CHAPTER 4

Mapping Key Past and Current Debate on Areas beyond National **Jurisdiction**

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Mapping Key Past and Current Debate

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> The history of the law of the sea is part and parcel of a wider vision for the law of nation's connection with globalization[1]

1 Introduction

The objective of the chapter is to give an overview of the debates on the status of areas beyond national jurisdiction (ABNJ) of the past and the present. The purpose is to inform and prepare the reader for the subsequent chapters. This includes mapping central themes of different periods and to assess how they have affected the development of the law of the sea and the current debate on the ABNJ.

The process towards adoption of a third Implementing Agreement under the United Nations Convention on the Law of the Sea on Conservation and Sustainable Use of Biodiversity in Areas beyond National Jurisdiction (BBNJ)[2] has touched upon at least two themes, which may be recognisable throughout the history of the law of the sea:

[1] David J Bederman, 'The Sea' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 359–80, 361.

[2] The BBNJ process involves the Intergovernmental Conference (IGC) on an international legally binding instrument under the United Nations Convention on the Law of the

- the legal status of the natural resources of the deep-sea bed: The potential high commercial value of deep-sea minerals and, in later years, marine genetic resources (MGR), have raised discussions on the right to access them and their governance.[3] Particularly developing States have feared and are fearing of losing out, that the access to these resources be reserved for States with economic and personnel resources.
- adjacency: Even if the jurisdiction of the coastal State gradually has been extended seawards, there have been debates on the role of the coastal State in the governance of the resources and/or areas adjacent to their zones of jurisdiction, such as preferential right and restrictions on activities in ABNJ that could undermine the sovereign rights of the coastal States.[4]

Sea (LOSC) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, established under UN General Assembly (UNGA) Res 72/249, its PrepCom and the Ad-hoc Open-ended Informal Working Group established under UNGA Res 68/20. Relevant documents are available at <www.un.org/bbnj/content/background> (accessed 29 December 2020).

[3] Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the Making of an Extractive Imaginary' (2019) 30 European Journal of International Law 573, 594–95; David Leary, 'Marine Genetic Resources in Areas beyond National Jurisdiction: Do We Need to Regulate Them in a New Agreement?' (2018–19) 5 Maritime Safety and Security Law Journal 22.

[4] See the historical context to the present debate in Joanna Mossop and Clive Schofield, 'Adjacency and due regard: The role of coastal States in the BBNJ treaty' (2020) 122 Marine Policy 1, 2–3.

The two themes may be understood in the context of two important drivers in the development of the law of the sea: the quest for territory and globalization.[5] Territory, in the setting of oceans, has meant providing States access to the oceans for transport and for the utilisation of its resources. The law of the sea throughout the centuries has been dominated by the competition between the exercise of territorial authority in the form of exclusive rights over the sea and the idea of the freedoms of the seas.[6] These debates have been further driven by impacts of globalization such as technological developments and the subsequent entry of new participants including new industries and developing countries in the exploitation of marine natural resources. Globalization may be defined as '…the increasing worldwide integration of economic, cultural, political, religious, and social systems'.[7] Technological developments made the oceans and their resources gradually accessible in an economic

[5] Daniel-Erasmus Khan, 'Territory and Boundaries' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press 2012) 225–49, 225–26.

[6] D P O'Connell, *The International Law of the Sea: Volume I* (1st edn) (Oxford University Press 1982) 1; E D Brown, 'Freedom of the High Seas Versus the Common Heritage of Mankind: Fundamental Principles in Conflict (1983) 20 San Diego Law Review 21; Tullio Treves, 'Historical Development of the Law of the Sea' in Donald Rothwell and others (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 1–23, 2.

[7] John Black, Nigar Hashimzade and Gareth Myles, *A Dictionary of Economics 3rd Edition* (Oxford University Press 2009), available at <www.oxfordreference.com/view/10.1093/acref/9780199237043.001.0001/acref-9780199237043-e-1359?rskey=GfnrTk&result=1262> accessed 22 March 2021.

manner. It led to intensified competition between States over the ocean resources and later over maritime spaces, challenging the traditional freedoms of the high seas. These technological developments did also result in the extended jurisdiction of coastal States. The entry of newly independent and mostly developing States led to questions on the fairness of the existing law of the sea, till then dominated by a few States.

The first debate in of the modern law of the sea in the 17th century is often described as the 'battle of the books'.[8] The debate centred on whether States were competent to exercise exclusive authority over ocean space. The proponents of the freedoms of the high seas such as Grotius argued that the oceans were limitless and not susceptible to appropriation. Their opponents – including Selden – referred to State practice arguing that States indeed were regulating ocean space, such as fisheries. The freedoms of the high seas prevailed as the dominating paradigm.[9] Even if States did not make territorial claims as such, the freedoms of the high seas provided them equivalently with an adequate space for maritime activities, access to marine resources and other economic activities.

From the 20th century the freedoms of the high seas regime have been challenged by a wider set of interests – typical of globalization – going beyond commercial interests and security issues. The high seas, its space and resources were not any longer reserved for a few maritime States. Their positions were challenged by other States, on access to the marine resources and later by the recognition of the need to conserve the marine living resources and to protect the marine environment following intensified use and pollution of the oceans and its resources.[10] The gradual conditioning of the freedoms of the high seas may be described as

[8] Treves (n 6) 4; Bederman (n 1) 369.

[9] Bederman (n 1) 369; Treves (n 6) 5.

[10] ibid 22–23.

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a second paradigm, applicable until the present. It implied rivalry between the commercial and military interests in maintaining the freedoms of the sea and the interests in restricting the freedoms in terms of ocean zones of coastal State control.[11] Again, this related to disputes over territorial or zonal authority, and the ability of States to control access to resources.

The chapter is organized temporally to map how the two themes identified above have been addressed throughout the history of the law of the sea. The purpose is also to explore how they relate to the ongoing BBNJ process: Are there differences and/or similarities with the previous debate?

Section 2 covers the period 1945 till the late 1960s. In this period the law of the sea was for the first time codified in a multilateral process facilitated by the United Nations (UN) through the International Law Commission (ILC) and the first and second UN Conference on Law of the Sea (UNCLOS I and II). The UN has been instrumental in later developments of the law of the sea, including the on-going BBNJ process. The balancing between individual and collective interests has varied throughout the last 75 years. This first period witnessed the dominance of individual interests through the extension of coastal State jurisdiction. More recently, in the context of the BBNJ process for example, collective interests are central. However, it might be a challenge moving the law in that direction, as it is likely to conflict with strong or well-established interests and practices, as was witnessed in the process that resulted in the UN Convention on the Law of the Sea (LOSC).

Section 3 covers the period from the late 1960s till today. During the 1960s and early 1970s, colonies in Africa and Asia gained independence, thereby changing the world map and diversifying the interests and claims in relation to the governance of the oceans. This was

[11] O'Connell (n 6) 13.

manifested throughout the negotiations leading to adoption of the 1982 LOSC.[12] The developing States advocated justice by arguing for the 200 nautical mile exclusive economic zone (EEZ) and the common heritage of mankind (CHM) status of the deep-sea bed beyond national jurisdiction and its mineral resources. The BBNJ process is also about justice, including topics such as access to MGR and benefit sharing advocated by developing States.

The extension of the fisheries jurisdiction through the EEZ did not provide the coastal State with exclusive control over the living marine resources. Some species have an area of distribution also covering ABNJ. Coastal States argued that they have some preferential rights in respect of these transboundary species. This was addressed through the 1995 Fish Stocks Agreement (UNFSA).[13] As the BBNJ treaty aims at the conservation and sustainable use of biodiversity in ABNJ, there are questions about the transboundary perspectives – similar to those of the marine living resources: Should the coastal State have a particular say in establishing area-based measures in ABNJ adjacent to their EEZs?

2 Balancing Freedoms and National Control: Between Unilateralism and Multilateralism

2.1 General

[12] United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

[13] 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 (opened for signature 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNFSA).

This section investigates the period from 1945 till the end of the 1960s, which involved the first successful multilateral attempts to legislate the law of the sea. 1945 marked a turning point in the history of the law of the sea. The period was initiated by unilateral State actions such as the 1945 Truman proclamations,[14] which expanded the areas within national jurisdiction (AWNJ) at the expense of the high seas regime. It is also marked by increased multilateralism facilitated by the United Nations (UN), which led to the codification of the law of the sea through the four 1958 Geneva Conventions.[15]

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[14] Presidential Proclamation No. 2667, 28 September 1945, 'Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf' available at <www.trumanlibrary.gov/library/public-papers/150/proclamation-2667-policy-united-states-respect-natural-resources-subsoil> accessed 22 July 2021; Presidential Proclamation No. 2668, 28 September 1945, 'Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas' available at <www.archives.gov/federal-register/codification/proclamations/02668.html> (accessed 22 July 2021).

[15] The four Geneva Conventions are the Following: The Convention on the Territorial Sea and the Contiguous Zone (opened for signature 29 April 1958, entered into force on 10 September 1964) 516 UNTS 205 (CTS); the Convention on the High Seas (opened for signature 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (HSC); the Convention on Fishing and Conservation of the Living Resources of the High Seas (opened for signature 29 April 1958, entered into force 20 March 1966) 559 UNTS 285 (CFCLR); the Convention on the Continental Shelf (opened for signature 29 April 1958, entered into force 10 June 1964) 499 UNTS 311 (CSC); and the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (opened for

This section aims at providing perspectives for understanding the present debate on BBNJ. The codification of the law of the sea represented a stage or phase in the development of the law introducing concepts, principles, and rules of the Geneva conventions, such as the continental shelf, that continue to impact the law. The legal developments of this period were started by coastal States unilaterally extending their jurisdiction seawards and claiming preferential rights in adjacent waters of the high seas. This section also examines the prevailing interests and focuses on the codification process whether other interests than those of individual coastal States had an influence on the codification process. In the following, the unilateral actions leading to the development of the law of the sea (section 2.2) will be addressed first, before the codification process through the UN (section 2.3).

2.2 Nationalisation through Unilateral Action

The Truman proclamations on the continental shelf[16] and on the conservation zones on the high seas[17] involved claims to exclusive rights over the natural resources of the seabed and subsoil adjacent to US coasts and jurisdiction to regulate fisheries in designated areas of the adjacent high seas.

