The main issue in this context is that drawing up artificial boundaries based on the distance criterion often ignores the actual circumstances concerning the nature of the ocean, the ecological conditions and the interactions between species.¹⁷¹ Science has frequently shown that “maritime delimitation lines do not respect the uniqueness of marine ecosystems. Indeed, due to their nature, several species, such as straddling and highly migratory species, do not respect artificial boundaries.”¹⁷² It has therefore been argued that the zonal management approach is not always the most suitable option for ocean management, particularly as relates to the conservation of marine biodiversity.¹⁷³ As for BBNJ, the problem with the zonal management approach is most apparent because of the vertical division of the high seas and the Area:

With respect to some pelagic fishes, this division still seems appropriate, as they swim freely in the open ocean. However other fish congregate around seamounts and in and around deep-sea corals. Furthermore, it is now known that areas at the bottom of the ocean previously thought to be devoid of life contain an abundance of organisms of immense scientific interest and potential commercial value. In addition, a symbiotic relationship exists between the water column and organisms belonging to the ocean floor. Even more problematic is the fact that many of the mineral resources and the biological resources are physically intermingled.¹⁷⁴

Despite the adoption of various integrated management approaches in several legal instruments and their relatively widespread existence, including a modest reference in the preamble of the LOSC, there is no universal definition of the concept, which remains elusive.¹⁷⁵ Different

¹⁷⁰ Yoshifumi Tanaka, *A Dual Approach to Ocean Governance: The Cases of Zonal and Integrated Management in International Law of the Sea* (Ashgate Pub 2008) 125–132.

¹⁷¹ *ibid* 6.

¹⁷² *ibid*.

¹⁷³ *ibid* 159–160.

¹⁷⁴ de La Fayette (n 5) 258.

¹⁷⁵ Richard Barnes, ‘The Law of the Sea Convention and the Integrated Regulation of the Oceans’ (2012) 27 *The International Journal of Marine and Coastal Law* 859, 859; Scott (n 167) 466.

instruments apply different formulations to the concept, such as MPAs, the ecosystem approach, ecosystem-based management and marine spatial planning.¹⁷⁶ In short, the concept of integrated management “describes an approach to oceans governance that is holistic, and which aims to integrate the management of activities that impact upon or affect the oceans across sectors, space and time under a unified over-arching vision.”¹⁷⁷ Instead of establishing a legal requirement to adopt integrated approaches, integrated approaches aim to set out a broad policy objective,¹⁷⁸ which is typically “designed to manage conflicts between, and cumulative impacts of, a wide range of activities taking place within or proximate to a marine and coastal environment. It is spatially focused in that activities are managed according to location and, increasingly, in the context of an ecosystem.”¹⁷⁹ For integrated ocean management to be effective, a high level of political, legal and institutional coordination and cooperation is required.¹⁸⁰ Before discussing the developments of the LOSC, it must be pointed out that that the zonal management approach and integrated oceans management approaches “are not mutually exclusive but complementary. Although one approach cannot be replaced by another approach, the balance of the contrasting approaches may change over time.”¹⁸¹

2.6. The United Nations Convention on the Law of the Sea

This year marks the 35th anniversary of the Convention, which is often referred to as the Constitution for the Oceans. As mentioned above, some have criticised the Convention for being unwieldy in responding to developments, largely because of its amendment procedure.¹⁸² However, developments of the LOSC were considered at UNCLOS III, and negotiators were aware of the fact that the evolution of science and technology would eventually necessitate changes. Several proposals concerning mechanisms for reviews and development were made at UNCLOS III, but no agreement was reached. Instead, a complex amendment procedure was designed which has never been used. Nevertheless, “[a] feature of the international law of the sea is that it has been in an ongoing state of development based on developing state practice,

¹⁷⁶ Ingvild Ulrikke Jakobsen, ‘The Adequacy of the Law of the Sea and International Environmental Law to the Marine Arctic: Integrated Ocean Management and Shipping’ (2013) 22 Mich. St. Int’l L. Rev. 291, 296–297.

¹⁷⁷ Scott (n 167) 465.

¹⁷⁸ Barnes (n 175) 859.

¹⁷⁹ Scott (n 167) 466.

¹⁸⁰ *ibid.*

¹⁸¹ Tanaka, *The International Law of the Sea* (n 18) 453.

¹⁸² Long and Chavez (n 12) 213–214.

the views of publicists, or via new international treaties and instruments.”¹⁸³ This chapter will consider the amendment procedures of the LOSC and its development.

2.6.1. Amending the LOSC

The LOSC provides for three types of amendment procedures. First, pursuant to Article 312, States Parties may propose specific amendments to the Convention other than those relating to activities in the Area. Upon such a proposal, the Secretary-General is to circulate the proposal to all States Parties; if not less than one half of the parties to the Convention reply favourably to the request, the UN Secretary-General shall convene the conference. This amendment procedure has been referred to as a review conference mechanism.¹⁸⁴ Second, Article 313 provides for a simplified procedure which entails an amendment without convening a conference, but it dispenses with a single objection to the proposed amendment. Third, Article 314 provides for an amendment procedure to the provisions of the LOSC relating exclusively to activities in the Area. This procedure was a simplified mechanism subject to approval by the UNGA, “however, that process now needs to be read alongside Section 4 of the Annex to the [Part XI Implementing Agreement], which envisages that the Assembly of State Parties to the ISA may undertake a review of certain deep-seabed measures.”¹⁸⁵

These amendment procedures of the LOSC are considered unattractive options. It has been argued that Article 316, which provides for the entry into force of amendments, explains why no amendments to the LOSC have been adopted and why it is unlikely that the amendment procedures will ever be used.¹⁸⁶ Article 316 stipulates that amendments adopted by the formal procedures do not enter into force until ratified by either two thirds of States Parties or 60 States parties, whichever is greater. Another reason for the amendment procedures being considered unattractive options is that, essentially, they entail opening up the package deal concluded at UNCLOS III. In this context, it should be kept in mind that the amendment procedure of the LOSC was not applicable when the Part XI Implementing Agreement was negotiated and adopted, as the LOSC had not entered into force, and that the purpose of the agreement was to a large extent reconciliation of the states that objected at UNCLOS III.

¹⁸³ Rothwell and Stephens (n 18) 25.

¹⁸⁴ *ibid* 28.

¹⁸⁵ *ibid* 29.

¹⁸⁶ Churchill (n 160) 42–43.

2.6.2. *Development of the LOSC*

Despite being difficult to amend through the procedures provided, the LOSC has evolved significantly since it was adopted, and the Convention was evidently intended to be capable of further development and evolution. This development “has taken place through a wide variety of mechanisms, including legally binding agreements and non-binding soft law. It is in that sense no less a dynamic or a living instrument than so-called framework agreements, or human rights treaties.”¹⁸⁷ Commentators have described the LOSC as a framework treaty, “as it lacks comprehensive rules on discrete uses of the sea, such as seabed mining, fishing and marine scientific research.”¹⁸⁸ Others have pointed out that the framework nature of the Convention “means that it does not contain a detailed set of norms frozen in time.”¹⁸⁹ The Convention is, however, not a framework treaty “in the sense applied to a number of environmental treaties. That is, it makes no formal provisions for the adoption of further protocols and annexes as a means of developing the legal regime to meet new priorities and problems.”¹⁹⁰

One of the mechanisms for development of the Convention is the provided dispute settlement mechanism, which includes the ITLOS. Another mechanism is the subsequent practices and treaties between State Parties.¹⁹¹ Article 311 of the Convention anticipates further developments via the continuing regulation of relations between states through treaties.¹⁹² A large number of treaties and the UNFSA have extensively developed the LOSC, while the adoption of the Part XI Implementing Agreement *de facto* amended provisions of the LOSC. Another example of mechanisms for the development of the Convention and the law of the sea in general is the annual Meeting of States Parties.

While the LOSC does not expressly provide for a regular forum for developments of the Convention, Article 319 provides for an institutional mechanism to oversee the implementation of the LOSC. The provision, “which sets out the functions of the UN Secretary-General in relation to the LOSC”,¹⁹³ stipulates that the UN Secretary-General shall report to all States Parties, the ISA and competent international organisations on issues of a general nature

¹⁸⁷ Alan E Boyle, ‘Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change’ in David Freestone, Richard Barnes and David M Ong (eds), *The law of the sea: progress and prospects* (Oxford University Press 2006) 18.

¹⁸⁸ Long and Chavez (n 12) 213.

¹⁸⁹ Robin Churchill (n 22) 5.

¹⁹⁰ Boyle (n 187) 42.

¹⁹¹ Donald Rothwell and others (eds), ‘Between Stability and Change in the Law of the Sea Convention: Subsequent Practice, Treaty Modification and Regime Interaction’, *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 46–48.

¹⁹² Harrison (n 119) 85.

¹⁹³ Churchill (n 160) 40.

that have arisen with respect to the Convention. Although it was hardly anticipated at UNCLOS III, the laconic provisions of Article 319 have developed what has been described as “an elaborate annual cycle of review of the LOSC and of the law of the sea generally.”¹⁹⁴ There are four elements to the annual cycle of review. The first step in the cycle is the publication of a report by the UN Secretary-General. These reports generally outline recent developments and pressing issues concerning the Convention and the law of the sea in general, although recently there have also been reports on specific issues.¹⁹⁵ Second is the Meeting of States Parties, which has on two occasions amended the deadline for making submissions to the CLCS concerning the outer limits of the continental shelf beyond 200 nm and has therefore, in practical terms, amended the LOSC. Third is the Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS). Normally, UNICPOLOS focuses on a single specific topic with the help of experts and publishes a summary of the meeting after its conclusion. These summaries are usually discussed at the UNGA, and can sometimes affect UNGA resolution on the ocean and the law of the sea by the UNGA, as is evident from the establishment of the Ad Hoc Open-ended Informal Working Group (BWG) to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction.¹⁹⁶ The annual review cycle ends with the adoption of a resolution by the UNGA which often calls on parties to take action concerning various issues. These resolutions have been influential in the development of the LOSC.¹⁹⁷

It is apparent that the LOSC, despite not being amended through the provided amendment procedures, has developed significantly since 1982. There are no indications that the LOSC will cease developing or become obsolete in the near future; however, “technological developments and environmental challenges may in the future further test the capacity of the regime of international law of the sea to cope and there has been speculation as to whether there may be a need for a Fourth UN Conference on the Law of the Sea.”¹⁹⁸ In answering the question of whether the LOSC can continue to act as a constitution for the oceans, Rothwell and Stephens point out that it could depend on perspectives towards ocean management. That is, if the law of the sea will be “seen as a distinctive body of international law that seeks to regulate all of the activities of the world’s oceans, from the territorial sea out to the high

¹⁹⁴ *ibid*; See also Harrison (n 119) 63.

¹⁹⁵ Churchill (n 160) 40–41.

¹⁹⁶ UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24 para 73.

¹⁹⁷ Churchill (n 160) 40–42.

¹⁹⁸ Rothwell and Stephens (n 18) 28.

seas,”¹⁹⁹ the LOSC can undoubtedly act as a constitution for the oceans. On the other hand, if “the legal regime of the oceans as reflected in the law of the sea is seen as requiring an integrated approach between the land, sea and air, then a newly conceived law of the sea may be more appropriate.”²⁰⁰

2.6.3. Implementing agreements

A brief consideration of the concept of implementing agreements is necessary when considering a potential third implementing agreement to the LOSC. Given the amendment procedures and the methods for development provided for by the Convention, it is relatively safe to presume that the negotiators at UNCLOS III did not anticipate the concept of implementing agreements, particularly an agreement amending the Convention as significantly as the Part XI Implementing Agreement. Nevertheless, the implementing agreements have arguably been the most significant developments for both the Convention and the modern law of the sea in general. The LOSC did not provide for the concept of an implementing agreement; “[r]ather, the concept [...] has arisen from the subsequent practice of states in developing the legal framework of the law of the sea.”²⁰¹ The adoption of an implementing agreement can be seen simply as a method, or an important tool, sought out by the international community in order to deal with the amendment difficulties of the LOSC “and to flesh out its key provisions on specific uses of the ocean [...]”²⁰² The term, or title, ‘implementing agreements’ is basically a characterisation of the agreements and is not of particular importance, as titles of treaties normally do not have any particular significance. More important are the content, purpose and legal effects of implementing agreements.²⁰³ In a broad sense, a common purpose of both the Part XI Implementing Agreement and the UNFSA is to rectify or solve problems or omissions that were identified after the LOSC was adopted.²⁰⁴ Given the universality of the LOSC, the Convention is an ideal platform for the adoption of an implementing agreement dealing with an issue requiring widespread participation, such as the conservation and sustainable use of BBNJ.

From a legal point of view, nothing stands in the way of adopting a new implementing agreement to the LOSC. Rather, the challenges are of a political and diplomatic nature, as “it

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ Harrison (n 119) 113.

²⁰² Long and Chavez (n 12) 113.

²⁰³ Harrison (n 119) 85.

