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στην

ΝΑΥΤΙΛΙΑΚΗ ΔΙΟΙΚΗΤΙΚΗ

**‘THE EXISTING LEGAL FRAMEWORK
GOVERNING AREAS BEYOND NATIONAL
JURISDICTION (ABNJ): BRIDGING THE
OCEAN GOVERNANCE GAP’**

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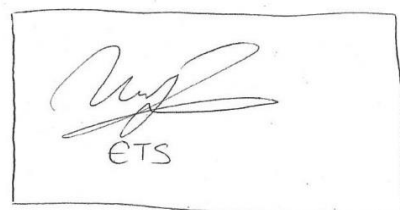
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Στη Σπυριδούλα, τη Ζωή και το Γιώργο – για όλα.

ΠΙΝΑΚΑΣ ΠΕΡΙΕΧΟΜΕΝΩΝ

Περιεχόμενα

ΔΗΛΩΣΗ ΑΥΘΕΝΤΙΚΟΤΗΤΑΣ / ΖΗΤΗΜΑΤΑ COPYRIGHT	2
ΤΡΙΜΕΛΗΣ ΕΞΕΤΑΣΤΙΚΗ ΕΠΙΤΡΟΠΗ.....	3
ΠΡΟΛΟΓΟΣ & ΕΥΧΑΡΙΣΤΙΕΣ.....	4
ΑΦΙΕΡΩΣΗ.....	5
ΠΙΝΑΚΑΣ ΠΕΡΙΕΧΟΜΕΝΩΝ.....	6
ΠΕΡΙΛΗΨΗ / ABSTRACT.....	7
1. INTRODUCTION.....	9
2. CHAPTER 1: CURRENT ISSUES	11
2.1 DEFINING ‘AREAS BEYOND NATIONAL JURISDICTION’	12
2.1.1 THE ELEMENTS OF ‘ABNJ’ ACCORDING TO UNCLOS.....	13
2.2 THE EXISTING REGULATORY FRAMEWORK: SUCCESSES & SHORTCOMINGS OF UNCLOS	14
3. CHAPTER 2: EXPANDING ON THE NOTION OF BUILDING AN INTERNATIONAL LEGAL FRAMEWORK.....	19
3.1 THE ARGUMENT IN FAVOUR OF BUILDING AN INTERNATIONAL LEGAL FRAMEWORK FOR EFFECTIVE OCEAN GOVERNANCE.....	20
3.2 THE PROBLEM WITH INTERNATIONAL LAW	22
4. CHAPTER 3: BRIDGING THE GOVERNANCE GAP THROUGH INTERNATIONAL COOPERATION	25
4.1 EXPANDING ON THE REGULATION AND GOVERNANCE PROBLEMS: THE EXAMPLE OF BIOPROSPECTING.....	25
4.2 THE ROLE OF REGIONAL AND INTERGOVERNMENTAL MECHANISMS IN ENCOURAGING STATE COOPERATION.....	27
4.3 EXAMPLES OF REGIONAL MECHANISMS AND THEIR WORK.....	29
5. CHAPTER 4: MOVING FORWARD	37
6. CONCLUSION	40
BIBLIOGRAPHY	43

