**'The Construction of Ocean Space in Areas Beyond National Jurisdiction a fisheries perspective'**

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## 1. Introduction

This chapter examines the development of fisheries regulation in areas beyond national jurisdiction (ABNJ) from a constructivist approach. In doing so it provides important insights into how the construction of space is influenced by law making and institutional constraints, some of which reflect bias or imbalance in powers structures in international law. Many have defended law as a discreet and coherent discourse, but few have argued that it operates in isolation from material, social, or political discourse.[1] Recognizing this wider context, constructivist approaches to international law show how social interaction and practice can create and give effect to law.[2] In this tradition, law is viewed as a continuous communicative process wherein interactions between various actors, conditioned through institutional structures and practices, make law and generate compliance with it.[3] As constructivism focuses on discursive, interactional practices, it is well-suited to bridging between law and other social science discourse.[4] And engaging with discourse about materiality.[5] Materiality here refers not simply to things as the mere object of legal relations (i.e. artifacts and their attributes), it also includes the meaning verst in such things which in turn can constitute social and cultural practices and identities in respect of those things.[6] This is important, because we need to understand how law influences and is influenced by the material world. Constructivism offers a more complete account of how and why law is created than approaches which focus simply on law as a system of rules flowing from formal sources. This makes constructivism a valuable tool to examine how the current regime for the governance of ABNJ is developing and should develop. Here the development of a legal regime is closely bound up with wider material, social or political concerns, so it is important that we are sensitive to these.[7]

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[1] Whilst the terms social and political are more commonly used, 'material' is less familiar. Here, and in the rest of this chapter, it refers to physical objects, resources and spaces (as well as their physical attributes) that frame social relations.

[2] See for example, Jutta Brunnée and Stephen J Toope, 'Constructivism and international Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012). This approach specifically underpins Myres S McDougal and William T Burke, *The Public Order of the Oceans* (Yale University Press 1982).

[3] See for example Abram Chayes and Antonia H Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); Harold H Koh, 'Why Do Nations Obey International Law? Review of *The New Sovereignty: Compliance with International Regulatory Agreements* by A Chayes and A Handler Chayes, and of *Fairness in International Law and Institutions* by TM Franck' (1997) 106 *Yale Law Journal* 2599; Moshe Hirsch, 'The Sociology of International Law' (2005) 55 *University of Toronto Law Journal* 891; Ian Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (Oxford University Press 2005); Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

[4] Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989).

[5] Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics' (1992) 46 *International Organization* 391.

[6] See Ian Woodward, *Understanding Material Culture* (Sage 2007).

[7] UNGA Resolution 48/263 (1994) states that 'political and economic changes, including in particular a growing reliance on market principles, have necessitated the re-evaluation of some aspects of the regime for the Area and its resources.'

Using fisheries in ABNJ as an exemplar, I argue that international law plays a critical role in constructing ocean space, but that a careless use of international law can limit the possibilities for the more effective governance of oceans space and limit the opportunities for certain interests to feed into debates and decisions about how to regulate activities in ABNJ. By way of clarification, space here is used not merely to describe the physical domain; I am making an ontological commitment to the oceans as a material space characterized by dynamic and fluid qualities, as a social space where meaning is constructed, and as a common space beyond the exclusive domain of individual States.[8] The material, legal and social conditions that are at play in ABNJ demand a holistic, integrated approach to oceans governance and the accommodation of fisheries within an ILBI on ABNJ. To do otherwise draws an artificial boundary between fishing and other activities in ABNJ; it ignores the fact that fishing has the largest impact on the health of marine biodiversity.[9] More profoundly, it impedes the opportunities for the interactions that are a necessary part of the law creation process; it limits the opportunities to remedy the situation.

The construction of ocean space is an interactional process, and the absence of, or limitations upon, interactional mechanisms denies law a proper function in constructing social space. For Brunnée and Toope, social norms emerge from social interaction and social learning, which, in turn, generate shared understandings.[10] This ensures law is congruent with external norms. When combined with a theory and practice of legality this generates legitimacy and compliance. Yet this is not without its challenges. As Brunnée and Toope point out:

> 'One of the major theoretical controversies within constructivism today relates to the power of shared understandings to shape the perceptions and decisions of social actors. How does one understand the balance between the explanatory power of structure, including structures of ideas and discourse, and of agency? Do people retain significant agency over their own behavior, or do they tend to replicate intersubjective habits, discursive patterns, or pre-existing practices?'[11]

This chapter contributes to this debate by making explicit how law structures the interactions where these considerations are at play in the development of a regime for ABNJ. If we deny or limit the possibilities for interaction, then we risk embedding structural weaknesses within the governance regime for ABNJ. If fisheries are not exposed to regular and critical insights from other ocean perspectives such as environmental concerns, then this will limit the influence of such concerns on the management of fish stocks. And if this is a deliberate strategy, then it is one that not only perpetuates unstainable or harmful fishing practices,[12] it undermines the effectiveness and legitimacy of the wider regime for ANBJ.

Although the emerging regime for ABNJ is potentially inclusive, some rules or processes advanced in the ILBI could exclude particular interests. For example, the

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[8] See Henri Lefebvre, *Production of Space* (1974) trans by Donal Nicholson Smith (Oxford University Press 1991). More recently, see Kimberley Peters and Philip Steinberg, '*The ocean in excess: Towards a more-than-wet ontology'* (2019) 9 *Dialogues in Human Geography* 293.

[9] Richard Barnes, 'Fisheries and Biodiversity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar 2010) 542.

[10] See Brunnée and Toope (n 3).

[11] Brunnée and Toope (n 2) 123.

[12] One can point the failure of CITES to deal with Atlantic Bluefin Tuna as an example of this type of 'closed' thinking. See Renée Martin-Nagle, 'Unsuccessful Attempt to List Atlantic Bluefin Tuna in CITEs Appendix 1' (2010) 25(4) *IJMCL* 609.

'not undermine' principle has been used to limit regulatory possibilities and excise fisheries management from the scope of the ILBI.[13] Although it is acknowledged that fisheries are a central element of oceans governance, they have been largely excluded from the process of developing an ILBI on the conservation and sustainable use of marine resources ABNJ.[14] This is despite the impact fishing has on marine biodiversity and the indirect impact area-based management tools (ABMT) and environmental impact assessment (EIA) may have upon fishing in ABNJ. States have taken the position that the ILBI 'should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.'[15] And since existing frameworks and bodies deal with fisheries, the ILBI should not interfere with those existing mandates. Despite well noted failing in the management of some international fisheries,[16] the opportunity to extend a degree of oversight or control – even through institutionalized engagement is being missed. As a result, this consolidates the exclusive mandate of RFMOs and renders them less susceptible to influences from within wider ocean governance processes.[17] At best, necessary interactions between fisheries and environmental bodies will be left to ad hoc measures, such as the North-East Atlantic Fisheries Commission and OSPAR Memorandum of Understanding in 2008.[18] However, ad hoc cooperation is well-short of the strong, system-wide cooperation that is required to govern effectively ABNJ.[19]

This chapter makes three specific contributions to the debates about the governance of ABNJ. The first is to demonstrate the critical importance of in how in structuring the construction of social space. The second is to demonstrate the need for law to be sensitive to the material and social conditions at play in ABNJ – something that seems to be lacking at present. I focus specifically on the need for integrated and holistic governance. There is much debate in the literature about the meaning of 'not' undermine' and about how the ILBI can and should relate to existing laws and institutional mandates. My third contribution is situated in the debate about the meaning of not undermine, and shows the importance not only enabling constructive interactions in the ILBI, but for the ILBI to positively orchestrating these interactions through strong institutional process and directive use of general principles of law.

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[13] Zoe Scanlon, 'The art of "not undermining": possibilities within existing architecture to improve environmental protection in areas beyond national jurisdiction' (2018) 75 *ICES Journal of Marine Science* 405; Andrew Friedman, 'Beyond "not undermining": possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction' (2019) 76 *ICES Journal of Marine Science* 452.

[14] Richard Barnes, 'Fisheries and ABNJ: Enhancing and Advancing Cooperation' in Tomas Heidar (ed), *New Knowledge and Changing Circumstances in the Law of the Sea* (Brill 2020) 124-53.

[15] UN Doc. A/RES/72/249, 19 January 2018, [7].

[16] See. for example, the failure of the IATTC to agree conservation and management measures for 2021. See https://www.globaltunaalliance.com/general/gta-expresses-profound-disappointment-at-lack-of-tropical-tuna-management-in-eastern-pacific/.

[17] On the governance gaps and limits of RFMOs, see: Erik J Molenaar, 'Participation in Regional Fisheries management Organizations' in Richard Caddell and Erik J Molenaar (eds), *Strengthening International Fisheries Law in an Era of Changing Oceans* (Hart 2019); James Harrison 'Key Regional Fisheries Governance Challenges' in Caddell and Molenaar, ibid; Richard Caddell in 'International Fisheries Law and Interactions with Global Regimes and process', in Caddell and Molenaar, ibid; Daniela Diz Pereira Pinto, *Fisheries Management in Areas beyond National Jurisdiction: The Impact of Ecosystem Based Law-Making* (Martinus Nijhoff 2013); B Pentz and N Kenk, 'The 'responsiveness gap' in RFMOs: The critical role of decision-making policies in the fisheries management response to climate change' (2017) 145 *Ocean & Coastal Management* 44.

[18] OSPAR has adopted MOUs with the International Seabed Authority (2011) and the North Atlantic Salmon Conservation Organization (2013). A collaborative arrangement was also agreed between OSPAR and the Sargasso Sea Alliance in 2012. These are available at http://www.ospar.org/about/international-cooperation/memoranda-of-understanding

[19] See James Harrison, *Saving the Oceans Through Law* (Oxford University Press 2017) 277-81 and 308-9. This is discussed further below at in Part 4

The chapter proceeds as follows. Part 2 shows that the construction of ocean space is a contextual, interactional process. Drawing upon a Steinberg, Allott and Ranganathan I demonstrate the importance of power and values (or their exclusion) in the construction of ocean space. In Part 3, I ground the construction of ocean space in three core conditions (material connectivity, legal integration and social sensitivity) which reinforce a holistic interactional approach. This shows how law can include/exclude or prioritise/marginalise certain interests at a structural level. In Part 4, the development of the ILBI is examined in light of the requirements for interaction and cooperation that constructivism requires. Here I argue that we need stronger provisions for institutional cooperation and substantive provisions that could aid the interaction between fisheries and other activities in ABNJ. The chapter concludes with a call for the ILBI to embody strong institutional mechanisms for cooperation that will enable it to orchestrate interactions between all the relevant interests at play in ABNJ.