²⁰⁴ *ibid* 85–86.

is the political support of the international community for the implementing agreements that distinguishes them from the plethora of other treaties that have been concluded on the law of the sea since 1982.”²⁰⁵ In negotiating the two existing implementing agreements, the need for widespread acceptance of the agreements “necessitated the use of consensus decision making techniques such as those that were first developed at UNCLOS III. Consensus was seen as a vital ingredient for the adoption of these modifications to the law of the sea regime.”²⁰⁶ Absent consensus and universal participation, there is a high risk of limited participation in and acceptance of the agreement, which would undoubtedly result in its being less meaningful and effective. After all, if consensus is not reached, any States opposed to the agreement could simply refuse to participate or accept and would consequently not be bound by its terms, pursuant to customary international law and the principle reflected in Article 34 of the Vienna Convention on the Law of Treaties.²⁰⁷ Finally, it should be noted that unlike the amendment procedures provided by the LOSC and discussed in the previous chapter, “the negotiation of an implementing agreement is much more likely to preserve the consensus underlying the law of the sea regime and protect the integrity of the Convention.”²⁰⁸

²⁰⁵ *ibid* 113–114.

²⁰⁶ *ibid* 113.

²⁰⁷ The *pacta tertiis nec nocunt nec prosunt* principle is reflected in Article 34 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

²⁰⁸ Harrison (n 119) 114.

3. Background

This chapter will consider the history and development of the law of the sea, particularly the developments of extensions of jurisdictional rights, as well as the history of international environmental law and international biodiversity law. Subsequently, the developments, that led to the initiation of a negotiation process for a new implementing agreement under the LOSC will be discussed, along with the Icelandic perspectives on these developments.

3.1. The international law of the sea

The law of the sea is among the oldest subjects of international law and its development is inseparable from the development of international law in general.²⁰⁹ In comparison, international marine environmental law is a relatively young field that has traditionally attracted limited attention. However, several environmental disasters, including the Torrey Canyon oil spill in 1967²¹⁰ and the Deepwater Horizon oil spill,²¹¹ as well as discoveries of toxic chemicals in the oceans, have alerted policy-makers, legislators and the public to the growing problem of conserving the oceans.²¹² The “protection of the marine environment and sustainable use of its resources have been significant issues in the modernisation of the law of the sea,²¹³ and “[t]he evolution of the modern international law of the sea has been particularly sensitive to, and influenced by, developments in scientific knowledge and technology.”²¹⁴ The law of the sea is now progressively evolving towards improved protection of the marine environment, particularly concerning the conservation and sustainable use of BBNJ.²¹⁵

The predecessors of the LOSC only contained a few, rather undeveloped, provisions concerning the marine environment.²¹⁶ Negotiators of the First and Second Conferences on the Law of the Sea (UNCLOS I and UNCLOS II) failed to settle issues concerning the breadth of the territorial sea and fisheries.²¹⁷ The concept of the EEZ did not exist, and the legal status of

²⁰⁹ Churchill and Lowe (n 134) 3.

²¹⁰ The Torrey Canyon was a oil tanker which grounded and broke in two. Consequently, it spilled approximately 120.000 tons of crude oil into the Atlantic Ocean causing damage to English and French coasts. See Donald Rothwell and WSG Bateman (eds), *Navigational Rights and Freedoms, and the New Law of the Sea* (Martinus Nijhoff Publishers 2000) 188, 203, 245.

²¹¹ The Deepwater Horizon was a oil rig which exploded when gas ran up the drilling column and ignited in - 2010 in the Gulf of Mexico causing it to be the largest oil spill in history, in terms of volume.

²¹² Tanaka, *The International Law of the Sea* (n 18) 267; Churchill and Lowe (n 134) 328.

²¹³ Birnie, Boyle and Redgwell (n 81) 380.

²¹⁴ David M Ong, ‘Towards an International Law for the Conservation of Offshore Hydrocarbon Resources within the Continental Shelf?’ in David Freestone, Richard Barnes and David M Ong (eds), *The law of the sea: progress and prospects* (Oxford University Press 2006) 93.

²¹⁵ Ong (n 214).

²¹⁶ Robin Churchill (n 22) 3.

²¹⁷ Churchill and Lowe (n 134) 51.

the continental shelf was provided by Article 2 and 2(1) of the 1958 Convention on the Continental Shelf,²¹⁸ which stipulated that coastal states had sovereign rights for the purpose of exploring and exploiting the natural resources of the continental shelf.²¹⁹ The landward limit of the shelf was defined as the outer limit of the territorial sea, and the seaward limit was defined as the depth of 200 meters (or the so-called exploitability criterion), under which the continental shelf extended to where the depth of superjacent waters admitted the exploitation of the natural resources of the continental shelf.²²⁰ The ICJ confirmed that these articles represented customary international law in the 1969 *North Sea Continental Shelf Cases*,²²¹ and placed emphasis “on the continental shelf being the natural prolongation of the coastal State’s land mass although no mention is made of this concept in the 1958 Continental Shelf Convention.”²²² This conclusion influenced the development of the issue at UNCLOS III.²²³ At the time, there were three different views relating to the legal status of natural resources in the deep-seabed beyond national jurisdiction.²²⁴ First, under the 1958 Convention on the Continental Shelf, the whole ocean was essentially divided between coastal states and subject to their sovereign rights as the seaward limit of the continental shelves moved into deep waters under the aforementioned exploitability criterion.²²⁵ The second view was that the deep-seabed should be a part of the commons, or *res communis*, and subject to the principle of the freedom of the high seas, meaning that any state could exploit the natural resources of the seabed beyond national jurisdiction. In the third view, the deep-seabed and its natural resources were nobody’s property, or *res nullis*, meaning that states were free to occupy the deep-seabed and exploit its natural resources. Despite the significant differences in these views, all the aforementioned interpretations resulted in technologically developed states having the upper hand against developing states when it came to exploiting the natural resources of the deep-seabed.²²⁶

After failed attempts at adopting a compromising rule for extended jurisdictional rights prior to UNCLOS III,²²⁷ technological advances and developments kept the international law

²¹⁸ Convention on the Continental Shelf, (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311.

²¹⁹ Tomas H Heidar, ‘Legal Aspects of Continental Shelf Limits’ in Myron H Nordquist, John Norton Moore and Tomas H Heidar (eds), *Legal and scientific aspects of continental shelf limits* (M Nijhoff 2004) 21–22.

²²⁰ 1958 Convention on the Continental Shelf, art. 1.

²²¹ *North Sea Continental Shelf Cases (Federal Republic of Germany v. Netherlands & Denmark)* (Judgement) [1969] ICJ Rep 3.

²²² Magnússon (n 146) 12.

²²³ Heidar (n 218) 22.

²²⁴ Tanaka, *The International Law of the Sea* (n 18) 178.

²²⁵ *ibid* 178–179.

²²⁶ *ibid* 179.

²²⁷ Churchill and Lowe (n 134) 15.

of the sea on the international agenda throughout the 1960s.²²⁸ In 1967, Arvid Pardo made a historic proposal concerning the reservation of the sea-bed and ocean floor beyond the present limits of national jurisdiction exclusively for peaceful purposes and the use of its resources in the interests of mankind. This proposal was also among the incentives that led to the UNGA deciding to convene UNCLOS III which was assigned the comprehensive task of dealing with all matters relating to the law of the sea.²²⁹

The agenda of UNCLOS III was “much broader than previous attempts at law-making in this area: deep-seabed mining, the marine environment and the transfer of marine technology were now key issues in the discussions.”²³⁰ At a time when environmental protection had only just become a prominent issue in international relations, the Conference’s achievements were remarkable. The success of UNCLOS III, despite its being concerned with highly political issues and the conflicting interests of a large number of newly independent developing and developed states, can be largely credited to its innovative procedural techniques, i.e. the consensus approach and the package deal approach. After nine years in the making, the LOSC was adopted on 10 December 1982.

One of the most significant changes provided by the LOSC was the establishment of the EEZ and the Area. Because 95 percent “of commercially exploitable fish stocks are found within the 200 nm EEZ, it was expected that by enclosing the commons, and bringing fisheries within national jurisdiction, coastal states would have an economic incentive to adopt effective conservation measures.”²³¹ At the time, coastal states had begun to extend their national jurisdictions towards the high seas in order to meet growing demand for offshore natural resources.²³² These actions were usually unilateral assertions on behalf of coastal states with high interests in fisheries and “led to numerous conflicts with those distant water states asserting high-seas freedoms.”²³³

3.1.1. Extension of jurisdictional rights

Among the conflicts concerning extensions of jurisdictions towards the high seas were the two almost identical Icelandic Fisheries Jurisdiction Cases in 1974 between Iceland against both

²²⁸ Harrison (n 119) 37.

²²⁹ UNGA Res 2750 (XXV) (17 December 1970); UNGA Res 3067 (XXVIII) (16 November 1973).

²³⁰ Harrison (n 119) 39.

²³¹ Rothwell and Stephens (n 18) 320.

²³² Tanaka, *The International Law of the Sea* (n 18) 25.

²³³ Boyle (n 187) 195.

Germany and the United Kingdom.²³⁴ The disputes can be traced back to 1948, when the Icelandic Parliament passed a law on the scientific protection of fishing grounds above the continental shelf,²³⁵ “permitting the Ministry of Fisheries to subject to Icelandic control all fishing areas lying above the country’s continental shelf.”²³⁶ The UK, Germany and other interested parties objected to this extension of the fisheries jurisdiction, and negotiations consequently commenced in order to resolve the conflict. The negotiations culminated at UNCLOS I, although the conference did not reach an agreement concerning the limits of fisheries jurisdictions. Shortly after UNCLOS I, Iceland declared a 12-mile fishery zone, which was met by strong objections on behalf of the UK.²³⁷ The disputes between the two states over the next three years following this extension are referred to as ‘the first Cod War’ by Icelandic historians. Following UNCLOS II, many participants were of the view that coastal states should be entitled to claim a 12 nm fisheries zone under certain conditions, even though the conference did not reach a conclusion on the issue.²³⁸ This momentum for an extended fisheries zone resulted in an Exchange of Notes between Iceland and the UK in 1961, in which the UK “undertook to refrain from objecting to Iceland’s 12 mile fishery zone, in return for permission from Iceland to allow British vessels to fish in certain areas during certain times of the year, within the outer six miles of the zone during a phasing out period of three years.”²³⁹

In 1971, Iceland terminated the agreement and indicated its intention to extend the exclusive fisheries zone to 50 nm, thereby ending a ten-year period during which no substantial conflicts had occurred between the states.²⁴⁰ The UK accordingly objected and unsuccessful negotiation attempts were made. In 1972, the UK filed an application with the Registry of the ICJ, but Iceland denied recognition of the court’s jurisdiction. Immediately after it was clear that the negotiations would be unsuccessful, the UK sought interim measures before the ICJ, which the court granted by ordering Iceland not to enforce its regulations.²⁴¹ Iceland was persistent in its view that the court did not have jurisdiction in the case, completely ignored the order and did not participate in the proceedings. In its judgement, the ICJ avoided the issue of whether the extension for an exclusive fisheries jurisdiction had any basis in international law,

²³⁴ *Fisheries Jurisdiction Case (United Kingdom v. Iceland)* [1974] ICJ Rep 3 & *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)* [1974] ICJ Rep 175.

²³⁵ Act no 44/1948 on the scientific protection of fishing grounds over the continental shelf.

²³⁶ Roger A Briney, ‘The Icelandic Fisheries Dispute: A Decision Is Finally Rendered’ (1975) 5 Ga. J. Int’l & Comp. L. 248, 248.

²³⁷ *ibid* 248–249.

²³⁸ *ibid* 249.

²³⁹ *ibid*.

²⁴⁰ *ibid* 249–250.

²⁴¹ *Fisheries Jurisdiction Case (United Kingdom v. Iceland) (Interim Protection)* [1972] ICJ Rep 12.

instead providing moral persuasion and laying down guidelines for the parties to continue their negotiations.²⁴² Nevertheless, the ICJ stated that a 12 nm exclusive fisheries zone had been acknowledged through customary international law, despite the issue not being settled at UNCLOS I. Furthermore, the ICJ examined the concept and implementation of preferential rights and “concluded that these rights were to be implemented by means of bilateral or multilateral agreements between states concerned or through some other means for the peaceful settlement of disputes in Article 33 of the United Nations Charter[²⁴³].”²⁴⁴ However, the court also found that preferential rights were incompatible with the exclusion of fishing activities of other states, and given the long-established UK fishing practice around Iceland, the extension was considered inapplicable to the UK “and was an infringement of the principle of the freedom of the High Seas and the rights of the [UK] under the 1961 Exchange of Notes.”²⁴⁵ This was not, however, the end of the dispute, which was finally resolved in 1976 after years of legal and political confrontation in a favourable agreement for Iceland in which the UK recognised the 200 nm exclusive fisheries zone declared by Iceland in 1975.²⁴⁶

The most relevant aspect of the Icelandic Fisheries Cases as concerns BBNJ is the fact that the judgement “indicated for the first time that states had a duty in customary law not merely to allocate common resources equitably, but also to conserve them for future benefit in the interest of sustainable utilization.”²⁴⁷ Another important aspect of the judgement is the fact that “the ICJ made significant observations on the character of high-seas fishing resources as common property.”²⁴⁸ References to common property in international law primarily mean resources situated in ABNJ. The 1893 Bering Sea Fur-Seals Arbitration had confirmed that the common property doctrine extended to most living resources found in the high seas, including birds, fish and mammals. Pursuant to customary international law and, at the time, Article 2 of the 1958 Geneva Convention on the High Seas,²⁴⁹ no state could validly claim exclusive rights over any parts of the high seas, and consequently no state had the rights to prevent others from exploiting the high seas.²⁵⁰

²⁴² Briney (n 235) 248, 256.