ΠΕΡΙΛΗΨΗ / ABSTRACT

Τα τελευταία χρόνια, το διεθνές νομικό καθεστώς προστασίας των ωκεανών του πλανήτη μας έχει επιτευχθεί μέσω της Σύμβαση των Ηνωμένων Εθνών για το Δίκαιο της Θάλασσας (UNCLOS), η οποία θεωρείται ως το «σύνταγμα» που εξασφαλίζει τη διακυβέρνηση των ωκεανών. Παρόλα αυτά, η συνεχής εκμετάλλευση των θαλάσσιων πόρων έχει οδηγήσει τους επιστήμονες και τη διεθνή κοινότητα να επιστήσουν την προσοχή τους στο θέμα της βιωσιμότητας της υπάρχουσας κατάστασης. Αξίζει να σημειωθεί πως το ισχύον καθεστώς συχνά αποδεικνύεται ανίκανο να προστατεύσει τις επίκαιρες προκλήσεις που αντιμετωπίζουν οι ωκεανοί, όπως η ανόμοια κατανομή της τεχνολογίας, η οποία θα μπορούσε να βοηθήσει τα κράτη στην καλύτερη ρύθμιση των θαλάσσιων δραστηριοτήτων βάση των κανονισμών. Το θέμα περιπλέκεται περαιτέρω λόγω του ότι η δικαιοδοσία των παράκτιων κρατών σταματά σε συγκεκριμένα όρια απ' όπου και ξεκινούν οι «ανοιχτές θάλασσες» (high seas) και οι «περιοχές πέραν της εθνικής δικαιοδοσίας» (Areas Beyond National Jurisdiction - ABNJ). Αυτές δεν εμπίπτουν εντός της δικαιοδοσίας συγκεκριμένων χωρών κι έτσι τα κράτη καλούνται να δουλέψουν μαζί ώστε να προστατεύσουν συλλογικά το θαλάσσιο περιβάλλον σε αυτές τις περιοχές. Αυτή η Δ.Ε. λαμβάνει υπόψη όλα τα παραπάνω και προσπαθεί να αναδείξει τους τρόπους με τους οποίους τα κράτη μπορούν να διασφαλίσουν την προστασία των περιοχών πέραν της εθνικής δικαιοδοσίας με βάση την προαναφερθέντα σύμβαση του ΟΗΕ κι έτσι να καταλήξει ότι αυτό μπορεί να πραγματοποιηθεί μέσω ουσιαστικής κρατικής συνεργασίας. Εξετάζονται επιπλέον συστάσεις οι οποίες αναδεικνύουν τα πρακτικά βήματα που μπορούν να ακολουθήσουν τα κράτη ώστε να διασφαλίσουν επιτυχώς το μέλλον των ωκεανών στις περιοχές πέραν της εθνικής δικαιοδοσίας.

In recent years, the global legal regime for the protection of our planet's oceans has been governed by the UN Convention for the Law of the Sea (UNCLOS), which is also considered the 'constitution' for ocean governance. However, the continuous exploitation of marine resources has led scientists and the international community to raise alarms about the sustainability of the current situation. It must be noted that the existing regime can often be ineffective to deal with the modern challenges faced by oceans, such as the inequitable distribution of technological resources, that could greatly assist states to better regulate their marine activities in line with existing regulations. The issue is further complicated by the fact that state coastal jurisdiction ends at certain points and then begin the 'high seas', and the 'areas

beyond national jurisdiction' (ABNJ). These do not fall under the jurisdiction of any specific countries and so, states are called to work together to collectively protect the marine environment in these areas. This thesis considers all the above and attempts to demonstrate the ways that states can ensure the protection of ABNJ on the basis of UNCLOS to conclude that this can be achieved through strong state cooperation. Recommendations are also considered to show that there are practical steps that states may follow to successfully create a sustainable future for ABNJ. The methodology used to produce the thesis included extensive research of academic papers, international legislation, policy publications and in general, a combination of primary and secondary resources. The majority of the resources were identified online through credible links, and many were provided to the writer by the supervisor which significantly assisted the analysis due to the rich materials provided. The bibliography provided is a testament to this.

Λέξεις κλειδιά/Keywords: ABNJ; ocean governance; UNCLOS; regional mechanisms

1. INTRODUCTION

In 2012, the UN General Assembly published Resolution 66/288 which reinstated the international community's commitments to the Sustainable Development Goals. One of the points highlighted within was the need to *'conserve and sustainably use the oceans and seas and their resources for sustainable development, including their contribution to poverty eradication, sustained economic growth, food security and creation of sustainable livelihoods and decent work, while at the same time protecting biodiversity and the marine environment and addressing the impacts of climate change.'*¹

Understandably, there is an abundance of topics that must be addressed by both states and the international community to achieve the effective protection of the marine environment and the sustainable use of its resources. There is also extensive existing literature in the form of reports, academic journals, policy papers, international legal agreements, UN resolutions and books, which have been used to produce the views and arguments of this paper.

Due to the limitations of this project, it is necessary to narrow the scope of this paper into the examination of one of these topics. Therefore, this dissertation focuses on the existing legal framework that has been built in relation to governing and thus protecting ABNJ with a view to ultimately achieve the goal that the UN General Assembly has set and is mentioned above. It is important to examine this regulatory framework as due to their nature, these areas pose a significant problem for the international community: how to establish coherent governance policies which protect the parts of the oceans that do not legally fall within the territories of specific states. The inherent difficulty is evident, as for such a policy to be drafted, agreed, ratified, and most importantly implemented by countries globally, requires their collaboration. Unfortunately though, the fact that to this day we have failed to effectively protect these areas signifies that individual state interests override the common goal of sustainable use of the oceans. More often than not, states are reluctant to surrender parts of their legislature's national sovereignty and do not effectively incorporate and implement international ocean law into national legislation.