## 2. Three Perspectives on the Construction of Ocean Space

The oceans might be viewed as a mere the object of human regulation. In this narrow view, law simply applies to this space and rules are designed to serve human needs. However, this view of the oceans and law fails to account for the complexity of material and social conditions within which law operates. In reality, the shape and content of law is influenced by the physical world and vice versa. Law may define how we interact with the world and, in that sense, it is constitutive of our relationship with it. At the same time through our legally constituted interactions with the world, we may change the world. For example, by drawing maritime boundaries, we commit ourselves to a 'category' of shared or straddling fish stocks since fish move across human-made legal boundaries. In turn, how we regulate fisheries impacts upon the material condition of fish stocks. Fish stocks may be in a better or worse condition through effective or ineffective regulation. In this sense, law helps constitute the form the material world takes. The point here is that 'legal world' and the 'material world' are mutually constituted. They are not distinct.

The view that the oceans and their resources are merely the something used by society has been challenged by Steinberg and others.[20] Steinberg argues that the history of the law of the sea shows the oceans to be a social space where meaning and values are constituted and reconstituted.[21] However, this process is dynamic and potentially unstable. Drawing on the work of Steinberg, Allot and Ranganthan, I show how the 'law of the sea' can become structurally flawed and so undermines the holistic and inclusive regulation of ocean space.

### 3.1 Steinberg: 'Social Construction of the Oceans'

As a political geographer, Steinberg is well placed to explore the relationships between the material and the social. Steinberg's review of the literature in political economy,

[20] Philip E Steinberg, *The Social Construction of the Ocean* (Cambridge University Press 2001). See also Carolyn Trist, 'Recreating Ocean Space: Recreational Consumption and Representation of the Caribbean Marine Environment'(1999) 51 *The Professional Geographer* 376; Marie Ntona and Mika Schröder, 'Regulating oceanic imaginaries: the legal construction of space, identities, relations and epistemological hierarchies within marine spatial planning' (2020) *Maritime Studies*, https://doi.org/10.1007/s40152-020-00163-5.
[21] Steinberg, ibid 21-2.

political geography, resource management and international relations theory shows that most research has been applied or empirical, focusing on specific sectoral activities, rather than an inclusive, integrated whole.[22] And that this literature generally treats the oceans as a passive object of human activity.[23] More specifically, the focus has been on the oceans as a provider of resources, as means of transport, and as a battleground between states.[24] Steinberg considers these approaches to be limited because they treat the oceans as something external to society, either a constraint on action or thing to be used to be used, but otherwise not connected to or influencing wider social structures and processes.[25] To address the limitations of such perspective, Steinberg advances a more nuanced account of nature-society interactions, one that is this sensitive to socio-economic power structures. This is done using a territorial political economy basis to explain the dynamic way in which the oceans are constructed as a social space:

> '… elements of a space's social construction may be tied to the material organization of society, which itself is a function of the natural material base and the technologies and systems of social organization developed for transforming nature so as to sustain social life. The political-economic logic and structures of a given society lead social actors to implement a series of uses, regulations, and representations in specific places, including ocean space. Once implemented in a particular space, each aspect of the social construction (each use, regulation, and representation) impacts the others, effectively creating a new "nature" of that space. This "second nature" is constructed both materially and discursively, and it is maintained through regulatory institutions. Finally, the social construction of space impacts the material organization of society, both directly and indirectly through its reconstruction of the nature that provides the foundation for social organization.'[26]

This recursive process of mutually constituting natural and social process is the foundation of social organization. It is achieved through use (economic activities such as trade or fishing), regulation (process of control) and representation (discourse).[27] Law is but one part of this, albeit an important one.[28]

How this applies to fisheries in ABNJ can be illustrated briefly.[29] For much of its history, the high seas have been viewed as a non-exclusive space beyond national jurisdiction where fishing and navigation occurred. This nature of space was originally constructed as a sort of *res communis* (*regulation*), a space where States exercise freedom of the seas to navigate and for fishing– subject to legal obligations of due regard and non-harmful use (*discourse*). This status reflected the common pool nature of the space but was also predicated upon an assumption that limited activities did not

[22] Ibid chapter 1.
[23] Ibid 10.
[24] Ibid 11
[25] Ibid 20.
[26] Ibid 21-2.
[27] Somewhat confusing for lawyers is the use of the term regulation – this refers not to regulation in a legal sense, but rather the process of by which individuals/societies define, bind, reify and control space toward some social end (See Steinberg, ibid 29). It is control in the broader sense or whether something is excludable, sharable or subject to stewardship (ie *res nullius*/*res communis*). Regulation (as the lawyer would use the term) is part of the discourse through which social meaning is constructed (along with art and geopolitics). Ibid 32-8.
[28] Ibid 34-6.
[29] A range of examples is provided by Steinberg. A pertinent example is the story of the deep seabed and the move from freedom of the seas to common heritage of mankind. Ibid 180-8.

disturb the material nature of the oceans (i.e. impede navigation routes or deplete finite yet renewable fish stocks). Society organized around broadly capitalist structures perpetuated this status ensuring our capacity to transform the ocean to value. Over time, human activities (*use*) increased to the point where use conflicts arose, and resources became depleted. This was not a singular event; it is something manifest in a series of events over time.[30] These adverse changes to the material basis of the oceans was the product of both the way ocean space was constructed and regulated (open access), but also a product of institutional organization, technology, market forces and consumptive demand that enabled and demanded more intensive fishing. This demanded greater exclusivity to ensure the value capture from the oceans (e.g. the regime of the exclusive economic zone). In turn, the 'new' nature of ocean space changed the way the oceans were socially constructed, moving from freedom of the seas to a regime where stewardship and management (*regulation*) responsibility take priority, with restrictions on access and fishing in some areas being conditional upon adherence to the rules of regional management bodies (*legal discourse*).[31] This recursive process continues to its next stage where the capitalist pressure to secure exploitation of marine biological resources in ABNJ competes with countervailing tendencies to secure the integrity of natural systems.[32] This is considered in more detail in Part 4 below.

Steinberg's approach is compelling. It is grounded in a grand sweep of qualitative evidence using examples from non-modern and capitalist societies.[33] And it charts the progress of these ideas and the resultant regulatory regimes produced for the ocean.[34] Most importantly, Steinberg captures the idea of the oceans as a contested space, and hence a site for social transformation.[35] But there are limits to his approach. First: how to reconcile different constructions of the sea; and second: how to account for the significant structural influence that law may have in shaping the transformative potential of ocean space. On the first point, Steinberg accepts that each construction may obscure the material reality of those who earn a living from the sea.[36] This may hide the influence of different groups have in the construction of social space. He specifically refers to those who earn a living from the sea (seafarers, fishers and dockworkers). Yet, implicit in his approach is recognition of a wider category of 'knowledge creators' through whom society constructs social meaning and order. Presumably, this includes, inter alia, scientists, artists, lawyers, diplomats, journalists and teachers. On the second point, Steinberg's analysis is not fine-grained enough to show how these voices come together to construct social reality at particular regulatory moments, such as negotiation of a treaty.[37] These different actors can feed into the construction of social space, but they do not all have the same influence on translating their construction of the oceans into its legal framing (or indeed geopolitical or cultural framing for that matter). And this legal framing is significant because it fundamentally structures subsequent interactions between those persons who live and work at sea or use it in other ways.

[30] For an overview, see Olav S Stokke, *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (Oxford University Press 2001).
[31] Steinberg, (n 00), 125-35, 176-80
[32] Ibid 187-8. See also Ranganathan, Part 3.3 below.
[33] Ibid, chapters 2-5.
[34] Ibid.
[35] Steinberg (n 20) 190-1, 206-9.
[36] Ibid.
[37] See for example Steinberg's short discussion of UNCLOS 1-III. Ibid 143-9.

Given the importance that different actors have in the construction of legal rules and ultimately social space, the challenge then is to examine within particular spaces or times, how the process of social construction works. The ongoing negotiation of the ILBI is a valuable testing site. It is a pivotal moment in the construction of ocean space; it is a deliberative, plenary moment of regulatory agenda setting.[38] I return to this in Part 4, but must first show how law influences the construction of social space.

Steinberg shows the importance of inclusive and integrated understanding of discourse in constructing social space, and he acknowledges that law has a key role to play in constituting social reality, that it operationalizes, legitimizes social relations; it 'naturalizes' material reality.[39] This is correct, but law operates in particular ways and mediates how different actors can influence the construction of space. At sea, law may determine who can do things, where and how. It may control the opportunities for interaction that help construct space in an immediate sense by the people who use the sea. Law carries a particular history and structure and with it a latent set of values can influence the outcomes of legal process. For example, some persons have legal standing to raise a claim, but others do not. Some legal persons have accredited status to participate in negotiations, but others do not. The construction of social space is influenced by the inter-State rules. International law plays a central role in the construction of ocean space, but its structure and mode of operation may influence outcomes by privileging or excluding certain voices or marginalizing certain types of interest.[40] If we look at the work of Phillip Allott, the means by which some material or social interests are marginalized in the international law creation process becomes obvious.

### 3.2 Allott: 'International Law and its Aggregative Effects'

Allott has written widely on the structure of international law in the idealist tradition, but many of his core arguments concern the construction of social reality through ideas and words, and so are relevant to the present discussion.[41] Here I draw upon Allott's theory of the aggregation of interests in 'Mare Nostrum'[42] to reinforces two key arguments that I make about law as a constructive social process. First, since the oceans are an international space, a space beyond the exclusive authority of individual states, the primary regulation of activities occurs at the inter-State level. Accordingly, the State-centric method of interaction may result in certain (non-State) views or interests being marginalised. Second, law plays a foundational role in constructing space (e.g. through constitutive treaties), and so structures later opportunities for the reconstruction of social space. Accordingly, if we are to ensure participation and encompass within the construction of social space interactions between interested or affected actors, the law creation process must be structured so as to ensure there is space for wider public interests to emerge. Failure to be inclusive both entrenches existing power structures and may detach the regulation of ocean space from its material condition.