²⁴³ Charter of the United Nations (Adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

²⁴⁴ Briney (n 235) 253.

²⁴⁵ DW Bowett, ‘The U.K./Icelandic Fisheries Case’ (1974) 33 *The Cambridge Law Journal* 179, 179.

²⁴⁶ Guðni Th. Jóhannesson, *Porskastríðin Þrjú: Saga Landhelgismálsins 1948-1976* (1st edn, Hafréttarstofnun Íslands 2006) 144.

²⁴⁷ Birnie, Boyle and Redgwell (n 81) 196.

²⁴⁸ *ibid* 195.

²⁴⁹ LOSC art. 89 entails the same principle by stating that no state may validly purport to subject any part of the high sea to its sovereignty

²⁵⁰ Birnie, Boyle and Redgwell (n 81) 195.

An important factor contributing to the classification of living resources as common property is that they have generally been so plentiful that the cost of asserting and defending exclusive rights exceeds the advantages to be gained. A regime of open access has generally been to everyone's advantage.²⁵¹

Needless to say, this perspective has changed with increased knowledge, as "the availability of a free resource leads to over-exploitation and minimizes the interest of any individual state in conservation and restraint."²⁵² This is often dramatically referred to as the "tragedy of the commons".²⁵³ It has been speculated that the reason for the ICJ not dealing with the most important issue before it was that "a definitive statement would jeopardize the outcome of [UNCLOS III] in that it might confuse the issues and affect the determination of the participants to come to some conclusion in regard to these problems."²⁵⁴ Over the following years, claims for extended jurisdictions increased and affected the negotiations at UNCLOS III, where the 200 nm EEZ was adopted.

3.2. International environmental law

International legal protection of the environment has been among the most debated fields of international law over the past decades. Despite considerably broad political consensus and increased awareness of the importance of environmental protection, best reflected in a number of UN environmental conferences in recent decades, there seems to be little agreement regarding exactly what should be done, to what extent, and who should cover the monetary expenses.²⁵⁵

In a nutshell, developed industrialized nations, whose industrialization and lifestyle has done much to help degrade the environment, are reluctant to mend their ways; less developed nations tend to think that if others could benefit from industrialization, then so should they, regardless of the consequences. And if much degradation has been caused by those others, it only seems fair that they, who became rich on the back of the degradation, should foot most of the bill. Partly as a result, much of international environmental law consists of fragile compromises.²⁵⁶

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

²⁵⁴ Briney (n 235) 256.

²⁵⁵ Klabbers (n 95) 257.

²⁵⁶ *ibid* 252.

International environmental law, in different forms than those known today, can be traced back several centuries.²⁵⁷ Early in the twentieth century, the first treaties on seals, fisheries and whaling were concluded as a result of increased international competition for living resources.²⁵⁸ The North Pacific Fur Seal Convention of 1911²⁵⁹ was a result of the 1893 *Bering Sea Fur-Seals Arbitration*, and as early as 1926, the emergence of environmental issues and concerns was evident when a draft convention on pollution from ships was drawn up at a conference in Washington D.C., although it was never opened for signature.²⁶⁰ In contrast with to the law of the sea, there is no single treaty or organisation working for the protection of the environment and “the closest international law has come is the creation of a programme on the part of the UN (the UN Environmental Programme, or UNEP) [...] Instead, environmental protection is parcelled out into a number of sectoral regimes.”²⁶¹ Regular meetings and conferences, often under the auspices of the UN, perform many of the tasks which would otherwise be assigned to international organisations.²⁶² Two of those conferences, namely the Stockholm Conference and the Rio Conference, are identified as the point of emergence of international environmental law.²⁶³

3.2.1. The modern era of international environmental law

The Stockholm Conference was a global conference convened by the UNGA with the purpose of serving as a practical means to provide guidelines for, and encourage actions by governments and international organisations, designed to protect and improve the human environment, as well as remedy and prevent its impairment by means of international cooperation.²⁶⁴ One of the essential objectives of the conference was to produce a document of basic principles; accordingly, the conference adopted the Stockholm Declaration. The declaration “espouses mostly broad environmental policy goals and objectives rather than detailed normative positions.”²⁶⁵ Despite not being legally binding, it had significant impact in

²⁵⁷ Peter H Sand (ed), *The History and Origin of International Environmental Law* (Edward Elgar Publishing 2015).

²⁵⁸ Birnie, Boyle and Redgwell (n 81) 379.

²⁵⁹ Convention between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals or The Fur Seal Treaty of 1911 (signed 7 July 1911) (1911) 214 CTS 80.

²⁶⁰ Birnie, Boyle and Redgwell (n 81) 379.

²⁶¹ Klabbbers (n 95) 257.

²⁶² *ibid* 253.

²⁶³ *ibid*.

²⁶⁴ UNGA Res 2398 (XXIII) (16 December 1968); UNGA Res 2581 (XXIV) (15 December 1969).

²⁶⁵ Günther Handl, ‘Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992’ (2012) 11 United Nations Audiovisual Library of International Law 1.

developing the principles of international environmental law, and both awareness and environmental law-making increased in the following years.²⁶⁶ It should be noted that the Stockholm Conference and subsequent declaration impacted the UNCLOS III significantly, and is perhaps one of the main reasons for the LOSC's emphasis on the protection of the marine environment.²⁶⁷

Twenty years later, the UNGA decided to convene the Rio Conference and tasked the conference with ten broad objectives.²⁶⁸ These objectives included examining the state of the environment, including changes that had occurred since the Stockholm Conference, and recommending measures to be taken in order to protect and enhance the environment.²⁶⁹ The Rio Conference was in many respects a Stockholm redux, similarly rejecting the idea of fundamental institutional reorganisation and resulting in increased momentum rather than a legal or political breakthrough.²⁷⁰ Interestingly, in contrast with UNCLOS III where some states were of the view that "balancing of competing state interests could not be undertaken by a body of independent legal experts",²⁷¹ the Group of 77 (G-77) and China rejected a proposal for a convention-style draft text for an Earth Charter, which had been advocated for by a legal expert group working under the auspices of the World Commission on Environment and Development. The reasoning for the rejection on the part of the G-77 was that the draft was unbalanced and emphasised the environment over development.²⁷² This undeniably raises the question of whether it would have been possible to adopt an Earth Charter, similar to the LOSC, had the task of preparing the text not been delegated to a group of legal experts, but instead arrived at via a process similar to the innovative UNCLOS III procedures. In the end, the Rio Conference resulted in the Rio Declaration and Agenda 21, which devoted a whole chapter to the protection of the oceans and the rational use and development of their living resources. However, it has been argued that the most significant results of the Rio Conference were not the outputs of the conference, but rather the treaties negotiated in parallel:²⁷³ that is, the UN Framework Convention on Climate Change²⁷⁴ (and more relevant to this thesis) the CBD,

²⁶⁶ *ibid.*

²⁶⁷ Robin Churchill (n 22) 3–4.

²⁶⁸ UNGA Res 44/228 (22 December 1989) UN Doc A/RES/44/288, para 15.

²⁶⁹ *Ibid.*

²⁷⁰ Daniel Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press 2010) 34.

²⁷¹ Harrison (n 119) 40.

²⁷² Handl (n 264) 3.

²⁷³ Bodansky (n 269) 34.

²⁷⁴ 1992 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

which “addresses directly the issues of the conservation and sustainable use of biodiversity in general, including marine biodiversity.”²⁷⁵ However, the CBD applies primarily to biodiversity within national jurisdiction, as will be discussed in greater detail later.

International environmental law is developing rapidly and has proven to be one of the most challenging topics of the International Law Commission.²⁷⁶ There are now hundreds of multilateral and bilateral environmental agreements and non-legally binding instruments concerned with environmental protection, reflecting global advances in the scientific understanding of the environment.²⁷⁷ International environmental law remains much debated and can be subdivided into several areas, including marine environmental law and international biodiversity law, a term that has been used for international and regional treaties regarding biodiversity.²⁷⁸

3.2.2. International Biodiversity law

The latter half of the twentieth century “was marked by a growing interest within the international community in the use of law as an approach to the conservation of biodiversity.”²⁷⁹ Interest in a global biodiversity convention was sparked at the General Assembly of the World Conservation Union in the 1980s. In 1988, UNEP convened the Ad Hoc Working Group of Experts on Biological Diversity to explore the need for such a treaty. Shortly afterwards, UNEP established the Ad Hoc Working Group of Technical and Legal Experts, later renamed the Intergovernmental Negotiating Committee (INC), in order to prepare an international legal instrument for the conservation and sustainable use of biodiversity.²⁸⁰ The INC held its last meeting in May 1992, shortly prior to the Rio Conference, but “[g]oing into the final meeting, delegates had agreed on less than half of the draft convention: 27 out of 42 articles contained square brackets. Of course, these outstanding areas reflected the most complex and controversial issues of the negotiation [...]”²⁸¹ Despite several

²⁷⁵ de La Fayette (n 5) 243.

²⁷⁶ Alan E Boyle and CM Chinkin, *The Making of International Law* (Oxford University Press 2007) 197.

²⁷⁷ Edith Brown Weiss, ‘The Evolution of International Environmental Law’ [2011] *Japanese Yearbook of International Law* 1, 26.

²⁷⁸ Jóhannsdóttir, Cresswell and Bridgewater (n 54) 1.

²⁷⁹ Désirée M McGraw, ‘The Story of the Biodiversity Convention: From Negotiation to Implementation’ in Philippe G Le Prestre (ed), *Governing global biodiversity: the evolution and implementation of the convention on biological diversity* (Ashgate 2002) 10.

²⁸⁰ ‘History of the Convention’ <<https://www.cbd.int/history/>> accessed 25 March 2017; McGraw (n 278) 9–13.

²⁸¹ McGraw (n 278) 13.

obstacles, the INC completed its work and the CBD was adopted only two weeks before the Rio Conference.²⁸²

Initially adopted with a view to put “order into disparate agreements regarding the protection of wildlife, the CBD quickly moved beyond this narrow concern.”²⁸³ Its principal objective is the conservation and sustainable use of biodiversity and the fair and equitable sharing of benefits arising from the utilisation of genetic resources (cf. Article 1). Because it addresses a wide range of differing issues, such as ecosystem exploitation, intellectual property rights, scientific knowledge, trade and commerce, and moreover recognises that the key to conserving biological diversity depends on using this diversity in a sustainable manner, the CBD has been referred to as “the first true sustainable development convention.”²⁸⁴

Additionally, the CBD established “institutional arrangements which provide a mechanism for further development of, and for monitoring the implementation of, the [CBD] through meetings, work programmes, reviews and negotiations.”²⁸⁵ These institutions are the Conference of the Parties (COP), the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) and the Secretariat. The regime established by the CBD has evolved significantly since 1992 during which time it has, for example, negotiated protocols and set up ad-hoc committees, as well as adopted several decisions which have been the initiative for programs and regulations relevant to BBNJ.²⁸⁶ Aside from the CBD, an abundance of multilateral environmental agreements focus on the protection of biodiversity.²⁸⁷ Despite the relatively extensive legal framework of treaties and legal instruments concerning biodiversity, there is little evidence of improved biodiversity outcomes. This is evident from the GBO, which points out that “[t]here has been significant progress towards meeting some components of the majority of the Aichi Biodiversity Targets.”²⁸⁸ The GBO concludes with a reminder that “continuing with ‘business as usual’ in our present patterns of behaviour, consumption, production and economic incentives will not allow us to realise the vision of the world with ecosystems capable of meeting human needs into the future.”²⁸⁹

²⁸² *ibid* 13–14.

²⁸³ Le Prestre Philippe G., ‘The Convention on Biological Diversity: Negotiating the Turn to Effective Implementation’ [2002] ISUMA: Canadian Journal of Policy Research 92, 93.

²⁸⁴ McGraw (n 278) 1–2.

²⁸⁵ Secretariat of the Convention on Biological Diversity (ed), *Handbook of the Convention on Biological Diversity* (Earthscan Publications 2001) xxvii.

²⁸⁶ Philippe G. (n 282) 93.

²⁸⁷ Jóhannsdóttir, Cresswell and Bridgewater (n 54) 142.

²⁸⁸ ‘Global Biodiversity Outlook 4: A Mid-Term Assessment of Progress towards the Implementation of the Strategic Plan for Biodiversity 2011-2012’ (n 72) 10.

²⁸⁹ *ibid* 143.

3.3. International discussions for a new implementing agreement

The developments that lead to the UNGA establishing the BWG and the PrepCom did not, as mentioned above, evolve in a vacuum, and have in fact been referred to as a long and winding road.²⁹⁰ The UNGA has decided that it will conclude on the convening and starting date of an intergovernmental conference to consider the recommendations of the PrepCom before the end of the 72nd session of the UNGA, although such a decision will depend on the outcome of the PrepCom.²⁹¹ This chapter will outline the developments and processes under the auspices of the UNGA to date, as well as the Icelandic perspective on these developments.