The US arguments were primarily based on notions of justice, referring to 'reasonable and just' claims, and the fact that the petroleum and mineral resources are located in areas, which are an extension of the US land mass.[18] This argument resonated with the 'land dominates the sea' doctrine, which was confirmed a few years earlier by the ICJ in the

signature 29 April 1958, entered into force 30 September 1962) UN Doc A/CONF.13/L.58.

[16] Presidential Proclamation No. 2667 (n 14).

[17] Presidential Proclamation No. 2668 (n 14).

[18] Ranganathan (n 3) 581.

Fisheries Jurisdiction case.[19] Interestingly, the US argument seemed to construct the idea that the continental shelf was an original concept, not infringing on the high seas regime. In fact, both Truman proclamations underlined that the character of high seas of the waters above the continental shelf was not affected.

Although the main rationale of the US for claiming preferential rights in adjacent parts of the high seas was the '…urgent need for protecting coastal fisheries resources from destructive exploitation …', the real motive was to secure preferential rights.[20] These resources were of special importance to its coastal communities. Under the proclamation, the US was competent to exercise jurisdiction over fishing vessels in designated areas of the high seas for these purposes. It recognised that other States were entitled to fish in these areas and signalled that it would collaborate on joint development and management of fisheries where nationals of several States were involved.[21]

The proclamations struck a chord of that time as they did not meet any objections.[22] The US initiative was followed *inter alia* by Latin American States arguing for a 200 nautical mile zone, distancing themselves from Grotian rules.[23] These coastal States used similar arguments as the US for nationalisation, the need to ensure subsistence for their population

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[19] See eg *Fisheries Case (UK v Norway)* [1951] ICJ Reports 1951, 116, 133: 'It is the land which confers upon the coastal State a right to the waters off its coasts'.

[20] Presidential Proclamation No. 2668 (n 14).

[21] ibid.

[22] Ranganathan, 'Ocean Floor Grab' (n 3) 581.

[23] Robert L Friedheim, *Negotiating the New Ocean Regime* (University of South Carolina University Press 1993) 19–20; Ann Hollick',The Origins of 200-Mile Offshore Zones' (1977) 71 American Journal of International Law 494, 500.

and to provide for economic development.[24] Again, either camouflaging it as preferential rights or outright claiming territorial rights, these States aimed at controlling access to and exploitation of important marine resources.

2.3 Multilateralism: Balancing between Freedoms and Sovereign Rights/Preferential Rights

With the adoption of the Geneva conventions, the legal order for the oceans was clarified providing for stability and predictability. This subsection will, as indicated above, look at the interests involved in the process and how they were balanced. It relates particularly to the collective interests of States in maintaining the freedoms of the high seas.

2.3.1 Codification of the Law of the Sea

The International Law Commission (ILC) included in its first year of operation (1949) the high seas regime as one of its priority areas.[25] This was triggered by recent State practice such as continental shelf claims that had 'profound repercussions' for the regime.[26]

Its discussions and analyses of the high seas regime came to include the fisheries and the continental shelf regime. The ILC recognised that coastal States had legitimate interests in the conservation of high seas fisheries.[27] '…The "special" character of the interest of the coastal State was based on the geographical adjacency to the high seas area'.[28] However, this

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[24] Declaration on the maritime zone (signed and entered into force 18 August 1952) 1006 UNTS 325.

[25] Yearbook of the International Law Commission (1949) 43.

[26] ibid 235; Treves (n 6) 11–13.

[27] Articles concerning the Law of the Sea with commentaries, Yearbook of the International Law Commission (vol 2, 1956) 286–87.

[28] ibid 288 (para 14).

special interest did not involve precedence *per* se over the interests of States exercising the freedom of fishing.[29] Until 1953, its reports included a proposal to establish under the UN a body competent to adopt legally binding regulations in high seas fisheries in case States were not able to agree on regulations.[30] The body would serve the interests of the international community as a whole. In later reports, arbitration had replaced a UN body as the default mechanism.[31]

Similarly, as concerns the continental shelf regime, it had been argued that its resources should not be allocated to the coastal State, but entrusted to the international community.[32] However, it was concluded that such '… internationalization would meet with insurmountable practical difficulties, and would not ensure the effective exploitation of natural resources necessary to meet the needs of mankind'.[33] The littoral State was in a better

[29] ibid.

[30] Yoshinobu Takei, *Filling regulatory gaps in high seas fisheries: Discrete high seas fish stocks, deep-sea fisheries and vulnerable marine ecosystems* (Martinus Nijhoff 2013) 22; Yearbook of the International Law Commission (vol 2, 1953) 218–19.

[31] Yearbook of the International Law Commission (vol 2, 1955); Report of the International Law Commission to the General Assembly, UN Doc A/2934: Regime of the High Seas, Article 31 30–31), Cf. Articles concerning the Law of the Sea with commentaries, Yearbook of the International Law Commission (vol 2, 1956) 286–87.

[32] Yearbook of the International Law Commission (vol 2, 1950) 384, para 198; Yearbook of the International Law Commission 1956 (n 31) 296.

[33] ibid.

position to provide for the effective exploitation of the natural resources of the continental shelf.[34]

The 1958 UN Conference on the Law of the Sea (UNCLOS I) resulted in the adoption of the four Geneva conventions. The Continental Shelf Convention (CSC) provided the coastal State with sovereign rights over the natural resources on the continental shelf.[35]

The High Seas Convention (HSC) defined the high seas as '…all parts of the sea not included in the territorial sea or internal waters of a State'.[36] The lack of reference to the continental shelf created uncertainty about the relationship between the two zones. The list of the freedoms of the high seas did not include the exploitation and exploration of the natural resources of its seabed and subsoil.[37] There was different readings of this omission.[38] ILC had considered that exploitation of the natural resources of the seabed of the high seas had not '…assumed sufficient practical importance to justify special regulation'.[39] The inadequate regulation of the high seas regime made it vulnerable to future challenges, which is recognizable from the debate of recent years on the status of MGR in ABNJ.[40]

[34] Yearbook of the International Law Commission 1950 (n 32) 384, para 198.

[35] CSC (n 15) art 2.

[36] HSC (n 15) art 1.

[37] ibid art 2.

[38] Bernard H Oxman, 'The High Seas and the International Seabed Area' (1989) 10 Michigan Journal of International Law 526, 530.

[39] ibid.

[40] Lyle Glowka, 'The Deepest of Ironies: Genetic Resources, Marine Scientific Research, and the Area' (1996) 12 Ocean Yearbook 154, 155.

Under the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (Fishing Convention), States were instructed to cooperate on necessary conservation measures.[41] The Fishing Convention recognised that the coastal State had a 'special interest' in the conservation of living marine resources in high seas areas adjacent to its territorial sea.[42]

2.3.2. International Legislation: Adapting to Practice Rather than Developing New Law

The codification process was to a large degree driven by and responsive to State practice. The lawyers involved – practitioners and academics – adopted a pragmatic approach.[43] They did not aim at dramatic changes to the law, rather sought to address pressing needs. Friedheim described the period as focusing on solving problems rather than considering principles.[44] The US had started a worldwide movement that could not be stopped or reversed, giving coastal States exclusive rights to marine natural resources. The function of international law was understood as adapting the law to this development rather than the opposite. Right or wrong, ~~Scholars~~ scholars argued that international law indeed could be developed through an international conference under the auspices of the UN and not be left to the practice of the powerful States.[45]

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[41] CFCLR (n 15).

[42] ibid arts 6(1) and 8.

[43] Ranganathan, 'Ocean Floor Grab' (n 3) 592–93.

[44] Friedheim (n 23) 19.

[45] Euripides L Evriviades, 'Third World's Approach to the Deep Seabed' (1982) 11 Ocean Development and International Law 201, 207.

The drawback of such a pragmatic approach was that no investigations were undertaken of the needs for regulations and/or of alternative models of governance. Proposals or ideas to establish international institutions charged with managing fisheries and petroleum resources of the high seas that could even strengthen the high seas regime were not seriously considered. Even if large parts of the oceans remained high seas, the obligations of States remained bilateral.[46] It was still the interests of the individual States to control space and resources, and not that of the international community, that prevailed.

Anand offered a sober analysis of the codification process: '… In sum, after the two UN Conferences, the law of the sea remained essentially the traditional law …'[47] The lesson from this period seems to be that the international conferences do not provide for quick and radical changes but aim at consolidating the law driven by State practice.

3 Progressive Development: Consolidating the ABNJ Regimes and Further Nationalisation

3.1 General

This section investigates the period from the late 1960s until today, including the on-going BBNJ process. After the adoption of the 1958 Geneva conventions, new States gained their independence and changed the composition of the world community, with respect to both the number of States and the range of interests that found a voice. They were mostly developing

[46] Surabhi Ranganathan, 'The Law of the Sea and Natural Resources' in Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018) 121, 124.

[47] R P Anand, 'Winds of change in the law of the sea' in R R Anand (ed), *Law of the Sea: Caracas and beyond*, (Brill 1980) 36, 41.

States located in the Global South, often having other priorities for the development of the law of the sea than the traditional (developed) maritime States.[48] According to Anand, the newly independent developing States in Africa and Asia broke '…open the exclusive and powerful club of western Christian powers and Japan, forming the active community of States'.[49] What started in the late 1960s as a concern among developing States about the legal regime for the exploitation of the minerals of the seabed led to a process that culminated with the adoption of the 1982 LOSC. They sought to change the '…imbalance in the international legal and economic order …'[50] However, as pointed out by Ranganathan, the developing States did not fully accept the proposals to subject vast areas of the seabed to the status of the CHM: They represented a diverse set of interests and together with developed States, they argued for extending their zones under national jurisdiction, including the continental shelf.[51] As coastal States, they were concerned about the control over the exploitation of natural resources in their coastal waters.[52] These claims resonated with the adoption of the UNGA resolution on permanent sovereignty over natural resources.[53] The purpose was partly to correct historical injustice and to have a recognition that an equal right to a full control and

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[48] Christopher C Joyner and Elizabeth A Martell, 'Looking Back to See Ahead: UNCLOS III and Lessons for Global Commons Law' (1996) 27 Ocean Development and International Law 73, 76.

