



Landlocked States and the Protection of the Marine Environment – with Special Emphasis on Switzerland

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List of Abbreviations

art	Article
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCNR	Central Commission for the Navigation on the Rhine
EEZ	Exclusive Economic Zone
EU	European Union
FAO	Food and Agriculture Organization
FSA	Fish Stocks Agreement
GATT	1947 General Agreement on Tariffs and Trade (reproduced in the 1994 General Agreement on Tariffs and Trade)
ICCAT	International Commission for the Conservation of Atlantic Tunas
ICPR	International Commission for the Protection of the Rhine
IMO	International Maritime Organization
IWC	International Whaling Commission
LLS(s)	Landlocked State(s)
NAFO	Northwest Atlantic Fisheries Organisation
OSPAR	Oslo/Paris Convention (on the Protection of the marine Environment of the North-East Atlantic)
RFMO	Regional Fisheries Management Organisation
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNCLOS I	The First United Nations Conference on the Law of the Sea, 1958
UNCLOS III	The Third United Nations Conference on the Law of the Sea, 1973 – 1982
WCPFC	Western and Central Pacific Fisheries Commission

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Table of Cases

Right of Passage case (Portugal v India), 12 April 1960, ICJ Rep. 6.

MOX Plant case (Ireland v United Kingdom) (provisional measures), 3 December 2001, (2002) 41 ILM 405.

Table of Treaties

Barcelona Convention	League of Nations. <i>Convention and Statute on Freedom of Transit</i> . 7 LNTS 13 441. Barcelona: Adopted 20 April 1921, in force 31 October 1922.
Bern Convention	European Ministerial Conference on the Environment. <i>Convention on the Conservation of European Wildlife and Natural Habitat</i> . ETS 104. Bern: Adopted 19 September 1979, in force 1 June 1982.
Cartagena Protocol	United Nations (adopted by the Conference of the Parties to the CBD). <i>Cartagena Protocol on Biosafety to the Convention on Biological Diversity</i> . 39 ILM 1027. Cartagena: Adopted 29 January 2000, in force 11 September 2003.
CBD	United Nations. <i>Convention on Biological Diversity</i> . 31 ILM 818. Rio de Janeiro: Adopted 5 June 1992, in force 29 December 1993.
CITES	Contracting Parties to the CITES. <i>Convention on International Trade in Endangered Species of Wild Fauna and Flora</i> . 12 ILM 1058. Washington: Adopted 3 March 1973, in force 1 July 1975.
FSA	United Nations. <i>Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks</i> . 34 ILM 1542. New York: Adopted 4 December 1995, in force 11 December 2001.

1947 GATT	Contracting Parties to the GATT. <i>General Agreement on Tariffs and Trade</i> . 55 UNTS 187. Geneva: Adopted 30 October 1947, in force 1 January 1948.
1994 GATT	World Trade Organization. <i>General Agreement on Tariffs and Trade</i> . 33 ILM 1154. Marrakesh: Adopted 15 April 1994, in force 1 January 1995.
High Seas Convention	United Nations. <i>Convention on the High Seas</i> . 450 UNTS 11. Geneva: Adopted 29 April 1958, in force 30 September 1962.
Implementation Agreement	United Nations. <i>Agreement on the Implementation of Part XI of the 1982 Law of the Sea Convention</i> . 33 ILM 1309. New York: Adopted 28 July 1994, in force 28 July 1996.
Mannheimer Akte	Contracting Parties to the Mannheimer Akte. <i>Revidierte Rheinschiffahrts-Akte zwischen Preussen, Baden, Bayern, Frankreich, Hessen und den Niederlanden</i> . BGBI II p 597. Mannheim: Adopted 17 October 1868, in force 1 July 1869.
Nagoya Protocol	United Nations (adopted by the Conference of the Parties to the CBD). <i>Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization</i> . Nagoya: Adopted 29 October 2010, not yet in force.
New York Convention	United Nations Conference on Transit Trade of Land-locked Countries. <i>Convention on Transit Trade of Land-locked States</i> . 4 ILM 957. New York: Adopted 8 July 1965, in force 9 June 1967.

OSPAR Convention	OSPAR Commission. <i>The Convention for the Protection of the Marine Environment of the North-East Atlantic</i> . 23 LOSB 32. Paris: Adopted 22 September 1992, in force 25 March 1998.
Ramsar Convention	Contracting Parties to the Ramsar Convention. <i>Convention on Wetlands of International Importance</i> . 11 ILM 963. Ramsar: Adopted 2 February 1971, in force 21 December 1975.
Swiss Maritime Code	Swiss Federal Assembly. <i>Bundesgesetz vom 23. September 1953 über die Seeschifffahrt unter der Schweizer Flagge</i> . AS 1956 1305. Bern: Adopted 23 September 1953, in force 1 January 1957.
UNCLOS	United Nations. <i>United Nations Convention on the Law of the Sea</i> . 21 ILM 1261. Montego Bay: Adopted 10 December 1982, in force 16 November 1994.
Versailles Treaty	Contracting Parties to the Versailles Treaty. <i>Treaty of Peace Between the Allied and Associated Powers and Germany</i> . 225 CTS 189. Versailles: Adopted 28 June 1919, in force 10 January 1920.
Vienna Convention	United Nations. <i>Vienna Convention on the Law of the Treaties</i> . 8 ILM 679. Vienna: Adopted 23 May 1969, in force 27 January 1980.

1 Introduction

1.1 Objective

‘Individual decision-making in interdependent situations leads to socially undesirable [...] outcomes’.¹ This problem, better known as ‘the collective-action problem’, has already been defined by Garret Hardin’s ‘The Tragedy of the Commons’ in 1968.² Although the collective-action problem is well known, it repeats itself in various issues. One of the most topical examples is the protection of the marine environment. Because the high seas are open to all states, as granted by the freedom of the high seas in Article 87 of the United Nations Convention on the Law of the Sea, every state is allowed to pursue their short-term benefits. If only one or a few states aim for the maximum benefit, the effect on the marine environment does not compromise the normal use of the other states yet. However, if the amount of states seeking their own maximum benefit exceeds a certain threshold, the result to the marine environment is disastrous.

The collective-action problem requires equal participation of all states to protect the marine environment, from both coastal and landlocked states (LLSs). The obligations of coastal states to protect the marine environment have been discussed before. However, the obligations of LLSs have not been considered at all. Therefore, this thesis concentrates on LLSs and seeks to find out if there are obligations for them to protect the marine environment.

In order to limit this thesis to a manageable scope, three international legal instruments are focussed upon: the United Nations Convention on the Law of the Sea (UNCLOS), the Fish Stocks Agreement (FSA), and the Convention on Biological Diversity (CBD). The UNCLOS and the CBD are amongst the most widely ratified international instruments³ to, *inter alia*, protect the marine environment and often used in conjunction with each other.

¹ Lubell (2011).

² Available on <http://www.sciencemag.org/content/162/3859/1243.full.pdf> [Visited 23 July 2012].

³ Number of member states (as of 17 August 2012): UNCLOS 162; CBD 193.

Although having significantly fewer member states,⁴ the FSA is still important as it is an implementation agreement to the UNCLOS and therefore ‘to be interpreted and applied in the context of and in a manner consistent with the Convention’.⁵

This thesis then goes one step beyond the existing regulations, and brings the obligations to protect the marine environment in conjunction with the participation in regional fisheries management organisations (RFMOs). The main objective of RFMOs is the management of certain fish stocks. It is suggested that fish stocks also belong to the marine environment and that therefore RFMOs have to take into account the whole environment when adopting fishery measures. RFMOs are more than just fishery managers; they also have environmental responsibilities. This thesis follows the question: what role do RFMOs play in the protection of the marine environment? Furthermore, it will assess if there is a right for LLSs to accede to RFMOs, without an interest in fishing quotas, but with the sole interest of marine environmental protection. The scope of this thesis stays limited to the UNCLOS, the CBD and the FSA.

The interest of LLSs to participate in the use of the oceans mainly originates in their dependency on international trade. Most of their imports and exports travel at least partly by sea. Therefore, freedom of navigation and freedom of overflight⁶ are of vital importance for their trade. However, LLSs can only enjoy these freedoms if they are granted access to the seas, connected with a transit right through states lying in between them and the seas. It is important to know the modalities of the right to transit and to access to the sea in order to understand the role of LLSs in using and protecting the oceans. The first part of this thesis is therefore dedicated to the discussion of whether LLSs have a right to transit and a right to access to the sea, and how these rights are regulated.

The author, herself being Swiss, chose to put a special emphasis on the case of Switzerland. All general discussions regarding rights and obligations of LLSs are adapted to Switzerland’s position as feasibly possible. Moreover, this thesis seeks to explain why Switzerland chose to participate in issues relating to the ocean despite not having a sea-coast

⁴ 78 member states to the FSA (as of 17 August 2012).

⁵ FSA art 4.

⁶ UNCLOS art 87(1)(a) and (b).

of its own. To this end, Switzerland's interests in access to the sea as well as in marine environmental protection are discussed.

1.2 Legal Methods

The author chose three main legal instruments to base the argumentation of this thesis on: the UNCLOS, the FSA, and the CBD. In particular chapters 3 and 4 are to a large extent based on these international treaties. Other national and international instruments mentioned serve the purpose of supporting particular premises or specific subjects.

Furthermore, the author also relied on some case law, books, articles, communications from the Swiss Federal Government, and personal communications from both the Federal Office for the Environment and the Federal Department of Foreign Affairs. The author especially wants to thank Mr Reto Dürler, head of the Swiss Maritime Navigation Office, for his advice, suggestions and comments, and for his explanations regarding the regulation of Switzerland's access to the sea and the Swiss role in marine environmental protection.

1.3 Structure

This thesis is divided into three main chapters: the legal status of LLSs regarding the right to access to the sea (chapter 2); the protection of the marine environment by LLSs (chapter 3); and the rights and obligations of LLSs to participate in RFMOs (chapter 4).

Chapter 2 opens with the definition of LLSs and their legal status. An abstract of the history then introduces the regulation of the access of LLSs to the sea, followed by an assessment of the access under the UNCLOS and under customary international law. The focus then turns to Switzerland and its interest in and regulation of the access to the sea.

Chapter 3 examines the obligation of LLSs to protect the marine environment. In order to limit this thesis to a manageable scope, the author chose three legal instruments to assess these obligations under: the UNCLOS, the FSA and the CBD. The identified obligations of LLSs to protect the marine environment are then implemented to the case of Switzerland.

Chapter 4 looks at the rights and obligations of LLSs to participate in an RFMO. A definition of 'RFMO' is followed by the assessment of the role of RFMOs regarding marine environmental protection under the UNCLOS, the FSA as well as the CBD. The focus then

turns to the rights of LLSs to participate in such an RFMO with the sole interest of environmental protection, but no interest in a fishing quota. Eventually, the focus turns to Switzerland again and its participation in RFMOs for the reason of protecting the marine environment.