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[38] See Barnes (n 14) 133-4.
[39] Steinberg (n 20) 35.
[40] See Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16(3) *EJIL* 369.
[41] See: Philip Allott, *The Health of Nations. Society and Law beyond the State* (Cambridge University Press 1998); *Eunomia: New Order for a New World* (2nd ed, Oxford University Press 2001).
[42] Philip Allott, '*Mare Nostrum*: A New International Law of the Sea' (1992) 86 *AJIL* 764. Allott's arguments about integration, participation and accountability reinforce the general approach made in this chapter. However, the main specific point I am making relates to how law structures interests, hence the focus on aggregation and public interests.

Allott observes that in international law, our primary social reality is one based upon sovereignty of the State.[43] Here all persons and land territory are linked to one State or another through the respective principles of nationality and sovereignty. Within this construction of the international social order, relationships operate as follows. First there is an aggregation of national interests, that is to say, the interests of individuals and groups within a State, through some form of domestic legal-political process of government and this is fed into the international system. International interests are then formed through the interactions of States (and other international actors) in international fora, e.g. treaty negotiations. In this way, the creation of important social norms is the product of the double aggregation of domestic and then State interests, and one where the international social reality takes on a life of its own, with State interests being the 'original interests' (international law is 'law for States and by States', with other interests being of indirect concern). This marginalizes the interests of subnational groups. The cycle is completed when international law feeds back into domestic social systems according to the relational principles which determine the interface between the two social systems. Individuals then conduct themselves according to these 're-aggregated rules'.

Clearly, this process can influence the creation of social norms. First, it may fail to take into account sub-national interests that are not adequately represented by governments (or other international actors). Indeed, when States act in particular fora, such as an RFMO, delegates are often experts, who think and act as, for example, the 'fisheries arm' of the state. Such diplomatic silos may marginalise other concerns in sectoral fora. Second, the process does not take into account transnational interests that are not exclusive to the aggregating process within a single State, for example, the interests of multinational corporations or transnational NGOs. Even transnational actors speak to their constituents, so it is arguable that a similar aggregating logic applies to transnational actors too. For example, when civil society channel individual interests, they aggregate such interests according to their own organisational logic or values.[44] It may be argued that the lobbying power of such actors enables then to advance their interests more directly, and that this could be a 'corrective' avenue to ensuring 'other' interests feed into the process. However, the point is that process is distorting of interests because it operates without formal checks and balances on such influences.[45] At the very least, the influence of these practices on legal outcomes is poorly understood.[46] Third, it may exclude the common interests of all humanity, that is interests which are not merely attained through the aggregation of State system interests. In order to avoid such consequences, it is essential for law to create space for participation and the development of other interests in order to allow wider social objectives to form.[47] For Allott, the United Nations Convention on the Law of the Sea[48]

[43] Ibid 774-6.
[44] Karin Bäckstrand and Jonathan W Kuyper, 'The democratic legitimacy of orchestration: the UNFCC, non-state actors, and transnational climate governance' (2017) *Environmental Politics* 764.
[45] See Jonathan I Charney, 'Transnational Corporations and Developing Public International Law (1983) *Duke Law Journal* 748.
[46] See Michele M Betsill and Elisabeth Corell (eds), *NGO diplomacy: The influence of nongovernmental organizations in international environmental negotiations* (MIT Press 2008). On the BBNJ process specifically, see Robert Blasiak et al, 'The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction' (2017) 81 *Marine Policy* 1.
[47] Allott (n 42) 777.
[48] United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, in force 16 November 1994), 1833 UNTS 396. (Hereafter, LOSC).

is important because it recognises a range of actors and interests that is more widely representative of an international society and accords them space to participate in the law creation process.[49] By articulating participatory rights and public interests the Convention (in a truly constitutional sense) is able to shift away from the false dialectic of mere inter-State interests. What is important here is not whether this process is 'perfect', but that it exists and so maintains the possibility of change and process in the way social reality is created.

If we apply this thinking to the BBNJ process, then it becomes critical to retain the possibility of change through inclusive processes and through the grounding of values/social objectives into the text of the ILBI. Inclusivity is advanced through institutional processes, and values/social objectives are set through the use of carefully designed treaty objectives and general principles. These two approaches are vital because the ILBI enhances the constitutive reach of the 1982 Convention to ABNJ. The ILBLI is not a mere sectoral regulatory tool; it will be a foundational instrument for ABNJ that structures future social interactions. In varying degrees, the interests of States and other actors in ABNJ includes: the protection of the marine environment, fishing, navigation, mineral extraction and the exploitation of genetic materials. These interests are not singular, nor do they exist in isolation. ABNJ are a shared space of shared interests and the legal process must enable those interests to come to together to constitute social norms and practices that fully reflect the material nature of that space and the actors' interests. If the opportunities for such interests to come together in an institutional process are limited, then this will impede the way in which social order is constructed.

If we look at a recent analysis of the development of an ocean space regime (the seabed) by Ranganathan, then we can see how the construction of social spaces is vulnerable to 'regulatory capture', and how this has structural consequences for the ongoing development of the regime for the Area.

### 3.3 Ranganathan: 'The Constitutive Consequences of Law'

Ranganathan describes the enclosure of the ocean floor as a 'grab'.[50] This echoes Steinberg, describing not only how exclusive claims to the ocean floor objectify the ocean and denying it as a site of value creation, but showing that the end product of this process was to secure resource use benefits for a few States and corporations. Here law played a critical role in driving these outcomes. Although her main focus is the seabed beyond national jurisdiction, her analysis necessarily includes the wider development of the continental shelf that was a precursor to the regime of the Area. Ranganathan argues that this resource grab was underpinned by two factors: ocean floor geography (material conditions) and economics (use).[51] Both were treated as 'given' facts. Yet both were constructs reified through law and bearing but a tenuous link to material reality. Law was used to reify an extractive imaginary about the seabed – 'reconstituting ocean space into a distinctive legal imaginary'.[52] Here, the geography of the continental shelf as a natural prolongation of the landmass was less a fact and more a

[49] Allott (n 42) 778-9.
[50] Surabhi Ranganathan, 'Ocean Floor Grab: International Law and the making of an Extractive Imaginary' (2019) 30(2) *European Journal of International Law* 573, 576.
[51] Ibid 586-96.
[52] Ibid 586.

device used to explain and underpin legal claims despite anomalies inherent in the approach. Ranganathan shows that legal entitlements to maritime zones and their delimitation did not accord with the natural geography that was used to justify them.[53] And that the divide between water column/seabed or living/non-living drew artificially separated natural systems.[54] Instead, the corresponding legal constructs (e.g. natural prolongation) facilitated acquisitive processes. In order to secure exclusive control of resources and economic benefit, legal arguments were developed to separate the seabed from the superadjacent waters (and the freedom of the seas).[55] The exploitative potential of the seabed following the Truman Proclamation (and later the deep seabed by Pardo) hypostasized the seabed as a commercial mining space even before this was a reality. The end product of this was the 1994 Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea being based mainly on commercial rather than redistributive principles.[56]

> '[T]his configuration has relied on – and continues to draw legitimacy from – a construction of the seabed as socio-culturally, economically and ecologically disembedded – that is, as remote, insulated and lacking local constituencies or pre-existing 'systems of meaning and practice' that would be ousted by the 'narrow predication of "universal interest"' on its mining potential.'[57]

This was very much a pragmatic approach by lawyers desirous of developing a common-sense, order-based system of international law.[58] This approach required law to adapt to new circumstance rather than adhere to doctrinal truth. In this sense neither material nor legal coherence was essential – what mattered most was whether the rules could secure respect. Whilst this pursuit of order was admirable, it did so at the expense of important distributive concerns. Ultimately, law played a critical role in constructing the social space of the seabed around an idea of commercial mining in a way that resulted in unequal distributions of material reality and constrained possible solutions to problems of inequality and environmental harm.

Whatever the rights or wrongs of this process, the legal imaginary became part of the legal actual and this in turn influenced later constitutive practices. As Ranganathan observes, 'we have a story of reification; the seabed, undeniably, contains both oil and minerals, but their importance, and value, was consolidated through law.'[59] Lawyers played a critical role in normalizing the social reality that was emerging. States may have made claims to the continental shelf, but 'lawyers did much of the work of normalizing this model - exclusive national jurisdiction for the sake of effective exploitation - which has characterized the law.'[60] Lawyers drafted the texts and presented states with the options for how to achieve their interests. Arguably, the

[53] Ibid 591.
[54] Ibid 590.
[55] Ranganathan is keen to show that the process was influenced by a range of acts or representations and narrative created by non-State actors. It was fed by economic and non-economic interests, political solidarity, suspicion, parochial and cosmopolitan urges. But critically, it was heavily influenced by international lawyers. Here she cites the influential work of Hersch Lauterpacht ('Sovereignty over Submerged Areas' (1950) 27 *British Yearbook of International Law* 376): it was 'unlikely that any purely doctrinal opposition of lawyers – even if otherwise well founded – would be able to stem the hitherto uniform progress of claims and developments, which are not intrinsically unreasonable, in the matter of the "continental shelf"'. Ranganathan ibid 592-3.
[56] Ibid 596.
[57] Ibid 577.
[58] Ibid 593.
[59] Ibid 591.
[60] Ibid 594.

development of the general regime for ABNJ as framed in the draft ILBI is repeating the mistakes of history. It includes legal constructs (i.e. 'not undermine') which risk detaching and reifying differences between materially connected interests (fish/wider marine biodiversity), and it denies any institutions established under the ILBI any power to change legal relationships in existing regional or sectoral bodies, including fisheries management bodies.

Hindsight gives us the opportunity to learn lessons: the first is to see how law can fundamentally structure how we engage with the material world. This may be subtle, but with profound effects on access to and use of critical resources. Second, once values are fixed in law, they become difficult to shift. For example, the common heritage of mankind principle applicable to the Area may entail measures for the protection of the marine environment, and the ISA has sought to adopt regulations and recommendations in mining codes in response to this. However, Ranganathan views these as ameliorative efforts (an ecological fix) that work towards 'better mining'.[61] Ecological principles are subverted to the overarching mining logic of the regime and so forestall questions about whether it should be mined at all. The key point is to recognise how law can reify certain values and how law exerts significant influence over how ocean space is subsequently constituted. Law is instrumental and it serves to frame the constructive process – influencing how certain actors or interests are represented in international interactions. As such law subtly, but fundamentally influences how those voices are heard. More than this it structures the power to create or change legal (and other) relationships. If the oceans are a site of value creation, then the absence of explicit provisions that control the adverse impact of fishing on ABNJ, and the lack of strong institutional engagement between fisheries interests and wider environmental concerns could serve to further insulate fisheries from wider environmental and ecological imperatives.