[49] Anand, 'Winds of change' (n 47) 42.

[50] Evriviades (n 45) 208.

[51] Ranganathan, 'Natural Resources' (n 46) 128.

[52] Anand, 'Winds of change' (n 47) 39–40.

[53] UNGA resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

free use of natural resources is a crucial condition for the political autonomy and the economic development of a State.[54]

The following two subsections investigates the rights of developing States to access and to participate in the governance of deep-sea resources and the preferential rights of coastal States, consistent with the two themes, identified in section 1, which were particularly debated in the years leading up to and following the adoption of the LOSC. Section 3.2 explores the latter-mentioned theme. First, it includes debates on the status of ABNJ as CHM (section 3.2.1) from the initial proposals in the late 1960s during the third UN Conference on the Law of the Sea (UNCLOS III) to its incorporation in the LOSC and the later amendments of the 1994 Implementation Agreement.[55] This is aimed at providing insight into the conflicting interests and how they were overcome and resolved, which is of relevance to the on-going BBNJ process. The subsection further investigates the more recent debate on the status of MGR in ABNJ (section 3.2.2), having parallels to the discussions of the 1970s. It is in recent years that the deep-sea regime of the LOSC and consequently the CHM is being put into operation, *inter alia* through regulations on exploration and exploitation developed through the International Seabed Authority (ISA). Protection of the marine environment is one of the components of CHM and the so-called sponsoring States have an important role in ensuring that the environmental regulations adopted by ISA are complied with. Section 3.2.3

[54] Petra Gümplová, 'Sovereignty over natural resources –A normative reinterpretation' (2020) 9 Global Constitutionalism 7, 16.

[55] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (signed 18 July 1994, entered in force 16 November 1994) 1836 UNTS 3.

investigates what this role entails and whether the CHM implies that developing States have different roles or responsibilities as sponsoring States.

The second theme is explored in section 3.3. Even if coastal States had their jurisdiction significantly expanded through the 200 nautical mile EEZ, there was still a debate on whether they enjoyed preferential rights in regard of straddling and highly migratory fish stocks in adjacent areas of the high seas (section 3.3.1). This debate was addressed through the 1995 UNFSA and the requirement of compatibility (section 3.3.2). The debate in regard of transboundary fish stocks resonates with the debate in the BBNJ process where arguments have been made that coastal States should enjoy preferential rights in adjacent areas of the ABNJ (section 3.3.3).

3.2 The Seabed beyond the Continental Shelf/National Jurisdiction as Common Heritage of Mankind

3.2.1 The Incorporation of the Common Heritage of Mankind into the Law of the Sea

In the mid-1960s, many States, including Malta, were concerned that the seabed and its resources would either be part of the continental shelf of coastal States or subjected to occupation, both options favouring developed States.[56] During a UNGA debate in 1967 over the status of the seabed, Malta's ambassador, Arvid Pardo, proposed that the seabed and ocean floor 'underlying the seas beyond the limits of present national jurisdiction' be designated 'the common heritage of mankind'.[57] The concept of CHM had already been

[56] Ranganathan, 'Natural Resources' (n 46) 127.

[57] Arvid Pardo, UNGA, First Committee, 15th Meeting 1 November 1967, UN Doc A/C.1/PV.L515, paras 10(a) and 13.

explored by UN agencies as possible means to regulate seabed mining.[58] Pardo argued that the consequences of the appropriation of the seabed may be incalculable and that States should consider some form of international jurisdiction and control over the seabed beyond the limits of present national jurisdiction, 'before events take an irreversible course'.[59] He later described the application of the traditional principles of the high seas as creating 'intolerable injustice of reserving the plurality of the world's resources for the exclusive benefit of a few States'.[60] His intervention was part of a broader movement both to stop the tendency of creeping national jurisdiction into ABNJ and to redefine its *res communis* character which benefited only a few States.[61] With this initiative a new dimension was introduced to law of the sea – equity – and more value driven approaches.

Following Pardo's speech, the UNGA established the Ad-Hoc Seabed Committee, charged with examining the use of the seabed outside national jurisdiction in the interest of mankind.[62] In its 1969 report, the Committee concluded that parts of the seabed lay beyond

[58] Ranganathan, 'Natural Resources' (n 46) 127.

[59] Pardo, UNGA Meeting (n 57) para. 7.

[60] Arvid Pardo, 'An International Regime for the Deep Seabed: Developing Law or Developing Anarchy' (1969) 5 Texas International Law Forum 204, 207.

[61] John E Noyes, 'The Common Heritage of Mankind: Past, Present, and Future' (2011–2012) 40 Denver Journal of International Law and Policy 447, 457; Helmut Tuerk, *Reflections on the Contemporary Law of the Sea* (Brill 2012) 33; Rüdiger Wolfrum, 'The Principle of the Common Heritage of Mankind' (1983) 43 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 312, 315.

[62] UNGA Res 2340 (XXII).

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national jurisdiction.[63] As the work of the Committee progressed, the conflicting values became evident: individual interests by States arguing the freedoms of the seas on the one hand versus community interests by States advocating some sort of stewardship on the other hand.[64] The majority of States agreed on establishing some sort of shared ownership regime between all States.[65] Even the US accepted such idea, realising the need for providing its industry with predictability and stability.[66] Subsequently, the UNGA declared the seabed beyond national jurisdiction as CHM.[67]

3.2.1.1 UNCLOS III: Clash of Values

UNCLOS III (1973–82), was charged with establishing 'an equitable international regime' for the oceans.[68] An important component was the deep-sea bed regime. Both during UNCLOS III and after the adoption of the LOSC the concept or principle of CHM was criticised for its

[63] O'Connell (n 6) 460.

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[64] Joyner and Martell (n 48) 76.

[65] Lea Brilmayer and Natalie Klein, 'Land and Sea: Two Sovereignty Regimes In search of A Common Denominator' (2001) 33 New York University Journal of International Law and Politics 703, 727.

[66] Ranganathan, 'Natural Resources' (n 46) 128.

[67] UNGA Res 2749 (XXV).

[68] UNGA Res 2750 V (XXV) para 2; UNGA Res 3067 (XXVIII). Reservation exclusively for peaceful purposes of the seabed and the ocean floor, and the subsoil thereof, underlying the high seas beyond the limits of present national jurisdiction and use of their resources in the interests of mankind, and convening of the Third United Nations Conference on the Law of the Sea, para. 3.

ambiguity.[69] This was not surprising, given the different views of developing and developed States on the legal regime pertaining to the resources of the deep seabed.[70] The introduction of the New International Economic Order (NIEO) added to these controversies, challenging the Western ideology of economic liberalism.[71] Morgera has described the NIEO as an attempt by the developing countries to 'radically restructuring the global economic system by prioritizing the objective of development …'[72] The NIEO was grounded in UNGA resolutions.[73] Its goal was to change the existing international economic world order that hampered the development of the newly independent States: 70% of the world population, and only 30% of the income. The basic principles for the NIEO required more just and equitable conditions by promoting broader cooperation between States, just and equitable relationship between the

[69] Noyes (n 61) 447.

[70] Lawrence Juda, 'UNCLOS III and the New International Economic Order' (1979) 7 Ocean Development and International Law Journal 221, 226.

[71] ibid; Boleslaw Adam Boczek, 'Ideology and the Law of the Sea: The Challenge of the New International Economic Order' (1984) 7 Boston College and International Comparative Law Review 1, 2; Ranganathan, 'Ocean Floor Grab' (n 3) 595.

[72] Elisa Morgera, 'The Need for an International Legal Concept of Fair and Equitable Benefit Sharing' (2016) 27 European Journal of International Law 353, 358.

[73] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI); Program of Action on the Establishment of a New International Economic Order, UNGA Res 3202 (S-VI); Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX).

prices of raw materials exported and imported by developing States and preferential non-reciprocal treatment of developing States.[74]

There were disagreements between States on several of the components of CHM. Some opponents of the CHM saw the regime as ‘the greatest land grab of all, which threatened commercial enterprise by vesting control of the seabed in a kind of supergovernment answerable to no one’.[75] In between the two extremes, some developed States from Scandinavia and Western Europe took a pragmatic approach.[76] They recognised that they were not able to prevent the adoption of the CHM and sought compromises.[77]

3.2.1.2 CHM in the LOSC

Article 140 paragraph 1 of the LOSC stipulates that the activities of the deep seabed area are to be carried out for ‘the benefit of mankind as a whole’, implying distributional justice as an important purpose.[78] The CHM, described as a fundamental legal principle, was elaborated through a regime of principles and obligations including:[79]

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[74] Declaration on the Establishment of a New International Economic Order, UNGA Res 3201 (S-VI), para 4.

[75] Ranganathan, ‘Ocean Floor Grab’ (n 3) 577 with reference to Ely, ’One OPEC Is Enough!’ (1981) 5 Regulation 19.

[76] Friedheim (n 23) 290.

[77] ibid.

[78] Rüdiger Wolfrum, ‘Common Heritage of Mankind’ (2009) Max Planck Encyclopedia of International Law para 19.

[79] Dire Tladi, ‘The Common Heritage of Mankind and the Proposed Treaty on Biodiversity in Areas beyond National Jurisdiction: The choice between Pragmatism and

- non-appropriation;[80]
- the resources of the deep seabed belong to the humankind as a whole;[81]
- governance through common management;
- use for peaceful purposes[82];
- sharing of benefits; and
- protection and preservation of the marine environment.

The controversies or differences surrounding the concept of CHM have particularly concerned the governance, access to the resources and sharing of benefits. The fact that *the resources belong to humankind as a whol*e, implies that the rights of individuals or States to access the resources are dependent on some sort of concession or licence adopted under the provisions of Part XI of the LOSC.[83] Developed States argued that the CHM should be limited to improvements in the distribution of benefits derived from the exploitation of the resources.[84] However, the developing States rejected that the freedom of access should be a component of CHM, arguing that the concept provided humankind with property rights similar to ownership.[85]

Sustainability' (2015) 25 YIEL 113, 124–27; Noyes (n 61) 450–54; Ranganathan, 'Natural Resources' (n 46) 125.