3.3.1. *The Informal Consultative Process on the Law of the Sea*

In November 1999, the UNGA established the UNICPOLOS, in consistence with the legal framework of the LOSC and the goals of chapter 17 of Agenda 21,²⁹² in order to facilitate the annual review cycle of the LOSC, which was outlined above. The first meetings of the UNICPOLOS had similar mandates, and discussed various topics and suggested several issues to be considered by the UNGA.²⁹³ When identifying issues for the possible consideration of the third meeting of the UNICPOLOS, in 2002, one delegation expressed the hope that future UNICPOLOS meetings would discuss the management of risks to biodiversity in ABNJ.²⁹⁴ At the fourth meeting of the UNICPOLOS, the Netherlands submitted a report addressing the need to improve protection of vulnerable marine ecosystems in ABNJ. The report identified gaps in the legal framework and was intended to provide input for discussions on the issue.²⁹⁵ Accordingly, the UNICPOLOS discussed the protection of vulnerable marine ecosystems and proposed, among other things, that the UNGA invite the relevant international bodies to consider urgently how to better address threats and risks to vulnerable marine biodiversity and ecosystems in ABNJ, as well as how existing treaties and relevant instruments, particularly the LOSC, could be used in that process.²⁹⁶ Consequently, the UNGA invited the relevant global and regional bodies to investigate how the issue might be better addressed on a scientific basis.

²⁹⁰ Wright and others (n 70).

²⁹¹ UNGA Res 69/292 (19 June 2015) UN Doc A/RES/69/292 (n 13) para 1(k).

²⁹² UNGA Res 54/33 (18 January 2000) UN Doc A/RES/54/33 para 2.

²⁹³ Jóhannsdóttir, Cresswell and Bridgewater (n 54) 1.

²⁹⁴ UNGA (56th Session) 'Report on the Work of the UNICPOLOS' (22 June 2001) UN Doc A/56/121 para 350.

²⁹⁵ UNICPOLOS (Fourth Meeting) 'The need to protect and conserve vulnerable marine ecosystems in areas beyond national jurisdiction: Submitted by the delegation of the Netherlands' (22 May 2003) UN Doc A/AC.259.9.

²⁹⁶ UNGA (58th Session) 'Report on the work of the UNICPOLOS at its fourth meeting' (26 June 2003) UN Doc A/58/95 para 20(c).

It also requested the Secretary-General to cooperate with those bodies, as well as to submit *ab addendum* to his annual report to the UNGA, describing the extant threats and risks to marine ecosystems and biodiversity in ABNJ, and details of the conservation and management measures already in place.²⁹⁷ Furthermore, the UNGA recommended that the UNICPOLOS should organise its discussions in the fifth meeting around “[n]ew sustainable uses of the oceans, including the conservation and management of the biological diversity of the seabed in [ABNJ].”²⁹⁸

The issue of BBNJ was explored in depth in panel discussions at the fifth meeting of the UNICPOLOS.²⁹⁹ Panel discussions were preceded by information on the outcome of the seventh session of the Conference of the Parties to the CBD, provided by the Executive Secretary of the CBD. The Secretary pointed out that the seventh COP had adopted several decisions relevant to the work of the UNICPOLOS, established a working group on Protected Areas, and called upon the UNGA to take measures to protect and conserve marine biodiversity.³⁰⁰ Several delegations made specific proposals for the conservation and management of BBNJ; however, delegations of the meeting had different views and there was no consensus on how to deal with the issue.³⁰¹ Consequently, the UNICPOLOS was not able to recommend setting up a committee of experts or an intergovernmental process, as had been discussed, to address existing legal gaps in the governance of ABNJ to the UNGA.³⁰² However, the UNICPOLOS proposed that the UNGA encourage States to improve their understanding and knowledge of the deep-seabed in ABNJ, either individually or in collaboration with international organisations.³⁰³ A year later, at the sixth meeting of the UNICPOLOS, there had been a change in the wind and several delegations welcomed the establishment of an ad hoc open-ended informal working group to study issues relating to BBNJ. Some of those delegations argued that the agenda of the group should be broad in scope, and that fisheries should be seen as a key component of its work.³⁰⁴

²⁹⁷ UNGA Res 58/240 (5 March 2004) UN Doc A/RES/58/240 para 52.

²⁹⁸ *ibid* para 68.

²⁹⁹ ‘Discussion Panel: New Sustainable Uses of the Oceans, Including the Conservation and Management of the Biological Diversity of the Seabed in Areas Beyond National Jurisdiction’ (*DOALOS*) <http://www.un.org/depts/los/consultative_process/5thmeetingpanel.htm> accessed 2 March 2017.

³⁰⁰ UNGA (59th Session) ‘Report on the work of the UNICPOLOS at its fifth meeting’ (1 July 2004) UN Doc A/59/122 para 56-62.

³⁰¹ *ibid* para 73-93.

³⁰² *ibid* para 87.

³⁰³ *ibid* para 7(b).

³⁰⁴ UNGA (60th Session) ‘Report on the work of the UNICPOLOS at its sixth meeting’ (7 July 2005) UN Doc A/60/99 para 42.

3.3.2. *Ad-hoc Open-ended Informal Working Group on BBNJ*

In 2004, the UNGA decided to establish the BWG,³⁰⁵ which convened nine times between 2006 and 2015 and was tasked with a broad mandate from the outset.³⁰⁶ In 2011, the BWG recommended that a process be initiated by the UNGA, to ensure that the legal framework for the conservation and sustainable use of BBNJ was effective by identifying gaps and possible developments, including through the implementation of existing instruments and possibly through the development of a multilateral agreement under the LOSC.³⁰⁷ Furthermore, the BWG identified four crucial elements that the process should address “in particular, together and as a whole.”³⁰⁸ These were, in short:

1. MGRs, including questions of the sharing of benefits;
2. Measures such as area-based management tools (ABMTs) including marine protected areas;
3. Environmental impact assessments (EIAs); and
4. Capacity building and the transfer of technology.

Collectively, these elements are referred to as the 2011 package. The recommendation was endorsed by the UNGA in resolution 66/231.³⁰⁹ The issues of conservation and sustainable use of BBNJ and the 2011 package gathered momentum at Rio+20, which resulted in a non-binding outcome document entitled “The Future We Want” where participants of the conference recognised the importance of the conservation and sustainable use of BBNJ.³¹⁰ Participants noted the ongoing work under the auspices of the UNGA and the BWG and, building on that work, committed to addressing the issue on an urgent basis, including by taking a decision on the development of an international instrument under the LOSC before the end of the 69th session of the UNGA.³¹¹ The outcome document was endorsed by the UNGA in resolution 66/288.³¹² In 2013, the UNGA requested that the BWG make recommendations on the scope, parameters and feasibility of an international legally binding treaty under the LOSC.³¹³ In its recommendations, the BWG stressed the need for a comprehensive global regime to better address the conservation and sustainable use of BBNJ, deciding in favour of developing an

³⁰⁵ UNGA Res 59/24 (17 November 2004) UN Doc A/RES/59/24 (n 196) para 73.

³⁰⁶ Long and Chavez (n 12) 217–218.

³⁰⁷ UNGA Res 66/231 (24 December 2011) UN Doc A/RES/66/231 Annex I, p. 40, para (a).

³⁰⁸ *ibid* Annex I, p. 40, para (b).

³⁰⁹ *ibid* para 166.

³¹⁰ ‘Future We Want - Outcome Document’ (*Sustainable Development Knowledge Platform*) para 162

<<https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf>> accessed 15 February 2017.

³¹¹ *ibid* 42 para 162.

³¹² UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288 para 2.

³¹³ UNGA Res 68/70 (9 December 2013) UN Doc A/RES/68/70 para 201; The UNGA reaffirmed the request in UNGA Res 69/245 (29 December 2014) UN Doc A/RES/69/245 para 214.

international legally binding instrument under the LOSC on the issue.³¹⁴ The BWG further recommended that the PrepCom be established and that negotiations should address the topics identified in the 2011 package.³¹⁵ In this context it must be noted that some states, including Iceland and the US, remained reluctant to develop a new international legally binding instrument. The US “argued that the new process should lead to an ‘international instrument’ rather than ‘an international legally binding instrument’ following the wording used in the Rio+20 outcome document. This wording would have left the door open for the development of soft law.”³¹⁶ For its part, Iceland promoted regional efforts such as the OSPAR Convention³¹⁷ and the better implementation of existing instruments.³¹⁸ In its resolution 69/292, the UNGA decided to develop an international legally binding instrument under the LOSC. To that end, it established the PrepCom to make substantive recommendations on the elements of a draft text of an international legally binding instrument.

3.3.3. The Preparatory Committee

The process of developing an implementing agreement for BBNJ moved into a new stage with the PrepCom. To date, the PrepCom has convened three times without reaching any apparent milestones. Its mandate is made clear by UNGA resolution 69/292, which stipulates that the PrepCom shall make substantive recommendations to the UNGA on the elements of a draft text of an international legally binding instrument under the Convention, taking into account the work of the BWG, and report to the UNGA by the end of 2017.³¹⁹ The resolution also provides that the PrepCom shall address the topics identified in the 2011 package and expressly stipulates that existing relevant legal instruments shall not be undermined.³²⁰ States have, however, disagreed on the mandate, and some have “argued that the PrepCom should focus on preparing rules of procedure and a structure for the negotiations, which raised concern that the new process would, in practice, lead to the continuation of the same informal discussions that had taken place under the auspices of the [BWG].”³²¹ In this respect it is important to bear in

³¹⁴ UNGA (69th Session) ‘Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly’ (13 February 2015) UN Doc A/69/780 Annex I: Outcome of the BWG, para, 1(d) and (e).

³¹⁵ *ibid* para 1.

³¹⁶ Wright and others (n 70) 37.

³¹⁷ "OSPAR Convention for the protection of the marine environment of the North-East Atlantic." *OSPAR Commission, London, UK* (1992).

³¹⁸ Wright and others (n 70) 37.

³¹⁹ UNGA Res 69/292 (19 June 2015) UN Doc A/RES/69/292 (n 13) para 1.

³²⁰ *ibid* 2–3.

³²¹ Wright and others (n 70) 30.

mind that the PrepCom is mandated address the topics identified in the 2011 package in its negotiations and make substantive recommendations, on the basis of which the UNGA will decide whether or not to convene an intergovernmental conference.

The first session of the PrepCom considered issues including the scope of the potential agreement, its relationship with other instruments, guiding approaches and principles and the elements of the 2011 package.³²² The mandate of the PrepCom provides that it shall exhaust every effort to reach agreement on substantive matter by consensus which “has been facilitated through the use of informal working groups arranged on the basis of the four key aspects of the proposed agreement.”³²³ Observers generally state that the impressions and momentum of the first session of the PrepCom was positive, the general attitude was cooperative, and that on the basis of progress made it should be relatively easy to “conclude that the negotiation of a new instrument is legally and technically feasible.”³²⁴ Although the first session was relatively well attended, attendance was “by no means universal, despite the aim of the UNGA to be as inclusive as possible through the participation of all States, IGOs [Intergovernmental Organisations] and NGOs, not just States Parties to the LOSC.”³²⁵ High sea fisheries were a noticeable feature in the discussions at the first session, and there was considerable tension between delegations who favoured either the inclusion or exclusion of high seas fisheries from the scope of the potential agreement; in the end; no agreement was reached on the issue.³²⁶ Opposed to including fisheries in the scope of the potential agreement were Russia, Japan and Iceland, which noted that no agreement was reached concerning high seas fisheries at the BWG and that the issue therefore fell outside the scope.³²⁷

To date, no agreement has been reached concerning how to deal with fisheries in the potential agreement. Several delegations have recommended distinguishing between fish as MGRs and fish as commodity. A group of states called for the definition of MGRs to include fish used for their genetic purposes, while the European Union has pointed out that fish as biological resources fall outside of the mandate of the potential agreement.³²⁸

³²² ‘Chair’s Overview of the First Session of the Preparatory Committee’ para 8 <http://www.un.org/depts/los/biodiversity/prepcom_files/PrepCom_1_Chair's_Overview.pdf> accessed 3 May 2017; IISD Reporting Services, ‘Earth Negotiations Bulletin’ (2016) Vol 25 No. 106 <<http://enb.iisd.org/download/pdf/enb25106e.pdf>> accessed 10 April 2017.

³²³ Richard Barnes, ‘The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and Its Impact on International Fisheries Law’ (2016) 31 *The International Journal of Marine and Coastal Law* 583, 591.

³²⁴ Long and Chavez (n 12) 229; See also IISD Reporting Services, ‘Earth Negotiations Bulletin’ (n 321).

³²⁵ Barnes (n 322) 590.

³²⁶ *ibid* 595.

³²⁷ IISD Reporting Services, ‘Earth Negotiations Bulletin’ (n 321) 4.

³²⁸ ‘Chair’s Overview of the First Session of the Preparatory Committee’ (n 321) 6.