### 3.4 The Influence of Law on the Construction of Social Space in ABNJ

A critical and common thread to constructivist approaches is their dependence upon some form of interactive process (claim/counter-claim; argument; justificatory discourse).[62] This is the process through which normative expectations are produced and sustained, whether this is through the internalisation of new values by actors,[63] or the practice of legality.[64] A consequence of this is that international law should ensure that these interactions are not prevented or limited through the structural isolation of materially relevant actors or interests.

International law plays a pivotal role in constructing ocean space – especially for ABNJ. Indeed, the negotiation of the ILBI is construction in action. A wider range of interests and voices play a role in constructing ocean space. Since this is a shared space and activities overlap, the process of construction should be inclusive of these voices and interests (shipping, fishing, resource extraction, environmental goods and services).

[61] Ibid 596-7.
[62] Harold H Koh, 'Transnational Legal Process' (1996) 75(1) *Nebraska Law Review* 181, 184; Chayes and Chayes (n 2) 25-6; MacDougal and Burke (n 2); Myres S McDougal and W Michael Reisman, 'The Prescribing Function in World Constitutive Process: How International Law is Made' (1980) 6 *Yale Studies in World Public Order* 249; Johnstone (3) 3; Hirsch (n 2) 902.
[63] Ryan Goodman and Derek Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54 *Duke Law Journal* 621-703.
[64] Brunnee and Toope (n 3) 20-33.

However, unless international law seeks to include and integrate such interests, it can influence the construction of ocean space.[65] Indeed, the institutionalisation of such exclusion can do structural violence to the construction of ocean space by distorting the recursive process through which space and society reconstitute themselves. As Allott shows there is a predisposition to this in the participatory and aggregating structure of international law, and we must guard against this. For Ranganathan, the regime for the Area has already proven vulnerable to this through the entrenchment of commercial mining interests. This privileging of interests in the construction of social space could happen again if the development of the ILBI fails to properly accommodate interests and effective participatory processes. To avoid the outcome, we need cooperative mechanisms that accommodate a wide range of material and social interests. Material interests should include all material aspects of ocean use in ABNJ – otherwise law risks becoming detached from its material basis. Social interests should reflect the wider interests of society as far as practicable, and not merely sectors interested in the exploitation of marine genetic resources. The process ought to be deliberative and structured, rather than passive because ad hoc interactions may simply default to engagement by limited groups of powerful, self-interested actors. Finally, the process needs to be explicit and transparent in how it makes use of higher order principles. Otherwise, it is susceptible to capture by powerful or competing interest groups.[66]

## 3. A More Holistic and Inclusive Construction of Ocean Space

The purpose of this Part is to show that the regulation of ocean space in ABNJ should be an inclusive, interconnected process.[67] To achieve this, we need to be sensitive to the structural influence law has on the opportunities for the construction of space. We also need to maintain structures and processes in law that enable interactions between activities that are materially, legally, and socially connected. Eachof these three points is addressed in turn.

Although the construction of social space is a function of recursive social processes, it operates in respect of material conditions that influence both the possible and probable outcomes of social interactions.[68] Material conditions are those physical and socially constructed attributes of things that shape our relationship with them. As the story of Canute and his stand against the tide shows,[69] it is impossible to ignore the material qualities of the oceans when we regulate them. The material qualities of the oceans are, for example, their fluid and tidal nature.[70] Thus law cannot command the tide, but it can manage how we interact with it. The material turn is central in other disciplines like archeology, anthropology and history, and important to Actor Network Theory or

[65] There are risks arising from integration, particularly if this is seen to run counter to individual state interests. See further Karen N Scott, 'Environmental Governance: Managing Fragmentation through Institutional Connection' (2011) 12 *Melb J Int'l L* 177, 211-5.
[66] Vito de Lucia, 'Competing Narratives and Complex Genealogies: The Ecosystem Approach in International Environmental Law' (2015) 27 *Journal of Environmental Law* 91.
[67] Although the focus is specifically on ABNJ, it is clear that integrated approaches also encompass areas within national jurisdiction.
[68] See for example, Oran R Young, *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale* (MIT Press 2002).
[69] Colin Hay, 'King Canute and the 'Problem' of Structure and Agency: On Times, Tides and Heresthetics' (2009) 5792) *Political Studies* 260-279.
[70] The material attributes of the oceans extend to its wider physical attributes. This is partially recognised in Art 1(4) of the LOSC (n 48).

Science and Technology Studies.[71] However, the need for law to be sensitive to the material qualities of its regulatory focus is often assumed or marginalized in legal discourse.[72] This marginalization of the material occurs because law foregrounds its subjects – the recipients of legal rights and duties, and backgrounds law's objects – the things that are the objects of rights and duties. Yet, the influence of material things on law and social order is inescapable. It is most profound in respect of property law (law between people in respect of things),[73] but it is critical too in the regulation of natural resources and the environment.[74] And in the law *of the sea*. In the context of natural resources (including fisheries), materiality is important for two reasons. First natural resources may be regarded as more fundamentally connected with questions of human existence per se.[75] That is to say that ensuring the existence of and access to (clean) water, air, food supplies and the means of shelter are common to all persons and pre-requisites for the existence of life and society. This ought to elevate their regulatory significance above other considerations. Second, the material qualities of things determine how they may be regulated. Land, air, water, fish, forests, minerals and so on possess different material qualities. Each has different functions within natural systems that must be accounted for in the design of legal rules. We cannot treat the oceans as but fluid. The common pool nature of the oceans should shape our regulatory options. We cannot ignore the way food chains operate or how fish are part of wider ecosystems. In each, case the construction of meaning occurs between the human and non-human thing. In a legal sense, the nature of a thing influences how we can use or regulate it. The history of the law of the sea is littered with examples of how the nature of the seas or the attributes of things has influenced their regulation: unboundable waters or mobile fish stocks.[76] The material nature of the thing influences how the legal regime develops, and law in turn shapes how we perceive and use that material thing. In summary, law cannot ignore the material nature of its object and in ABNJ this includes fish stocks.

Turning to the second pillar (legal process), if the construction of ocean space works through law, then law will subject the process of construction to the logic and function of law as a system of rules. Law operates by reference to existing rules and institutions.[77] This claim need not depend upon an exhaustive survey of legal institutions and rules, it can be substantiated by reference to the general method of

[71] See Shiela Jasanoff (ed), *States of Knowledge: The Co-production of Science and Social Order* (Routledge 2004); Bruno Latour, *Reassembling the Social. An Introduction to Actor Network Theory* (Oxford University Press 2005);
[72] This is only recently explored in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018). Arguably an extreme extension of this is that idea of objects having legal standing since only by giving things standing can their value be protected vis a vis anthropocentric concerns. Thus, in New Zealand and India, rivers have been granted the status of legal persons. See EL O'Donnell and J Talbot-Jones, 'Creating legal rights for rivers: lessons from Australia, New Zealand, and India' (2018) 23 *Ecology and Society* article 7.
[73] Stephen R Munzer, *A Theory of Property* (Cambridge University Press 1990) 74; Gregory S Alexander, 'Constitutionalising Property: Two Experiences, Two Dilemmas' in Janet McLean (ed), *Property and the Constitution* (Hart 1999) at 95.
[74] Richard Barnes, *Property Rights and Natural Resources* (Hart 2009) at 37-9, and 54.
[75] Ibid.
[76] More recently ecosystem-based approaches take the complex interaction between nature and society to another level. Seemingly grounded in nature, ecosystems are also social constructs – the product of still contested scientific knowledge and values. See Cécile Barnaud and Martine Antona, 'Deconstructing ecosystem services: Uncertainties and controversies around a socially constructed concept, (2014) 56 *Geoforum* 113-26.
[77] Aspects of this rule are found in the prohibition of a non liquet: See Herch Lauterpacht, 'Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (Martinus Nijhoff 1958) 199 and Julius Stone, '*Non Liquet* and the Function of Law in the International Community' (1959) 35 *BYIL* 123. In defence of non liquet, see Daniel Bodansky, 'Non Liquet *and the Incompleteness of International Law*' in Laurence Boisson de Chazournes and Phlippe Sands (eds) *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press 1999) 153-70.

law.[78] Law as both a general institution and branch of practical reason operates according to certain 'ground rules', for example, reasoning by analogy or precedent.[79] It is desirable that law is systematic and ordered – so that conduct can be planned. Yet law must also be flexible so that rules can be developed to accommodate new circumstances. If we are to mediate between competing legal claims or reconcile the tension between stability and change (something at the heart of discussions about the BBNJ mandate to not undermine existing mandates), then we need to give reasons. Law is an interactive process, and its capacity to advance depends upon the capacity of legal actors to use reason to persuade both a legal audience (e.g. judges, diplomats, legislators) and a plenary legal community (members of the constituent society to which law applies i.e. States or individuals). The contingency of law upon reason means that the progress of law is fundamentally shaped by the process of legal reasoning.

MacCormick presents a convincing account of what makes (legal) reasons compelling. Reasons are compelling because they are universalizable, consequence sensitive, reasonable and coherent.[80] Universalisation requires that we commit to the consequences of our decisions in similar situations (i.e. we treat like cases alike). Consequentialism requires us to act consistently with pre-existing rules or principles so that we do not undermine the institutional authority of law.[81] It also requires us to consider the wider social consequences of a rule (for example rejecting a rule that might engender too much liberty to cause harm – such as an absolute freedom of the seas). Reasonableness requires legal authority to be exercised with due regards to 'relevant considerations'.[82] What is relevant will depend upon how the scope of legal authority is delimited – such as the proper scope of jurisdiction, or having regard to certain criteria when exercising discretion (this is illustrated in Part 4). Coherence requires that a rule fit or make sense within the structure of an accepted set of higher order rules or principles (e.g. duty not to cause harm, sustainable development).[83] Coherence reinforces the importance of law as order, but also as a purposive social enterprise, whereby law guides conduct towards a view of a good or satisfactory way of life. To the extent that these factors are used to explain why rules are adopted or decisions are made, then law exerts a capacity to compel. MacCormick's approach is consistent with constructivist approaches to law in that it applies to specific legal transactions or law-making instance. Critically, it is sensitive to both the legal and extra-legal context and consequences. It foregrounds the systemic context within which law operates and shows how the contingency of legal reasoning existing legal and social institutions. If we apply this to how rules for ABNJ are developing, it is clear that the systemic nature of legal reasoning and its consequence sensitivity demands that law reflect the material object of law and the power structuring effects of law. This strengthens the argument for inclusion of fisheries (or strong cooperative mechanisms) within the ILBI because fish and fishing are material aspect of ABNJ and the ILBI will have impacts on the structuring of legal relationships in ABNJ.[84]

[78] A similar argument is made by Brunée and Toope, who draw upon the work of Fuller to construct their ground rules of legal obligation. Above (n 3) 20-33.
[79] See generally, Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford University Press 1978) 153, 187-8; Cass Sunstein, 'On Analogical Reasoning' (1993) 106 *Harvard Law Review* 741, 778-9.
[80] MacCormick ibid 100.
[81] Ibid 101ff.
[82] Ibid 181ff.
[83] Ibid 193-230.
[84] See Part 4, below.