[80] LOSC art 89 (high seas) and art 137 (1) (Area).

[81] ibid art 137(2).

[82] ibid arts 88 and 141.

[83] LOSC art 137(2).

[84] See for an overview Tuerk (n 61) 36–37.

[85] ibid.

The Nixon administration had recognised the need for an international trusteeship zone to prevent further nationalisation.[86] This policy was reversed with the Reagan administration, which built on a more liberal approach to property rights.[87] It was based on the Lockean notion that ownership is acquired by those who find the natural resources, invest labour and capital in extracting them, take the risks, and consequently those with the greatest connection to the resource.[88]

Restricting the right to access to the mineral resources presupposes the existence of a *common management* regime. The regime involved a global, institutionalized mechanism competent to regulate all activities and to distribute the benefits equitably.[89] CHM presumes the establishment of an international institution – the ISA (or Authority) – competent to manage the resource on behalf of mankind.[90]All the States parties to the LOSC are members of the ISA. The US, the proponent of free access to the mineral resources was critical of the establishment of the ISA, and in particular its competence to restrict entry into the market, set

[86] Ranganathan, 'Ocean Floor Grab' (n 3) 583.

[87] R P Anand, *Studies in International Law and History* (Springer 2004) 182.

[88] Doug Bandow, 'UNCLOS III: A Flawed Treaty' (1982) 19 San Diego Law Review 475, 478–79; Louis B Sohn, 'The Law of the Sea Crisis' (1984) 58 St. John's Law Review 237, 258–60.

[89] Ranganathan, 'Ocean Floor Grab' (n 3) 592.

[90] Tladi (n 79) 126; LOSC art 137(2). The Authority is set up under LOSC Part XI section 4 whereas its areas of competence are regulated in same part, section 3 (as amended by the 1994 Implementation Agreement).

[90]Bandow (n 88) 480.

production limitations, and mandate the transfer of technology, which violated ‘rights of economic liberty’.[91]

Sharing of benefits is an essential element of CHM and may include both monetary and non-monetary benefits.[92] There is a close link between benefit sharing and the NIEO movement, which aimed at accommodating the needs of developing States.[93] Tladi argues that the implementation of the CHM hinges on the benefit-sharing element.[94]

The CHM principle included both preferential treatment to ensure economic development and provided for a *de facto* equal participation.[95] Preferential treatment was facilitated through provisions ensuring the transfer of technology, establishment of production policy and the role of the Enterprise.[96] Examples of *de facto* equal participation included States receiving revenues equivalent to direct participation in deep seabed activities and restricting the activities of the deep seabed mining States and supporting activities of other States.[97]

Under the leadership of the Group of 77, third world States joined against prospective deep seabed mining States, particularly the US.[98] However, although the developing States were successful in adopting a Part XI in accordance with their positions and interests, their

[91] ibid.

[92] LOSC art 140(2).

[93] Noyes (n 61) 470.

[94] Tladi (n 79) 126–27.

[95] Wolfrum, ‘The Principle’ (n 61) 321–22.

[96] See eg LOSC arts 144, 150–151, 153 and Annex III.

[97] ibid.

[98] Joyner and Martell (n 48) 78–79.

triumph was short-lived. On 30 April 1982, in the vote on the LOSC, 130 States were in favour, 4 opposed, and 17 abstained.[99]

3.2.1.3 The 1994 Implementation Agreement: Watering Down the CHM?

As the LOSC was to enter into force, initiatives were taken to ensure its universal application by attracting the ratification and accession of developed States.[100] This led to the negotiation and adoption of the 1994 Implementation Agreement, which in reality amended Part XI of the LOSC.[101] According to Oxman, the amendments responded to the criticism of the US.[102] It provided the US and other industrial States with increased influence on decision-making and incorporated marked-based principles.[103]

The Implementation Agreement strengthened the role of the 36 member-Council, one of the principal organs of ISA at the expense of its plenary organ, the Assembly.[104] Its decisions are to be based on the recommendations of the Council.[105] The procedures for the elections to the Council were amended, securing the US a permanent seat, if it were to accede

[99] Summary Record of 182nd plenary meeting; Official Records, Volume XVI, UN Doc A/CONF.62/SR.182, 154–55 (paras 27–28).

[100] Louis B Sohn, 'International Law Implications of the 1994 Agreement' (1994) 88 The American Journal of International Law 696.

[101] See n 55 for full title.

[102] Bernard Oxman, 'Law of the Sea Forum: The 1994 Agreement on Implementation of the Seabed Provisions of the Convention on the Law of the Sea. The 1994 Agreement and the Convention' (1994) 88 American Journal of International Law 687.

[103] ibid 695.

[104] LOSC art 159 (1).

[105] Implementation Agreement, Annex, section 3, para 4.

to the Convention. The decision-making procedures of the Council provide the US and developed States with *de facto* veto power.[106]

Furthermore, ISA is no longer competent to set a ceiling on production, to limit production, to require licenses for participation and production or to require transfer of technology.[107] The Enterprise, an organ under the ISA, was competent to carry out exploration and exploitation activities in the Area.[108] The US and other States were critical to such role arguing that it would discriminate private actors, by forcing them to cooperate through joint ventures with the Enterprise or developing countries. Under the Implementation Agreement, the Enterprise had lost its privileged status and is subject to the same conditions as any private contractor.[109] Private contractors are neither required to fund one mining site of the Enterprise.[110]

The LOSC provides few details on how the benefits from the activities of the Area shall be shared. The Assembly shall adopt rules and procedures for the equitable sharing of financial and other economic benefits, '… taking into particular consideration the interests and needs of developing States and peoples that have no attained full independence or other self-governing status'.[111] As noted above, under the revised decision-making procedures, providing the Council with extended power, the developed/industrialized States have extensive influence in designing and practicing the equitable sharing regime.

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[106] ibid annex, section 3, paras 15(a) and (b).

[107] ibid annex, section 6, para 7 and section 5, para 2.

[108] LOSC art 170.

[109] Implementation Agreement, annex, section 2, para 4.

[110] ibid annex, section 2, para 3.

[111] LOSC art 160(2)(f).

3.2.1.3 Present Status of CHM

The Implementation Agreement has been subjected to different and even conflicting assessments. Stevenson and Oxman were concerned that the political controversy over deep seabed mining had dominated the debate for too long and creating misconceptions of the LOSC.[112] Their hope was obviously that the Implementation Agreement could attract a more positive and constructive attention to the LOSC. Noyes argued that the traditional elements of CHM were still in place: The basic features banning sovereign claims, ensuring equitable sharing of benefits, the peaceful purposes and environmental protection. On the opposite end, Anand argued that the US got 'all it wanted' through the Implementation Agreement and the practice of the ISA.[113] The international community had backtracked to satisfy Washington. The CHM principle had lost its original meaning, as advocated by Pardo, argued Anand.[114] He concluded: 'The deep seabed will now be exploited on commercial terms, irrespective of the needs and interests of the weaker members of the international community'.[115]

The Implementation Agreement reflects a pragmatic approach. It was pragmatic in the sense that the objective of ensuring universal application of the CHM regime – and indeed of the LOSC as a whole – was viewed as more important than insisting on a principled stance. The consequence was that the ideas of economic liberalism again prevailed over the ideas of community interests and justice. The developed States, capable of exploring and exploiting the resources of the deep-sea had the decisive say. The alternative would have been a

[112] John R Stevenson and Bernard H Oxman, 'The Future of the United Nations Convention on the Law of the Sea' (1994) 88 The American Journal of International Law 488.

[113] Anand, *International Law and History* (n 87) 195.

[114] ibid 196; Noyes (n 61) 464.

[115] ibid.

fragmented international legal order, where developed States could have developed a parallel regime for the exploration and exploitation of the minerals of the deep sea based on traditional freedoms of the high seas in competition with the deep seabed regime of the LOSC.

Similar situations may occur in the BBNJ process. Although constituting the majority of the world community, the developing States and their call for community-based solutions that promote equity and justice may clash with proponents of economic liberalism. Again, to ensure universal application of a legally binding instrument on BBNJ, demands for more fundamental changes to the law may be left for non-principled compromises.

3.2.2 The Legal Status of MGR: CHM or Part of the Freedoms of the High Seas?

The debate of recent years has not only been concerned with the implementation of the CHM regime and its potential inadequacies. It has been extended to whether it includes other resources than minerals, such as MGR.

3.2.2.1 Introducing Marine Genetic Resources to the Law of the Sea

The Convention on Biological Diversity (CBD) introduced genetic resources as a new legal concept, also relevant in the law of the sea.[116] The CBD aims at the conservation of biodiversity, sustainable use of its components and the fair and equitable sharing of the benefits of the utilization of the genetic resources.[117] In the ABNJ, the CBD is applicable to processes and activities under the jurisdiction or control of Contracting Parties.[118] They are required to cooperate with the aim of conservation and sustainable use of biological

[116] Convention on Biological Diversity (signed 5 June 1992, entered in force 29 December 1993) 1760 UNTS 79 (CBD) art 2 (definition) and art 15 (access to genetic resources).

[117] ibid art 1.

[118] ibid art 4.

diversity.[119] There are no clear answers as how to apply the obligations under the CBD to the ABNJ, consistently with the rights and obligations of States under the law of the sea.[120]

A concern is the status of MGR in the ABNJ, as the adoption of the CBD revealed gaps in the international regulatory framework for MGR.[121] The debate on the status of MGR raised questions as to the ability of the LOSC to adapt to new knowledge and technological developments. One of the 'deepest of ironies' of the LOSC, it was argued, was that the MGR, probably the 'most immediately exploitable and lucrative resource' of the Area, are not referred to in the Convention.[122]

3.2.2.2Four Approaches to the Status of MGRs in ABNJ

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[119] ibid art 5.

[120] Louise Angelique 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, 276; CBD art 22.

[121] Robin Warner, 'Developing New Regulatory Paradigms for the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction' in Robin Warner and Stuart Kaye (eds), *Routledge Handbook of Maritime Regulation and Enforcement* (Routledge 2016) 397.