The second session of the PrepCom met in plenary and working group settings and considered proposals regarding the possible elements of the potential implementing agreement, particularly the 2011 package. The session was reported to have “lived up to the expectations raised by the constructive dialogue at PrepCom 1 [...]”³²⁹ While attendance was better than at the first session, with 115 UN member states and three non-member states, this can hardly be considered universal, bearing in mind that almost a third of the States Parties to the LOSC did not attend. In addition to the previous working groups, a working group on cross-cutting issues was convened in order to focus on objectives, principles, scope, definitions, relationships with other instruments, institutional arrangements, responsibility and liability, dispute settlement and final clauses.³³⁰ Among the principles addressed by the working group on cross-cutting issues was the principle of common but differentiated responsibilities, at which point a group of African States supported by Costa Rica, Ecuador and others called for the principle’s inclusion in the potential implementing agreement, while the US and Japan argued that the principle is not included in the CBD, LOSC or the UNFSA and that it was therefore inappropriate for the potential agreement.³³¹ Finally, it was decided that the Chair would prepare a compilation of proposals for elements of a draft text on the potential agreement prior to the third session in order to provide a structured presentation of issues and ideas reflected in the second session. The Chair’s non-paper was published on 28 February 2017.³³²

The third session was considered by some to be the last entirely substantive session. Reportedly, the PrepCom continued discussions on the issues of the 2011 package in increasingly detailed proposals. Discussions concerning MGRs focused on scope, definitions and approaches, as well as intellectual property rights and a clearing-house mechanism, while ABMT discussions focused on objectives, principles and relationships with existing mechanisms. As for cross-cutting, delegations debated how to avoid undermining the existing legal framework relevant to BBNJ.³³³ The session concluded by requesting an updated non-paper “structuring and streamlining submissions as well as draft substantive recommendations for consideration by [the fourth session].”³³⁴

³²⁹ IISD Reporting Services, ‘Earth Negotiations Bulletin’ (2016) Vol. 25 No. 118 1 <<http://enb.iisd.org/download/pdf/enb25118e.pdf>> accessed 2 May 2017.

³³⁰ *ibid* 15–16.

³³¹ *ibid* 16.

³³² DOALOS, ‘Chair’s Non-Paper’ (n 80).

³³³ Lauren Anderson, ‘PrepCom 2 Identifies Areas of Convergence and Further Discussion on BBNJ Instrument | SDG Knowledge Hub | IISD’ <<http://sdg.iisd.org/news/prepcom-2-identifies-areas-of-convergence-and-further-discussion-on-bbnj-instrument/>> accessed 4 May 2017.

³³⁴ IISD Reporting Services, ‘Earth Negotiations Bulletin’ (n 15) 1.

The fourth session is scheduled from 10-21 July 2017 and is expected to prepare recommendations to the UNGA on whether to convene an intergovernmental conference in order to finalise negotiations of a new international legally binding instrument. Considering, however, that limited participation may stem from limited interest, and that there still seems to be a considerable lack of consensus, the PrepCom could possibly request additional meetings before recommending convening an intergovernmental conference.

3.3.4. Icelandic perspective on the recent developments

Situated in the North Atlantic Ocean and surrounded by some of its richest and most prolific fishing grounds, Iceland has been dependent on fisheries for centuries, as these have proved more reliable than the fruits of earth.³³⁵ Fisheries are a significant part of Icelandic economic and cultural history.³³⁶ Iceland has played a role in the development of the international law of the sea, most notably as a result of the international disputes discussed above between the UK and Iceland (the so-called Cod Wars) over fishing rights and the extension of Icelandic jurisdiction, which ended in 1976 with an agreement in which the UK recognised the 200 nm exclusive fisheries zone declared by Iceland in 1975.³³⁷ In her speech at Rio+20, the Icelandic Minister for the Environment and Natural Resources stated that “Iceland succeeded in transcending from a small island developing state to a small island state in the 20th century – mainly by gaining control of its rich marine resources. The importance of the oceans cannot be overstated for a country like ours.”³³⁸ It must be noted that this is a significantly simplified picture of the events that led to Iceland transcending from a developing to a developed state. However, Iceland has always proclaimed that maintaining healthy oceans and marine ecosystems is a constant priority.³³⁹

From the beginning of the discussions concerning an implementing agreement on BBNJ, Iceland has opposed and been unconvinced of the need for such an instrument. The country has persistently maintained its position that the conservation and sustainable utilisation of living resources is a local and regional matter, and that there is no lack of existing legal

³³⁵ Jón Þ Þór, ‘History - The Icelanders and the Sea’ (*Icelandic Fisheries: Information centre of the Icelandic Ministry of Fisheries and Agriculture*) <<http://www.fisheries.is/history/>> accessed 13 February 2017.

³³⁶ *ibid.*

³³⁷ Guðni Th. Jóhannesson (n 245) 144–145.

³³⁸ Ministry for the Environment and Natural Resources and Svandís Svavarsdóttir, Minister for the Environment, ‘Statement at the United Nations Conference on Sustainable Development 22 June 2012, Rio de Janeiro, Brazil.’ <<https://sustainabledevelopment.un.org/content/documents/1703liceland.pdf>> accessed 20 February 2017.

³³⁹ See for example; UNGA (70th Session) ‘68th plenary meeting’ (8 December 2015) UN Doc A/70/PV.68, Ms Jonsdottir (Iceland), 22.

instruments and tools to ensure that it continues.³⁴⁰ At the fifth meeting of the UNICPOLOS in June 2004, Iceland expressed its view that a new instrument should not be commenced before existing instruments, particularly the UNFSA, are fully implemented. However, Iceland has also recognised that minerals at the deep-seabed and living organisms are often closely related or linked while being subject to different legal regimes, and that this may cause practical problems, which need to be addressed in due course.³⁴¹

In a statement at the first meeting of the BWG, Iceland stated that the promotion of scientific research was the single most important action to take in order to promote the conservation and sustainable use of BBNJ, and that:

The [LOSC] provides the legal framework for all activities in the oceans including the conservation and sustainable use of marine biodiversity in [ABNJ]. A number of specialized agreements supplement the [LOSC] by providing measures for the conservation and sustainable use of marine biodiversity. In our view, the implementation of the [LOSC] and relevant agreements will promote the conservation and sustainable use of marine biodiversity in [ABNJ]. We are not convinced of the need for a new global agreement to deal with this issue.

We emphasize that the conservation and management of living marine resources in [ABNJ] should remain at a regional level, in accordance with the [LOSC], the UN Fish Stocks Agreement and other relevant instruments.³⁴²

Throughout the work of the BWG, Iceland was persistent in stating that improved implementation of the LOSC and related instruments (particularly the UNFSA) would promote the conservation and sustainable use of BBNJ, while also pointing out that the need to strengthen cooperation and coordination between states was both obvious and crucial. When the idea of a new implementing agreement started gathering increased momentum and the BWG was tasked with making recommendations on the scope, parameters, and feasibility of an international instrument under the LOSC,³⁴³ Iceland cautioned that the scope should not include fisheries and should instead focus on possible gaps in the existing legal framework.³⁴⁴

³⁴⁰ UNGA (57th Session) ‘71st plenary meeting’ (10 December 2002) UN Doc A/57/PV.71, Mr Mathiesen (Iceland), 16; UNGA (58th Session) ‘63rd plenary meeting’ (24 November 2003) UN Doc A/58/PV.63, Mr Pálsson (Iceland), 10; UNGA (59th Session) ‘54th plenary meeting’ (16 November 2004) UN Doc A/59/PV.54, Mr. Hannesson (Iceland), 10; UNGA (60th Session) ‘54th plenary meeting’ (28 November 2005) UN Doc A/60/PV.54, Mr. Hannesson (Iceland), 27.

³⁴¹ ‘Iceland’s Ocean Strategy Introduced at the United Nations’ (n 16).

³⁴² Tomas H. Heidar, Legal Adviser, Icelandic MFA, ‘Marine Biological Diversity’ (*Ministry for Foreign Affairs*, 13 February 2006) <<https://www.mfa.is/news-and-publications/nr/2963>> accessed 28 February 2017.

³⁴³ UNGA Res 69/292 (19 June 2015) UN Doc A/RES/69/292 (n 13) para 214.

³⁴⁴ UNGA (69th Session) ‘67th plenary meeting’ (9 December 2014) UN Doc A/69/PV.67, Mr. Pálsson (Iceland), 3; UNGA (70th Session) ‘68th plenary meeting’ (8 December 2015) UN Doc A/70/PV.68 (n 338), Ms. Jonsdottir (Iceland), 22.

At the first three sessions of the PrepCom, Iceland has remained unconvinced of the need for a new international legally binding instrument under the LOSC, and emphasising that existing legal instruments should not be undermined in the process of creating a new agreement. Iceland has consistently reiterated that the existing relevant legal framework should not be undermined and that high seas fisheries should not be part of the scope of the potential agreement. At the second session, Iceland stated that the main purpose of the new agreement should be twofold. First, it should coordinate the co-existence of existing legal instruments; second, it should fill legal gaps relating to the conservation and sustainable use of BBNJ where needed.³⁴⁵ Furthermore, Iceland has pointed out that conservation and sustainable use are two distinct elements, and that maintaining a good balance between these elements is necessary as one should not be promoted at the cost of the other.³⁴⁶ Moreover, Iceland has expressed its understanding that discussions concerning MGRs refer to MGRs both on the seabed and in the water column above it. In that context, while unconvinced that the CHM principle is suitable for MGRs, Iceland argued that perhaps neither the principle of the freedom of the high seas nor the principle of CHM are suitable for “such comprehensive substantive scope of application as biological diversity, including MGRs, beyond national jurisdiction requires [...]”³⁴⁷ Despite being of the view that the freedom of the high seas is more suitable for MGRs, Iceland has recognised that there may be a need to “seek alternative or hybrid solutions for the matter at hand in order to reach consensus.”³⁴⁸

³⁴⁵ Matthías G. Pálsson, Counsellor, Icelandic MFA, ‘General Statement’ (n 17); Matthías G. Pálsson, Counsellor, Icelandic MFA, ‘Statement on the Scope of an International Legally Binding Instrument and Its Relationship with Other Instruments (Item 7)’ (*Statement at the meeting of the PrepCom, New York*, 29 March 2016) <<http://statements.unmeetings.org/media2/7656896/7-iceland.pdf>> accessed 28 February 2017; Matthías G. Pálsson, Counsellor, Icelandic MFA, ‘Statement on Area-Based Management Tools, Including MPAs (Item 7 Continued)’ (*Statement at the meeting of the PrepCom, New York*, 30 March 2016) <<http://statements.unmeetings.org/media2/7656973/74-iceland.pdf>> accessed 1 March 2017.

³⁴⁶ Matthías G. Pálsson, Counsellor, Iceland MFA (n 79); Matthías G. Pálsson, Counsellor, Icelandic MFA, ‘Statement on the Scope of an International Legally Binding Instrument and Its Relationship with Other Instruments (Item 7)’ (n 344).

³⁴⁷ Matthías G. Pálsson, Counsellor, Icelandic MFA, ‘Statement on Marine Genetic Resources (Item 7)’ (*Statement at the meeting of the PrepCom, New York*, 30 March 2016)

<<http://statements.unmeetings.org/media2/7656952/73-iceland.pdf>> accessed 28 February 2017.

³⁴⁸ *ibid.*

4. Existing Legal Framework

This chapter will outline the legal framework relevant to BBNJ. Although the LOSC does not explicitly address the conservation and sustainable use of BBNJ or MGRs, its relevant provisions will be reviewed, as the Convention provides the legal framework for both all activities in the oceans and the governance of the use of the oceans. Furthermore, the LOSC contains versions of some of the principles discussed in chapter two, which are applicable to BBNJ. Subsequently, the CBD and its initiatives will be contemplated, followed by a brief mention of other relevant legal instruments.

4.1. The United Nations Convention on the Law of the Sea

As mentioned above, the LOSC may not in practice be the most important treaty for the protection of the marine environment; however, it has a fundamental status in international environmental law.³⁴⁹ The LOSC has contributed tremendously to the development of international marine environmental law. In its Preamble, it specifically recognises the desirability of promoting the conservation of living marine resources and preserving and protecting the marine environment, stating that the “conservation of living resources and the protection and preservation of the marine environment are key objectives of the [Convention].”³⁵⁰ Before addressing the provisions of the LOSC relevant to BBNJ, it is necessary to first outline the provisions relevant in areas under national jurisdiction.

4.1.1. Provisions of the LOSC relating to the Conservation of Marine Biodiversity in Areas under National Jurisdiction

As explained above, coastal states enjoy sovereignty over their internal waters and territorial seas,³⁵¹ and sovereign rights in their EEZs as well as on their continental and outer continental shelves. The sovereign rights of coastal states in the EEZ include sovereign rights for the purposes of exploring and exploiting, conserving and managing natural resources, whether living or non-living,³⁵² and the protection and preservation of the marine environment.³⁵³ Article 61 of the Convention provides for the obligation of coastal states to conserve living resources in the EEZ, including the obligation to ensure through proper conservation and

³⁴⁹ Robin Churchill (n 22) 4–5.

³⁵⁰ Scott (n 167) 463.

³⁵¹ LOSC art 2(1).

³⁵² LOSC art. 56(1)(a).

³⁵³ LOSC art 56(1)(b)(iii).

management measures that the maintenance of living resources in the EEZ is not endangered by over-exploitation, taking into account the best scientific evidence available. The duty to conserve living resources has been interpreted as including non-edible marine organisms.³⁵⁴ Furthermore, Part XII of the Convention sets forth requirements for states to protect the marine environment. It is generally acknowledged that the jurisdiction over natural resources, the sovereign rights and jurisdiction over marine environmental protection and the duty to conserve living resources entail that coastal states have jurisdiction over the conservation of biodiversity, “since such diversity concerns the variability among marine living organisms.”³⁵⁵ However, there is no exact or explicit obligation to conserve marine biodiversity in the EEZ.