2 Legal Status of Landlocked States regarding the Right of Access to the Sea

Continuing efforts seek to promote freedom of transport throughout the world's oceans as to mainly facilitate international trade and commerce. LLSs are not able to enjoy this freedom without being allowed access to and from the sea, executed through a transit right through other states separating LLSs from the sea. Therefore, LLSs are interested in securing a right to transit through neighbouring states in order to obtain access to the sea.⁷

LLSs' access to the sea is not directly related to them protecting the marine environment. However, states being interested in an access to the sea usually also have an interest in protecting the marine environment. May it be living marine resources or sea transport – LLSs are interested in upkeeping a healthy environment, as otherwise restrictions increase while benefits decrease. Access to the sea thus also marks the starting point for LLSs' interest to protect the marine environment. Therefore, it is important to understand the modes of access to the sea before discussing marine environmental protection by LLSs.

This chapter assesses the access of LLSs to the sea in order to provide the full picture of marine environmental protection by LLSs. In section 2.1, LLSs are first defined, followed by a historical background of how the access to the sea evolved over time in section 2.2. However, the focus lies in section 2.3 where the UNCLOS is assessed as the most important international instrument regulating the access for LLSs to the sea. Section 2.4 then deals with customary international law while Switzerland's regulation of access to the sea in section 2.5 will close this chapter.

2.1 Definition of 'Landlocked State'

Neglecting the question of statehood, the definition of 'landlocked state' raises no particular problems. An LLS is a state that is not adjacent to a sea-coast⁸ and therefore has no direct

⁷ Rothwell & Stephens (2010) pp 190 – 191.

⁸ Uprety (2006), p 5.

access to international maritime transport. Accordingly, the UNCLOS defines an LLS as ‘a State which has no sea-coast’ and abstains from any further explanations.⁹

Not having a sea-coast puts LLSs at a disadvantage compared to those states, which have their own coast, own ports and direct access to the sea. This makes LLSs dependent on a right for their nationals and goods to cross the territory (a right of transit) of neighbouring states, the so-called transit states. Transit states can either be landlocked themselves, or be port states with a direct access to the sea.¹⁰

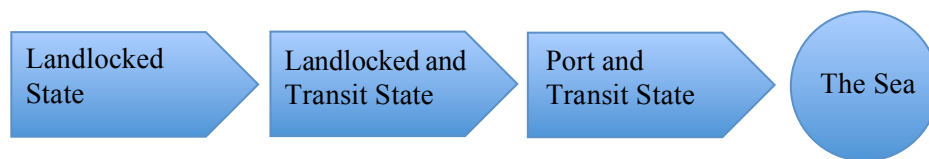


Figure 1: Access of Landlocked States to the Sea

2.2 Historical Background

In the eleventh century, landlocked territories in Europe were the first to secure rights under bilateral treaties to access the sea across neighbouring countries. It was under the auspices of the League of Nations in the aftermath of World War I, however, when most of the early practices took place. Some writers argued that a right of transit is based on natural law principles, as a logical consequence of the freedom of the seas, or as an international servitude of necessity.¹¹ In fact, access was regulated through bi- and multilateral treaties.¹²

First regimes of transit for LLSs can be found in the 1919 Versailles Treaty (applying to certain international rivers in Europe), in the 1921 Convention and Statute on Freedom of Transit,¹³ and in the 1947 General Agreement on Tariffs and Trade (GATT, reproduced in the 1994 GATT).¹⁴ It was the Barcelona Convention that recognised the right to a flag of states having no sea-coast for the first time and established the view that LLSs have the same navigational rights as coastal states.¹⁵ However, these regimes were all limited in some ways

⁹ UNCLOS art 124(1)(a).

¹⁰ UNCLOS art 124(1)(b).

¹¹ E.g. De Visscher, C. (1924). *Le Droit International des Communications*; and Scelle, G. (1941). *Manuel de Droit International Public*.

¹² Rothwell & Stephens (2010) p 193.

¹³ Barcelona Convention.

¹⁴ 1947 GATT and 1994 GATT.

¹⁵ Churchill & Lowe (1999) p 434.

for they only applied to the transit of goods or not to all forms of overland transport.¹⁶ Bi- and multilateral treaties still constituted the norm for gaining access to the sea.

At UNCLOS I (1958), Switzerland with the support of the other LLSs prepared draft articles for a first specific treatment of transit rights for LLSs to the sea without limitations as mentioned above. The attempt to codify the existing state practice of granting LLSs the right of free access to the sea showed some success in Article 3 of the 1958 Convention on the High Seas.¹⁷ However, Article 3 did not give LLSs an enforceable legal right to access as it could only be claimed via a 'specific, negotiated agreement' with the transit states.¹⁸

Following UNCLOS I, the number of LLSs grew substantially as a result of the proceeding decolonisation. LLSs started to seek for greater recognition in the environment of trade liberalisation rather than under the law of the sea. These efforts paid off in the 1965 New York Convention on the Transit Trade of Land-locked States.¹⁹ For the first time a legal right of free transit was agreed upon, applicable to all means of transport, strengthened through compulsory arbitration of disputes regarding the interpretation or application of the New York Convention. Because of the relatively small number of ratifications and major transit states that did not join the regime, it could not be argued as codifying existing or generating new customary law. Nonetheless, it constituted the basis for further negotiations at UNCLOS III.²⁰

At UNCLOS III (1973 – 1982), the group of LLSs²¹ was formed of a diversity of developed and developing states, such as Switzerland and Nepal. Having little in common, the group of LLSs was united in seeking recognition of existing rights of access to the sea. While other requests (such as access to living and non-living resources) were met with limited success, UNCLOS III conceded some correction for the natural inequality resulting from the geographical position of some LLSs. However, economic disadvantages faced by these states were not systematically accounted for.²²

¹⁶ Rothwell & Stephens (2010) pp 193 – 194.

¹⁷ Ibid p 195; High Seas Convention.

¹⁸ Bowett (1967) p 51 – 52.

¹⁹ New York Convention.

²⁰ Rothwell & Stephens (2010) pp 195 – 196.

²¹ In fact, it was the group of landlocked and geographically disadvantaged states. However, the geographically disadvantaged states are not discussed as this would go beyond the scope of this thesis.

²² Rothwell & Stephens (2010) p 190.

2.3 Access under the UNCLOS

As of June 2011, there were forty-five LLSs, of which twenty-five have ratified the UNCLOS.²³

Landlocked State Parties to the UNCLOS		Landlocked States Not Parties to the UNCLOS
Armenia	Slovakia	Afghanistan
Austria	Switzerland	Andorra
Belarus	Uganda	Azerbaijan
Bolivia	Zambia	Bhutan
Botswana	Zimbabwe	Burundi
Burkina Faso		Central African Republic
Chad		Ethiopia
Czech Republic		Holy See (Vatican City)
Hungary		Kazakhstan
Laos		Kosovo
Lesotho		Kyrgyzstan
Luxembourg		Liechtenstein
Macedonia		Niger
Malawi		Rwanda
Mali		San Marino
Moldova		South Sudan
Mongolia		Swaziland
Nepal		Tajikistan
Paraguay		Turkmenistan
Serbia		Uzbekistan

Table 1: Landlocked State Parties and Non-Parties to the UNCLOS

Concerning the use of the sea in any way, LLSs are dependent on transit states willing to grant them access to seaports under reasonable conditions. Part X of the UNCLOS aims at providing a minimum protection for the interests of LLSs by guaranteeing the right of access to and from the sea by means of a freedom of transit:

Article 125 Right of access to and from the sea and freedom of transit

1. Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.

²³ According to the List of Parties on http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm#The%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea [Visited 31 August 2012].

2. The terms and modalities for exercising freedom of transit shall be agreed between the land-locked States and transit States concerned through bilateral, subregional or regional agreements.

3. Transit States, in the exercise of their full sovereignty over their territory, shall have the right to take all measures necessary to ensure that the rights and facilities provided for in this Part for land-locked States shall in no way infringe their legitimate interests.

Additionally it provides for equal treatment of ships flying the flag of an LLS:

Article 131 Equal treatment in maritime ports

Ships flying the flag of land-locked States shall enjoy treatment equal to that accorded to other foreign ships in maritime ports.

Freedom of transit is further ensured by provisions of the UNCLOS that prohibit transit states to levy customs duties, taxes, and other charges on traffic in transit,²⁴ or to subject means of transport in transit to higher taxes or charges than those customary in the transit state;²⁵ preferential treatment of specific nations is prohibited as well.²⁶ Transit states have the obligation to ‘take all appropriate measures to avoid delays or other difficulties of a technical nature in traffic in transit’.²⁷ If such delays or difficulties occur anyway, the authorities of the transit state are asked to cooperate in eliminating such difficulties.²⁸ These minimum requirements, however, do not preclude agreements between transit and LLSs to go beyond what is provided for in the Convention.²⁹ Accordingly, in addition to the means of transport listed in the UNCLOS (railway rolling stock, sea, lake and river craft, road vehicles, porters and pack animals)³⁰ the states in question may also agree to include pipelines and gas lines as well as other means of transport.³¹

All aspects of the freedom of transit mentioned above are limited by the fact that transit states exercise full sovereignty over their territory. Therefore, a transit state may act to protect its ‘legitimate interests’ and based on that insist that agreements regarding terms and conditions for exercising the freedom of transit be made.³²

²⁴ UNCLOS art 127(1).

²⁵ Ibid art 127(b).

²⁶ Ibid art 126.

²⁷ Ibid art 130(1).

²⁸ Ibid art 130(2).

²⁹ Ibid arts 128, 129 and 132.

³⁰ Ibid art 124(1)(d).

³¹ Ibid art 124(2).

³² Ibid art 125(2) – (3).

The language of UNCLOS Article 125 is rather ambiguous. It guarantees an apparently enforceable freedom of transit, but one that can only be given effect through bilateral, sub-regional or regional arrangements.³³ Freedom of access to the sea for LLSs is balanced against territorial sovereignty of transit states. Hence the freedom of transit exists independently of any arrangement between landlocked and transit states, but exactly such an agreement is necessary for the freedom to be given effect in practice.³⁴ Following this, the exercise of the right of transit is very much dependent on the terms and modalities taken by the transit state under UNCLOS Article 125(3).

It can be concluded that LLSs do not have a self-executing right to access, nor is it directly enforceable. Transit states are nonetheless under the obligation to consider the right to access, to engage in negotiations and to seek to conclude a transit agreement in good faith.³⁵ This regulation is certainly not completely satisfactory, but looking at the existing state practice it seems to be functioning.