[122] Glowka, 'Deepest of Ironies' (n 40) 155.

The application or non-application of the CHM to MGR have been widely debated in the literature.[123] There have been four broad approaches to the relevance of CHM to MGR.[124] They have been introduced at different times, some even before the BBNJ process started and some may have been subject to subsequent modifications or changes.

The arguments of the *first* approach that MGR are part of the CHM, are based on the interpretation of the LOSC and in particular its Part XI, where it is stated that the both the resources of the Area *and* the Area itself are the CHM.[125] This entails that MGR are naturally encompassed by the CHM regime.

Others argue that MGR are part of the freedoms of the high seas and freely accessible to all States.[126] The status of MGR is arguably the same as mineral resources in ABNJ before the adoption of the LOSC.[127] Therefore, according to the *second approach* there is an urgent need for a debate on the future status of MGR: whether it should be retained as a freedom, be

[123] See eg Penelope Ridings, 'Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction' (2018) 75 ICES Journal of Marine Science 435.

[124] David Leary, 'Moving the Marine Genetic Resources Debate Forward: Some Reflections' (2012) 27 International Journal of Marine & Coastal Law 435, 439.

[125] Alex G Oude Elferink, 'The Regime of the Area: Delineating the Scope of Application of the Common Heritage Principle and Freedom of the High Seas' (2007) 22 International Journal of Marine & Coastal Law 143, 147ff.

[126] Glowka, 'Deepest of Ironies' (n 40) 168.

[127] Lyle Glowka, 'Genetic Resources, Marine Scientific Research and the International Seabed Area' (1999) 8 Review of European Community & International Environmental Law 56, 58–59.

included by CHM regime or regulated through a new legal regime.[128] Freely accessible MGR would only benefit a handful of States.[129]

Proponents of the *third* approach, recognizing that MGR are part of the freedoms of the high seas, acknowledge the need to fill the gaps evident in the present regime.[130] However, this could be undertaken within the existing framework of Part VII of the LOSC under which there is an obligation of States to cooperate.

The *fourth* approach involves analyses that are not preoccupied on whether MGR belong to either of the two regimes. They were more concerned with finding pragmatic – non principled – solutions and less with defining the legal status of MGR.[131] One commentator described the promotion by developing States of the 'common heritage solution' as a 'fundamentalist' approach.[132] Another argued that it was unlikely that the status of MGR would '…reflect the CHM principle in any "pure", Pardo-esque form, if at all'.[133] The consequence was that the proponents of CHM status ignored the possibility of finding solutions that are more practical.

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[128] ibid.

[129] Glowka, 'Deepest of Ironies' (n 40) 155.

[130] Craig Allen, 'Protecting the Oceanic Gardens of Eden: International Law Issues in Deep Sea Vent Resources Conservation and Management' (2001) 13 Georgetown International Environmental Law Review 563.

[131] Seemingly also Louise Angelique de La Fayette (n 120) 221–80.

[132] David Leary, 'Moving the Marine Genetic Resources Debate Forward: Some Reflections' (2012) 27 International Journal of Marine & Coastal Law 435, 438.

[133] Noyes (n 61) 469.

The (fourth) pragmatic approach was criticised by proponents of the CHM status.[134] Their concern was that important elements of CHM are lost without any real consideration. It was '… the [CHM] principle [that] is the thread that binds the proposed elements of a new treaty together – that is, conservation and sustainable use, including benefit sharing, area-based management tools (ABMTs) including marine protected areas (MPAs), environmental impact assessment (EIA) and capacity building, and technology transfer'.[135]

Parallel to the academic debate, the Ad Hoc Open-ended Informal Working Group[136] was established in a recognition of the need for a more systematic approach to addressing the gaps regarding conservation of marine biodiversity in ABNJ.[137] The debate in the Working Group (2006–15) included the status of MGRs, which was one of the most controversial issues discussed.[138] Its outcome document did not conclude on the status of the MGR other than

[134] Tladi (n 79) 114; Vito De Lucia, 'The Question of the Common Heritage of Mankind and the Negotiations towards a Global Treaty on Marine Biodiversity in Areas beyond National Jurisdiction: No End in Sight?' (2020) 16(2) McGill Journal of Sustainable Development Law 140; Alice B M Vadrot, Arne Langlet and Ina Tessnow-von Wysocki, 'Who owns marine biodiversity? Contesting the world order through the "common heritage of humankind" principle' (2021) Environmental Politics available at <https://doi.org/10.1080/09644016.2021.1911442> accessed 22 July 2021.

[135] Tladi (n 79) 131.

[136] Full title: 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, established by UNGA Res/59/24, para 73.

[137] Warner (n 121) 401; UNGA Res/59/24 (n 136) Oceans and the law of the sea, para 73.

[138] ibid.

including marine genetic resources, and benefit sharing as one of the recommended topics for negotiations at an intergovernmental conference.[139] The status of MGR is still unresolved in the ongoing intergovernmental conference. A principle that the utilisation of MGR shall be '…for the benefit of mankind as a whole …' is placed in brackets in the revised draft text of an agreement on the conservation and sustainable use of BBNJ (Revised Draft Agreement) prepared by the President of the conference.[140]

3.2.2.2 The Debate on the Status of MGR: Between CHM and Part of the Freedoms of the High Seas

The positions taken in the debate on status of MGR have clear parallels to the debate during UNCLOS III on the status of minerals of the deep-sea bed, particularly between those arguing for CHM status and those arguing for the freedoms of the high seas. In between, there are voices arguing for compromise solutions, probably reflective of the development in recent years of the deep-sea regime as evidenced by the Implementation Agreement.

[139] Outcome of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction and Co-Chairs' summary of discussions, in Annex to 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.

[140] Revised draft text of an agreement 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 (Revised Draft Agreement). Note by the President (18 November 2019) art 9(4), cf art 5(c), UN Doc A/Conf.232/2020/3.

Still, the CHM principle and its implications in respect of MGR are fraught with ambiguities.[141] Similar to the regime for deep seabed minerals, the principle needs to be transformed into concrete rules, standards, and practices. Furthermore, the question is what remains of the original CHM principle following the amendments made through the Implementation Agreement. The question is most relevant for the BBNJ process. It is natural to assume that the CHM principle would have the same application to MGR as to minerals under the LOSC. Consequently, the core element (in addition to common management) would include procedures for benefit sharing, unless the other elements of CHM, such as preferential treatment are reintroduced into a new legal instrument. The latter does not seem very likely given the positions of States. It may explain the attempts to find a middle ground by highlighting benefit-sharing. The benefit-sharing element has become a central element of the debate, but will there be any benefits to redistribute?[142] The question is whether the debate on the status of MGR as CHM is more of a symbolic than a substantive character.

3.2.3 Implementing the CHM: The Role of Developing States in Protecting the Marine Environment

The protection and preservation of the marine environment is one of the components of the CHM. The common management component of the CHM principle included a regulatory framework for the protection of the marine environment.[143] As the exploration and exploitation of mineral resources of the Area became more feasible, the debate on the implications of the CHM moved from theoretical to 'practical' approaches. The ISA started to develop the Mining Code, which includes a comprehensive set of rules, regulations and procedures to regulate prospecting, exploration and exploitation of marine minerals.[144] Several regulations for exploration of minerals such as polymetallic nodules have been

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[141] Common Heritage of Mankind is listed as one of possible general principles of the Revised Draft Agreement, art 5.

[142] Ranganathan, 'Ocean Floor Grab' (n 3) 597.

[143] ibid 596.

[144] International Seabed Authority: Mining Code available at <www.isa.org.jm/mining-code> accessed 22 July 2021.

adopted.[145] The ISA is currently developing regulations for the exploitation of minerals of the deep-sea.[146]

The focus of the debate in relation to mining within academia subsequently moved to questions on the implementation of the CHM principle, including the protection of the marine environment.[147] There were critical reviews of the adequacy of the regulations in addressing the potential negative effects of mining operations on the environment.[148] There were calls for a comprehensive review of the regulatory regime. This included calls for more scientific knowledge, providing for public participation in the decision-making processes, revising the

[145] Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, Annex of Decision of the Council of the International Seabed Authority relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, ISBA/19/C/17, available at <www.isa.org.jm/mining-code/regulations> accessed 22 July 2021.

[146] Draft Exploitation Regulations, available at <www.isa.org.jm/mining-code/ongoing-development-regulations-exploitation-mineral-resources-area> accessed 22 July 2021.

[147] Ranganathan, 'Natural Resources' (n 46) 133.

[148] Aline Jaeckel, Jeff A Ardron and Kristina M Gjerde, 'Sharing benefits of the common heritage of mankind – Is the deep seabed mining regime ready?' (2016) 70 Marine Policy 198; Aline Jaeckel, Kristina M Gjerde and Jeff A Ardron, 'Conserving the common heritage of humankind – Options for the deep-seabed mining regime' (2017) 78 Marine Policy 150; Erik van Doorn', Environmental aspects of the Mining code: Preserving humankind's common heritage while opening Pardo's box?' (2016) 70 Marine Policy 192.

licensing schemes, assessing the need to start seabed mining, and setting environmental targets.[149]

3.2.3.1 Due Regard Obligation of Sponsoring States: Preferential Treatment of Developing States?

The 2011 Advisory Opinion of the ITLOS Seabed Dispute Chamber (SDC) on Responsibilities and obligations of States with respect to activities in the Area (hereafter sponsoring States)[150] included statements on the environmental protection obligations of States, as *inter alia* entailing an obligation of due diligence to protect the marine environment, which is supplemented by the precautionary approach.[151] This provides a framework for constraining the activities of private enterprises, which have become the dominant players after the Implementation Agreement.[152]

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[149] Jaeckel, Gjerde and Ardron, 'Conserving' (n 148).

[150] *Responsibilities and obligations of States with respect to activities in the Area* (Advisory Opinion, 1 February 2011) ITLOS Reports 2011 (*Sponsoring States*), 10 available at <www.itlos.org/en/main/cases/list-of-cases/case-no-17/> accessed 22 July 2021.