As for jurisdiction and sovereign rights over the continental shelf and the outer continental shelf, Article 77(1) provides that the coastal state exercises sovereign rights for the purposes of exploring the continental shelf and exploiting its natural resources. In this respect, it is worth recalling that under the potential implementing agreement there will most likely be instances where the agreement will be applicable in the water column, but not on the seabed below it. Article 77(4) defines the natural resources of the continental shelf as consisting of the mineral and other non-living resources of the seabed and subsoil, together with living organisms belonging to sedentary species; that is, organisms which at the harvestable stage, are either immobile on or under the seabed, or are unable to move except in constant physical contact with the seabed or the subsoil. Article 77(4) has therefore been understood to entail, if literally interpreted, that “the only living components of natural resources falling within the continental shelf regime are sedentary species, which include oysters, clams and abalone.”³⁵⁶ The Convention therefore “places explicit obligations upon states to conserve marine living resources in the EEZ. Whilst the natural resources on the continental shelf include sedentary species by virtue of Article 77(4), the LOSC provides no specific obligation to conserve these species.”³⁵⁷ However, Article 61(4) of the Convention requires coastal states to take into consideration the effects on species associated with or dependent upon harvested species, with a view to maintaining or restoring populations of such associated or dependent species; this may possibly provide protection for sedentary species.³⁵⁸

Part XII of the Convention is devoted to the protection of the marine environment. Article 192 sets out the general obligations that states have to protect and preserve the marine

³⁵⁴ de La Fayette (n 5) 222.

³⁵⁵ Tanaka, *A Dual Approach to Ocean Governance* (n 170) 134.

³⁵⁶ *ibid* 135.

³⁵⁷ Tanaka, *The International Law of the Sea* (n 18) 234.

³⁵⁸ Rothwell and Stephens (n 18) 328.

environment. In practice, the implementation of Article 192 is “highly dependent on the regulatory measures in place for different sectors of human activity at sea and the relative strength of enforcement measures within different zones of ocean space.”³⁵⁹ The following provision, Article 193, provides that states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment. The Convention therefore anticipates that coastal states will adopt their own environmental policies, underpinned by the very general and unspecific duty to “protect and preserve the marine environment”. Merely two provisions in the LOSC can be considered as directly relating to the issue of conserving marine biodiversity.³⁶⁰ First, Article 194(5) provides that the measures taken in accordance with Part XI of the Convention shall include those necessary to protect and preserve rare or fragile ecosystems, as well as the habitat of depleted life, threatened or endangered species and other forms of marine life. Even though the duty provided by Article 194(5) is perhaps too general to be useful, it is arguably applicable to the ocean as a whole, including ABNJ, as there is no geographical limit in the provision.³⁶¹ Second, Article 196(1) requires states to prevent, reduce and control pollution of the marine environment resulting from the use of technologies under their jurisdiction or control, or the intentional or accidental introduction of species, alien or new, to a particular part of the marine environment, which may cause significant or harmful changes thereto. Article 196 has been amplified by the International Convention for the Control and Management of Ship's Ballast Water and Sediments, which was adopted by the IMO in 2004 and will enter into force in September 2017.³⁶²

Compared to the legal situation concerning BBNJ, the legal situation in areas within national jurisdiction is relatively clear, despite the lack of either explicit provisions on the issue or any specific duty to conserve marine biodiversity.³⁶³ While the relevant provisions are very general and of a framework nature, it is clear that coastal states have jurisdiction over both the conservation and the sustainable use of all marine organisms and biological resources in the water column as well as sedentary species on the continental shelf.

³⁵⁹ Robin Warner, *Protecting the Oceans beyond National Jurisdiction: Strengthening the International Law Framework* (Martinus Nijhoff Publishers 2009) 47–48.

³⁶⁰ Tanaka, *A Dual Approach to Ocean Governance* (n 170) 133.

³⁶¹ *ibid* 133, 136.

³⁶² *ibid* 133.

³⁶³ de La Fayette (n 5) 222.

4.1.2. Provisions of the LOSC relating to Conservation of Marine Biodiversity in Areas Beyond National Jurisdiction

As outlined above, ABNJ are divided vertically into the high seas, which are governed by the principle of the freedom of the high seas, and the Area, governed by the principle of CHM. No state may validly purport or subject any part of the high seas to its sovereignty,³⁶⁴ and no state may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical person appropriate any part thereof.³⁶⁵ Consequently, no state has sovereign rights of jurisdiction over the conservation and sustainable use of BBNJ. However, the general requirements of Articles 192, 194(5) and 196 are not confined to specific zones and are therefore applicable in ABNJ. All States parties to the LOSC are therefore obligated to take these provisions into account in their activities, as well as activities of their nationals and ships flying under their flags in the high seas.

Similarly to Article 61 for the conservation of living resources of the EEZ, chapter two of Part VII sets forth requirements for the conservation and management of the living resources of the high seas. The chapter sets out a general obligation to preserve living resources, but does not explicitly provide for requirements to conserve biodiversity in the high seas. Article 117 provides for the duty of states to adopt with respect to their nationals measures for the conservation of the living resources of the high seas and further stipulates that all states have the duty to take, or to cooperate with other states in taking such measures, for their respective nationals as may be necessary for the conservation of the living resources of the high seas. Articles 118 and 119 also address the conservation of living resources but “pertain in essence to the regulation of fisheries not conservation of marine biological diversity.”³⁶⁶

As for the Area, the LOSC provides the ISA with a regulatory role for the protection and conservation of the marine environment, including marine biodiversity. Articles (17)(1)(b)(xi) and (xii) of Annex III of the Convention stipulate that the ISA shall adopt and uniformly apply rules, regulations and procedures for prevention of interference with other activities in the marine environment, as well as for mining standards and practices, including those relating to operational safety, conservation of resources and the protection of the marine environment.³⁶⁷ Article 145 of the Convention amplifies this regulatory role concerning the protection of the marine environment in the Area, stating that in order to take necessary

³⁶⁴ LOSC art 89.

³⁶⁵ LOSC art 137.

³⁶⁶ Tanaka, *A Dual Approach to Ocean Governance* (n 170) 136.

³⁶⁷ *ibid* 138.

measures in accordance with the LOSC with respect to activities in the Area and to ensure effective protection for the marine environment from harmful effects which may arise from such activities, the Authority shall adopt appropriate rules, regulations and procedures for specific stipulated issues. Particularly relevant to the conservation and sustainable use of marine biodiversity is that the provision provides that the ISA shall adopt rules for the interference with the ecological balance of the marine environment. Moreover, Article 145(b) explicitly refers to the conservation of natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment. The provisions therefore “appear to suggest that the Authority's prescriptive jurisdiction covers the protection of the flora and fauna of the Area.”

4.2. Convention on Biological Diversity

The CBD provides a global legal framework for the conservation of biodiversity and extends the general obligations of the LOSC concerning marine environmental protection.³⁶⁸ When adopted in 1992, the CBD introduced principles and obligations for the conservation of biodiversity and the achievement of the following objectives, described in Article 1: (1) the conservation of biological diversity, (2) the sustainable use of its components and (3) the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.³⁶⁹ The comprehensive definition of biological diversity in Article 2 of the CBD provides that the Convention is applicable to the conservation of marine biological diversity, as it “covers terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part.”³⁷⁰

Article 3 of the CBD codifies the no harm principle and contains a formulation of the precautionary principle, as described above. However, as for ABNJ, Article 4 of the CBD provides for the jurisdictional scope of the convention and distinguishes between the components of biodiversity on the one hand and processes and activities in relation to biodiversity on the other hand: In the case of *components* of biodiversity, the applicability of the CBD is limited to areas within national jurisdiction, while “[i]n the case of *processes and activities*, the provisions of the [CBD] apply, regardless of where their effects occur, when carried out under national jurisdiction or control, within the area of its national jurisdiction or

³⁶⁸ Jakobsen (n 176) 292–293.

³⁶⁹ *ibid* 300.

³⁷⁰ Tanaka, *A Dual Approach to Ocean Governance* (n 170) 146.

beyond the limits of national jurisdiction”³⁷¹ In other words, the application of the CBD in ABNJ is limited “to components of biodiversity in areas within the limits of national jurisdiction and to processes and activities related to biodiversity carried out under the jurisdiction or control of Contracting Parties both within and beyond national jurisdiction.”³⁷² Pursuant to Article 5 of the CBD, any obligation of the Convention in ABNJ is limited to cooperation between states.³⁷³ Therefore, the Convention is primarily applicable to the conservation of biodiversity within national jurisdiction and “cannot apply to specific components of marine biodiversity in ABNJ, because under the law of the sea, States parties individually do not have jurisdiction or sovereign rights over these components.”³⁷⁴

However, because Article 4(b) entails that states must apply the general principles of the CBD to processes and activities carried out under their jurisdiction or control, which would in practice include taking measures to control actions of both their nationals and ships flying their flag, components of BBNJ are not left entirely unprotected.³⁷⁵ Furthermore, Article 5 stipulates that each contracting party shall, as far as is possible and appropriate, cooperate with other contracting parties, either directly or, where appropriate, through competent international organisations, in respect of ABNJ and on other matters of mutual interest, for the conservation and sustainable use of biodiversity in ABNJ. Nothing in the CBD provides explicitly or directly for an obligation of parties to the convention to conserve or sustainable use components of BBNJ.³⁷⁶ Additionally, “in carrying out activities in ABNJ that may have significant adverse impact on the conservation and sustainable use of biodiversity, States parties must take into account the provisions of the CBD and the policy decisions taken by its COPs.”³⁷⁷

4.2.1. Initiatives of the Conference of the Parties to the CBD

In 1995, the second Conference of the Parties to the CBD (COP-2) adopted a program of action for implementing the Convention with respect to marine and coastal biodiversity, thereafter termed the Jakarta Mandate on marine and coastal biological diversity.³⁷⁸ The Jakarta Mandate “demonstrates that the [CBD] is an important legal tool for promoting the conservation of

³⁷¹ *ibid.*

³⁷² Robin Warner, ‘Conserving Marine Biodiversity in Areas beyond National Jurisdiction: Co-Evolution and Interaction with the Law of the Sea’ in Donald Rothwell and others (eds), *The Oxford handbook of the law of the sea* (First edition, Oxford University Press 2015) 757.

³⁷³ Tanaka, *A Dual Approach to Ocean Governance* (n 170) 146.

³⁷⁴ de La Fayette (n 5) 243.

³⁷⁵ *ibid.*

³⁷⁶ Warner (n 371) 757.

³⁷⁷ de La Fayette (n 5) 243.

³⁷⁸ COP Decision II/10, UNEP/CBD/COP/DEC/II/10.

marine and coastal biodiversity and the sustainable use of living marine and coastal resources.”³⁷⁹ At COP-4, on the basis of the Jakarta Mandate, the parties to the CBD adopted a work programme focused on five thematic issues with the purpose of implementing the Jakarta Mandate.³⁸⁰ The programme was founded on the six basic principles of the ecosystem approach, the precautionary principle, the importance of science, the principle that full use should be made of the roster of experts, the involvement of local and indigenous communities, and three levels (national, regional and global) of programme implementation.³⁸¹ In the same decision, COP-2 requested the Executive Secretary of the CBD, in consultation with the UN Division for Ocean Affairs and the Law of the Sea (DOALOS), to undertake a study of the relationship between the CBD and the LOSC and to assist the SBSTTA “in addressing issues relating to bioprospecting for genetic resources of the deep-seabed. The study was submitted to the eighth meeting of SBSTTA in 2003.”³⁸² The SBSTTA concluded their study by proposing that three options exist regarding the management of MGRs of the deep-seabed in ABNJ:³⁸³

1. Maintain the status quo;
2. Use the regime of the Area and its resources as a framework for the development of a management regime for the genetic resources of the deep-seabed; and
3. Amend the CBD in order to extend its application to components of biological diversity in ABNJ.

Furthermore, the study states that options two and three are not mutually exclusive and could be integrated.³⁸⁴ As for the third option, it was pointed out that amending the CBD would be a simpler procedure than amending the LOSC; however, amendments would have to comply with the LOSC, and owing to of the national approach of the CBD, there would be a need for the creation of a specialised body for the issue.³⁸⁵

Both COP-7 and COP-8 addressed BBNJ from several aspects. COP-7 noted increasing risks to BBNJ, agreeing on the existence of an urgent need for international cooperation and action to improve conservation and sustainable use of BBNJ, and stating that this would include the establishment of further MPAs consistent with international law, and based on scientific

³⁷⁹ A Charlotte De Fontaubert, David R Downes and Tundi Agardy, *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats* (IUCN 1996) 1.

³⁸⁰ de La Fayette (n 5) 244; Secretariat of the Convention on Biological Diversity, ‘The Jakarta Mandate - from Global Consensus to Global Work: Conservation and Sustainable Use of Marine and Coastal Biological Diversity’ (2000) 6 <<https://www.cbd.int/doc/publications/jm-brochure-en.pdf>> accessed 13 April 2017.

³⁸¹ Secretariat of the Convention on Biological Diversity (n 379) 6.

³⁸² de La Fayette (n 5) 244. Paragraph 12 í Decision II/10

³⁸³ CBD SBSTAA (22 February 2003) UN Doc UNEP/CBD/SBSTTA/8/INF/3/Rev.1 (n 39) para 128.