2.4 Right of Access and to Transit under Customary Law

Prior to the UNCLOS, it was controversial whether there was a general right of access under customary international law. In any case, there was no such customary right that did not require reciprocity, other compensation, or specific agreements between landlocked and transit states. Frequent denials of transit rights on the one hand and considerable treaty practice in this regard on the other suggested significant doubt on the existence of customary law in general. However, local customary rules may have existed and were also confirmed by the International Court of Justice in the *Right of Passage* case³⁶ in 1960.³⁷

With the codification of the right of access to the sea and the freedom of transit in the UNCLOS, these very rights may have become customary international law. First of all because the UNCLOS as a whole is considered by some to have gained status of customary

³³ Ibid art 125(2).

³⁴ Rothwell & Stephens (2010) p 197.

³⁵ Ibid p 198; Churchill & Lowe (1999) p 444.

³⁶ *Right of Passage* case (Portugal v India), 12 April 1960, ICJ Rep 6.

³⁷ Churchill & Lowe (1999) p 440; Rothwell & Stephens (2010) p 197.

international law;³⁸ and secondly because of the widespread practice between landlocked and transit states and the assumption of *opinio juris* based therein.

2.5 Switzerland and Its Access to the Sea

The first attempts by Switzerland to establish itself as a flag state go back as far as 1850, when Swiss citizens living abroad asked for permission to fly the Swiss flag on their vessels. However, maritime nations were objecting on the grounds that Switzerland was landlocked and that in the absence of a navy it was not able to defend and protect a merchant fleet. It was only during World War II, in 1941, when the Swiss fleet was established in order to secure national supply. Following these events, the first maritime code was established in 1953.³⁹ This not only marks the starting point of Switzerland's interest in maritime law but also in the law of the sea.⁴⁰

2.5.1 Switzerland's Interests in Access to the Sea

Switzerland is, to a significant extent, dependent on international trade and therefore has an eminent interest in the upkeep of international transportation routes. The right of access to the sea is crucial as the exchange of goods is mainly conducted through international shipping.⁴¹

Switzerland is not only interested in the upkeep of sea lanes but also of air lanes.⁴² These are secured through the freedom of the high seas in UNCLOS Article 87(1)(a) – (b) and in the exclusive economic zones of coastal states through UNCLOS Article 58(1) in connection with 87(1)(a) – (b).⁴³

Without a coast of its own, it is in Switzerland's interest that sovereignty and sovereign rights of coastal states are minimised. Territorial seas and exclusive economic zones of coastal states always imply limited access and rights for LLSs, stricter regulations to follow

³⁸ E.g. Sohn, L. B. (1984 – 1985). *The Law of the Sea: Customary International Law Developments*. In: 34 Am. U. L. Rev. 271 (1984 – 1985), pp 271 – 273.

³⁹ Swiss Maritime Code.

⁴⁰ Walser (1999).

⁴¹ Bundesrat (2008) p 4079.

⁴² Ibid p 4080.

⁴³ These regulations are also argued as having gained status of customary international law.

and smaller profits (if any at all).⁴⁴ Only on the high seas are all states equals, whether coastal or landlocked.⁴⁵

Future ambitions of Switzerland regarding access to the sea focus on the exploitation of the seabed. As a state with limited resources but great technological knowledge and opportunities, Switzerland expects the exploitation of the seabed to become of actual interest within the next ten years.⁴⁶

2.5.2 Regulation of Switzerland's Access to the Sea

In this section, only the access from Switzerland to the sea by waterway is being assessed, as all other means of transport are not relevant for this thesis.

Switzerland has secured free access to the sea through international law: the 1868 Mannheimer Akte. It guarantees free navigation on the Rhine from the open sea to the Mittlere Brücke in Basel. The Central Commission for the Navigation on the Rhine (CCNR)⁴⁷ issues the necessary regulations concerning security and order and also deals with the environmental protection related to shipping on the Rhine. The member states⁴⁸ then implement such regulations into their national legislations.⁴⁹

The European Union (EU) has no legislative authority over the Rhine. However, the European Commission and the CCNR pursue a close collaboration in various areas of inland navigation.⁵⁰

2.5.3 Changes by Switzerland's Accession to the UNCLOS

For an LLS, such as Switzerland, whose prosperity is greatly dependent on foreign trade, a guaranteed access and transit free of charge is important. The UNCLOS confirms and strengthens these very rights. It also ensures legal certainty as well as predictability.

⁴⁴ Bundesrat (2008) p 4080.

⁴⁵ See UNCLOS arts 87, 89 and 90.

⁴⁶ Bundesrat (2008) p 4080.

⁴⁷ The CCNR was established at the Congress of Vienna, 1814 – 15, and is said to be the oldest international organisation. It was modified by the Mannheimer Akte, wherein free navigation on the Rhine and equal treatment of ship and cargo was confirmed.

⁴⁸ Germany, Belgium, France, the Netherlands and Switzerland.

⁴⁹ UVEK (n.a.).

⁵⁰ Ibid.

Additionally, the ratification allows Switzerland in the future to also participate in the utilisation of the seafloor resources.⁵¹

Switzerland signed the UNCLOS as early as 17 October 1984 but only ratified it in 2009. The reason for the late ratification was mainly the embodiment of Part XI (The Area). Switzerland (together with major western states) was of the opinion that developed countries' interests regarding decision processes of the International Sea Bed Authority as well as regulations of tax burden, limitation of exploitation, and technology transfer were not sufficiently accounted for. The changes and mutual interpretations agreed on in the 1994 Agreement on the Implementation of Part XI⁵² could eventually convince Switzerland to ratify the UNCLOS together with the Implementation Agreement to Part XI.⁵³

The ratification of the UNCLOS did not change Switzerland's mode of access to the sea; the regulation stayed the same as described in section 2.5.2 above. However, being a state party to the UNCLOS strengthens Switzerland's legal position towards the transit states significantly. Although the access is secured by an international agreement and may even have become local custom through long-term practice, the UNCLOS provides additional security and a mechanism for dispute resolution. The right to access and the freedom of transit is no longer only locally recognised, but by some three-quarters of all states worldwide.

⁵¹ As in UNCLOS art 133(a); Bundesrat (2008) pp 4074 – 4075.

⁵² Implementation Agreement.

⁵³ Bundesrat (2008) p 4075.

3 Protection of the Marine Environment by Landlocked States

Humanity depends on nature; its conservation is of crucial importance for our survival. The growth in world population and the massive progression in technologies bring economic growth and highly increased demands on resources. The result is degradation and loss of nature, natural resources and biodiversity. A worldwide awareness has taken place that the global action is required. One state's action alone is not enough; the universal protection of the environment requires common action by all states in order for measures of protection to work.⁵⁴ Marine environmental protection thus requires actions from both coastal and LLSs.

The need of LLSs to participate in marine environmental protection is often neglected. LLSs may not be as active on the oceans as coastal states, but they carry their fair share of responsibility. As to be seen in the case of Switzerland, pollution through rivers that originate or run through LLSs, but also vessels flying the flag of an LLS, or other activities under an LLS' jurisdiction or control can, amongst others, have a crucial influence on the marine environment. It is this use of the oceans that requires LLSs to take according measures alongside coastal states. The counterpart to the responsibilities is the interest that LLSs may have in the protection of the marine environment. Navigation, living marine resources, or the oceans' biodiversity for its own sake can all constitute possible reasons why an LLS is interested in participating in the protection of the marine environment.

Although the obligations of coastal and LLSs to protect the marine environment are often the same, this thesis only looks at the obligations of LLSs. Among the numerous global regulatory treaties, the following discussion is limited to the protection of the marine environment under the UNCLOS, the CBD and the FSA.

The analysis of the state obligations to protect the marine environment assumes a ratification of the treaty in question. Obligations do not apply to states that are not party to the respective treaty.

⁵⁴ Birnie, Boyle & Redgwell (2009) p 128.

Section 3.1 analyses the obligation of LLSs under three selected international legal instruments: the UNCLOS (3.1.1), the CBD (3.1.2), and the FSA (3.1.3). Switzerland's interest in the protection of the marine environment is then assessed in section 3.2, followed by section 3.3, the closing discussion of Switzerland's obligation to protect the marine environment under the same three international treaties as assessed before.

3.1 Obligations of Landlocked States to Protect the Marine Environment

3.1.1 Under the Convention on the Law of the Sea

The UNCLOS provides regulations for all uses of the seas in the exclusive economic zone (EEZ) as well as on the high seas. For this thesis relevant, UNCLOS Part XII after all provides for the obligation to protect and preserve the marine environment. Furthermore, references made throughout the whole Convention stress the need to protect the marine environment.⁵⁵ The obligations apply to all state parties to the UNCLOS, both coastal and landlocked.⁵⁶

The obligation of Article 192 to protect and preserve applies to the entirety of the marine environment.⁵⁷ Article 194(1) further strengthens this by stating that 'States shall take [...] all measures [...] necessary to prevent, reduce and control pollution of the marine environment from *any* source' (emphasis added). The need for states to take 'all measures necessary' is immediately moderated by allowing use of the 'best practicable means at their disposal and in accordance with their capabilities'.⁵⁸ This is a typical feature of due diligence obligations in international treaties. The concept of due diligence offers great flexibility, especially for developing countries that cannot provide the same means as developed countries do, by allowing differentiated standards of conduct for different states. The main disadvantage however is, that it lacks conditionality, solidarity, and guidance on what legislation or technology is required in specific cases.⁵⁹ Due diligence does not create an obligation of result; it creates an obligation to do the best within a state's capabilities. This

⁵⁵ Rothwell & Stephens (2010) p 342.

⁵⁶ If argued that the UNCLOS has become customary international law, the obligations even apply to all states worldwide.

⁵⁷ Rothwell & Stephens (2010) pp 342 – 343.

⁵⁸ Birnie, Boyle & Redgwell (2009) p 389.

⁵⁹ Ibid p 149.

leaves states with wide discretion as to what ‘best practicable means’ may contain. There is a chance that states use this generalised formulation to justify taking the minimum measures possible in order to protect the marine environment.

Article 194 is nonetheless essential to analyse states’ obligations under the UNCLOS. It provides the foundation for the following obligations: the obligation to act individually or jointly as appropriate; the obligation to take all measures necessary to prevent, reduce and control pollution of the marine environment; the obligation to endeavour to harmonise policies with other states; the obligation for states to control activities under their jurisdiction or control so as to not cause damage by pollution to other states and their environment and so as to not spread outside a state’s jurisdiction; and the obligation to protect and preserve rare or fragile ecosystems and the habitats of species at risk.⁶⁰

The duty to protect and preserve the marine environment takes priority over the sovereign right of states to exploit their natural resources; states must exercise this right ‘in accordance with their duty to protect and preserve the marine environment’.⁶¹ The UNCLOS further urges states to cooperate on a global and regional basis in formulating rules and standards, either directly or through competent international organisations.⁶² Because protection of the marine environment is a collective action problem and thus of global concern, states are required to cooperate in order to be efficient and achieve effective results. Accordingly, in the *MOX Plant* case the International Tribunal for the Law of the Sea concluded that ‘the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law’.⁶³ On this basis, Ireland and the UK had to enter into consultations regarding possible consequences for the Irish Sea arising out of the commissioning of the MOX plant, monitoring of risks and effects, and elaborating measures to prevent possible pollution of the marine environment by operation of the MOX plant.⁶⁴

In Articles 207 – 212, the UNCLOS addresses six main sources of ocean pollution: land-based and coastal activities, continental shelf drilling, potential seabed mining, ocean

⁶⁰ Doelle (2006) p 323.