¹ UN General Assembly, Resolution 66/288 'The future we want' (A/RES/66/288) (2012)

In Chapter 1, it is suggested that in addition to the existing legal framework namely UNCLOS, states in collaboration with the international community must set out national, regional and global action plans, strategies and policies, institutional and fiscal reforms and protocols.² The key outcome that must be ensured is the effective implementation of these alongside the existing framework.³ The chapter provides the definition of the term that governs this thesis (i.e. 'ABNJ') along with its main elements based on UNCLOS. It also analyses the existing regulatory framework and provides an overview of the successes and shortcomings of the international ocean regulations of UNCLOS. In this way the reader will acquire the necessary background knowledge on the topic to have a better understanding of the topics that will be discussed and analysed throughout the thesis.

Following this, Chapter 2 expands on what it means for the international community to build a stronger international legal framework. It presents arguments which are in favor of a legal approach for achieving effective ocean governance and demonstrates its potential usefulness, especially since UNCLOS has already set the basis and it would be a waste of resources to completely disregard the efforts and developments that have been achieved because of it. However, it also presents some of the negative aspects of international law that should be considered as they could potentially hinder the goal of bridging the ocean governance gap.

Chapter 3 then builds on the previous analysis and addresses directly the issue using examples to demonstrate the results of problematic ocean governance. This analysis aims to bring to surface the problems stemming from the existing governance framework to understand what needs to be done to ameliorate the situation. It presents the argument that bridging the ocean governance gap in ABNJ requires not only a strong international regulatory framework, but also the willingness of individual member-states to abide by it and to cooperate with each other to achieve a common goal: the sustainable use of our oceans and their resources. It is argued that this could be done through the encouragement of regional cooperation by strengthening the already existing regional and intergovernmental mechanisms that work on monitoring and ensuring ocean governance. This argument is supported via the demonstration of relevant examples of such organisations and their work.

² UNDESA, 'How Oceans – and Seas-related Measures Contribute to the Economic, Social and Environmental Dimensions of Sustainable development: Local and Regional Experiences', 6

³ *ibid*

Finally, the thesis concludes with a chapter that expands on the potential ways forward for the international community. It further analyses the relevant recommendations that will be mentioned in the main body but also builds on these and provides an overview of practical advices that states may implement to abide by their legal obligations to protect ABNJ. In this way, this project achieves its two-fold aim which is to provide a thorough academic analysis on the issue of safeguarding ocean governance for ABNJ and to suggest realistic ways that this could be achieved.

2. CHAPTER 1: CURRENT ISSUES

This chapter outlines the necessary background for the reader to comprehend the challenging nature of ABNJ which leads to the need of a solid legal framework to govern and protect these areas with a view to achieve a much greater goal, which is the sustainable use of the oceans and the protection of their resources. It begins with an overview of the current challenges our oceans face and introduces the key existing legislation: the UN Convention on the Laws of the Sea (UNCLOS) along with its successes and shortcomings.

Seventy per cent of our planet's surface is covered by oceans.⁴ Oceans play a vital role in preserving the livelihood of millions of people around the globe both in terms of being a source of food as well as a source of income. Unfortunately, scientists monitoring the state of the oceans observe an exponential increase of disastrous practices such as overfishing, marine pollution and seabed mining which threaten the livelihood of the marine ecosystem.⁵ There has been progress in recent years; yet, there are still important issues at stake that need to be addressed. While there is a variety of threats our oceans face, these can be summarized in the following five broad categories: unsustainable extraction of marine resources; marine pollution, alien invasive species; ocean acidification and climate change impacts; and, physical alteration and destruction of the marine habitat.⁶

Understandably, these challenges are much more difficult to be tackled in the waters falling outside of states' jurisdictional borders, also known as Areas Beyond National Jurisdiction

⁴ FAO, 'Common Oceans – ABNJ: Global Sustainable Fisheries Management and Biodiversity Conservation in Areas Beyond National Jurisdiction' <<http://www.fao.org/3/a-i7539e.pdf>> accessed 05/07/2020

⁵ *ibid*

⁶ UNDESA (n 2) 6

(ABNJ) which make for forty per cent of the Earth's surface, sixty-two per cent of the oceans' surface and nearly ninety-five per cent of their volume.⁷ Evidently, these areas cover massive parts of our planet and are essential to our being. Therefore, it is vital to ensure the existence of a regulatory framework for ABNJ that will deal with the challenges effectively, so as to guarantee the holistic protection of our oceans and marine life and resources.