Although I have sought to emphasise the influence of law on the construction of ocean space, it is important to remember that law does not occur in a vacuum. As demonstrated by Steinberg and others, it is set against wider economic, political and social conditions.[85] A function of law is to regulate social co-existence in the pursuit of values that are partially independent of law.[86] Law is a social practice and as such it is not immune to wider social expectations and values – it must respond to such concerns.[87] These are the concerns of those who are ultimately affected by the operation of legal rules. The point here is not to argue in favour of any particular social rules or values. Nor is it to engage in a wider and more controversial debate about the relationship between law and other forms of social order. Rather it is to point out that as a matter of practice, law cannot operate as an abstract, acontextual discipline. This in turn favours a context sensitivity to wider social practices and institutions in the development of legal rules. If we take but one example: Article 27 of the ICCPR provides that minorities 'shall not be denied the right … to enjoy their own culture…'. General Comment 23 of the HRC has further explained that:

> … culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[88]

Indigenous peoples are not to be denied access to the *material* basis of their culture. Just as law must mediate material concerns, it must accommodate wider social conditions.[89] As the ICCPR example shows, material, legal and social factors elements do not operate in isolation. These three elements interact in the construction and operation of legal regimes. In the case of fisheries, we are concerned with socio-ecological systems whereby the interaction of human and natural systems changes the systems and so demand adaptive responses.[90] Thus overfishing of coastal waters caused the collapse of some fish stocks. Recognition of the economic drivers of this pressure gave rise to access limitations in order to reduce pressure on stocks to help them recover. However, it also pushed surplus fishing capacity onto the high seas – since the economic drivers of fishing remained. This generated pressure to restrict

[85] Steinberg, above (n 28). On the general construction of knowledge, see Paul Boghossian, *Fear of Knowledge: Against relativism and Constructivism* (Oxford University Press 2007). On the causal and epistemic dependence of law, see Janina Dill, *Legitimate Targets? International Law Social Construction, and US Bombings* (Cambridge University Press 2015).
[86] David Lyons, 'Normal Law, Nearly Just Societies, and Other Myths of Legal Theory' in Roger Brownsword, *Law and the Public Interest* (F Steiner 1993).
[87] This is not to deny a wider debate about what it means to say law is a social practice. See Matthew N Smith, 'Law as a Social Practice: Are shared activities at the foundations of law?' (2006) 12 *Legal Theory* 265.
[88] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc HRI/GEN/1/Rev.1 at 38 (1994), para 7.
[89] See Stephen Allen, Nigel Bankes and Øyvind Ravna (eds), *The Rights of Indigenous Peoples in Marine Spaces* (Hart 2019).
[90] Elinor Ostrom, 'A diagnostic approach for going beyond panaceas' (2007) 104 *Proceedings of the National Academy of Sciences* 15181.

access to high seas stocks or risk their collapse. These interactions form part of a dynamic system, and each component cannot be understood in isolation.[91]

To summarise, the material and social contingency of law, and the nature of law as a systemic, reason-based discipline commits us to an inclusive, pluralistic, coherent and integrated approach. Despite this, some of law's ground rules may operate so as to influence the construction of ocean space to the exclusion of some of these considerations. This is shown in more detail next in the analysis of the BBNJ process and draft ILBI.

## 4. The ABNJ Negotiations: The Construction of Ocean Space in Action

As demonstrated in Parts 2 and 3 of this chapter, the construction of social space is an interactional process. It is a process involving partipants in law creating situations engaging with each other according to any structural rules. And it is a process that needs to be holistic and inclusive. In this light, we can view the BBNJ process as both constructing social space in action and a process of patterning or structuring future interactions. During the negotiations, the acts of perceiving, speaking, reasoning, claiming, contesting, categorizing, debating, negotiating, and producing a treaty text, are part of the process of construction, a process helping generate shared understandings. Yet we can also see, according to Allott's notion of aggregation, how this process captures a limited range of inter-State interests. According to our 'model' of construction in Part 3, the recursive process must respond to the material reality of ABNJ. It must also be sensitive to the way in which law shapes influences the ongoing construction of social reality. This is critical since the ILBI will fundamentally structure the way in which future interactions occur.

In this part, I argue that the capacity of the ILBI to structure present and future interactions is specifically informed, first, by the way it enables different actors (and hence interests) to participate in the process of law development. Second, by the way the ILBI structures intersections between such actors, namely by defining its relationship with other legal instruments and institutions; and third, by the way the ILBIs aims and objectives guide cooperation through such procedures.

The second argument is focused on two sets of provisions in the draft ILBI that may come into tension: those requiring the ILBI not to undermine existing regimes; and those setting out institutional process for cooperation. I argue that in order to allow for a more inclusive constructive process, and to advance coherence and integration, we should give priority to strong, proactive cooperative mechanisms rather than a rigid requirement not to undermine. Not only does this enable interactions, it is also consistent with is one that embraces the wider integrating forces that permeate the law of the sea and connects with the material condition of the oceans. As de Lucia argues we should think like the ocean and elaborate an oceanic 'lawscape' better aligned with

[91] There is a burgeoning literature on systems-based approaches: James A Wilson, 'Matching social and ecological systems in complex ocean fisheries' (2006) 11 *Ecology and Society* (article 9 online); Serge M Garcia and Anthony T Charles, 'Fishery systems and linkages: from clockworks to soft watches' (2007) 64 *ICES Journal of Marine Science* 580.

ecological realities.[92] To privilege the concept of 'not undermining' would be to constrain the interactional possibilities that enable wider material and legal interests to feed into the construction of social space in ABNJ. It is true that there are opportunities for interaction and construction of ocean space to occur in other fora, both material (through actual use of the seas) and through discourse (i.e. law-making in other fora such as regional organisations). However, the exclusion of fisheries risks fragmenting the construction of social space to emerge. And a stated before, the multi-lateral scope and substantive content of the ILBI mean that it will play a pivotal role in setting future agendas.

The third argument is that we need to underpin the agreement with strong general principles and substantive duties to have due regard to wider interests, including fishing. A principled approach, as advocated by Oude Elferink,[93] could ameliorate the exclusion of fisheries by guiding the substantive focus for how different sectoral processes can interface. Although the ILBI provides some options for cooperation and coordination,[94] it remains unclear how the ILBI can orchestrate the interactions and integrate thinking towards a holistic regime for ABNJ. I argue that the articulation of general principles alongside standards and mechanisms for reviewing the development of such principles will provide a powerful means of enabling shared understandings to emerge in future interactions.

### 4.1 Participation in the Process of Constructing Social Space in ABNJ

Participants involved in interactions or law creation moments play critical roles in both the construction of social space and in constructivist approaches to international law-making. So, who are these actors? And does their participation influence the BBNJ process?

We can readily identify the actors participating in the BBNJ process from official records. The UNGA established an Ad Hoc Open-ended Informal Working Group in 2004 to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.[95] Predominantly comprised of members of foreign ministries, a small number of States included representatives from fisheries departments.[96] Expertise and capacity varied considerably between States. Also attended by inter-governmental organisations (the Asian-African Consultative Organisation; the Caribbean Community; the EU; the IUCN, and the Pacific Islands Forum), UN Specialised Agencies (Food and Agriculture Organization; Intergovernmental Oceanographic Commission; World Intellectual Property Organization; and the International Seabed Authority) and bodies (e.g. CBD Secretariat; UNEP), and other IGOs (South East Atlantic Fisheries Commission (SEAFC) and North East Atlantic Fisheries Commission (NEAFC); and OSPAR), and a range of NGOs (Fridtjof Nansen Institute, Greenpeace, the International Chamber of Commerce, the International Coastal and Ocean Organisation, the Natural Resources

[92] Vito de Lucia, 'The BBNJ negotiations and ecosystem governance in the Arctic' (2019) *Marine Policy* (forthcoming), section 4.3.
[93] Alex G Oude Elferink, 'Governance Principle for Areas Beyond National Jurisdiction' (2012) 27 *IJMCL* 205.
[94] See further Part 4.2 below
[95] UNGA Res 59/24, 17 December 2004, UN Doc A/Res/59/24, 4 Feb 2005.
[96] E.g., the EU, Canada, Indonesia, Japan, Namibia, Norway, Philippines, Republic of Korea, and the Russian Federation See https://www.un.org/depts/los/biodiversityworkinggroup/documents/participants_wg9.pdf

Defence Council, the Pew Environment Group, Sylvia Earle Alliance, and the WWF). Perhaps reflecting the wider range of interests at stake and the wide range of actors involved in discussions, this contributed towards a widely drawn mandate to develop an agreement on the conservation and sustainable use of marine biodiversity in ABNJ. United Nations General Assembly Resolution 69/292 of 19 June 2015 put in motion the process for formally developing an implementation agreement.[97] The Resolution was, in principle, open to including fisheries, although the detail of this remained to be worked out. A preparatory committee (PrepCom) open to all Member States of the UN, its specialized agencies and Parties to the LOSC was established and tasked with making recommendations to the UNGA on the elements of a draft text of a binding agreement.[98] Although States have again driven this process, there was considerable input from both IGOs and NGOs.[99] It was attended by 91 States Parties to the LOSC, 10 Non-States Parties, seven IGOs, five UN specialised agencies, five UN funded programmes and agencies, 17 NGOs and two private commercial groups. All RFMOs were invited to attend PrepCom, but only a few attended: the North Pacific Fisheries Commission, the Northwest Atlantic Fisheries Commission (NAFO), and the SEAFC, and even then the RFMOs possessed only a limited role as observers.[100] In short, the process is broadly inclusive, but by no means exhaustive of interest groups, and RFMOs appear to have been marginally involved.