⁶¹ UNCLOS art 193.

⁶² Ibid art 197.

⁶³ *MOX Plant* case (Ireland v United Kingdom) (provisional measures), 3 December 2001, (2002) 41 ILM 405, para 82.

⁶⁴ Ibid para 89(1).

dumping, vessel-source pollution, and pollution from and through the atmosphere. The definition of ‘pollution’ in Article 1, however, avoids designating different sources and instead clearly includes any type of pollution that results in harmful effects. Articles 207 – 212 are nonetheless of great importance as they aim at incorporating the latest ‘internationally agreed rules, standards and recommended practices and procedures’. By reference, Articles 207 – 212 seek to apply standards established through competent international organisations, namely the International Maritime Organization (IMO). This mechanism – application through reference – is a great example to show the framework nature of the UNCLOS. The Convention provides guiding objectives and principles and basic obligations. Additional or more specific commitments and institutional arrangements have then to be elaborated on the basis of the framework convention in order to implement it. In the case of the UNCLOS, standards adopted through global pollution-control conventions and soft-law instruments, *inter alia*, under the auspices of the IMO or the International Atomic Energy Agency elaborate basic regulations from Articles 207 – 212.⁶⁵

Of special importance for LLSs is the responsibility as a flag state, the state where a ship is registered and whose flag it flies. With the right to fly a flag, the responsibility comes along to enforce the rules adopted for the control of marine pollution from vessels, irrelevant where a violation occurs.⁶⁶ Particularly on waters beyond national jurisdiction, i.e. on the high seas, this regulation ensures the enforcement of other international provisions.⁶⁷ Thus LLSs do not have fewer obligations than coastal states to monitor and control ships flying their flags and activities under their jurisdiction, e.g. a deep seabed mining operation.

In addition to the due diligence obligation of Article 194(1), 194(2) elaborates that states have to ensure that activities under their jurisdiction or control do not cause damage to other states or their environment.⁶⁸ Similarly, Article 195 directs states not to transfer harm from one area to another or to transform one type of harm into another when taking measures to prevent, reduce and control pollution of the marine environment. The exact scope of this provision is not clear. Ahead of its time, the UNCLOS may have intended a holistic approach to addressing environmental issues. In any case, Article 195 introduces a concept

⁶⁵ Rothwell & Stephens (2010) pp 342 – 344.

⁶⁶ UNCLOS art 90 in connection with art 94.

⁶⁷ Churchill & Lowe (1999) p 346.

⁶⁸ Rothwell & Stephens (2010) p 343.

that requires states to design mitigation measures so as to not result in other environmental harm.⁶⁹

Is there a right to marine environmental protection? No such right can be read into the legal framework of the UNCLOS. However, some authors observed a ‘shift in the approach to regulating marine pollution’ from ‘pollution and dumping being regarded as legitimate and permissible uses of the seas, subject to certain restrictions’ towards the ‘presumption that pollution that damages the marine environment is, or should be, prohibited’.⁷⁰ Assuming such a prohibition exists, the violation of international law that could be claimed converges on a right to environmental protection. Then again, not specified thresholds and terms that need to be met for qualifying as violations of international law leave a wide range for interpretation and thus compromise such an assumed right.

3.1.2 Under the Convention on Biological Diversity

The CBD is one of the most widely ratified environmental conventions.⁷¹ To date, forty out of forty-five LLSs are state parties to the CBD:⁷²

Landlocked State Parties to the CBD			Landlocked States Not Parties to the CBD
Afghanistan	Hungary	Rwanda	Andorra
Armenia	Kazakhstan	San Marino	Holy See (Vatican City)
Austria	Kyrgyzstan	Serbia	Kosovo
Azerbaijan	Laos	Slovakia	Moldova
Belarus	Lesotho	Swaziland	South Sudan
Bhutan	Liechtenstein	Switzerland	
Bolivia	Luxembourg	Tajikistan	
Botswana	Macedonia	Turkmenistan	
Burkina Faso	Malawi	Uganda	
Burundi	Mali	Uzbekistan	
Central African Rep.	Mongolia	Zambia	
Chad	Nepal	Zimbabwe	
Czech Republic	Niger		
Ethiopia	Paraguay		

Table 2: Landlocked State Parties and Non-Parties to the CBD

⁶⁹ Doelle (2006) p 323.

⁷⁰ Rothwell & Stephens (2010) p 342; also Redgwell, C. (2006). In David Freestone, Richard Barnes and David M Ong (eds). *The Law of the Sea: Progress and Prospects*. Oxford: Oxford University Press, p 180.

⁷¹ Birnie, Boyle & Redgwell (2009) p 612.

⁷² According to the List of Parties on <http://www.cbd.int/convention/parties/list/> [Visited 27 July 2012].

The CBD aims at conserving the earth's biodiversity and ensuring the sustainable use of its components. Biological diversity is defined in Article 2 of the CBD as the 'variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. Thus the CBD is also applicable to the biological diversity to be found in the marine environment as relevant for this work.

In Article 4, the CBD defines its jurisdictional scope:

Article 4 Jurisdictional Scope

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:

(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and

(b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction

Components of biological diversity include species, ecosystems, and genetic material. Regarding these components, Article 4(a) restricts each state party's obligation to those components within the limits of its national jurisdiction (its territory, territorial sea, EEZ, and continental shelf). Exception can only be made if 'expressly provided' for in the CBD.⁷³ Consequently, states do not have direct management obligations when acting individually with respect to components of biodiversity in another party's jurisdiction or on the high seas.⁷⁴

Processes and activities are at the responsibility of the state under whose jurisdiction or control they are carried out within its area of national jurisdiction or beyond the limits of national jurisdiction, regardless of where their effects occur.⁷⁵ Article 4(b) refers to two geographic areas of jurisdiction: the area of a state's national jurisdiction, and the area beyond the limits of any state's national jurisdiction. Within these two areas, a state party's obligations are restricted to processes and activities under its jurisdiction or control. Thus a state is obligated to control processes or activities under its jurisdiction or control in areas of

⁷³ CBD art 4.

⁷⁴ Chandler (2003) pp 147 – 148.

⁷⁵ CBD art 4(b).

its own jurisdiction and on the high seas. However, a state has no obligation to control such processes or activities when they take place in the EEZ or territory of another state.⁷⁶

At first sight, Article 4 seems to protect biodiversity in all spaces (areas within and beyond national jurisdiction), or at least everywhere where it is necessary. Reading more carefully, it becomes clear that the coverage for protection is not sufficient at all.⁷⁷ Components of biodiversity are only protected within a state's own national jurisdiction; the high seas and areas within other states' national jurisdiction are not protected. Processes and activities under a state's jurisdiction are protected within a state's own national jurisdiction and in areas beyond the limit of national jurisdiction; but again areas within other states' national jurisdiction are not protected.

Strictly applying the jurisdictional scope of the CBD to LLSs, components of biological diversity are not under their obligation at all. As states are only responsible for components within their own areas of national jurisdiction and LLSs do not possess such sea areas, LLSs are absolved from this responsibility. For processes and activities under their jurisdiction or control, on the other hand, LLSs carry the full responsibility in areas beyond any state's national jurisdiction. However, as LLSs do not have sea areas under their own national jurisdiction, they are relieved from controlling processes and activities in such areas. From the wording in Article 4 it can be concluded that the CBD does not have to be applied on a personal basis. That is to say, if an LLS decides to carry out activities prohibited by the CBD, it could do so in the national jurisdiction of a state that is not bound by the CBD. Although these activities may turn out to be harmful to biodiversity (of the state where the activities take place or even of the state who is carrying out the activities), it would still not be a violation under the CBD.⁷⁸ This result is more than unsatisfactory.

The obligation to cooperate in Article 5 does to a certain extent compensate for the insufficient jurisdictional scope. Regarding components of biodiversity, state parties have the obligation to cooperate with respect to areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity. The obligation to cooperate thus seems to extend the coverage of the protection of

⁷⁶ Chandler (2003) p 148.

⁷⁷ Maffei (1995) pp 153 – 154.

⁷⁸ Ibid p 154.

components of biodiversity to the high seas, for both coastal and LLSs. Regarding processes and activities, the obligation to cooperate applies to areas within a state's own or within another state's jurisdiction as well as in areas beyond any state's national jurisdiction and on other matters of mutual interest.⁷⁹ The obligation to cooperate seems to also extend the coverage of protection in regard of processes or activities to other states' areas of national jurisdiction. In general it can be said that when state parties cooperate, it is only the logical consequence that they extend the protection obligations to each other's areas of national jurisdiction in order to achieve effective results. In addition to cooperation, state parties are also free to widen the jurisdictional scope of the CBD through their domestic legislation to territories of other states.⁸⁰

The Preamble sets forth that 'the conservation of biodiversity is a common concern of humankind' and recognises the environment as a global responsibility.⁸¹ At the same time, the CBD also recognises the responsibility of each single state to conserve it. This responsibility is integrated in Article 1, in three main objectives: the conservation of biological diversity; the sustainable use of its components; and the fair and equitable sharing of the benefits arising of the utilisation of genetic resources. These guiding objectives are further elaborated in Articles 6 – 20. They are more substantive than the objectives in Article 1 and constitute binding commitments.⁸² Some key provisions regulate, *inter alia*, measures for conservation and sustainable use of biodiversity⁸³ and of its components,⁸⁴ both in-situ⁸⁵ and ex-situ;⁸⁶ identification of components of biodiversity and monitoring of such;⁸⁷ research and training;⁸⁸ public education and awareness;⁸⁹ impact assessment and minimizing adverse impacts;⁹⁰ access to genetic resources;⁹¹ access to and transfer of technology;⁹² technical and

⁷⁹ Chandler (2003) p 148.

⁸⁰ Maffei (1995) p 154.

⁸¹ Birnie, Boyle & Redgwell (2009) p 128.

⁸² Ibid p 616.

⁸³ CBD art 6.

⁸⁴ Ibid art 10.

⁸⁵ Ibid art 8.

⁸⁶ Ibid art 9.

⁸⁷ Ibid art 7.

⁸⁸ Ibid art 12.

⁸⁹ Ibid art 13.

⁹⁰ Ibid art 14.

⁹¹ Ibid art 15.