[151] Donald K Anton, Robert A Makgill and Cymie R Payne, 'Seabed Mining – Advisory Opinion on Responsibility and Liability' (2011) 41 Environmental Policy and Law 60, 65; Rosemary Rayfuse, 'Differentiating the Common: The Responsibilities and Obligations of States Sponsoring Deep Seabed Mining Activities in the Area' (2011) 54 German Yearbook of International Law 459, 487–88.

[152] Duncan French, 'From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor – the Seabed Disputes Chamber's 2011 Advisory Opinion' (2011) 26 International Journal of Marine & Coastal Law 525, 566.

In the context of the themes of this chapter, it is the elaboration of the SDC on the responsibilities of developing States when participating in deep-sea bed mining activities that is relevant.[153]

The ISA asked SDC to give an advisory opinion on *inter alia* the legal responsibilities and obligations of States Parties to the LOSC in respect of their sponsorship activities in the Area.[154] The background was that two small Pacific island developing States (Nauru and Tonga) were involved in planned projects in the Area as sponsoring States to private companies.[155] Sponsorship by a State Party is required for private companies to engage in mining activities on the deep-sea bed.[156] The sponsoring State Party is required to ensure that activities undertaken by companies under its jurisdiction are in conformity with the Part XI of the LOSC.[157] If these two small developing States risked significant responsibility as sponsoring States, it would in effect mean they were excluded from taking part in seabed activities.[158]

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[153] *Sponsoring States* (n 150) paras 4 and 151ff.

[154] ibid para 1.

[155] David Freestone, 'Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area' (2011) 105 The American Journal of International Law 755, 760.

[156] LOSC art 153(2)(b).

[157] ibid art 139.

[158] Freestone (n 155) 756.

The outcome of the Advisory Opinion, it is argued, is an important step for the development of the deep-sea regime.[159] This does not only relate to the clarification of the due diligence obligations of sponsoring States in regard of the environment, but also whether developing States enjoy preferential treatment compared with that granted to developed States. The point of departure of the SDC was the fifth paragraph of the preamble of LOSC that it will '…contribute to the realization of a just and equitable international economic order which takes into account the interests and needs of mankind as a whole and, in particular, the special interests and needs of developing countries …'[160] This objective prompted SDC to investigate whether developing sponsoring States enjoyed some sort of preferential treatment under Part XI/the Implementation Agreement, specifically in respect of the duty of State Parties under Article 139 of the LOSC to ensure that activities undertaken under its control or jurisdiction are carried out in conformity with its Part XI.[161] It did identify certain provisions aimed at 'enabling [them] to participate in deep seabed mining on an equal footing with developed States'.[162] However, SDC noted that none of the provisions setting out the responsibilities of States specifically provides for preferential treatment of developing sponsoring States in respect of their due diligence obligation. The provisions on responsibility apply equally to all sponsoring States.[163] The alternative would promote

[159] Yoshifumi Tanaka, 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011' (2013) LX Netherlands International Law Review 205, 230.

[160] *Sponsoring States* (n 150) para 151.

[161] ibid paras 152ff.

[162] ibid para 163.

[163] ibid para 158.

sponsoring States 'of convenience' that according to the Chamber would '…jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind'.[164]

The Advisory Opinion provides insight into the role of States and in particular developing States in the activities of the Area, which is relevant for the debate in the BBNJ process, on questions on equity and justice and in particularly in regard of possible CHM status for MGR. The primary take-home is that sponsoring States – irrespective of status as developed or developing – are equally required to take the necessary measures to ensure that the entities under their jurisdiction comply with the legislation adopted to fulfil their international obligations. Consequently, it may be demanding for developing States – also others than Nauru and Tonga – to comply with the standard of due diligence and force them to refrain from becoming sponsoring States.

3.2.3.2What Remains of Preferential Treatment?

The SDC also investigated provisions that provide for preferential treatment of developing States, *inter alia* Article 148 of the LOSC.[165] The latter provides for the promotion of '…the effective participation of developing States in activities of the Area …', having due regard for their special needs and interests. This signals that developing States should be granted preferential treatment and provided *de facto* equal participation, elements of CHM as referred to above. However, the SDC establishes that there is no general clause on preferential treatment and that such requirements must be derived from specific provisions.[166] SDC reviewed such provisions, which include the promotion of marine scientific research in the

[164] ibid para 159.

[165] *Sponsoring States* (n 150) paras 153–57.

[166] ibid. para 156.

Area for the benefit of developing States, of transfer of technology to developing States and for training opportunities.[167] These provisions are mostly formulated in general terms suggesting that they do not entail any 'hard' obligations. Similarly formulated obligations may be found in Part VII of the UNFSA as well as Part V of the Revised Draft Agreement.[168] Given the obligations of the sponsoring State, which seems to be formulated similarly in the Revised Draft Agreement, questions on the effective participation of developing States in ABNJ activities may still be raised.[169]

3.3 Status of Coastal States in High Seas Fisheries Governance

3.3.1 The EEZ as a Means for a More Equitable Distribution of Marine Resources

In the negotiations preceding UNCLOS III, there were proposals to establish an international authority competent to regulate fisheries on the high seas, similar to those contemplated by the ILC some decades earlier.[170] Again, such proposals were considered impossible given the strong resistance by States to submit to international authority.[171] On the contrary, coastal States, and in particular developing States, proposed that their jurisdiction be expanded further seawards. This included the 1972 Draft articles on exclusive economic zone concept,

[167] ibid. para 157.

[168] Revised Draft Agreement (n 140).

[169] ibid art 20.

[170] Takei (n 30) 28.

[171] Parzival Copes, 'The impact of UNCLOS III on management of the world's fisheries' (1981) 5 Marine Policy 217, 220.

submitted by Kenya.[172] The EEZ concept would provide for a more just and equitable distribution of marine resources, it was argued. A Kenyan delegate stated '…We must find new concepts to resolve existing conflicts of interests in the sea, so that [a] fair and equitable framework for the exploitation of the seas is created'.[173] The concept implied that the coastal States would enjoy sovereign rights over the natural resources – living and non-living – within 200 nautical miles measured from the baselines.[174]

3.3.2 LOSC: Preferential Rights for Coastal States?

The establishment of the EEZ also transformed the freedom of fishing on the high seas.[175] Although most commercial fisheries are undertaken within 200 nautical miles, some fish stocks straddle into adjacent areas of the high seas or migrate between areas within and beyond national jurisdiction.[176] This raised questions on how rights and interests of the

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[172] Draft articles on exclusive economic zone concept, submitted by Kenya, in Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, Twenty-seventh Session, suppl 21, UN Doc A/8721, 180–82, referred to by Satya N Nandan, 'The Exclusive Economic Zone: An Historical Perspective' in *Law of the Sea – Essays in Memory of Juan Carroz* (FAO 1987) available at <www.fao.org/3/s5280T/s5280t00.htm#Contents> accessed 22 July 2021.

[173] Referred to by Anand, 'Winds of change' (n 47) 45–46.

[174] Draft articles on exclusive economic zone concept (n 172) arts II and VII.

[175] Barbara Kwiatkowska, 'The High Seas Fisheries Regime: At a Point of No Return' (1993) 8 The International Journal of Marine and Coastal Law 327.

[176] U Rashid Sumaila and others, 'Winners and losers in a world where the high seas is closed to fishing' (2015) 5 Scientific Reports Article no 8481. They estimate (at 3) that 42%

coastal State in respect of such transboundary resources (known as straddling fish stocks and highly migratory fish stocks) should be accommodated and whether they would involve preferential rights in areas of the high seas adjacent to their EEZs.[177] The background was that the freedom of fishing on the high seas under the LOSC is '…subject to the rights, duties as well as the interests of coastal States provided for, *inter alia* in article 63 paragraph 2, and articles 64 to 67 …'[178] Unsurprisingly, the provision was subject to different interpretations, prompting Kwiatkowska to describe the rights of coastal States in areas beyond 200 nautical miles as 'one of the unfinished businesses of UNCLOS III'.[179] Burke probably offered the most radical interpretation arguing that the freedom to harvest straddling fish stocks on the high seas was subjected to the sovereign rights of the relevant coastal States.[180]

Other writers have a more nuanced reading of these provisions. According to Nandan and others, the provision builds on the premise that the '…marine ecosystem is a physical

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of fish stocks analysed are straddling and that 10% of catches are taken in adjacent areas of the high seas.

[177] ibid.

[178] LOSC art 116(b). Art 63(2) regulates the duty to cooperate of coastal States and States fishing on the high seas on management of straddling fish stocks in adjacent areas of the high seas. Art 64 involves obligation to cooperate between coastal States and States fishing on the high seas on the management of highly migratory species (which are listed in Annex I of the LOSC).

[179] Kwiatkowska (n 175) 327.

[180] William T Burke, *The New International Law of Fisheries. UNCLOS 1982 and Beyond* (Oxford University Press 1994) 132–36.

continuum which has been subdivided by juridical boundaries …'[181] The purpose, they argued, of conditioning the high seas fisheries to duties of conservation and cooperation was to ensure sustainable fish stocks as well as maintaining the balance between the interests of the coastal States and those of the other States.[182] Subjecting the right to fish on the high seas to the right and interests of coastal States could be seen as an application of the general duty to have due regard to the interests of other States.[183]

This unfinished business probably contributed to disputes between flag States and coastal States over the harvesting of straddling and highly migratory fish stocks in adjacent areas of the high seas.[184] Coastal States were concerned that the activities of distant water fishing fleets undermined their efforts to manage the fish stocks within their EEZ. One example is the Turbot war between Canada and EU following the arrest of the Spanish fishing vessel *Estai* on the high seas of the Grand Banks off Newfoundland.[185]

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[181] Satya Nandan and others, *The United Nations Convention on the Law of the Sea. A Commentary. Articles 86-132 and Documentary Annexes Vol. III* (Martinus Nijhoff 1985) 285.

[182] ibid.

[183] ibid.

[184] Peter G G Davies and Cathrine Redgwell, 'The International Legal Regulation of Straddling Fish Stocks' (1997) 67 The British Yearbook of International Law 199, 200–02.

[185] Christopher C Joyner and Alejandro Alvarez von Gustedt, 'The Turbot War of 1995: Lessons for the Law of the Sea' (1996) 11 International Journal of Marine & Coastal Law 425, 444–45.