A similar spread of participation is evident in the intergovernmental conference charged with drafting the ILBI. Crucially, formal participation is limited to members of the UN, members of the specialized agencies and parties to the LOSC.[101] However, observers status has been granted to representatives from a wide range of organizations, including UNGA observers (e.g. the International Council for the Exploration of the Sea), specialized agencies of the UN and related organizations, interested global and regional organizations, accredited NGOs, and associate members of regional commissions.[102] The records of participants indicates a wide range of attendance, particularly from research institutions and environmental organizations.[103] Given the present focus on the position of fisheries, it is notable that there has been engagement from fisheries organizations. The FAO, NEAFC, NAFO and NPFC have attended all sessions to date, the South East Atlantic Fisheries organization attended the second and third sessions, and the Inter-American Tropical Tuna Commission and the International Commission for the Conservation of Atlantic Tuna attended the third session.[104]

Having identified the range of actors involved, we can turn to considering their influence on the BBNJ process. Unfortunately, there is only limited qualitative research on the BBNJ process to draw upon, and this does not cover the full duration of the negotiations, which are still ongoing.[105] What we do know is that despite initial

[97] UNGA Res 69/292, A/Res/69.292, 6 July 2015.
[98] Ibid para [1(a)].
[99] Robin Warner 'Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott and Tim Stephens (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015).
[100] Formal participation was limited to state Members of the United Nations, members of the specialized agencies and parties to the Convention. UNGA Res 69/292, [1(a)].
[101] UNGA Res 72/249, 19 January 2018, [8].
[102] Ibid [12-15].
[103] UN Doc A/CONF.232/2018/INF.3, 28 Sept 2018; UN Doc A/CONF.232/2019/INF.3/Rev.2, 26 April 2019; UN Doc A/CONF.232/2019/INF/5/Rev.1, 23 October 2019.
[104] Ibid.
[105] Robert Blasiak et al conducted a frequency analysis of statements made by delegates during PrepCom1, showing OECD member were more likely to mention the dangers of undermining existing fisheries mandates, but there is no

recognition that fishing should fall within the scope of the agreement, States moved towards excluding fisheries management from the scope of the ILBI.[106] The exclusion of any direct provision on fisheries has happened despite the recognized importance of a holistic, inclusive regime for the governance of ABNJ, and despite the presence of some States and non-State actors pushing for the inclusion of fisheries within the ILBI. In the absence of more fine-grained data on the negotiations, some general observations on the extent of participation and influence of different interest groups and actors can be offered.

First, there may simply be a lack of interest in participating in ABNJ issues. Arguably, ABNJ are quite removed from the reality of everyday life of most people so it tends to attract the engagement only from dedicated interest groups. In other words, the material connection wider society has with the oceans is weak or distant and this places ocean issues out of sight and out of mind. As I have argued previously, this is rooted in a more fundamental structural dislocation of ocean issues from the social and legal interests of society.[107] So far, the BBNJ process has never really reached 'the mainstream' thereby attracting wider engagement in the processes, even though there is an increasing focus on the deep-sea riches, the blue economy and high seas biodiversity. When we compare the BBNJ negotiations with other fora, such as the CBD or the Paris Climate talks and the resulting agreement, the differences seem stark. In Paris, NGOs, companies and sub-national public bodies have become 'essential agents' of treaty implementation in climate fora.[108] This may be through capacity support, advocacy, or private initiatives, such as business pledges. This agency can result in the inclusion of their interests being formalized in the resultant agreement. The Paris Agreement clarifies in its preamble that it is essential to engage 'all levels of government and *various actors*', and the Clean Development Mechanism makes explicit reference to involvement by public private entities. When the text was adopted, the Conference of Parties recognized the interests of a wide range of interest and the need to 'mobilize stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples.'[109] This is important recognition of the material interests at stake. Similarly, there is research showing that non-States delegates are playing an influential role in outcome of the CBD Conference of Parties.[110] These examples may cast light on the wider culture and value of participation in international law-making, but there remains a degree of resistance to empowering non-State actors.

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other data on the later or qualitative influence of delegates on outcomes of the negotiating process. 'Negotiating the Use of Biodiversity in Marine Areas beyond National Jurisdiction' (2016) 3 *Frontiers in Marine Science* 224: https://doi.org/10.3389/fmars.2016.00224 . More generally, see Christian Downie, 'Towards an Understanding o State behavior in Prolonged International Negotiation' (2012) 17 *International Negotiation* 295.

[106] Richard Barnes 'The Proposed LOSC Implementation Agreement on Areas Beyond National Jurisdiction and its Impact on International Fisheries Law' (2016) 31 *International Journal of Marine and Coastal Law* 583. The exclusion extends into the acute debates about how to treat fish in the context of MGR, and the difference between fish as a commodity or repository of genetic material. David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction' (2019) 99 *Marine Policy* 21, 26

[107] Richard Barnes, 'Environmental Rights in Marine Spaces' in Sanja. Bogojević and Rosemary Rayfuse (eds), *Environmental Rights in Europe and Beyond* (Hart, 2018) 49-85.

[108] Karin Bäckstrand, Jonathan W Kuyer, Björn-Ola Linnér and Eva Lövbrand, 'Non-state actors in global climate governance: from Copenhagen to Paris and beyond' (2017) 26(4) *Environmental Politics* 561.

[109] Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, FCCC/CP/2015/10/Add.1, at 2.

[110] Rebecca Witter et al, 'Moments of influence in global environmental governance' (2016

States remain resistant to conceding authority to non-State actors in the formal law-making process. Without detouring too much into questions of legal personality and authority under international law, we can point to a body of research that shows the cautious approach of States to the empowering other actors.[111] Negotiating the BBNJ ILBLI is principally conducted by States. Even if other actors can inform the discussions, they have no direct role to play in the decision-making process. The formal and informal records of the negotiations do not capture the full extent of interactions between the different participants. For example, the records of the side events show active engagement by groups like the Nippon Foundation, the High Seas Alliance, and Pew Charitable Foundation.[112] But, we are left to speculate as to whether or not such events make a difference.

Finally, and most importantly, there is a lack of interest from some States to include of fisheries in the ILBI because this would weaken the authority those same States to pursue their interests in existing regional fisheries arrangements. As Benvenisti and Downs argue, powerful States seek to maintain fragmentation because it enables them to maintain their dominance by reducing opportunities for weaker actors to create coalitions across institutions Fragmentation increases the transaction costs of change because change must occur in multiple for a. Thus fragmentation frees powerful states of accountability for problems of their own making by that are presented as the result of systemic deficiencies rather than as flowing from their inaction.[113] Broude argues that the integration of substantive norms produces pressure to integrate authority.[114] This means that even general or indirect references to fisheries in the ILBI may challenge the authority that limited groups of States enjoy within RFMOs. It could also expose RFMOs to greater scrutiny over the extent to which fishing activities are compatible with the potentially more far-reaching provisions on environmental protection. The bottom line here is that there is a resistance to the inclusion of fisheries in the ILBI from States. However, the implications of this are that it will hamper an inclusive construction of ocean space in ABNJ by reducing or limiting the potential for material interests to feed into the law-making process, both during the negotiations and through the future agreement. If we look at the draft ILBI, we can see how this is happening through the limitation of opportunities to the recursive construction of interests in ABNJ.[115]

### 4.2 Orchestrating Procedural Interactions Through the ILBI

The ILBI is broadly concerned with the conservation and sustainable use of marine biological diversity in ABNJ, but its main focus of its text is on four thematic issues:

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[111] Andrew Guzman, 'International Organizations and the Frankenstein Problem' (2013) 24 EJIL 999; C Ryngaert, 'Non-State Actors: Carving Out a Space in a State-Centred International Legal System' (2016) 63 *Netherlands International Law Review* 183.

[112] https://www.un.org/bbnj/content/side-events

[113] Eyal Benvenisti and George W Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law' (2007) 60 *Stanford Law Review* 595.

[114] Tomer Broude, 'Principles of Normative Integration and the Allocation of International Authority: The WTO, the Vienna Convention on the Law of Treaties, and the Rio Declaration' (2008) 6 *Loyola University Chicago International Law Review* 173.

[115] On adaption within the ILBI, see Catherine Blanchard, Carole Durussel and Ben Boteler, 'Socio-ecological resilience and the law: Exploring the adaptive capacity of the BBNJ agreement' (2019) 108 *Marine Policy* (article 103612).

marine genetic resources (MGR), including benefit sharing area-based management tools (ABMT); environmental impact assessment (EIA); and capacity-building, including technology transfer.[116] Despite the material reality of the oceans as an integrated, socio-ecological system, the draft text of ILBI reflects only part of that reality. Although the ABNJ ILBLI will form part of a wider system of rules that can be drawn upon to regulate matters outside of its scope, this does not mean that it can or should operate separate to such matters. As I argue elsewhere, this is problematic for practical reasons, since fishing is the main cause of biodiversity loss.[117] And the development of EIAs or ABMTs necessarily depend upon input (e.g. data) from fisheries, and when implemented they will impact upon the conduct of fishing activities in areas subject to protective measures. If the ILBI lacks mechanisms for engaging with other material interests, then it denies space not just for those issues now, but also in the future because the ILBI determines the patter of future interactions in the construction of social space.