⁹² Ibid art 16.

scientific cooperation;⁹³ and the financial resources in order to achieve the objectives of the Convention.⁹⁴ All these obligations also apply to LLSs.

The CBD in its Preamble also states two crucial conservatory principles: the precautionary approach and inter-generational equity. The precautionary approach states ‘that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat’. Inter-generational equity demands state parties ‘to conserve and sustainably use biological diversity for the benefit of present and future generations’.⁹⁵ It is partially reinforced by the definition of ‘sustainable use’ in Article 2.⁹⁶ The further elaboration and discussion of these principles goes beyond the scope of the present thesis. For the obligations of state parties and therefore also of LLSs, it is important that the Preamble is as binding upon them as any other part of the treaty. The Preamble puts a cap over all following articles; that is to say, all provisions of the CBD have to be read in the light of the principles stated in the Preamble.⁹⁷

The CBD is, just as the UNCLOS, a framework convention. On the one hand this was necessary for the CBD to be concluded; on the other hand it is also the reason why substantive articles are expressed in broad terms and their impact further weakened by additional requirements. Phrases such as ‘as appropriate’, ‘as far as possible’, ‘significant’, ‘promote’, or taking into account special needs’ leave the Convention with many grey areas. State parties are required to elaborate broad objectives and to provide the details for achieving the objectives to the extent that they are not already provided for in international and regional agreements and national laws.⁹⁸ Article 28 also requires state parties to cooperate in formulating protocols that further elaborate the Convention and adopt them at the Conferences of Parties. To date only the 2000 Cartagena Protocol on Biosafety is in force;⁹⁹ the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and

⁹³ Ibid art 18.

⁹⁴ Ibid art 20.

⁹⁵ Ibid Preamble.

⁹⁶ Birnie, Boyle & Redgwell (2009) p 619.

⁹⁷ Ibid p 618.

⁹⁸ Ibid p 616.

⁹⁹ Cartagena Protocol.

Equitable Sharing of Benefits Arising from their Utilization has been adopted but is not in force yet.¹⁰⁰

Unlike the UNCLOS, the CBD does not provide for specific provisions for LLSs. Nonetheless, within the jurisdictional scope set forth in Article 4, all obligations stipulated in the CBD also apply to LLSs as much as they do to coastal states.

As mentioned above, the Preamble of the CBD qualifies biological diversity as a common concern of humankind. It is argued that the common concern of humankind might develop into a principle of customary law and that it could even constitute the basis for a human right to environmental protection.¹⁰¹ The CBD may insofar create a right to environmental protection; it certainly states a stronger point than the UNCLOS. However, these interpretations are still in the minority and an actual right to environmental protection can thus not be claimed yet.

3.1.3 Under the Fish Stocks Agreement

The FSA is an implementing agreement under the UNCLOS. Accordingly, it is to be interpreted and applied consistent with the UNCLOS.¹⁰² Nonetheless, the FSA is a stand-alone agreement and a state can be party to the FSA without being party to the UNCLOS and *vice versa*.¹⁰³

The FSA only applies to straddling and highly migratory fish stocks. Straddling fish stocks are fish that migrate between EEZs and the high seas.¹⁰⁴ Highly migratory fish stocks are listed in Annex I of the UNCLOS, whereas most of them migrate considerable distances during their life cycle, through EEZs of two or more states as well as on the high seas.¹⁰⁵ Not all high-seas stocks fall into one of these categories and they do not cover stocks, which are exclusive to one or more EEZs either. But the FSA does acknowledge the unity of the marine ecosystem, regardless of boundaries (e.g. in Articles 5 – 7).¹⁰⁶

¹⁰⁰ Nagoya Protocol.

¹⁰¹ Horn (2004) pp 247 and 233, with references to other authors of the same opinion.

¹⁰² FSA art 4.

¹⁰³ Rothwell & Stephens (2010) p 316.

¹⁰⁴ Ibid p 303.

¹⁰⁵ Churchill & Lowe (1999) p 311.

¹⁰⁶ Birnie, Boyle & Redgwell (2009) p 734.

This thesis assesses the protection of the marine environment as a whole; fish stocks are part thereof. Even though they only constitute a small part of the marine environment, fish stocks play an important role. Firstly, there are a lot of sea-going vessels and ever new technology dedicated to fishing; secondly, and even more important, is the role of fish stocks in ecosystems. Every species and aspect has its place and function within an ecosystem. If one species is being overfished or even close to extinction, the whole ecosystem it belongs to goes out of balance. With regard to this very concern, the FSA aims at optimum utilisation of living marine resources (i.e. fish stocks), but always within a precautionary and ecosystem-focussed approach.¹⁰⁷ Hence it is evident that the FSA also plays a relevant role in protecting the marine environment.

The FSA is based on the twelve principles set forth in Part II, Article 5(a) – (l), which put the obligation on all state parties to adopt measures to ensure long-term conservation and sustainable use of the relevant fish stocks. The principles include, *inter alia*, a precautionary approach to be applied to the conservation and management of stocks, consideration of associated ecosystems, measures to be taken according to the best scientific evidence available, protection of marine biodiversity, elimination of overfishing and overcapacity, the collection and sharing of fisheries data, and effective monitoring, control and enforcement.¹⁰⁸ The precautionary approach is further strengthened through Article 6 and Annex II to the FSA, which includes seven guidelines for the application of the precautionary approach.

Article 7, the last in Part II, states the principle of compatibility; that is the requirement for measures adopted in the EEZ and measures adopted on the high seas to be compatible with each other. To this mean, coastal states and states acting on the high seas (state parties only) have the duty to cooperate in adopting compatible measures according to an extensive list of criteria.¹⁰⁹

Part III of the FSA provides the mechanisms for international cooperation concerning straddling and highly migratory fish stocks. Article 8 sets out the obligation to cooperate ‘either directly or through appropriate subregional or regional fisheries management

¹⁰⁷ Rothwell & Stephens (2010) p 316.

¹⁰⁸ Ibid; Birnie, Boyle & Redgwell (2009) p 733.

¹⁰⁹ FSA art 7(2)(a) – (f); Rothwell & Stephens (2010) p 317.

organizations or arrangements, taking into account the specific characteristics of the subregion or region, to ensure effective conservation and management'. Articles 9 – 12 further elaborate the cooperation through fisheries management organisations.

Although all the obligations discussed above do apply to LLSs, Part V of the FSA may contain the most important regulations for them: Article 18 puts forward the duties of flag states. It ensures that a flag state exercises an appropriate level of supervision over fishing vessels flying its flag, and that they 'do not engage in any activity which undermines the effectiveness' of the measures adopted under the FSA.¹¹⁰ To this end, states have to authorise the use of vessels flying a state's flag for fishing on the high seas (Paragraph 2). Paragraph 3 lists the measures to be taken by a flag state, although not exhaustively.

Just as the CBD, the FSA does not have specific provisions for LLSs either. Nonetheless, the above discussed obligations for FSA state parties all apply to LLSs. However, to date only five out of seventy-eight state parties to the FSA are landlocked. These are Austria, the Czech Republic, Hungary, Luxemburg, and Slovakia (all EU member states). In order to benefit from acceding the FSA, LLSs must be interested in fishing on the high seas for exactly the species targeted by the FSA. If that is not the case, LLSs may ratify the FSA to participate in decisions and to make sure that other states (mainly coastal states) adhere to the regulations provided by the FSA. Fact is that the five landlocked state parties to the FSA were required by the EU to accede thereto.¹¹¹ What their actual interest were, if they had any at all, stays unclear and is beyond the scope of this thesis to find out. Therefore, it can be said that the FSA may be important for the protection of the marine environment, mainly for coastal states, but for LLSs its relevance and benefits are rather small.

3.2 Switzerland's Interests to Protect the Marine Environment

Switzerland's interest to protect the marine environment evolved naturally through distinctive historical events, whereas the following two were of special importance.

The first decisive event was the 1985 Sandoz Warehouse Fire in Basel. Pesticides and other chemicals that were stored in the burning building were specifically designed for the destruction of microscopic organisms, plants and animals. Some twenty tons of these

¹¹⁰ FSA art 18(1); Rothwell & Stephens (2010) p 317.

¹¹¹ Molenaar (2011) p 214.

substances seriously polluted the Rhine through the contaminated firewater and caused the death of almost all fish and the micro-fauna as far as Koblenz, Germany. In the aftermath of this disaster, the International Commission for the Protection of the Rhine (ICPR)¹¹² established the 1987 Rhine Action Programme, also known as ‘Salmon 2000’. The programme set goals to be reached by the year 2000 to restore the damage caused by the Sandoz fire, but also to limit discharges of the most important noxious substances. The Rhine Action Programme ended in the year 2000. Shortly after the ICPR decided on the succession programme ‘Rhine 2020’, also called ‘Salmon 2020’, with the same six participating states and new goals to be achieved by 2020.

The second event took place in 1990; Switzerland was invited to participate in the International Conference on the Protection of the North Sea in its role as Rhine riparian state.¹¹³ The North Sea Conference was established in 1984 due to the growing concern that the large input of various harmful substances via rivers, direct discharges and dumping could cause irreversible damage to the North Sea ecosystem. Switzerland agreed to participate and did not only set a political sign, but also one for the supra-regional character of environmental protection. Switzerland wanted to support the interests of the EU to protect the North Sea and avoid irreversible harm. Both, the North Sea Conference and the Rhine Action Programme 2000 stated a reduction of the most important noxious substances by 50% compared with the respective reference years. The Protection of the North Sea was even added to the targets of the Rhine Action Programme in 1989 after enormous algal mats caused by large amounts of nutrients from waste water blanketed the North Sea in summer 1988.

The Swiss participation in the protection of the marine environment may so far only base on the pollution through the Rhine; the efforts however were remarkable and most importantly successful.

Following the two key events, Switzerland joined the Convention for the Protection of the marine Environment of the North-East Atlantic in 1992, better known as the OSPAR Convention. With this accession, Switzerland showed its true interest in the protection of the

¹¹² The ICPR was founded in 1963 by the states bordering the Rhine River. Its participants are Switzerland, France, the Netherlands, Germany, Luxembourg, and the EU.

¹¹³ The main issue was the pollution of the North Sea through pesticides that were introduced into the Rhine.

marine environment. For the first time, the Swiss participation was not motivated by events it was at least partly responsible for anymore, but by the sole motivation to support international efforts to protect the marine environment.

The events discussed above demonstrate Switzerland's ambitions to internationally address marine environmental protection. Switzerland puts great emphasis on setting an example for the need of collective actions against common concerns such as environmental protection. Furthermore, the events show Swiss solidarity towards the EU in combatting marine pollution. It recognises its responsibility as Rhine riparian state and is committed to the measures necessary. Switzerland demonstrates the importance to not only react to environmental issues but to also act preventively so as to sustain biological diversity for present and future generations.