2.1 DEFINING 'AREAS BEYOND NATIONAL JURISDICTION'

The term ABNJ refers to the areas of oceans for which no nation has the specific or sole responsibility for managing and exploiting.⁸ The meaning of this is that all states have equal rights of access to these seas and to their resources.⁹ ABNJ include the *high seas* (water column beyond national jurisdiction) and *the Area* (seabed, ocean floor and subsoil beyond national jurisdiction). Consequently, it is challenging to sustainably manage the biodiversity in ABNJ as these areas are negatively impacted by human activity which is what brings to surface the need for comprehensive legal instruments and coherent governance.

Further to the definition of the main term that concerns this thesis, understanding the problems surrounding ABNJ requires us to investigate the most prominent activities within these regions. A brief overview was provided above, but it is worth looking into this in more detail. Merrie et al have done some work in identifying the uses of ABNJ which they have summarised as follows: capture fisheries; aquaculture; oil and gas exploration and production; deep-seabed mining of mineral resources; scientific research and marine genetic resources in ABNJ; bioprospecting for marine genetic resources (a very relevant topic which will be explored in more detail in Chapter 4); submarine cables and last but not least, global trade and maritime shipping.¹⁰ As it can be observed, these findings suggest a very wide range of users and interested parties in ABNJ which can make the task of effective ocean governance even more challenging as it requires the regulation and cooperation of many different actors and states. There is an increased numbers of countries involved in fisheries in ABNJ as well as in deep-

⁷ FAO (n 4)

⁸ *ibid*

⁹ Erik J Molenaar and Alex G. Oude Elferink, 'Marine protected areas in areas beyond national jurisdiction: The pioneering efforts under the OSPAR Convention' (2009) *Utrecht Law Review* Volume 5, Issue 1

¹⁰ Andrew Merrie et al, 'An ocean of surprises – Trends in human use, unexpected dynamics and governance challenges in areas beyond national jurisdiction' (24 April 2014) *Journal of Global Environmental Change* 27 19-31

sea mining and in general more and more actors are involved in human marine activities in this areas which raises the demand for a realistic and successful governance framework.¹¹

2.1.1 THE ELEMENTS OF 'ABNJ' ACCORDING TO UNCLOS

This section outlines some of the basic definitions relating to ABNJ as these have been expressed by UNCLOS. These terms will be repeatedly used throughout this paper and so it is important to note their meaning for the purposes of the analysis. Firstly, as it was mentioned in the previous paragraph one of the elements of ABNJ are the 'high seas.' In UNCLOS, the provisions regulating the high seas refer to '*... all parts of the seas that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State ...*'.¹²

The above definition includes other terms that need to be put in context to ensure the proper understanding of what constitute the high seas and thus ABNJ in general. The 'exclusive economic zone' (EEZ) is clearly defined in Article 55 UNCLOS as '*the area beyond and adjacent to the territorial sea*' which is governed by the legal regime set out in Part V of the convention ('Exclusive Economic Zone'). A fundamental distinction between areas defined as EEZ and ABNJ is set out in Article 56 which grants the coastal state '*sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources ... of the waters superjacent to the seabed and of the seabed and subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water*'. Essentially, EEZ belong to certain coastal states which enjoy the freedom to exploit their marine resources to achieve economic benefits; nonetheless, with '*due regard to the rights and duties of other States*'.¹³ In contrast, waters falling within the definition of ABNJ are to be freely enjoyed by the international community and no state can claim sovereignty or sovereign rights over them. This notion will be discussed in detail in section 2.2 below.

¹¹ Merrie et al (n 10)

¹² United Nations Convention on the Law of the Sea (UNCLOS) 1982, Art 86

¹³ Ibid, Art 56(2)

However, there are shared characteristics of EEZ and ABNJ when it comes to effective governance of their resources which is worth considering as they highlight the inherent difficulties of ocean governance. Indeed, while UNCLOS gives a very clear definition of EEZ and imposes rights and obligations on coastal states such as the duty to '*conserve and manage the[ir] living resources*',¹⁴ it does not provide further insight as to the ways to achieve appropriate resource management and how this may be monitored and assessed. Also, there is no mention of *sustainable* conservation which raises important environmental concerns. One justification could be that this was purposefully done so that the convention would not appear to interfere too much with state sovereignty i.e., not to impose too pervasive state legislation and as a result invite more states to ratify it.