3.3.2 The Compatibility Requirement: Balancing Coastal States Sovereign Rights and Freedom of Fishing

3.3.2.1 A Short Introduction to the Fish Stocks Agreement

The 1992 Rio Conference called for convening an intergovernmental conference.[186] Its mandate was to identify and assess existing problems related to the conservation and management of straddling and highly migratory fish stocks and to consider means of improving cooperation on fisheries among States, and to formulate appropriate recommendations.[187] This resulted in the adoption of the 1995 UNFSA.[188]

Under the UNFSA, coastal States and States fishing on the transboundary fish stocks in adjacent areas of the high seas are required to cooperate on the conservation and management of these stocks through competent Regional Fisheries Management Organization (RFMO).[189] States shall either become member of the RFMO or accept to apply its regulatory measures.[190] The adjacent coastal States may influence the conservation and management of the stocks on the high seas as members of the relevant RFMO.

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[186] Agenda 21, Chapter 17 Protection of the Oceans, Report of the United Nations Conference on the Environment and Development, Annex II, UN Doc A/CONF.151/26 (vol. II), para 17.49.

[187] UNGA Res 47/192, United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks.

[188] Full title: 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 (n 55).

[189] UNFSA art 8.

[190] ibid art 8(3).

The UNFSA is applicable to straddling fish stocks and highly migratory fish stocks in adjacent areas of the high seas.[191] As these stocks are transboundary, some of its provisions are made applicable to the conservation and management of these stocks in AWNJ.[192] This includes the general principles (including long-term sustainability and the duty to protect marine biodiversity) and the obligation to apply the precautionary approach.[193] The challenge is to ensure common understanding and application of these norms across the jurisdictions and some form of coordination between the regulatory measures adopted by the coastal State and those agreed through the RFMO. The duty of coastal States and the States fishing on the high seas to cooperate with the purpose of achieving compatibility between the measures is the remedy.[194]

3.3.2.2 Compatibility

The compatibility requirement was one of the most challenging themes to address during the negotiations, together with finding a balance between the freedom of fishing and States' sovereign rights.[195] States agreed on the need for coordination of measures but disagreed on how to achieve such coordination. Coastal States submitted a proposal that meant that the measures agreed through a RFMO for the high seas were not to have harmful effects on the

[191] ibid art 3(1).

[192] ibid art 3.

[193] ibid arts 5 and 6.

[194] ibid art 7(2).

[195] David Balton, 'Strengthening the law of the sea: The new agreement on straddling fish stocks and highly migratory fish stocks' (1996) 27 Ocean Development & International Law 125, 137.

stock in AWNJ.[196] Flag States such as Japan favoured a more balanced approach, arguing that the principle of due regard should inform the compatibility requirement.[197] A commentator gave this striking description of the dilemma:

> … Should the high seas rules be made or altered to conform to pre-existing EEZ rules (which could be seen as an extension of the coastal State control beyond 200 miles)? Should coastal States establish EEZ rules compatible with high seas rules adopted multilaterally (which could be seen as infringement on coastal State jurisdiction)?[198]

The compatibility requirement provides for the co-existence of two different regimes.[199] Five different factors supplement the compatibility requirement under an overall prerequisite that the measures in total do not result in harmful effects on the living marine resources as a whole.[200]

Does this arrangement provide priority to coastal States' interests? The measures agreed for the high seas are not to undermine the effectiveness of the measures adopted by the coastal State, suggesting some sort of priority.[201] However, the coastal State is to take into

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[196] Draft Convention on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks on the High Seas (Argentina, Canada, Chile, Iceland and New Zealand) UN Doc A/Conf.164/L.11/Rev. 1.

[197] Comments on compatibility and coherence between national and international conservation measures for the same stock (Japan) UN Doc A/Conf.164/L.28.

[198] Balton (n 195) 137.

[199] Tore Henriksen, Geir Hønneland and Are Sydnes, *Law and Politics in Ocean Governance. The UN Fish Stocks Agreement and Regional Fisheries Management Regimes* (Martinus Nijhoff 2006) 31.

[200] UNFSA art 7(2)(a)–(e) whereas the limits on the total pressure follows from art 7(2) (f).

[201] ibid art 7(2)(a).

account the measures adopted or agreed for the same stock in adjacent areas of the high seas.[202] These seemingly contradicting factors are criticized for not providing a clear understanding of the requirements.[203] Others have warned against reading too many details into the requirement because it is to be applied in different regions under changing circumstances.[204] In a more recent paper it is argued that the UNFSA does not provide the coastal State with the means to dictate the regulation of high seas fisheries.[205]

The compatibility requirement primarily calls for a more coherent conservation and management of transboundary fish stocks. An example is the dependency factor, providing guidelines on the distribution of fishing opportunities and practices between coastal States and the States fishing in adjacent areas of the high seas, *inter alia* based on their respective dependency on the stocks in question.[206] The overall duty to ensure that the effects of the measures do not have harmful impact on the living marine resources as a whole means that their duty to conserve the living marine resources is to downplay juridical boundaries.[207]

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[202] ibid art 7(2)(b) and (c).

[203] Rosemary Rayfuse, 'The Interrelationship between the Global Instruments of International Fisheries Law' in Ellen Hey (ed) *Developments in International Fisheries Law* (Kluwer Law International 1999) 134.

[204] Alex G Oude Elferink, 'The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks' (2001) 5 Max Planck Yearbook of United Nations Law 551, 603.

[205] Mossop and Schofield (n 4) 3.

[206] UNFSA art 7(2)(e).

[207] ibid art 7(2)(f).

3.3.3 The Compatibility Requirement: A Example for the BBNJ Process to Follow?

The relationship between AWNJ and ABNJ, specifically the role of the coastal State in managing adjacent areas of the high seas is also relevant in the BBNJ process. MGR, ABMTs as well as EIAs, three of the themes of the ongoing negotiations, have implications for areas within national jurisdiction.[208] Arguments from the 1990s on straddling and highly migratory fish stocks can be recognised in the so-called adjacency debate. Adjacency is not only used as a geographical concept. In the debate, adjacency relates to the role and interests of the coastal State in relation to the activities of the ABNJ.[209] Following the same line of argument as Burke it has been argued that '…extending the rights of coastal States to have primary responsibility in conservation of their migratory and straddling biodiversity in ABNJ is not only consistent with existing principles in international law […] but would likely result in better stewardship of those resources …'[210] The lessons from disputes on transboundary fish stocks is that there is a need for clearer and more specific regulations of the rights, interests and obligations of the adjacent coastal State(s).

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[208] 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, UNGA Res 72/249 para 2.

[209] Joanna Mossop and Clive Schofield (n 4) 1–2.

[210] D C Dunn and others, 'Adjacency: How legal precedent, ecological connectivity, and Traditional Knowledge inform our understanding of proximity' (2017) Nereus Scientific & Technical Briefs on ABNJ series 9, available at <http://archives.nereusprogram.org/tag/Nereus-Scientific-&-Technical-Briefs-on-ABNJ-series/> accessed December 2020.

The compatibility requirement may be viewed as part of the wider development described by Broggatio and others[211] as operationalization of the freedoms of the high seas. It is not happening as 'a *Mare Clausum* type of policy', but rather it is a recognition that there is a further need for sharing common resources. Instead of sharing the ocean space freely through open access, States are sharing its natural resources in an organised and regulated way.[212]

The debate on compatibility requirement broadens the context of the adjacency debate in the BBNJ process. It seems clear that the coastal State does not enjoy preferential rights of any sort in the governance of adjacent high seas fisheries. Compatibility appears as more balanced, introducing biological as well as socio-legal criteria, located within an overall frame where conservation of the living marine resources is the overall goal or duty. Importantly, and in contrast to the BBNJ process, the coastal State does not only have rights, but also obligations under the Fish Stocks Agreement. In the BBNJ process, as the primary focus is on the ABNJ, the emphasis is on preventing negative effects of measures taken in the ABNJ on the rights and jurisdiction of adjacent coastal States.[213] These obligations relate to transboundary MGR (duty of due regard), ABMTs (duty not to undermine the effectiveness of coastal State policy), and EIAs (take into account possible impacts of activities in AWNJ).[214] The rights and interests of the coastal States are further to be safeguarded through procedures

[211] Arianna Broggatio and others, 'Mare Geneticum: Balancing Governance of Marine Genetic Resources in international waters' (2018) 33 International Journal of Marine and Coastal Law 3, 5–6.

[212] ibid.

[213] Revised Draft Agreement, eg art 15(4) on ABMTs.

[214] Revised Draft Agreement, arts 9(2), 15(4) and 26(2), respectively.

for notification and consultation and involvement in benefit sharing. As noted by Mossop and Schofield, the proposal differs from the compatibility requirement as the duty not to undermine is not balanced by a similar duty of the coastal State.[215] The Revised Draft Agreement is only applicable to ABNJ, consistent with the mandate given by the UNGA.[216] Consequently, a legally binding instrument on conservation and sustainable use of BBNJ will not include any obligations on the coastal States in AWNJ. Even if the Revised Draft Agreement includes principles such as ecosystem approach and integrated approach, implying a need for cooperation between coastal States somehow involving the parts of the same ecosystems, species, and habitats under their jurisdiction, it does not provide any answers as to how.

4 Concluding Remarks

The high seas and its freedoms have been a central element in the law of the sea from the early 1600s till the present, including the on-going BBNJ process. However, the character and content of the high seas regime has changed from a simple regime to a complex set of regimes.

The purpose of this chapter has been to map the debate on the status of ABNJ throughout the modern history of law of the sea and in particular assess if and how it is reflected and relevant in the BBNJ process. The debate has been mapped in regard of two themes: the legal status of the natural resources of the seabed and the role or interests of the coastal State in governance of ABNJ (adjacency). The mapping was based on two hypotheses or rather assumptions, on what activates, drives and/or permeates the debate: *First*, the struggle of States for territory, in the context of oceans, ensuring access to the oceans for

[215] Mossop and Schofield (n 4) 6.