If we look beyond the four main topics, there are three general provisions that could enable interactions with wider actors and interests:[118] Article 4 on the relationship with the LOSC and other relevant global and regional instruments; Article 6 on international cooperation; and Article 48 establishing a Conference of the Parties.[119]

The relationship between the ILBI and existing legal instrument is set out in Article 4. It provides that nothing in the agreement shall prejudice the rights, jurisdiction and duties of States under the LOSC.[120] The ILBI shall also be interpreted and applied in manner consistent with the LOSC. Such a provision is not unusual and designed to ensure consistency between different but related treaties (e.g. Article 4 of the UN Fish Stocks Agreement). Article 4 of the ILBI further states that the rights and jurisdiction of coastal States in areas within national jurisdiction shall be respected.[121] This can be contrasted with the UN Fish Stocks Agreement, which requires compatibility between conservation and management measures between the high seas and areas within national jurisdiction. This neither restricts conservation measures per se, nor does it establish a normative hierarchy. As such, this does not constrain regulatory possibilities, rather it encourages constructive engagement to secure compatibility. De Lucia argues compatibility is advanced in the BBNJ ILBI, noting that this could be read

[116] There is a growing literature on these topics, and I do not intend covering this in any detail. See generally: Robin Warner, 'Strengthening Governance Frameworks for Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Southern Hemisphere Perspectives' (2017) 32 *IJMCL* 607; Cymie Payne, Biodiversity in high Seas areas: An Integrated Legal Approach' (2017) 21 *ASIL Insights*. On EIA, see: Alex G Oude Elferink, 'Environmental Impact Assessment in Areas Beyond National Jurisdiction' (2012) 27 *IJMCL* 449; Meinhard Doelle and Gunnar Sander, 'Next Generation Environmental Assessment in the Emerging High Seas regime: An Evaluation of the State of the Negotiations' (2020) 35 *IJMCL* 498. On MGR and benefit sharing, see Leary (n 106); Fran Humphries et al, 'A tiered approach to the marine genetic resource governance framework under the proposed UNCLOS agreement for biodiversity beyond national jurisdiction (BBNJ)' (2020) *Marine Policy* (article 103910). On capacity-building, see: Harriet R Harden-Davies and Kristina Gjerde, 'Building Scientific and Technological Capacity: a Role for Benefit-sharing in the Conservation and Sustainable Use of Marine Biodiversity beyond National Jurisdiction' (2019) 33 *Ocean Yearbook* 377; Marjo K Vierros and Harriet R Harden-Davies, 'Capacity building and technology transfer for improving governance of marine areas both beyond and within national jurisdiction (2020) *Marine Policy* (article 104158).

[117] Barnes (n 106).

[118] Arguably, this should include dispute settlement. See further Joanna Mossop, this volume.

[119] 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, A/CONF.232/2020/3, 18 Nov 2019. Cooperation is also supported in specific provisions, such as Arts 14-5 (area-based management tools), Art 28 (conducting strategic environmental assessment), Art 43(capacity-building)

[120] Ibid Art 4(1).

[121] Ibid Art 4(2).

into provisions requiring cooperation, such as Art 15(5).[122] However, there is no explicit reference to compatibility in the ILBI and it is not clear that 'not undermining' means the same compatibility. He correctly observes that compatibility would need t be transformed into a key principle and involve a positive duty to adopt compatible conservation measures.

Article 4(3) is significant because it constrains the scope of the ILBI:

> 'This Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.'[123]

The term 'undermine' is ambiguous, but it risks having a chilling effect on legal developments.[124] This is evident from the negotiations where some States have used it as a device to limit the scope of the agreement.[125] The logic here is that because the UNFSA and RFMOs regulate fisheries, the ILBI should leave these matters alone. This could be viewed as favouring the status quo and protecting existing interests.[126] In response, one could argue that the requirement to 'not undermine' gives fisheries bodies a strong voice in the ABNJ process in the sense that it reinforces their authority and it indirectly connects the ILBI to existing regimes. It might be viewed as a manifestation of legal coherence. However, I would challenge such a view. First it ignores the fact that existing mandates seek to advance integration between sectors and institutions.[127] Second, the requirement to 'not undermine' is a negative provision. It leaves space for interactions, but it does not establish a constructive institutional process for different interests to be 'worked out.' There is also a real risk that this could result in a status quo bias and one that constrains new approaches, depending upon who is in control of the process to determine the meaning of 'not undermine'. This could operate as a veto or build into the structure of the ILBI a prioritization of commercial fishing practices. As I have argued elsewhere, a restrictive approach to not undermine' should be rejected.[128] Alternative constructions of the concept should be used to enable the ILBI to adopt measures that fill gaps or enhance the mandates of other institutions to regulate new matters. Such a reading would at least be consistent with the capacity of the regime to adapt to changed circumstances. Interestingly the present draft of Article 4(3) contains an alternative 'to respect' existing mandates. This approach to regime interaction would drive positive, constructive engagement, rather than potentially freeze interactions between regimes.[129] This could prompt better communication and coordination between the different sectoral institutions.

Article 6 exhorts States to 'cooperate under this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including through strengthening and enhancing cooperation with and among relevant

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[122] Above (n 92), section 4.2.

[123] The text in brackets indicates a provision which has alternatives or where some States have expressed a view for its omission. This does not imply that non-bracketed text is agreed.

[124] Although the UN Fish Stocks Agreement uses a similar term (eg Arts 7(2)(a), 17(4), 18(1), 20(7)), these provisions seek to constrain flag States from undermining conservation and management measures. These provisions do not seek to preserve the mandates of other bodies.

[125] Namely, Iceland, Japan and Russia. See *Earth Negotiations Bulletin*, (2016) vol. 25/97, 1-2 and *Earth Negotiations Bulletin,* (2016) vol. 25/98, 2.

[126] Benvenisti and Downs (n 113)

[127] See Part 4 above.

[128] Barnes (n 14).

[129] On cooperation between regimes from an international relations perspective see: Xinyuan Dai, Duncan Snidal and Michael Sampson, 'International Cooperation Theory and International Institutions' *Oxford Research Encyclopedia of International Studies* (Online), https://doi.org/10.1093/acrefore/9780190846626.013.93

legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and members thereof in the achievement of the objective of this Agreement.' It is potentially critical to the future development of ocean space in ABNJ because it establishes the principal treaty mechanism for the recursive construction of material and social interests. At present, the text is drawn in terms of a basic commitment to cooperate. Beyond this it does little to structure or facilitate interactions. Ideally, specific forms of cooperation need to be mandated and structured. For example, Iceland submitted a proposal for a regional consultative process.[130] This is not a holistic solution, but at a step in the right direction by having structured cooperative process. There also need to be checks and balances on how cooperation operates, as well as oversight. If cooperation is be left to ad hoc, self-interest driven actions by a limited group of State actors, then this could negatively influence the construction of ocean space by excluding actors or allowing particular accounts of ocean space (e.g. pro-exploitation or sectorally divided visions) to prevail.

These shortcomings could be ameliorated through an institutional process, such as a conference of the parties (COP). In the draft ILBI, this is provided for in Article 48, which contains proposals for periodic meetings of the COP. The COP would have authority to establish rules and procedures for itself and any subsidiary body it may wish to establish, as well as the remit to review the implementation of the ILBI, exchange information, promote cooperation, set budgets, review the effectiveness of the ILBI and, if necessary, propose measures to strengthen or reform it. As it stands in the draft ILBI, the COP is mainly focused on oversight of internal processes. Thus, it will '[monitor and] and keep under review the implementation' the agreement'.[131] Of course, the adoption of decisions and recommendation by the COP will only have effect inter se on States parties.[132] This means that influence on other regional and sectoral activities will occur only indirectly through the influence of States in those other fora. Article 48(4)(c) is a potentially critical provision because if could enable more inclusive holistic interactions on issues of oceans governance. The draft provision provides that the COP shall:

> Promote cooperation and coordination with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, with a view to promoting coherence among efforts towards, and the harmonization of relevant policies and measures for, the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction [, including by establishing processes for cooperation and coordination with and among relevant global, regional, subregional and sectoral bodies] [, including by inviting other global, regional, subregional and sectoral bodies to establish processes for cooperation]'

Presently this is drafted in weak terms – it refers only to 'promotion' with a 'view to promoting coherence'. Critically, the options for establishing processes of cooperation and coordination with sectoral bodies (such as RFMOs) are in square brackets and so only options at present. A COP with a limited remit could perpetuate the structural weaknesses inherent in ABNJ and limit inclusive and holistic governance opportunities.

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[130] Textual proposals submitted by the delegation by 20 February 2020, at 52-4. Available at https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf

[131] Draft ILBI above (n 119), Article 48(4).

[132] Ibid Article 48(4)(a).

### 4.3 Orchestrating Substantive Interactions Through the ILBI

General principles serve a number of integrative functions – something that is critical to effective governance of ABNJ. For present purposes, two are relevant. First, they can provoke the creation of new rules in a structured way; they establish general frameworks for action that can be advanced through more detailed rules.[133] In doing so they contribute to the advancement of the values inherent in such principles.[134] This is important because the meaning and content of principles contained within the ILBI are not exclusive to the ILBI; the principles cut across the wider law of the sea and international law and their meaning may be shaped in these wider legal regimes. As such this can help create opportunities for a wider set of values to feed into ABNJ discourse and, in turn, the practices of bodies operating in ABNJ.

The second integrating function of general principles is to assist in the process of interpreting and applying rules as they apply to novel situations.[135] This can be achieved through an interstitial, gap-filling function as described by Lowe.[136] Or as a supplementary means of clarifying ambiguous or uncertain language. Principles are value orientated and so can be used to explain why sets of rules exist. The reasons underlying a principle can be used to inform the interpretation or application of a rule.[137] This echoes the reasons-contingent nature of law discussed in Part 3.

Article 5 of the ILBLI sets out seven principles/approaches potentially applicable to ABNJ: an integrated approach; and ecosystem (resilience) approach; the non-transfer of harm principles; the internalisation of costs (polluter pays) approach; accountability; the principle of non-regression; and to take into consideration flexibility, pertinence and effectiveness. This list of principles has been reduced from the longer list of 22 principles in the President's Aid to Negotiations for the second session.[138] Notable omissions to the current draft are the principles of transparent and open-decision-making, public availability of information and stewardship.[139] Precaution is now only mentioned in Articles 16 and 17 on identifying and making proposals on area-based management tools. To these we could add a missing principle of compatibility and a requirement of have due regard to the rights and interests of other States. These omissions from the list of generally applicable principles are important because the principles facilitate interactions and enable opportunities for new social and material interests to emerge. Transparent/open-decision-making and public availability of information can help ensure accountability of actors in a system prone to marginalise non-dominant interests. Compatibility and due regard can direct users to develop mutually beneficial solutions to potential conflict of use/interest situations. And

[133] M Cherif Bassiouni, A Functional Approach to "General Principles of International Law' (1990) 11 *Michigan Journal of International Law* 768, 777ff; Robert Kolb, 'Principles as Sources of International Law (with special reference to good faith)' (2006) *Netherland International Law Review* 1, 7. See also the point about non-liqet, above (n 77).
[134] Kolb describes them as value catalysers. Ibid 29.
[135] Bassiouni (n 133) 776.
[136] Vaughan Lowe 'Sustainable development and unsustainable arguments' in Alan Boyle and David Freestone (eds) *International law and sustainable development: past achievements and future challenges* (Oxford University Press 2005) 21.
[137] Kolb (n 133) 32-3.
[138] A/CONF.232/2019/1, 3 December 2018.
[139] Advocates of a principle-based approach include David Freestone, 'Principles Applicable to Modern Ocean Governance' (2008) 23 *IJMCL* 385; and Oude Elferink (n 93).