Additional interests include the conservation of the marine environment as a source of living and non-living resources. Moreover, Switzerland takes interest in minimising the effects of climate change as well as shipping impacts on the marine environment through appropriate regulations. At the same time, however, it is important for Switzerland to maintain sea transport lanes, as it is dependent on international trade.

In conclusion it can be said that Switzerland attaches great importance on setting an example for international and preventive efforts to protect the marine environment.¹¹⁴ In the Swiss opinion, uni- and bilateral cooperation is not enough; multilateral measures are needed for cross-border environmental impacts. Only then can the sea, its resources and its positive effect on the global climate be sustained.¹¹⁵

3.3 Switzerland's Obligation to Protect the Marine Environment

Switzerland is party to the UNCLOS (1 May 2009) as well as to the CBD (21 November 1994) and to the supplementary agreement to the CBD known as the Cartagena Protocol on Biosafety (11 September 2003). Therefore, the obligations discussed above in section 3.1.1 and 3.1.2 also apply to Switzerland. Switzerland however is not party to the FSA.

¹¹⁴ Sieber (2012).

¹¹⁵ Bundesrat (2008) p 4080.

In the following sections, Switzerland's obligations under the UNCLOS, the CBD, and the FSA are assessed. To this end, the obligations for LLSs as discussed above in section 3.1 are adapted to the case of Switzerland.

3.3.1 Under the Convention on the Law of the Sea

Under the UNCLOS, Switzerland has the overall duty to protect and preserve the marine environment, according to Article 193. This takes priority over the Swiss sovereign rights to exploit natural resources, i.e. fishing on the high seas¹¹⁶ or marine scientific research in the Area.¹¹⁷ Switzerland as any other state party shall cooperate on a global and regional basis.¹¹⁸ This requirement can either be fulfilled by entering bi- or multilateral agreements with states that have interests in the same issue area; or by acceding to or co-founding a competent international organisation.

UNCLOS Part XII Section 5 also applies to Switzerland, except for Article 208, which relates to pollution arising from seabed activities subject to a state's jurisdiction. The provision for pollution from land-based sources, Article 207, is of special importance for Switzerland. The Rhine provides not only access from Switzerland to the sea; it is also a possible source for land-based pollution. Extensive Swiss legislation on water protection through national acts as well as international agreements provide for adherence with Article 207.¹¹⁹ Moreover, Articles 207 – 212 requires Switzerland to take into account 'internationally agreed rules, standards and recommended practices and procedures'. This is accounted for in the above-mentioned national and international legislation. Additionally, Switzerland is currently preparing for ratification of four IMO conventions.¹²⁰

Switzerland carries the responsibility as a flag state to enforce the rules adopted for the control of marine pollution from vessels, irrelevant where a violation occurs.¹²¹ Particularly on the high seas, Switzerland is required to enforce international regulations as a flag

¹¹⁶ According to UNCLOS art 87.

¹¹⁷ According to UNCLOS art 143.

¹¹⁸ UNCLOS art 197.

¹¹⁹ Swiss legislation (incl. international agreements) can be accessed on <http://www.admin.ch/ch/d/sr/0.81.html#0.814.2> [Visited 20 July 2012].

¹²⁰ 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage; Annex VI to the 1973 MARPOL; 2004 International Convention for the Control and Management of Ships' Ballast Water and Sediments; and 2001 International Convention on the Control of Harmful Anti-fouling Systems on Ships.

¹²¹ UNCLOS art 217.

state.¹²² Furthermore, Switzerland has to ensure that activities under its jurisdiction or control do not cause damage to other states or their environment.

3.3.2 Under the Convention on Biological Diversity

The jurisdictional scope of the CBD for LLSs is restricted (see section 3.1.2). In terms of components of biological diversity, Switzerland only has the obligation to cooperate with respect to areas beyond national jurisdiction and on other matters of mutual interest for the conservation and sustainable use of biological diversity.¹²³ For processes and activities under Swiss jurisdiction or control, however, Switzerland carries full responsibility in areas beyond any state's national jurisdiction. Additionally, the obligation to cooperate for processes and activities applies with respect to the EEZ or the territory of another state as well as in areas beyond any state's national jurisdiction and on other matters of mutual interest.¹²⁴

The three main objectives in CBD Article 1, as well as the elaborating Articles 6 – 20, are binding for Switzerland. Moreover, Switzerland has to regard the principles of the precautionary approach and intra-generational equity, stated in the Preamble, when applying or implementing the provisions of the CBD.

Article 28 requires Switzerland to cooperate in formulating protocols that further elaborate the Convention and adopt them at the Conferences of the Parties. Switzerland ratified the 2000 Cartagena Protocol on Biosafety, to date the only protocol in force.

3.3.3 Under the Fish Stocks Agreement

Switzerland is not party to the FSA and as discussed above in section 3.1.3, the incentive for LLSs to accede to the Agreement is rather small. The lack of an own fishing fleet is probably the main reason why Switzerland has not joined the FSA. An accession may be worth considering in order to become a member of RFMOs (see also section 4.3.3) or to receive a stronger vote in fishing quotas and the therewith connected environmental protection. However, considerable costs and efforts of such an accession have to be balanced against the benefits. Without a real interest in fishing opportunities – that Switzerland does not have for the time being – the input of acceding the FSA probably outweighs the output.

¹²² Churchill & Lowe (1999) p 346.

¹²³ CBD art 4 and 5.

¹²⁴ Ibid.

4 Rights and Obligations of Landlocked States to Participate in Regional Fisheries Management Organisations

As the name implies, Regional Fisheries Management Organisations are usually known for fisheries. Fisheries shall not be the topic to be assessed though, but the role of RFMOs in respect of marine environmental protection.

In section 4.1, it is explained what an RFMO is, what its objectives usually are and how RFMOs can be differently arranged and organised. Section 4.2 then looks at the role of RFMOs in protection of the marine environment under the three international treaties already discussed above in section 3.1.1 – 3.1.2: the UNCLOS, the CBD and the FSA. In the last section 4.3, it is assessed whether LLSs, which have no fishing interests whatsoever, have a right to participate in RFMOs for the sole reason of environmental protection.

4.1 What is an RFMO

The oceans are vast and international and regional cooperation among states is fundamental for an effective management of this spacious areas. RFMOs are such mechanisms for cooperating between coastal states and states whose nationals and vessels flying their flag are involved in fishing highly migratory fish stocks, fish stocks that straddle national fisheries management boundaries, and other high-seas species.¹²⁵

The United Nations Food and Agriculture Organization (FAO) defines fisheries management organisations the following:

Fisheries management organizations [...] are international institutions or treaty arrangements between two or more States that are responsible for fisheries management, including the formulation of the rules that govern fishing activities. The fishery management organization, and its subsidiary bodies, may also be responsible for all ancillary services, such as the collection of information, its analysis, stock assessment, monitoring, control and surveillance [...], consultation with interested parties, application

¹²⁵ Udearity (2011) p 1.

and/or determination of the rules of access to the fishery, and resource allocation.¹²⁶

RFMOs conserve and manage straddling fish stocks, highly migratory fish stocks and other high-seas fisheries; they ensure sustainable use and thus seek to prevent depletion of such stocks. Furthermore, they aim at eliminating conflicts between states by providing a forum for states in order to enable agreements on conservation and management measures for fisheries.¹²⁷

Different RFMOs have different regulatory areas¹²⁸ and various management approaches. In respect of target species, some RFMOs manage all fish stocks within the regulatory area (e.g. Commission for the Conservation of Antarctic Marine Living Resources, CCAMLR), while others only target particular species or fish stocks or a group of closely related fish stocks (e.g. International Commission for the Conservation of Atlantic Tunas, ICCAT). Regarding the power of an RFMO, some possess full regulatory powers and have the competence to issue conservation and management measures over the regulatory area binding for member states (e.g. Northwest Atlantic Fisheries Organisation, NAFO); others only hold an advisory role towards member states (e.g. Western Central Atlantic Fishery Commission). However, only a few RFMOs have a purely advisory function, while most RFMOs have management powers. There are also RFMOs with the sole function to provide scientific advice relating to conservation and management measures (e.g. North Pacific Marine Science Organization).¹²⁹

RFMOs are intergovernmental organisations. States are the primary members of RFMOs, whereas some RFMOs also allow the participation of other entities competent for fishing such as the European Community. The requirements of how to become a member lie in the discretion of each RFMO itself, or rather in its statutory regulations. One option is an open membership for all states and entities, whereas there are two modes of regulation: either the membership can be obtained automatically by application; or by meeting established criteria that can be met by all states or entities, independent of geographical, political or catch historical requirements. Another option is a restricted membership, that is dependent on

¹²⁶ UN FAO (n.a.).

¹²⁷ Udeariry (2011) p 2.

¹²⁸ Statutory defined areas where management measures apply to.

¹²⁹ Udeariry (2011) p 2; European Commission (n.a.).

criteria such as geographical and political factors, catch history, or the decision of an external authority.¹³⁰

The European Commission describes three kinds of regulatory decisions RFMOs take, determining

‘fishing limits (total allowable catches, maximum number of vessels, duration and location of fishing);

technical measures (definition of how fishing activities must be carried out, permitted gear and technical control of vessels and equipment); and

control measures (monitoring and surveillance of fishing activities)’.¹³¹

These three functions of RFMOs show their strong emphasis on fisheries. However, all three functions also promote the protection of the marine environment. The marine environment has to be looked at as a whole. The interplay between species, ecosystems and external factors together only make it an ‘environment’. Fish are one part thereof and play a significant role, especially in the function of living marine resources. Fishing causes a lot of vessel traffic, and thus air, water and noise pollution; it promotes the introduction of alien species; it produces by-catch and too much ‘operational waste’ until the quota is exhausted by the right sized fish, etc. In conclusion it can be said that fishing not only disturbs the ecosystems and their cycles, it also diminishes biological diversity and pollutes the marine environment. Therefore, all measures taken by RFMOs to manage fishery are in effect also measures to protect the marine environment.

The trend in RFMOs goes towards adopting an ecosystem and a precautionary approach.¹³² To this end, RFMOs take into account the impacts of fisheries on the wider ecosystem beyond the target species on the one hand; and in the absence of adequate scientific information, on the other hand, measures are adopted accordingly in order to minimize the risk of overfishing and negative impacts on the ecosystem. RFMOs that have adopted an ecosystem approach are, *inter alia*, CCAMLR, the Inter-American Tropical Tuna Commission, the South East Atlantic Fisheries Organisation, and the South Indian Ocean Fisheries Agreement. RFMOs that have adopted a precautionary approach are, *inter alia*,

¹³⁰ Udeariry (2011) p 2.

¹³¹ European Commission (n.a.) (emphasis added).

¹³² Currie (2007) pp 10 – 13; and WWF (n.a.).