³⁸⁴ *ibid.*

³⁸⁵ *ibid* 124–126.

information.³⁸⁶ COP-8 recognised that the law of the sea provided the legal framework for regulating activities in ABNJ and requested that the Executive Secretary collaborate with the UN Secretary-General in producing the report called for by the UNGA in resolution 58/240.³⁸⁷ However, the COP also “agreed that work on the conservation and sustainable use of BBNJ should proceed in the UN context, but the CBD would provide scientific information.”³⁸⁸

The COP “has laid some of the groundwork for area based management in ABNJ at the regional level through the provision of expert advice on describing marine EBSAs and in addressing biodiversity concerns in sustainable fisheries.”³⁸⁹ COP-9 adopted scientific criteria for identifying ecologically or biologically significant areas (EBSAs) and scientific guidance for designing representative networks of MPAs.³⁹⁰ EBSAs are defined as geographically or oceanographically discrete areas that provide important services to one or more species or populations in an ecosystem, or to the ecosystem as a whole, compared to other surrounding areas or areas of similar ecological characteristics. The applicable site-specific considerations of EBSAs include their uniqueness or rarity, their special importance for life history stages of species, their importance for threatened, endangered or declining species and/or habitats, their vulnerability, fragility, sensitivity or slow recovery, their biological productivity, their biodiversity and their naturalness.³⁹¹ In its decision, COP-9 recognised that strong evidence had been compiled emphasising the need for urgent area protection in selected seabed habitats and other marine areas in need of protection in accordance with the precautionary approach and international law, including the LOSC.³⁹²

COP-10 noted that the application of the EBSA criteria is a scientific and technical exercise, and that areas found to meet the criteria may require enhanced conservation and management measures which could be achieved through a variety of means, including MPAs and EIAs. Furthermore, COP-10 emphasised that the identification of EBSAs and the selection of conservation and management measures is a matter for States and competent intergovernmental organisations acting in accordance with the LOSC and international law. Moreover, COP-10 requested that the Executive Secretary organise a series of regional workshops with the primary objective of facilitating the description of EBSAs through the

³⁸⁶ COP Decision VII/5, UN Doc UNEP/CBD/COP/DEC/VII/5, paras 29-30; de La Fayette (n 5) 244.

³⁸⁷ COP Decision VIII/21, UN Doc UNEP/CBD/COP/DEC/II/10, para 6; UNGA Res 58/240 (5 March 2004) UN Doc A/RES/58/240 (n 296) para 52.

³⁸⁸ de La Fayette (n 5) 245.

³⁸⁹ Warner (n 371) 767.

³⁹⁰ COP Decision IX/20, UN Doc UNEP/CBD/COP/DEC/IX/20, para 14.

³⁹¹ *Ibid* 20 annex II, page 11.

³⁹² *Ibid*, para 14.

application of the scientific criteria.³⁹³ Pursuant to this request, a series of regional workshops convened in the Western South Pacific, the Wider Caribbean and Western Mid-Atlantic, the Southern Indian Ocean, the Eastern Tropical and Temperate Pacific, the North Pacific, the South-Eastern Atlantic, the Arctic, the North-West Atlantic and the Mediterranean. To date, no EBSAs have been described within or near the Icelandic EEZ. The closest EBSAs are in the Southern Labrador Sea off the coast of Canada and in the south-eastern Barents Sea.³⁹⁴ However, it must be noted that describing EBSAs is an ongoing process.

COP-12 requested the Executive Secretary to develop practical options to further enhance scientific methodologies and approaches to the description of areas meeting EBSA criteria, ensuring the use of best available scientific and technical information and the traditional knowledge of various users of marine resources.³⁹⁵ Furthermore, at COP-13 the Executive Secretary was requested to continue this work by organising an expert workshop tasked with developing options for cases both within and beyond national jurisdiction.³⁹⁶

Another initiative of the COP is its proactivity “in investigating the scientific and technical aspects of EIA for activities in ABNJ.”³⁹⁷ COP-9 invited parties to cooperate in further developing scientific and technical guidance for the implementation of EIA and strategic environmental assessments (SEA) for activities and processes under their jurisdiction and control which may have significant adverse impacts on BBNJ. To that end, an expert workshop, referred to as the Manila Expert Workshop, was convened to discuss scientific and technical aspects relevant to EIA in ABNJ and contribute to the development of such scientific and technical guidance.³⁹⁸ In its report, referred to as the Manila Report,³⁹⁹ the Workshop identified a need for global and regional standards for acceptable perturbation, as well as a better understanding of the connection between impacts and ecosystem processes both within and beyond national jurisdiction. Furthermore, the Workshop identified a gap in assembling global experience with marine ecosystems beyond national jurisdiction, with particular regard to how those ecosystems have responded to past human impacts and natural forces and how effective any mitigation measures were when applied.⁴⁰⁰ COP-10 took note of this, requesting the Executive Secretary to facilitate the development of voluntary guidelines for the

³⁹³ COP Decision X/29, UN Doc UNEP/CBD/COP/DEC/X/29, para 36.

³⁹⁴ ‘Ecologically or Biologically Significant Marine Areas (EBSAs)’ <<https://www.cbd.int/ebsa/>> accessed 14 April 2017.

³⁹⁵ COP Decision XIII/22, UN Doc UNEP/CBD/COP/DEC/XIII/12, para 10.

³⁹⁶ *Ibid* para 10.

³⁹⁷ Warner (n 371) 768.

³⁹⁸ COP Decision IX/20, UN Doc UNEP/CBD/COP/DEC/IX/20, para 10.

³⁹⁹ CBD STSTTA Report, UN Doc UNEP/CBD/SBSTTA/14/INF/5.

⁴⁰⁰ *Ibid* Annex II, paras 16-18.

consideration of biodiversity in EIAs and SEAs in marine and coastal areas using the guidance from the Manila report.⁴⁰¹ The voluntary guidelines for the consideration of biodiversity in EIA and SEA “were developed for all marine and coastal areas rather than simply for ABNJ, emphasizing the interconnections between ocean ecosystems across jurisdictional boundaries and endorsed by [COP-11].”⁴⁰² Many of the initiatives of the CBD have been discussed at the PrepCom, and there have been suggestions concerning the use of some of these initiatives in the potential implementing agreement.

4.3. Other relevant instruments

There are several other global and regional instruments related either directly or indirectly to the issues of conservation and the sustainable use of BBNJ. While, space unfortunately does not permit a detailed discussion of all these instruments, a note should be made of a few instruments directly relevant to the issue. For example, the Convention for the Regulation of Whaling,⁴⁰³ and the Convention on Migratory Species of Wild Animals, and associated instruments for the protection of marine species,⁴⁰⁴ as well as the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁴⁰⁵ are species-specific conventions which contribute to the issue.⁴⁰⁶ Furthermore, the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,⁴⁰⁷ including its 1996 Protocol “[has] prohibited all dumping of hazardous waste into the sea.”⁴⁰⁸ Moreover, the International Maritime Organization (IMO) has adopted several instruments relating to general marine environmental protection, and thereby indirectly to conservation and sustainable use of BBNJ.⁴⁰⁹ Two of the instruments adopted by the IMO address threats to biodiversity directly, namely, the International Convention for the Control and Management of Ships' Ballast Water and Sediments and the International Convention on the Control of Harmful Anti-fouling

⁴⁰¹ COP Decision X/29, UN Doc UNEP/CBD/COP/DEC/X/29, para 28.

⁴⁰² Warner (n 371) 769.

⁴⁰³ International Convention for the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 161 UNTS 72.

⁴⁰⁴ Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.

⁴⁰⁵ Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 3 March 1973 entered into force 1 July 1975) 993 UNTS 243.

⁴⁰⁶ de La Fayette (n 5) 249.

⁴⁰⁷ London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120; 1996 Protocol to the 1972 Convention on the Prevention on Marine Pollution by Dumping of Wastes and Other Matters (adopted 7 November 1996, entered into force 24 March 2006)

⁴⁰⁸ de La Fayette (n 5) 249; See also ‘List of Conventions’

<<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx>> accessed 26 April 2017.

⁴⁰⁹ de La Fayette (n 5) 249.

Systems on Ships.⁴¹⁰ Additionally, the IMO can designate particularly sensitive sea areas (PSSA) that need protection through action by the IMO.⁴¹¹ The guidelines adopted by the IMO on designating PSSAs “are an increasingly useful tool for the protection of marine biodiversity from harmful effects of international shipping activities.”⁴¹²

In response to Agenda 21, regional efforts and initiatives have also made significant progress since 1992, and there is some evidence of reverse deterioration of the marine environment, for example in the North Atlantic.⁴¹³ Some regional efforts do address BBNJ; for instance, the OSPAR Convention “includes in its area of responsibility waters within and beyond national jurisdiction” and recently established six MPAs in ABNJ.⁴¹⁴ The OSPAR Convention provides for general marine environmental obligations, such as taking all possible steps towards maritime area protection against the adverse effects of human activities. Particularly relevant, however, is a more specific obligation in Annex V, which requires parties to take necessary measures to protect and conserve the biodiversity of the ecosystems and the maritime area, as well as (where practicable), to restore marine areas which have been adversely affected.⁴¹⁵

⁴¹⁰ *ibid.*

⁴¹¹ ‘Particularly Sensitive Sea Areas’

<<http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>> accessed 26 April 2017.

⁴¹² de La Fayette (n 5) 249.

⁴¹³ Birnie, Boyle and Redgwell (n 81) 381.

⁴¹⁴ Warner (n 371) 769.

⁴¹⁵ *Review and Analysis of International Legal and Policy Instruments Related to Deep-Sea Fisheries and Biodiversity Conservation in Areas Beyond National Jurisdiction.* (Food & Agriculture Org 2017) 75–76.

5. Gaps and the potential implementing agreement

At the onset of this chapter it is important to recall the distinction between implementation gaps and legal gaps. While a legal or regulatory gap describes the absence of a rule, or the inadequate regulation of a specific matter, an implementation gap describes a situation where an existing legal framework is not implemented in the absence of any apparent reason or barrier to implementation.⁴¹⁶

5.1. A Legal Regime for Marine Genetic Resources

The issue of MGRs is likely to be the most challenging issue in the process of negotiating a new implementing agreement. The main divergence of opinion, in a nutshell, concerns whether the principle of CHM or the freedom of the high seas is applicable to MGRs. This contestation is partly due to an ambiguity or a difference in interpretation of the LOSC,⁴¹⁷ and most likely stems from the fact that the deep-seabed was believed to be empty of life and that MGRs and their value were not well understood at the time the LOSC was negotiated (as noted above). The provisions in question are Article 133(b), which defines the term ‘resources’ for the purposes of Part XI of the LOSC, and Article 136, which declares the Area and its resources as the CHM.

On one side of the argument is a group of industrialised states, including Iceland, the US, Russia, Norway, Canada and Japan, who hold that pursuant to Article 133(b), MGRs are not subject to the principle of CHM and that the principle of the freedom of the high seas is therefore applicable to MGRs.⁴¹⁸ Article 133(b) clearly and unambiguously stipulates that for the purposes of Part XI, the term ‘resources’ means ‘all solid, liquid, or gaseous mineral resources *in situ* in the Area at or beneath the seabed, including polymetallic nodules’. The application of the provision “would imply that the regime established by Part XI was not applicable to [MGRs] which, by definition, are biological and can therefore not be said to be ‘solid, liquid or gaseous mineral resources.’”⁴¹⁹ On the other side of the argument is the Group of 77, China and several other States, who support the application of the principle of CHM for MGRs and “have argued for the establishment of an access and benefit sharing (ABS)

⁴¹⁶ Duncan EJ Currie, ‘Overview of Legal and Regulatory and Implementation Gaps in the Conservation and Sustainable Use of Biodiversity in Marine Areas Beyond National Jurisdiction’ <<http://highseasalliance.org/sites/highseasalliance.org/files/BBNJ%202014%20Gaps%20analysis%20-Main-FINAL.pdf>> accessed 26 April 2017.

⁴¹⁷ Tladi (n 58) 260.

⁴¹⁸ Wright and others (n 70) 24; Tladi (n 58) 261.

⁴¹⁹ Tladi (n 58) 261.

mechanism, inspired by that developed for the Area, and an extension of the role of the ISA to the management of these resources on behalf of all humankind [...].”⁴²⁰ This group of States argues that Article 136 of the LOSC, which stipulates that the Area ‘and’ its resources are the CHM, entails that not only the resources of the deep-seabed, but also the deep-seabed itself (and consequently its MGRs.) are subject to the principle of CHM⁴²¹ Additional support for this argument is found in Article 140, which provides that activities in the Area shall be carried out for the benefit of mankind.

Regardless of these interpretations of the LOSC, it is clear that this argument cannot be settled with reference to the LOSC alone, that the negotiators of the LOSC did not anticipate MGRs at the deep-seabed, and that there are obvious flaws in some aspects of both arguments.⁴²² It seems equally clear that, to date, there is no consensus regarding the applicable legal regime for MGRs in ABNJ, and that the group of industrialised States is not willing to extend the principle of CHM as understood prior to debates on MGRs, that is, being applicable to resources of the deep-seabed as defined in Article 133(b). There have however been suggestions concerning a clearing-house mechanism for knowledge sharing, which could lead to a consensus on a hybrid approach where the exploitation and exploration of MGRs would be permitted subject to rules on the sharing of information and knowledge.⁴²³

5.2. Conservation Management Tools in ABNJ

Because the high seas are governed by the freedom of the high seas principle and flag state jurisdiction, establishing any conservation management tools in ABNJ is problematic. Sectoral approaches to marine biodiversity approaches are prevailing at the global level, and regional and international organisations have already established MPAs and other area-based management tools in certain areas.⁴²⁴ For instance, Regional Fisheries Management Organisations (RFMOs) “can designate closure of certain fisheries to protect or restore the stocks they manage, or to protect the vulnerable marine ecosystems located at the seabed (pursuant to relevant UNGA resolutions regarding non-tuna RFMOs). Approximately 30 such closures have been made.”⁴²⁵ Furthermore, the ISA has the power to designate APEIs, and the IMO can identify PSSAs as discussed above.⁴²⁶ The problem with sectoral approaches is that

⁴²⁰ Wright and others (n 70) 24.