[216] Revised Draft Agreement art 3(1).

transport and for the utilisation of the marine resources and the competition between the exercise of territorial authority in the form of exclusive rights over the sea and the idea of the freedoms of the seas. *Second*, fundamental notions of the law of the sea have been challenged and has prompted some evolution of the law in times of globalization, as indicated in the following paragraphs.

The freedoms of the high seas prevailed for centuries because they provided a few major maritime States with ample access to space and resources. The freedoms provided them with benefits equivalent with those of a territory. These privileges have particularly been challenged during the last 75 years, leading to the evolution of the law of the sea. This chapter maps several phases of this evolution. The first phase, inaugurated in 1945 (section 2) which was characterised by the extension of AWNJ (section 2.2), driven by new technology and increased knowledge, made the oceans available to more States and introduced them to new resources and consequently intensified competition between States over space and resources. State practice and subsequent codification came primarily as a recognition that the freedoms of the high seas did not provide adequate security in regard of the access to resources and control its thus, a need to provide the States with exclusive or at least preferential rights. In the codification process (section 2.3) proposals for managing the marine resources of the high seas on behalf of world community interests were not seriously considered. The status quo prevailed, the law adapted to State practice and not vice versa. The interests of the individual State prevailed over the interests of the community.

The second phase (section 3) is characterised by the entry into the world community of new and mostly developing States, which affected the debate in different ways. Globalization – in terms of integrating States in the world community with more diverse interests – resulted in broadening the set of values in the law of the sea debate. New arrivals were proponents of community interests, as reflected by the CHM concept. The idea of

community interests had earlier been rejected in favour of bilateral/individual interests of States. The developing States called for a more just legal order for the oceans, where States irrespective of their capacities and level of development were ensured access to their natural resources and their benefits. The status of the seabed and its resources as CMH would provide them with access to the governance, utilization, and benefits of these natural resources, which otherwise would not be possible under the 'first come, first served' consequences of the freedom of the high seas principle. Such re-distribution of access to the resources would provide them with benefits equivalent to the benefits of a territory. In parallel, developing States and developed States reached compromises on extended sovereignty and sovereign rights over the natural resources of their coastal waters through an extended territorial sea, the EEZ and continental shelf. This extension of the jurisdiction of coastal States at the expense of the high seas freedoms can also be viewed as a contribution to a more just and equitable legal regime. This was less controversial as developed States were also interested in extending their national jurisdiction. More contentious was the proposed CHM status of the deep-sea bed which clashed with the economic liberalism that had been the dominating the freedom of the high seas' dogma (section 3.2). The CHM was incorporated into the LOSC, but the success was short-lived. Important elements of the CHM were watered-down through the 1994 Implementation Agreement to safeguard economic liberalism: Activities were to be based on commercial conditions, profits should come to those investing in technology and providing funding.

There is a similar debate in the BBNJ process in regard of MGR (section 3.2.2) where developing States are arguing their CHM status, whereas developed States claim that MGR are part of the freedoms of the high seas. Many of the arguments may be recognised from the negotiations of UNCLOS III: A regime that promotes the core values of the CHM, such as equity, preferential treatment, transfer of knowledge and technology and benefit sharing, or a

regime that facilitates the freedom to explore and exploit MGR and where the profits fall to those investing/taking the financial risks. However, CHM is not a clear-cut legal concept, particularly following the amendments to the deep-sea bed regime made through the Implementation Agreement. Benefit sharing appears the main element of the CHM. Unless the intention is to reintroduce CHM in its original format, questions may be raised about the usefulness of including it as a principle in an international legal instrument on the conservation and sustainable use of BBNJ. Would the status of MGR as CHM be more of symbolic than have a real value? Could States achieve the same result through a less principled approach, not defining its status, either as CHM or as part of the freedoms of the high seas? Or is the symbolic value as CHM more important for developing States? The past law of the sea negotiations seems to favour the interests of economic liberalism. States with the economic, technological and personnel capacity to exploit and explore MGR, although in a minority, are in a position to ignore solutions that conflict with their interests. What is the value of an instrument not applicable to those States? Will the interests of universally applicable norms prevail, again? The description of Friedheim of the first period as focusing on solving problems rather than considering principles may still be the dominant feature.[217]

The scope of preferential treatment of developing States, an element of CHM, was addressed in the 2011 Advisory Opinion of the ITLOS SDC (section 3.2.2). Preferential treatment does not apply to the due diligence obligations of the sponsoring State. They may be subject to the same obligations as developed States. This may deter developing States from getting actively involved in deep-sea mining activities. They are likely to meet similar obstacles in participating in exploration and exploitation of MGR. The obligations of

[217] Friedheim (n 23) 19.

developed States to provide for technological, personnel and financial assistance are likely to remain of a hortatory character and thus not provide for building adequate capacity.

The second theme of the chapter is adjacency or the role of the coastal State in the adjacent areas of the high seas – specifically whether it enjoyed some sort of special rights or preferential rights was primarily addressed in section 3.3. However, it came to the forefront with the 1945 Truman proclamation (section 2.2). The adjacency perspective was a driver for the extension of AWNJ through the continental shelf, subsequently by exclusive fisheries zones and the 200 nautical mile EEZ. These maritime zones provided coastal States with exclusive rights, a better solution for them than having preferential rights in adjacent areas of the high seas or having actively to occupy and control an area of the seabed. Following the adoption of the LOSC, there were different opinions as discussed in section 3.3.2 on whether the coastal State enjoyed special or preferential rights in the management of transboundary living resources in areas of the high seas adjacent to the EEZ. The 1995 UNFSA has contributed to the clarification on how to ensure coordination of conservation of marine living resources subjected to two different regimes, consistent with an ecosystem approach. The compatibility requirement (section 3.3.2) seems to provide for a balancing of the interests, and not providing the coastal State with any preferential rights. There are similar transboundary challenges in the BBNJ process discussed in section 3.3.3, as MGR may be transboundary and a MPA in ABNJ may affect coastal States' rights and jurisdictions and vice versa. This raises questions whether and how coastal States should be involved, from having an active role in the governance of the adjacent ABNJ to a more 'passive' duty of other States not to take actions in ABNJ that undermine coastal States' sovereign rights and jurisdiction in adjacent AWNJ. Differently from transboundary marine living resources, the on-going debate seems to only apply to impacts of activities in ABNJ or measures to be adopted in ABNJ on the national jurisdiction of coastal States. There seems to be a consensus that a new legally binding

instrument resulting from the BBNJ process is only applicable to ABNJ. However, such juridical boundaries are at odds with principles such as ecosystem approach and integrated approach, which are included in the Revised Draft Agreement (although in brackets).[218] The obligations of coastal States in regard of ABNJ would then have to be based on their obligations under the LOSC, such as Article 194 paragraph 5 and Article 197 as well as other pertinent obligations, including those contained in Article 8 of the CBD.

The reason for restricting the BBNJ process to ABNJ is probably that a legally binding instrument *inter alia* providing basis for the adoption of ABMTs may potentially impact the sovereign rights and interests of coastal States. In contrast to fisheries management, coastal States, and States with interests in ABNJ do not necessarily have concurrent interests in more extensive protection of the marine environment through such means as an MPA. It would be difficult for a coastal State to ignore the establishment of an MPA in an adjacent area of an ABNJ, even if this would lead to costs in form of restrictions in access to and exploitation of marine resources. Furthermore, the coastal State has a separate obligation under Article 194 paragraph 5 of the LOSC to protect fragile ecosystems, habitats of threatened or endangered species and other forms of marine life. Thus, it would be problematic to disregard measures taken in ABNJ to protect the same ecosystems or habitats. Thus, applying a similar solution as the UNFSA, eg requiring some sort of compatibility between the environmental protection of the coastal State and of the adjacent ABNJ would be a way of developing measures to protect marine biodiversity straddling/across jurisdictional boundaries.

The BBNJ process, like past law of the sea negotiations, does not seem to provide room for any fundamental rethinking or transformation of the law of the sea, but seems locked to the status quo and opening only for minor amendments or gradual evolution,

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[218] Revised Draft Agreement art 5(f) and (g) – in brackets.

consistent with the interests of the major States. A fundamental rethinking would require community interests such as the protection of the marine environment – to be prioritized at the expense of the territoriality approach of States. The SDC in its Advisory Opinion recognised that the protection of the marine environment is a community interest – a duty *erga omnes*. However, the law of the sea provides few venues for promoting such interests, if adequate. It is still to a large degree left to the individual State to enforce the compliance with these obligations, within a system that primarily is constructed for bilateral interaction.

Future debates on the development of the law of the sea are likely to follow the same pattern as those presented here. However, with increasing negative effects of climate change on the oceans, marine species and ecosystems, the question is whether the debate will take another direction, giving environmental protection and justice a stronger voice and the recognition of the need for more coherent approaches that challenge the law of the sea. Although not new, recent calls for other ethos or approaches such as 'World Ocean Public Trust', public trusteeship, Ocean Trust or stewardship may diversify the future debate.[219] It

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[219] Montserrat Gorina-Ysern, 'World Ocean Public Trust: High Seas Fisheries after Grotius – Towards a New Ocean Ethos' (2004) 34 Golden Gate University Law Review 645; Montserrat Gorina-Ysern, Kristina Gjerde and Michael Orbach, 'Ocean Governance: A New Ethos through a World Ocean Public Trust' in Linda Glover and Sylvia Earle (eds), *Defying Ocean's End: An Agenda for Action* (Island Press 2004); Peter H Sand, 'Sovereignty Bounded: Public Trusteeship for Common Pool Resources?' (2004) 4 Global Environmental Politics 47, 48; Rosemary Rayfuse and Robin Warner, 'Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century' (2008) 23 The International Journal of Marine & Coastal Law 399;

would require a recognition that continuing the pursuit of economic liberalism is likely to lead to irreversible damage to the oceans, marine species, ecosystems and the marine environment.

Fran Humphries, ‘A Stewardship Approach to Legitimate Interests in Deep Sea Genetic Resources for Use in Aquaculture’ (2017) 40 University of New South Wales Law Journal 27; Mary Turnipseed and others, ‘Using the public trust doctrine to achieve ocean stewardship’ in Christina Voigt (ed), *Rule of Law for Nature New Dimensions and Ideas in Environmental Law* (Cambridge University Press 2013) 365–79.