ICCAT, the Western and Central Pacific Fisheries Commission (WCPFC), and the Commission for the Conservation of Southern Bluefin Tuna.¹³³

4.2 The Role of RFMOs in the Protection of the Marine Environment

Having explained what RFMOs are, this section looks at the role of RFMOs in protecting the marine environment under the three treaties already discussed before: the UNCLOS, the CBD, and the FSA.

RFMOs are established under fisheries regulations of various international instruments. Even if RFMOs pursue an ecosystem and/or precautionary approach, fisheries management is still their main goal. However, this thesis does not assess the role of RFMOs under fisheries regulations, but only their actual or possible role under marine environmental protection provisions.

As can be seen in sections 4.2.1 – 4.2.3, all three treaties discussed require cooperation among states in order to achieve their codified environmental goals. Whether states have lived up to these requirements is discussed in the sections of the respective treaties.

4.2.1 Under the Convention on the Law of the Sea

UNCLOS Part XII dedicates Section 2 to global and regional cooperation. Three articles thereof are significant for the environmental protecting role of RFMOs: Articles 197, 200 and 201. These provisions require cooperation between states through competent international organisations ‘for the protection and preservation of the marine environment’ in general; ‘for the purpose of promoting studies, undertaking programmes of scientific research and encouraging the exchange of information and data acquired about pollution’; and for ‘establishing appropriate scientific criteria for the formulation and elaboration of rules’ and standards, respectively.

To the author’s knowledge, no international organisation has been established under UNCLOS Part XII, Section 2. There has been the suggestion of another implementing

¹³³ Ibid.

agreement to the UNCLOS in order to address the deficient implementation of Part XII Section 2.¹³⁴ To date, this seems not to have taken shape in practice.

The importance of environmental principles such as the ecosystem and the precautionary approach in RFMOs is growing. The time may have come to consider extending RFMOs' powers from fisheries management to the protection of the whole marine environment. RFMOs possess functioning organisations and part of the assignment already concerns the marine environment as a whole. Additionally, states interested in sustainable fishing are most likely also interested in a stable marine environment free of pollution. Not only because a clean marine environment means more living marine resources to harvest. But also because it would spare them the effort to establish and accede to yet another international organisation. Advancing RFMOs' powers from fisheries management to additional environmental management may be the solution to unify the protection of the whole marine environment in one instead of two organisations per regulative area. On the one hand, the efforts to extend the powers of RFMOs with existing organisations would be relatively small; whereas the establishment of new environmental management organisations on the other hand is costly, complex, requires great diplomatic effort, and after all time that is probably not available anymore.

4.2.2 Under the Convention on Biological Diversity

The CBD already stresses in its Preamble 'the importance of, and the need to promote, international, regional and global cooperation among States and intergovernmental organizations'. Article 5 further promotes that states shall 'as far as possible and as appropriate, cooperate with other Contracting Parties, [...] through competent international organizations, [...] for the conservation and sustainable use of biological diversity'.

The CBD obligation to cooperate among states has partly been implemented. The CBD decided to team up with, *inter alia*, the 1979 Convention on the Conservation of European Wildlife and Natural Habitat¹³⁵ as well as with the 1971 Ramsar Convention on Wetlands of

¹³⁴ E.g. IUCN (2008). *Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*. In: IUCN Environmental Policy and Law Papers online, Marine Series No. 2. <http://data.iucn.org/dbtw-wpd/edocs/EPLP-MS-2.pdf> [Visited 19 July 2012] p 9.

¹³⁵ Bern Convention; see <http://www.cbd.int/doc/press/2008/pr-2008-05-22-bern-rev1-en.pdf> [Visited 20 July 2012].

International Importance¹³⁶, and the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).¹³⁷

To the author's knowledge, however, no international cooperation as actually required by the CBD has been implemented. As discussed above in section 4.2.1, extended power of RFMOs may be an option to implement the cooperation obligation at least with respect to the marine biodiversity.

4.2.3 Under the Fish Stocks Agreement

FSA Part III is fully dedicated to mechanisms for international cooperation. Article 8 requires states to cooperate through appropriate subregional or regional fisheries management organisations¹³⁸ and to establish such an RFMO when there is none.¹³⁹ The guidelines for establishing an RFMO are set forth in Article 9. The WCPFC and NAFO for example were established under these two provisions.¹⁴⁰ Articles 10 – 14 further elaborate modalities of RFMOs, *inter alia*, function of RFMOs, functionalities of new members or participants of RFMOs, and strengthening of existing RFMOs.

It has been mentioned before that most RFMOs are established under fisheries regulations of international instruments. The FSA is such an instrument and accordingly there already are RFMOs established under it. RFMOs implementing the FSA aim at optimum utilisation of straddling and highly migratory fish stocks (see also section 3.1.3), but always within a precautionary and ecosystem-focussed approach. Insofar, RFMOs implementing the precautionary and/or ecosystem approach already are concerned with marine environmental protection although only within the scope stated by the FSA. States could further use this to their benefit and, as discussed above, extend the power of RFMOs to manage the marine environment beyond the scope of the FSA or other relevant international instruments.

¹³⁶ Ramsar Convention; see http://www.ramsar.org/cda/en/ramsar-documents-mous-fourth-joint-work-plan/main/ramsar/1-31-115%5E15844_4000_0 [Visited 20 July 2012].

¹³⁷ CITES; see <http://www.cites.org/common/disc/sec/CITES-CBD.pdf> [Visited 20 July 2012]; see also <http://www.cbd.int/cooperation/related-conventions/activities.shtml> [Visited 20 July 2012].

¹³⁸ FSA art 8(1).

¹³⁹ Ibid art 8(5).

¹⁴⁰ Udeariry (2011) p 4.

4.3 Right of Landlocked States to Participate in RFMOs with the Sole Interest of Marine Environmental Protection

The two possible modalities for membership in an RFMO, as discussed above in section 4.1, are the open membership and the restricted membership. Which choice an RFMO takes is left to its statutory regulations and maybe to its state parties. However, this is different from the question whether there is a right for states to participate in an RFMO. The possible right to participation is not regulated by the respective RFMO, but by the international treaty under which the RFMO is established. In order to stay within the relevant scope of the thesis, the question of a right to participation is restricted to LLSs without an interest in fishing quotas. It is assessed under the UNCLOS, the CBS as well as the FSA.

4.3.1 Under the Convention on the Law of the Sea

UNCLOS Articles 63, 64 and 118 proclaim cooperation between states for the conservation and management of living resources. States shall work together in RFMOs where the same stock or stocks of associated species occur within the EEZ of two or more coastal states, both within the EEZ and in an area beyond and adjacent to the EEZ, or in the area of the high seas. Living resources are a part of the marine environment. However, an accession under these provisions rather indicates an intention to participate in fisheries than one to marine environmental protection. Even if we neglect this fact, Articles 63, 64 and 118 may not provide a sufficient basis for a right to participation in an RFMO. Under these three provisions, states are free to cooperate through an RFMO. Where no such organisation exists, Article 64(1) requires states to cooperate to establish one and participate in its work. Although this indicates a preference of the UNCLOS to cooperate through RFMOs, it cannot create an obligation to do so.¹⁴¹ It follows that RFMOs are free to set the procedure for admission of new members and to reject applications if they are not otherwise bound by international law.

Article 197 sets forth the requirement for cooperation in relation to the protection of the marine environment as a whole. The same argumentation as discussed above can be adapted to Article 197 and again, a right to accession to an RFMO cannot be established thereunder.

¹⁴¹ Winter (2009) p 21.

The FSA can be used for further interpretation of the relevant UNCLOS provisions as ‘subsequent agreement between parties regarding the interpretation of the treaty or the application of its provisions’ within the meaning of Vienna Convention Article 31(3)(a). However, reading a right to accession to RFMOs into the UNCLOS provisions on the basis of the FSA would go beyond interpretation. It would rewrite these provisions and is therefore not allowed. Whether the FSA provides a sufficient basis for a right to participation in an RFMO is discussed in section 4.3.3 below.

4.3.2 Under the Convention on Biological Diversity

In Article 5, the CBD sets out the main obligation to cooperation between states for the conservation and sustainable use of biological diversity. But the same argumentation that disqualified the UNCLOS provisions in section 4.3.1 above, also disqualifies the CBD. Hence the CBD does not provide a sufficient legal basis for a right to accession to an RFMO.

The UNCLOS and the CBD overlap in the conservation of living marine resources as well as in the protection and conservation of the marine environment as these are all part of biological diversity.¹⁴² Therefore the CBD could be used for interpretation of the UNCLOS and *vice versa*.¹⁴³ However, neither of the two instruments does create a right to accession to an RFMO and further interpretation is thus not required.

4.3.3 Under the Fish Stocks Agreement

FSA Article 8(3) provides that RFMOs are open to all states with a 'real interest' in the fisheries concerned; that is to say in the fisheries within the regulatory area of the RFMO in question. What does 'real interest' mean and when does a state have such an interest in fisheries? Article 8(3) sets out that

‘[...] States having a real interest in the fisheries concerned may become members of such organization or participants in such arrangement. The terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned’ (emphasis added).

¹⁴² CBD arts 2 – 3 and UNCLOS arts 63, 64 and 118.

¹⁴³ According to Vienna Convention art 31(3)(a) and (c).

The term 'real interest' is not defined in the FSA nor in any other relevant legal instrument. 'Real interest' has thus to be interpreted in accordance with Vienna Convention Article 31.

From the requirement of 'real interest' it can be deduced that RFMOs under the FSA are not intended to be open to all, but limited to a membership.¹⁴⁴ The wording in FSA Article 8(3) puts forward that 'States fishing for the stocks on the high seas and relevant coastal States' have a real interest at any rate, whereas the 'relevant coastal states' are those states whose maritime zones are included in, or adjacent to, the RFMOs' regulatory area. LLSs do not fall under this qualification for they do not have a sea-coast. 'States fishing' are the states that are engaged in fishing activities for the stock concerned at the time of the application for membership. New applicants that are not interested in engaging in fishing as such, but want to ensure protection of the marine environment, however, may not be regarded as having a real interest. Some authors argue that the concept of real interest may have been included in the FSA in order to avoid a situation, as it currently exists in the International Whaling Commission (IWC).¹⁴⁵ In the IWC, too many member states are only interested in conservation issues and therefore make the commission rather ineffective, despite the original purpose of providing for proper conservation of whale stocks and thus making the orderly development of the whaling industry possible. Other authors agree with that the purpose of the provision is to limit access to RFMOs. 'Real' has to be interpreted as indicating that states have to demonstrate a factual or concrete interest.¹⁴⁶

It could be argued that states promoting environmental protection have a factual and concrete interest in fisheries in a wider sense. However, if one state is granted membership on these grounds, this sets a precedent where other states with the same grounds have to be accepted as well. If these states were to comprise a majority, they would be able to change an RFMOs' policy from fisheries to conservation.¹⁴⁷ The FSA promotes sustainable fishing while conserving the resources; this is to say that sustainable use has been given priority. In the light of the purpose of the FSA, Article 8(3) should not be read in a way that allows

¹⁴⁴ Hedley, Molenaar & Elfering (2003) p 20.