Moving on, UNCLOS provides clear definitions on what constitutes the territorial sea and its components in Part II. According to the definition, the territorial sea is an extension of the sovereignty of the coastal state '*beyond its land territory and internal waters and, in the case of the archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea*'.¹⁵ This extension though has specific limits as '*Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention*'.¹⁶ Finally, the second component of ABNJ which is 'the Area' consists of '*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*'.¹⁷

2.2 THE EXISTING REGULATORY FRAMEWORK: SUCCESSES & SHORTCOMINGS OF UNCLOS

Since the mid-20th century the jurisdiction of coastal states expanded; yet, the gradual developments in the law governing oceans that have occurred since then have led to complicated and overlapping regimes.¹⁸ Extensive literature has been written in relation to the regulation of the oceans with researchers focusing on a variety of topics. It is a common understanding among all (including the international community) that the basic framework governing the oceans is covered by UNCLOS, as it is the international instrument which sets

¹⁴ UNCLOS (n 12), Art 73(1)

¹⁵ Ibid, Article 2(1)

¹⁶ Ibid, Article 3

¹⁷ Ibid, Art 1

¹⁸ Molenaar and Elferink (n 9)

out the legal regime for governing oceans and is considered to be the ‘constitution for the oceans’, covering all aspects of state interaction with the oceans and how these must be carried out.¹⁹ Article 192 sets out the fundamental obligation of states to ‘*protect and preserve the marine environment*’;²⁰ yet, it does not provide the mechanisms or process to conserve the environment in ABNJ, leaving its biodiversity in a vulnerable state.²¹

Additionally, the previous section referred to the ‘high seas’ as one of the elements of ABNJ and it was noted that one of the elements of ABNJ is that these areas are to be freely enjoyed by all states. This ‘freedom of the high seas’ is set out in Article 87 UNCLOS which must be enjoyed ‘*under the conditions laid down by this Convention and by other rules of international law*’.²² It is also significant to note that these freedoms are to be ‘*exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area*’.²³ Examples of such freedoms include freedom of navigation, scientific research and more. While the abovementioned sections rightly set out these freedoms, they fail to include any indication as to how their exercise within the limits of this convention and international law in general can be achieved. In other words, it does not indicate how effective regulation of the high seas can be achieved, which is another testament to the overall issue under discussion in relation to achieving effective ocean governance. As the wording of the convention includes that ‘all states’ enjoy freedom of the high seas, it logically flows that the regulation of the high seas can be achieved through the collaborative efforts of the international community.²⁴

Furthermore, UNCLOS sets out more states’ rights based on different maritime zones in Articles 2 (legal status of territorial sea), 56 (rights, jurisdiction and duties of the coastal state in the EEZ), 58 (rights and duties of other states in the EEZ) , 77 (rights of the coastal state over the continental shelf) and 89 (invalidity of claims of sovereignty over the high seas). However, it has been rightfully characterized as an ‘umbrella’ convention because it extensively covers a range of issues relating to the law of the sea but this leaves important gaps

¹⁹ Michael Shewchuk, ‘Findings of the First World Ocean Assessment on Fisheries and Maritime Transport and relevant UN Regulatory Frameworks’ (2016) United Nations Office of Legal Affairs

²⁰ UNCLOS (n 12) Art 192

²¹ IUCN, ‘Governing Areas Beyond National Jurisdiction’ <<https://www.iucn.org/resources/issues-briefs/governing-areas-beyond-national-jurisdiction>> accessed 05/07/2020

²² UNCLOS (n 12) Art 87(1)

²³ Ibid, Art 87(2)

²⁴ Molenaar and Elferink (n 9)

– also in relation to ABNJ protection and effective ocean governance – and so it needs additional detailed agreements.²⁵ An example of such gaps relates to the protection of marine biodiversity, specifically the protection of rare ecosystems, and to the fact that it does not provide any obligatory environmental rules for states to follow.