⁴²¹ Tladi (n 58) 261.

⁴²² *ibid* 261–262.

⁴²³ IISD Reporting Services, ‘Earth Negotiations Bulletin’ (n 15) 4.

⁴²⁴ Wright and others (n 70) 23.

⁴²⁵ *ibid* 23–24.

⁴²⁶ *ibid* 23.

they are only binding to contracting parties of the relevant organisation. In this respect, it has been stated that “[t]he freedom of the high seas effectively re-enacts Hardin’s ‘tragedy of the commons’ by allowing States (and vessels under their jurisdiction) to behave with few restrictions.”⁴²⁷ This legal or governance gap could potentially be solved by establishing a global institutional framework for conservation management tools; however, any measures taken in order to establish such a framework would most likely entail restrictions to the freedom of the high seas.

As for EIAs, Article 206 of the LOSC stipulates that when States have reasonable grounds for believing that scheduled activities under their jurisdiction or control may cause considerable pollution of or harmful changes to the marine environment, they shall assess the possible effects and publish reports of results pursuant to Article 205. This obligation may “form part of customary international law, including for activities in ABNJ.”⁴²⁸ The gap in this respect is mainly the lack of minimum standards for EIAs and global requirements or mechanisms for conducting EIAs or SEAs in ABNJ. However, the CBD has prepared voluntary guidelines, and a few sectoral organisations and the ISA have developed requirements for conducting EIAs.⁴²⁹ There seems to be a considerable agreement concerning the need for EIAs in ABNJ, however “States do not entirely agree on the practical implementation modalities of this requirement”⁴³⁰; that is, on whether there should be voluntary guidelines, sectoral binding agreements, or if the new implementing agreement should contain provisions concerning EIAs.⁴³¹

5.3. Fisheries

Despite considerable existing restrictions to the freedom of fisheries, they are still said to be the most severe threat to BBNJ after climate change.⁴³² The most notable troubles with high seas fisheries are twofold: first, “despite being a small fraction of total global catch, commercial exploitation of deep-sea fisheries has generated an intensive debate due to concerns regarding its sustainability [...]”,⁴³³ mainly because many species being fished in the high seas generally live longer than other fishes and have a lower reproduction rate than other fishes. Second are

⁴²⁷ Tladi (n 58) 264.

⁴²⁸ Wright and others (n 70) 25.

⁴²⁹ *ibid.*

⁴³⁰ Elisabeth Druel, ‘Environmental Impact Assessments in Areas beyond National Jurisdiction’ [2013] IDDRI, Paris 42, 37.

⁴³¹ *ibid.*

⁴³² de La Fayette (n 5) 251.

⁴³³ Wright and others (n 70) 26.

governance challenges, which again can be traced to the freedom of the high seas to a large extent. The management of fisheries in ABNJ relies primarily on flag States and RFMOs.⁴³⁴ In the case of the flag State, the main problem is that the LOSC does not define the term ‘genuine link’ which “has facilitated the development of so-called “flags of convenience”, encouraging illegal, unreported and unregulated (IUU) fishing.”⁴³⁵ As for the RFMOs, the problem is similar to the problem of conservation management tools, but there are also significant issues with implementation and the fact that certain RFMOs “have been criticized for failing to integrate conservation and biodiversity concerns into their regulatory approaches to fisheries.”⁴³⁶

It should be pointed out that high sea fisheries per se are not a part of the 2011 package that the PrepCom is mandated to address. Fish, however, falls within the definition of biological resources, and there have been suggestions of distinguishing between the use of fish for genetic resources and fish as commodity in the potential implementing agreement. This issue is likely the most debated issue concerning the material scope, and to date, there is no consensus on how exactly to deal with fisheries in the potential agreement.

5.4. The potential implementing agreement

Whether or not a new implementing agreement will be concluded in the near future remains uncertain. Compared with previous processes conducted under the auspices of the UN in relation to the law of the sea, the BBNJ process has extended over a much longer period of time, with the BWG alone lasting for 11 years, three years longer than UNCLOS III. In this context, it is worth noting that both UNCLOS I and the UN Conference on Straddling Fish Stocks (which resulted in the UNFSA), lasted for two years.

The overall objective of the potential agreement, namely, the conservation and sustainable use of BBNJ, is relatively clear. However, there are still considerable differences in views on most issues and “consensus has remained elusive on any of the package issues, as well as other fundamental questions regarding institutional arrangement and funding mechanisms for implementing a new agreement.”⁴³⁷ For instance, the issues of how to deal with fisheries and MGRs are still disputed, and delegates have not agreed whether there should be “mandatory, top-down regulation to enforce conservation, or a horizontal persuasive approach that gradually builds capacity, willingness and cooperation among disparate actors

⁴³⁴ *ibid.*

⁴³⁵ *ibid.*

⁴³⁶ *ibid.*

⁴³⁷ Robert Blasiak and others, ‘The Role of NGOs in Negotiating the Use of Biodiversity in Marine Areas beyond National Jurisdiction’ (2017) 81 *Marine Policy* 1, 7.

through continuous exchange of conservation success stories and lessons learned.”⁴³⁸ Overall, it appears that despite its increasingly detailed discussions, the PrepCom has not made any significant breakthroughs.

In this context it should be noted that “[b]oth existing implementing agreements seemed impossible when negotiations began, but both were successfully concluded.”⁴³⁹ Considering the limited progress in the conservation of BBNJ and the deteriorating status of the oceans, the PrepCom and potential future negotiators are faced with numerous challenges. While there is an apparent need for an instrument with the objective of ensuring the protection, preservation and sustainable use of BBNJ and biological resources, there is no consensus concerning solutions. There is, however, a possibility of proceeding without consensus, as the UNGA recognised the importance of proceeding efficiently in the PrepCom and specifically permitted the PrepCom to include issues in its recommendations without attaining consensus.⁴⁴⁰

Should the PrepCom succeed in its negotiations, the resulting implementing agreement “should emphasise the need for States and organisations to cooperate for the protection of marine biodiversity and should encourage the development and promotion of MSR relating to the understanding of ecosystems and their conservation.”⁴⁴¹ Furthermore, emphasis should be placed on codifying the relevant and appropriate general principles discussed above, allowing further regulation concerning possible future uses of the ocean, and developing mechanisms for the coordination of the existing instruments.⁴⁴²

⁴³⁸ IISD Reporting Services, ‘Earth Negotiations Bulletin’ (n 15) 16.

⁴³⁹ de La Fayette (n 5) 280.

⁴⁴⁰ UNGA Res 69/292 (19 June 2015) UN Doc A/RES/69/292 (n 13) para 1(i).

⁴⁴¹ de La Fayette (n 5) 276.

⁴⁴² *ibid.*

6. Conclusions and final remarks

This thesis has outlined several aspects, directly and indirectly relevant to the topic of the conservation and sustainable use of biological diversity, which is perhaps the last major issue which remains unresolved under the Convention. The topic is likely the largest and most contentious issue concerning ocean affairs and the law of the sea in recent years, and it is enormously broad topic. In many aspects, including the legal aspect, the topic is novel and not easily comprehended. The extensive legal framework surrounding the issue, including regional organisations and other efforts are relatively fragmented and inaccessible due to factors such as the level of complexity and the number of technical terms. It is evident that in order to adopt a new implementing agreement, compromises will have to be made at the PrepCom on behalf of states with opposing views.

After a brief discussion of the relevant general principles of marine environmental law, which will likely be contained in the potential implementing agreement in some formulation, the main and underlying reasons for adopting the agreement were considered. Although there seems to be increased momentum around the topic, it is undeniably subdued and can hardly be said to have received much international attention, compared to issues such as climate change. This lack of attention can likely be traced to how abstract or ‘distant’ the issue is. The issue is not only distant from the perspective of having been absorbed by the mass of other negative environmental reports and predictions constantly reported by various organisations and the media, but also from perspective of actual physical distance; after all, the areas under discussion are beyond national jurisdiction and remain unexplored to a large extent.

The limited knowledge of these distant areas, including the biological diversity on the deep sea-bed, as well as the ‘distance’, likely further add to the problems which have surrounded the making of international environmental law: namely, what should be done, to what extent, and who should cover the monetary expenses? Although monetary expenses concerning the actual agreement do not seem to be among the major issues to date, industrialised states are not willing to extend the principle of CHM and are opposed to fisheries being subject to the scope of the potential agreement.

After considering the rationale for a potential agreement, the thesis outlined necessary contextual factors, the precise boundaries of ABNJ, developments of the LOSC and its amendment procedures. The Convention has unarguably developed significantly since its adoption, without ever being amended through the formal amendment procedure, and an annual cycle of review has evolved through practice. From a legal point of view there is nothing in the

way of adopting a new implementing agreement under the LOSC. If the legal regime for the oceans will, however, be seen as requiring an integrated approach to oceans management, an implementing agreement may in fact be necessary for the Convention in order to retain its status as the constitution for the oceans.

As outlined in chapter three, marine environmental law has developed significantly over the past decades, most notably with the adoption of the Convention and the subsequent extension of jurisdictional rights, which is an interesting historical aspect in line with the discussions of the precise boundaries of ABNJ. In contrast to the law of the sea, modern environmental law has suffered barriers, leaving the field parcelled out into a number of sectoral regimes and a number of non-binding agreements and declarations for the protection of the environment, including the marine environment. The process that has led to the PrepCom can be traced back to the 1990s although it took off in earnest in 2004 with the establishment of the BWG. Chapter three outlined this almost 20-year process, which may last for at least another decade given the existing divergence of opinion between States. While most States recognise the need for an international legally binding instrument (or in certain cases an international instrument) for the conservation and sustainable use of marine biodiversity in ABNJ, this consensus is not reflected with regards to the content and scope of the potential agreement, as well as its relationship with existing legal instruments. In this respect it should be noted that several States have not yet expressly recognised the need for an agreement on BBNJ, and simply seem to be floating along.

The thesis set out to focus on the Icelandic perspective and attitudes towards the potential agreement. To summarise this perspective so far, Iceland has been unconvinced of the need for a new implementing agreement from the beginning of the process. The main point of focus so far has been that high seas fisheries should not be subject to the scope of the potential agreement, as the UNFSA and the LOSC provide a sufficient legal framework for high seas fisheries. On almost all occasions, Iceland has reiterated that the existing legal framework relevant to BBNJ should not be undermined, and that a good balance between conservation and sustainable use is necessary in order to reach an agreement. Iceland has therefore placed itself in a group with Canada, Japan, Norway and Russia and the US, who have similar perspectives towards the process and the potential agreement. To date, there is no apparent evidence that these perspectives will change before the fourth and, as for now, the final meeting of the PrepCom.

Moreover, the thesis outlined the legal framework relating to the Conservation of BBNJ, particularly the LOSC and the CBD, as well as gaps that have been identified in the

framework. The Convention does not provide for an explicit duty to conserve or sustainably use marine biodiversity in ABNJ, it does contain general requirements for the protection of the marine environment that are not confined to specific zones, and therefore apply in ABNJ. The CBD on the other hand, extends the general obligations of the Convention and provides for a legal framework for the conservation of biodiversity. However, the application of the CBD in ABNJ is limited to processes and activities related to biodiversity as well as cooperation between states in ABNJ. Importantly, the CBD COP has laid down important groundwork concerning MPAs, EIAs and more. In addition to the CBD COP initiatives, RFMOs and various global and regional organisations have adopted instruments in relation to the gaps which have been identified in the legal framework. Such efforts have provided increasingly useful tools for the conservation of BBNJ, and regardless of the result of the PrepCom, such efforts will continue to develop and expand. Nevertheless, it may prove difficult to establish conservation management tools in ABNJ, due to the principle of the freedom of the high seas. Moreover, the issue of MGRs on the deep seabed will not be solved with regional efforts.

Given the existing divergence in view of political and legal aspects, it is rather unlikely that the PrepCom will recommend convening an intergovernmental conference for the negotiation of an implementing agreement after its fourth meeting. However, considering the history of the law of the sea, it is not inconceivable that the PrepCom will reach an agreement and decides to attempt reaching consensus on the most contentious issues at an intergovernmental conference. A new implementing agreement in the near future is therefore not impossible, depending on what compromise states are willing to make and diplomatic abilities. It must be noted that the limited participation at the PrepCom may indicate that participation will potentially be similar to the UNFSA, which to date has only been ratified by 85 States. In that context, further implementation and encouragement of ratifying the UNFSA and other instruments relevant to BBNJ, should perhaps be a priority.

In this respect, it is also rather unlikely that the agreement will affect Iceland in any significant way in the near future. Should the PrepCom, however, recommend convening an intergovernmental conference, it must be considered unlikely that the Icelandic perspective will change significantly, meaning that the scope of the potential implementing agreement will be a decisive factor in whether or not Iceland will participate.

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