¹⁴⁵ Ibid.

¹⁴⁶ Henriksen, Hønneland, & Sydnes (2006) p 19.

¹⁴⁷ Ibid.

states to change RFMOs' policies from sustainable use to conservation. The preparatory work to the FSA seems to confirm such an understanding.¹⁴⁸

According to the argumentation above, LLSs without an interest in fisheries do not qualify as having a 'real interest' as required by FSA Article 8(3). Even if adapting the wider interpretation of 'real interest', LLSs with the only interest in marine environmental protection do not qualify for a right to accession.

4.4 Switzerland's Participation in RFMOs for the Reason of Environmental Protection

According to the Swiss federal communication from 15 August 1979, Switzerland joined the IWC for the main reason of environmental protection. In opposition to the commercial interests of whaling states, Switzerland was interested in conserving the habitat of the whales.¹⁴⁹ This motivation however has drastically changed over the time. Although the Swiss Federal Council ('Bundesrat') continues to reaffirm that environmental protection is the main goal, in fact, Switzerland mostly has a mediating role within the IWC. Because of the tensions between pro- and anti-whaling state parties, the IWC is as good as incapable of actions. Insofar, a mediating state is important to help to agree on at least some measures. However, these measures are certainly not as effective as Switzerland originally intended them to be and cannot fulfil the primary motivation of Switzerland's accession. There have even been discussions about Switzerland leaving the IWC, which has never been put into effect though.¹⁵⁰

The Swiss accession to the OSPAR Convention is discussed in section 3.2. As member state to the OSPAR, Switzerland's key concern is its responsibility as Rhine riparian state. The fact that two-thirds of Swiss drainage leaves the country through the Rhine and eventually runs into the North Sea makes Switzerland an essential player in the protection of the OSPAR regulatory area. It is important that not only the impacts of coastal states, but also of other responsible states such as Switzerland are discussed on an international platform. Only then effective actions can be agreed on that do justice to the common concerns of the

¹⁴⁸ Ibid p 20.

¹⁴⁹ Bundesrat (1979) p 631.

¹⁵⁰ Krebs (2012).

OSPAR regulatory area. On top of that, Switzerland actively takes part in all current discussions and is particularly involved in OSPAR's work on eutrophication, hazardous and radioactive substances. Moreover, the OSPAR offers an important platform for Switzerland to discuss marine environmental protection with the EU although it is not a member thereof.¹⁵¹

Switzerland participates in both the Rhine Action Programme as well as the succeeding programme 'Rhine 2020'. Although both programmes are multilateral cooperation for, *inter alia*, marine environmental protection, they are not RFMOs and therefore not relevant for this discussion.

According to the information received from the Federal Department of Foreign Affairs, Switzerland does not have any ambitions to accede to further RFMOs, not for the reason of environmental protection nor for any other reasons.¹⁵²

¹⁵¹ Ibid.

¹⁵² Ibid.

5 Conclusions

This thesis is aimed at answering the questions: (a) whether LLSs have a right to transit and a right to access to the sea, and how these rights are regulated; (b) what Switzerland's interest in access to the sea and in marine environmental protection are; (c) whether there are sound obligations for LLSs to protect the marine environment; (d) what role RFMOs play in the protection of the marine environment; (e) and whether there is a right for LLSs to participate in RFMOs with the sole interest of marine environmental protection.

(a) It has been elaborated above that LLSs are dependent on a right to access to the sea via a transit right through transit states. These rights are secured by UNCLOS Article 125 and further elaborated in Articles 126 – 130. However, these rights are not self-executing and can only be given effect through bilateral, subregional or regional arrangements. Although the freedom of transit exists independently of any arrangements between landlocked and transit states, exactly such an agreement is necessary for giving the freedom effect in practice. Some argue that the UNCLOS has become customary international law and therefore the right to access and the transit right codified therein. Even if this is controversial, it still is a persuasive argument considering the widespread practice. Either way, to date states have and probably will keep regulating the right of access and the transit right through bi- and multilateral treaties.

Switzerland's access to the sea has been regulated since 1868 through the multilateral Mannheimer Akte. The ratification of the UNCLOS further strengthened this right, but did not change any existing modes of regulation.

(b) The Swiss interest in access to the sea is primary motivated by the dependency on international trade and the upkeep of international transportation routes. In the near future, however, the exploitation of seabed resources may become an additional focus of attraction. It will be interesting to follow these plans and probable events.

Switzerland's participation in marine environmental protection is on the one hand motivated by the 1985 Sandoz Warehouse Fire, and on the other hand through the invitation in 1990 to

participate in the International Conference on the Protection of the North Sea. Some sort of guilt combined with the evolving awareness of its role as Rhine riparian state, Switzerland seeks to follow up with its responsibilities towards other Rhine riparian states, the EU as well as towards the OSPAR member states. Switzerland wants to state an example for the need of international collective actions and of sustaining biological diversity.

(c) UNCLOS Part XII provides for the obligation to protect and preserve the marine environment, strengthened by further references made throughout the whole Convention. The obligation applies to the entirety of the marine environment and, despite naming the six main sources of pollution in Articles 207 – 212, to pollution from any source. The obligation takes priority over national sovereignty and sovereign rights. Furthermore, the UNCLOS urges states to cooperate on a global and regional basis in formulating rules and standards, either directly or through competent international organisations. This shows that the UNCLOS acknowledges the collective action problem of marine environmental protection and requires states to act accordingly.

In addition to the general obligations that are applicable to LLSs, they carry a special responsibility as flag states under UNCLOS Article 90 in conjunction with Article 94 to ensure enforcement of international provisions to protect the marine environment. Moreover, under Article 194(1) they have to ensure that activities under their jurisdiction or control do not cause damage to other states or their environment.

CBD Article 1 states the Convention's three objectives whereas only the conservation of biological diversity and the sustainable use of its components are relevant for this thesis. These guiding objectives are more substantively elaborated in Articles 6 – 20 which constitute binding commitments. Additionally, the precautionary approach and the principle of inter-generational equity stated in the Preamble, requires state parties to read the provisions of the CBD in the light of these two principles. Article 5 of the CBD further obliges states to cooperate with other contracting parties, where appropriate through international organisations. Attention has to be paid to the jurisdictional scope of Article 4 that puts restrictions on the parties' obligations as well as on their cooperation. However, the application of this provision is not satisfactory and still has to be clarified through state practice.

Unlike the UNCLOS, the CBD as well as the FSA do not provide for specific obligations of LLSs; the obligations set forth, however, are applicable to all state parties, including LLSs.

Although the FSA is only applicable to straddling and highly migratory fish stocks, it plays an important role in the protection of the marine environment, as fish are a relevant part thereof. Article 5 sets forth the twelve principles that oblige states to ensure long-term conservation and sustainable use of the relevant fish stocks. Moreover, the FSA pursues a precautionary and ecosystem approach, applicable to all measures taken under the FSA. Part II provides mechanisms for international cooperation, either directly or through RFMOs. Of special importance to land-locked states is FSA Part V that requires flag states to exercise an appropriate level of supervision over fishing vessels flying their flags and to ensure that they do not engage in any activity undermining the effectiveness of the measures adopted under the FSA.

All three instruments discussed provide obligations to protect the marine environment that are also adaptable to LLSs, although only the UNCLOS states this explicitly. The UNCLOS, the CBD as well as the FSA are all framework conventions and thus only use broad terms to identify the obligations to protect the marine environment. Wide discretion is left to the member states and further elaboration is required when implementing the obligations into national law or international cooperation. This makes the treaties less effective but leaves the parties the possibility to act within their means. Due diligence obligations further promote measures according to states' interpretations of what lies within their respective means and usually result in less effective measures than those required. Uncertainties as to questions of interpretation and actual obligations of each state party in order to effectively protect the marine environment can only be clarified through future state practice and case law.

Switzerland is party to the UNCLOS and the CBD. Therefore, the obligations stated therein also require Swiss activities to ensure marine environmental protection. The jurisdictional scope of CBD Article 4, however, restricts the Swiss obligations under this Convention. The FSA does not constitute any obligations for Switzerland, as it is not a party thereto.

(d) To date, RFMOs are limited to managing fisheries. In effect though, the measures taken by RFMOs also protect the marine environment and the trend shows that RFMOs increasingly adopt an ecosystem and/or precautionary approach. Thus they have to regard the impact of fisheries on the ecosystems and take precautionary measures accordingly.

The UNCLOS as well as the CBD require state parties to cooperate through international organisations in order to protect the marine environment. To the author's knowledge, however, no such organisations have been established yet. Therefore she suggests extending the powers of RFMOs from fisheries only to additional protection of the marine environment. Because RFMOs are already established and functioning institutions, the establishment of new ones is not necessary. Instead, the extension of powers would only cause proportionally little effort and avoid regulative overlaps compared to the administrative effort and costs that the establishment of new international organisations would cause. In the author's opinion, a combination of the two functions offers a reasonable solution to effectively protect the marine environment including the management of fisheries. Coming back to the collective action problem, this solution provides for the required international cooperation and for a clear coordination of fisheries and the marine environment in each regulatory area for an all-embracing protection and preservation.

The trend in RFMOs may go beyond fisheries and towards an ecosystems approach. But only the future will show if a combination of the protection of fisheries and the marine environment take form in reality, or if it remains an assumption of the author.

(e) A right for LLSs to participate in RFMOs for the sole reason of environmental protection cannot be established under either the UNCLOS, the CBD, or the FSA. This shows that RFMOs are still completely focussed on fisheries management and that marine environmental protection only plays a secondary role. If the powers of RFMOs should one day be extended to additional protection of the marine environment, the mode of accession would also have to change. Only then could the participation of LLSs in RFMOs without any interest in a fishing quota become possible.

In conclusion, it can be said that obligations to protect the marine environment are extensively codified in the UNCLOS, the CBD, and the FSA. Stringent measures are nonetheless missing and leave wide discretion to coastal and LLSs as to what lies in their possibilities and thus also as to what they want to achieve. The result is hardly effective and makes one questioning the actual impact of environmental provisions in international treaties. Opposed thereto, the public awareness of the collective action problem is increasing; and so is the urgent state of the oceans. This puts growing pressure on governments to take actions. States cannot postpone effective actions for much longer

without arriving at the point of no return. At that point, all efforts will fail to repair the damage caused. In order to avoid this point, collective actions are required. Actions of LLSs are thus as important as actions of any other state. While people are still surprised to hear 'Switzerland' in the same sentence as 'marine environmental protection', this has to change soon in order to effectively protect and preserve the oceans for present and future generations.

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