While the existence of an international regulatory framework should be considered a positive development for the protection of the marine environment; UNCLOS has significant shortcomings in establishing solid governance for ABNJ which has been described as an ‘incoherent and ineffective regime’.²⁶ It is worth noting that states have been negotiating a new international instrument under the UN Convention to close the ABNJ governance gap. This would be an *Implementing Agreement* to UNCLOS which would ‘provide a global framework for marine protected areas in ABNJ, ensure that states assess the impacts of potential harmful activities’ and would further support the inclusion of scientific research to promote the equitable sharing of the benefits of marine genetic resources.²⁷

It is worth expanding on the idea of the implementation agreement as it has been frequently featured in discussions for a more sustainable ocean governance model. One obvious point of view in relation to the agreement, is that it is questionable what more it could achieve. In other words, if UNCLOS alone is not able to achieve sustainable ocean governance because of the many problems and mainly state implementation, it is not clear how or why another written agreement would make a real difference. As the analysis will also show in the following chapters, the problem does not stem from a lack of legal framework but from the practical difficulties such as inadequate spread of technology among states and lack of financial resources. However, there still is value in such agreements as they can keep the conversation going within the international community and update practices based on modern technological developments. More specifically, topics such as marine genetic resources, area-based management tools, environmental impact assessments and capacity-building and the transfer

²⁵ Peter Ehlers, ‘Blue Growth and Ocean Governance – how to balance the use and the protection of the seas’ (April 2016) World Maritime University

²⁶ Wright, G. and Rochette, J., ‘Regional Ocean Governance of Areas Beyond National Jurisdiction: Lessons Learnt and Ways Forward’ (2019) STRONG High Seas Project

²⁷ IUCN (n 21)

of marine technology are issues that are constantly undergoing developments²⁸ and should be featured in any regulation implemented by states.

To this end, the UN General Assembly went on to adopt the Part XI ('the Area') Implementation Agreement which entered into force in July 1996 without however any impressive results in the actual implementation of this part of the convention.²⁹ In 2015, the UN General Assembly adopted Resolution 69/292 aimed at developing an international legally binding instrument under UNCLOS to achieve the conservations and sustainable use of marine resources in ABNJ.³⁰ The Resolution set out the steps to be taken in preparation of establishing this instrument such as a preparatory committee and an intergovernmental conference. Nonetheless, the resolution did not make any mention as to how to ensure the implementation of this legally binding instrument.

Again, while the above were positive developments and demonstrate willingness from states to cooperate to find a sustainable solution to the protection of ABNJ and the marine environment, it can be argued that it is doubtful whether yet another agreement would make a real difference. States may sign endless agreements which include declarations and commitments to secure the biodiversity of ABNJ but there is no guarantee that they will truly implement another Implementation Agreement or that this would achieve effective ocean governance. Potentially, by signing another agreement, states may feel they have fulfilled their duties towards the oceans and so they may continue to undertake marine activities in the same manner; essentially without making a real difference towards ABNJ protection.

Furthermore, in relation to the Area, Article 136 contains the principle of 'common heritage' whereby '*the Area and its resources are the common heritage of mankind*' and then Article 137 outlines the legal status of the Area and its resources, which forbids states from claiming

²⁸ Elisabeth Druel and Kristina M. Gjerde, 'Sustaining marine life beyond boundaries: Options for an implementing agreement for marine biodiversity beyond national jurisdiction under the United Nations Convention on the Law of the Sea' (18 December 2013) *Journal of Marine Policy* 49 (2014) 90-97

²⁹ UN General Assembly Resolution 48/263 'Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea' 10 December 1982 (A/RES/48/263)

³⁰ UN General Assembly Resolution 69/292 'Development of an international legally binding instrument under the United Nations Convention on the Law of the Seas on the conservation and sustainable use of marine Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.' 6 July 2015 (A/RES/69/292)

sovereignty over them. Also, any activities in the Area should be done for the benefit of mankind³¹ and with *'due regard to the rights and legitimate interests of any coastal State across whose jurisdiction such deposits lie.'*³² In effect this means that in undertaking certain activities within the Area they need to be for the 'benefit of mankind' which may include scientific research, archeological excavations and others. It is also important to highlight the legal status of the Area and its resources which is manifested in Article 137. The legal status is comprised by two principles. First, states cannot claim sovereignty over them and second, any rights in the resources of the Area belong to 'mankind as a whole' and minerals can only be extracted in line with the regulations of the Authority (see following paragraph).