stewardship, which conditions use of things according to overriding duties of conservation and preservation, ensures a necessary focus on the material conditions of ABNJ.[140] It offers an alternative value structure to the CHM, which is both contested and skewed towards exploitative ideals.[141]

The principles indicate the core values underpinning the treaty and can thus influence the direction of policy and practice under the ILBI.[142] They can imbue the ABNJ agreement with adaptive qualities necessary for responding to change in a dynamic physical environment. Principles framed in open-ended terms enhance the capacity of the treaty to adapt to new circumstances and may provide opportunities for cross-fertilisation of practices between different activities. The inclusion of the common principles in different treaty texts creates linguistic and legal connections between different instruments, connections that can enable the development of practices in different fields in a connected fashion. This function of general principles can be particularly important in the event of any disputes arising under the ILBI.[143] Principles can be used to internalises (i.e. makes subject to inter-se treaty practice) the external (i.e. wider meanings or practices of a general principle) and so establishes an epistemic link between the subject matter of the treaty at hand and external subject matter. Here general principles can be a starting point for the development of generally accepted international rules and standards for ABNJ.[144] At the very least, the inclusion of general principles in the ABNJ agreement are points of common interest and so set the tone and direction for such interactions. And any technical body or Conference of Parties can be a forum for reporting and discussing progress on the implementation of such principles. Given the risk that institutional process can reify a limited set of values and interests, it is important that the ILBI structure cooperation in pursuit of a wider, value inclusive set of principles. This must include principles of transparency, integration and due regard since these principles engender inclusive and constructive interaction between different interest groups. And it must ensure the principles cut across all substantive matters within the ILBI, rather than being separated into discreet sections on different activities (e.g. EIA or ABM).[145]

### 4.4 Strengthening the ILBI and the Opportunities for Constructing Social Space

Drawing on the arguments presented in Parts 2 and 3, it is important that any institutional mechanism possesses three qualities to ensure that inclusive interactions take place and that the law is able to develop constructively. First, cooperation must enable opportunities for a wide range of material and social interests to be articulated in the law-creation process for ABNJ. In practice, this means providing an opportunity through, for example, subsidiary bodies for a range of actors (e.g. industry/civil society/scientific community) who have a material interest in the activities in ABNJ. A key challenge here is the limited remit of the draft ILBI and the fact that as currently framed, the ILBI will be unable to influence the mandates of existing bodies (such as

[140] This definition of stewardship is taken from Barnes (n 23) 157.
[141] Ranganathan (n 50).
[142] Katherine Houghton, 'Identifying new pathways for ocean governance: The role of legal principles in areas beyond national jurisdiction' (2014) 49 *Marine Policy* 118.
[143] This type of reasoning features in the *Responsibilities and obligations of States with respect to activities in the Area,* Advisory Opinion, 1 February 2011*,* ITLOS Reports 2011 [125-35].
[144] See C Redgwell, 'Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the offshore Sector' in Nigel Bankes and Seline Trevisanut (eds), *Energy from the Sea. An International Law Perspective on Ocean Energy* (Brill, 2015) 40, at 57-8.
[145] See, for example, Draft ILBI (n 119) Art 7, 14 and 42

RFMOs) that are so critical to decision-making in and constructing space in their respective sectors. Participation of different actors within the ABNJ agreement alone may not be sufficient to fully integrate governance of ABNJ. This requires opportunities for influence to be made both within the institutional structures of the ILBI and in related forums. The institutional mechanisms established in an ILBI need to be to be active, deliberative and structured. This could be through formal consultative processes, or by directly mandating States Parties to establish cross-sectoral regional cooperative arrangements, as pioneered by OSPAR and NEAFC. Third, any institutional process should be explicitly subject to a requirement to respect the ILBI's general principles. This should be accompanied by standards or procedures for evaluating the implementation of principles. This can help harmonise the institutional and substantive development of the regime for ABNJ. By requiring that existing institutional practices align with the ILBI, States (and institutional bodies) will be pressured to frame their conduct in terms of common values.

## 5. Future Fisheries: The Importance of Interactions and Inclusive Institutional Arrangements

The lessons from this chapter are not merely practical ones for the future regulation of ocean space. This chapter contributes to wider understanding of the relationship between the law creation process and power. By showing how law structures interactions in respect of maritime spaces and risks marginalising certain interests, I caution against conservative thinking and highlight the importance of designing inclusive processes into our legal institutions. If we do this carefully, then these processes can orchestrate in a constructive way a more inclusive and holistic regime for ABNJ.

Although many activities are brought together within the framework of LOSC and related instruments, the mundane regulation of such activities is often pursued through discreet sectoral regimes for fisheries, shipping, pollution control, deep seabed mining and marine scientific research. The fact that these activities are connected in a material way renders a diffuse and atomised system of control (e.g. flag State jurisdiction, sectoral regulation) flawed.[146] We need to recognises and respond to the material connectivity of space and activities in ABNJ. As Molenaar and Oude Elferink have stated: 'Cooperation will always be essential to effectively manage specific activities in the high seas or to protect the marine environment of the high seas.'[147] Cooperation is particularly important for fisheries given the wider impact it may have on other activities and that cooperation is fundamental to the effectiveness of fisheries governance on the high seas.

An inclusive, cooperative framework, with interactional opportunities for States may be part of the residual structure of the law of the sea. However, this inclusive, cooperative approach is a work in progress. As this chapter shows, when space is institutionalized in a sectoral way this may to consolidate and constrain interactional

[146] Robin M Warner, 'Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea, *Frontiers in Marine Science*, 20 May 2014. Available online at https://www.frontiersin.org/articles/10.3389/fmars.2014.00006/full#B44.

[147] Erik J Molenaar and Alex G Oude Elferink, 'Marine protected areas in areas beyond national jurisdiction: The pioneering efforts under the OSPAR Convention' (2009) *Utrecht Law Review* 5.

opportunities. Despite efforts to ensure the scope of fisheries management is more geographically complete and integrated into wider environmental concerns, the current legal system remains flawed. The LOSC and related instruments have so far failed to ensure that resources in ABNJ are properly protected against the adverse impacts of fishing. The Fish Stocks Agreement does not address discrete high seas stocks, and whilst it provides a framework for the development of RFMOs, it does not require RFMOs to act in conformity with its provisions.[148] This can be done voluntarily, but it lacks systematic implementation.[149] Some RFMOs have the competence to regulate the activities of members in parts of the high seas, but the extent of their regulatory coverage is limited both geographically and materially.[150] In these respects there are significant gaps in the scope and extent of international fisheries law.[151]

This chapter has shown that development of a legal regime for ABNJ is closely bound up with wider social, political and economic concerns. It must also reflect the material nature of ocean space in ABNJ. A constructivist perspective allows us to better understand how these wider social and material interactions are shaped through the process of law creation and application. Lawyers and diplomats do not enjoy exclusive domain over the material underpinnings of social practice or domain over those wider social practices. However, in ABNJ, law appears to occupy a privileged position. As an area between, but common to States, ABNJ are truly international spaces. It sits outside the territorial space of the State and beyond many of the usual social institutions that can influence the ongoing construction of space. Here, international law in general, and the ABNJ agreement in particular, will play an influential role in how space is constructed in the future. The creation of a treaty and its entry into force can have significant impacts on the future possibilities for constituting social space. This is because treaties can be difficult to amend or change. Law is not immutable, but how it develops and adapts is heavily constrained by the institutional structure of law and the practices of legal reasoning. Witness the widely accepted narrative of the LOSC as a 'constitution for the sea'. The legal relationships and power structures that international law creates ripple out and influence wider social economic and political practices, which in turn create or limit the opportunities for future change.

The current debate about the scope of the ILBI, and how it relates to wider management of fisheries illustrates the way in which law may embed structural limitations on the possibilities for creation of social space. The current legal regime for ABNJ is not structured in a way that drives a holistic, integrated construction of social space in ABNJ. And the ILBI risks further exacerbating this. Whilst there are broad provisions within LOSC and other instruments that exhort inclusive, integrated approaches, there are noted gaps in both the institutional and substantive reach of the law of the sea. And it remains too focused on a sectoral approach. It is less concerned with correcting some of the structural weakness in the existing regime. By implication this limits the way in which States (and other actors) can engage in issues of oceans governance. It

[148] Kristina Gjerde et al., *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (IUCN 2008) 9.
[149] Margaret A Young and Andrew Friedman, 'Biodiversity Beyond National Jurisdiction: Regimes and their Interaction' (2018) 112 *AJIL Unbound* 123, 128.
[150] See Erik J Molenaar, 'Current legal and institutional Issues Relating to the Conservation and Management of High-Seas Deep-Sea Fisheries' in FAO, *Report and documentation of the Expert Consultation on Deep-sea Fisheries in the High Seas. Bangkok, Thailand, 21–23 November 2006. FAO Fisheries Report. No. 838* (FAO 2007).
[151] See David Freestone and Gerald Mangone, 'The Law of the Sea Convention: Unfinished Agendas and Future Challenges' (1995) 10 *IJMCL* 151.

institutionalises who has a voice, what can be said, and where. The ABNJ agreement will structure the constitution of space. It will fundamentally structure and influence the interests and values that are at play in the future construction of ocean space. If we are not to stymie the construction of ocean space, then the ILBI needs to ensure that it is inclusive of the material and social values inherent in ocean spaces beyond national jurisdiction. This argument should apply to any concern (energy generation or navigation), but it is particularly acute with regards to fishing given the material impact of fishing on marine biodiversity. This means creating opportunities for a wider range of actors to engage in the governance of ABNJ. It means ensuring that the requirement to 'not undermine' does not undermine an integrated approach to governance. It means having active, deliberative and structured procedures for institutional cooperation between different regional and sectoral regimes. It means drawing the work of RFMOs in the wider governance arrangements that are developing for ABJN in a way that exposes them to greater accountability and to thinking about the oceans in a more integrated way. It means ensuring general principles permeate the whole interactional structure of the ILBI, and in turn ripple out to other regional arrangements. And that these principles include not just the precautionary approach, ecosystem-based approaches, non-harmful use, and best use of science, but extend to transparency, public availability of information, due regard and stewardship. These procedural and substantive measures will enhance the potential of the ILBI to positively influence the future governance of ABNJ both within its own institutional structures and those of other bodies, such as RFMOs, that are critical to the governance of ABNJ.