Yet, the convention does not articulate the specific activities which it refers to, leaving their regulation a challenging task. It is only in Article 137(3) where there is direct mention to mineral activity and that states cannot claim any rights to minerals recovered from the Area. Interestingly though, UNCLOS establishes the International Seabed Authority ('the Authority') which binds all member-states and it is *'the organisation through which State Parties shall, ... organize and control activities in the Area, particularly with a view to administering the resources [therein].'*³³ Moreover, Article 145(b) requires the Authority to adopt rules, regulations and procedures for the prevention, reduction and protection of pollution and for the protection and conservation of the natural resources of the Area.

While this was another positive development because an international organization with specific purpose was created for the protection of the marine environment from the impact of mining activities in the Area; it has been argued that the Authority is not the ideal body to address these issues.³⁴ Those advocating in favor of this view tend to also be in favor of having regional treaties to regulate the protection of the marine environment and/or other international treaties that have been ratified, each of which is focused on regulating one particular topic. An example of such a treaty is the Convention on Biological Biodiversity (CBD) which deals with

³¹ UNCLOS (n 12), Art 140(1)

³² UNCLOS (n 12), Art 142(1)

³³ *ibid* Art 156; Art 157(1)

³⁴ Molenaar and Elferink (n 9)

conserving biodiversity, sustainable usage of resources and the equitable sharing of benefits arising from the marine resources.³⁵

In identifying further developments introduced by UNCLOS, it is worth mentioning other international bodies which were established besides the Authority.³⁶ Specifically, the International Tribunal for the Law of the Sea (ITLOS), the Commission on the Limits of the Continental Shelf (CLCS) and the Meeting of State Parties (MSP). These bodies represent positive developments because they can assist states in monitoring the oceans as well as state actions in relation to the marine environment. Holding states accountable or giving them incentives to examine their ocean policies in relation to ABNJ can lead to positive outcomes as this creates a system resembling that of ‘checks and balances’. If relevant actors can efficiently scrutinize state adherence to international ocean law, this could lead to more effective protection of marine resources in ABNJ. Yet, the downside of this argument is that this appears to be a more coercive and intrusive approach to state sovereignty which could be met with dissatisfaction and unwillingness to abide by UNCLOS and its established bodies. As a result, this could translate into failure to ensure state cooperation which can severely impact effective ocean governance.

3. CHAPTER 2: EXPANDING ON THE NOTION OF BUILDING AN INTERNATIONAL LEGAL FRAMEWORK

Having established the legal definition of ABNJ and the basic aspects of UNCLOS in chapter 1, this chapter attempts to further explain the need for an international legal framework that protects our oceans. While some may argue that this already exists, this section goes further than to merely recognise the existence of UNCLOS but tries to address the core issue: the reasons behind the lack of implementation of international legislation. In accepting this shortcoming, it logically stems to delve into another issue – whether coherent ocean governance for ABNJ can be truly achieved via legal means. If not, we ought to explore what other means (if any) the international community has at its disposal to succeed in protecting the marine environment.

³⁵ United Nations ‘Convention on Biological Diversity, key international instrument for sustainable development’ <<https://www.un.org/en/observances/biological-diversity-day/convention>> accessed 21/09/2020

³⁶ Shewchuk (n 19)

One of the most important questions that is yet to be addressed is how we can set up an effective legal framework for ABNJ that can strengthen the protection of our ecosystems through proper implementation. Therefore, we need to consider the role of international law in supporting sustainable ocean development. It has been rightly observed that two factors have affected the shaping of international law in relation to ocean governance: first, the common nature of ocean i.e. the fact that not one single nation has exclusive control over these waters; and second, the intensified human activity attributed to population increase, technological developments and increased consumer demand.³⁷ Consequently, it is obvious that national action on its own is insufficient to deal with these issues. This is where international law comes into play which forms the basis for sustainability in ocean governance, as the formality of the law demonstrates to each nation what is expected of it, allows for continuity and assists in avoiding arbitrary action.³⁸ However, it must be reinstated that while legal measures are necessary, they are not necessarily sufficient to effectively protect ABNJ; implementing relevant policies is also required.³⁹

3.1 THE ARGUMENT IN FAVOUR OF BUILDING AN INTERNATIONAL LEGAL FRAMEWORK FOR EFFECTIVE OCEAN GOVERNANCE

Therefore, it is necessary to have a legal framework within which marine activities must be carried out to ensure the protection of the oceans. In particular, ABNJ are home to unique ecosystems that are negatively affected by the factors mentioned earlier in the introduction and other human activities. It has been reported that in the past years, such activities in ABNJ have witnessed a rapid increase which puts at great risk the marine biodiversity which exists therein. To put things into perspective, one prominent human activity that severely affects these regions is shipping, as approximately ninety per cent of global trade is carried out by vessels crossing the oceans which highly increases risks of pollution, collisions with large sea animals and introduction of alien species.⁴⁰ Other threats including fishing activities which have expanded to the high seas (IUU fishing) and the exploration of mineral resources.⁴¹ All this demonstrate that there are significant heralds in achieving an effective legal framework for the regulation

³⁷ Kimball, Lee A, *International Ocean Governance: Using International Law and Organisation to Manage Marine Resources Sustainably* (2003) IUCN – The World Conservation Union

³⁸ Molenaar and Elferink (n 34)

³⁹ *ibid*

⁴⁰ Druel and Gjerde (n 28)

⁴¹ *ibid*

of marine activities in ABNJ which are framed around one main issue: the way to achieve effective implementation of ocean regulations.

As it was shown in Chapter 1, the international community has undertaken some steps towards attempting to implement the ocean legal framework. In addition, we must also consider another challenge which is the *incorporation* of international legislation into national jurisdictions. To end up implementing international legal rules, states must first enforce them within their domestic contexts. Therefore, the success of international law in addressing the regulation of ABNJ depends largely on the government of each state. Even though international seas and the seabed fall under international jurisdiction, this should not mean that they are considered as unlegislated regions. Rather, it should mean that the international community as a whole is responsible for the high seas because each state bears a responsibility to protect these waters.

Looking into the actions of the international community, in 2004 the Ad Hoc Open-ended Informal Working Group was established to study issues on the conservations and sustainable use of marine biological diversity in ABNJs.⁴² This is a useful mechanism working towards achieving the effective ocean governance for ABNJ as states came together to deal with governance issues, mainly the implementation gaps, discuss the establishment of a new instrument, local management tools and conduct environmental impact assessments.⁴³ In 2015, the UN General Assembly adopted resolution 70/235 on ‘Oceans and the law of the sea’,⁴⁴ which recognised and incorporated the first global integrated marine assessment.⁴⁵ In this more recent report, the position taken by this report is reinstated, i.e. the need to engage a variety of actors, and disseminate more knowledge in the efforts to protect the marine environment and so achieve effective ocean governance in ABNJ:

‘Emphasizing the need to strengthen the ability of competent international organisations to contribute at the global, regional, sub-regional and bilateral levels, through cooperation programmes with Governments, to the development of national capacity in marine science and the sustainable management of the oceans and their resources ...’⁴⁶

⁴² Kimball (n 37)

⁴³ Ibid

⁴⁴ UN General Assembly Resolution ‘Oceans and the Law of the Sea’ 15 March 2016 (A/RES/70/235)

⁴⁵ Ibid

⁴⁶ Ibid

Moreover, the report has a dedicated section on the ‘Implementation of the Convention and related agreements and instruments’ which invites states to ‘*harmonise their national legislation with the provisions of the Convention ...*’ and ‘*to improve the existing geographic information system for the deposit by States of charts and geographical coordinates concerning maritime zones, including lines of delimitation, submitted pursuant to this Convention ...*’.⁴⁷

Furthermore, there have been calls from EU reports that recognise the importance of enhancing the existing legal framework for ABNJ which would effectively lead to building a regulatory framework that will apply to new activities that have surfaced in recent years as the usage of marine resources has been changing. More specifically, it has been argued that there is a need for another legal instrument, linked to UNCLOS, which would have as its purpose to ensure the conservations and sustainable use of marine biodiversity in ABNJ by carrying out environmental impact assessments and establishing the legal status of marine genetic resources. Other existing legal gaps are linked with the new activities linked to oceans such as offshore renewable energy, deep-water hydrocarbon exploitation and seabed mining.⁴⁸ This is of particular importance as the global advancement of technology has introduced further means through which humans interfere with ABNJ; thus, making their regulation via legal means a necessity. The argument in favor of international law to regulate these activities and bridging the gaps – at least to the extent that it is realistically possible – is evidently that the international community considers that there needs to be a legal basis of measures upon which we can then build further to create a successful ocean governance framework for ABNJ.

3.2 THE PROBLEM WITH INTERNATIONAL LAW

The commitments made by the international community towards the SDG and consequently the establishment of coherent ocean governance for ABNJ are tied with a requirement to be in line with international law amongst other things.⁴⁹ One of the problems with this legal connection stems from the fact that predominantly, international law (and arguably law in

⁴⁷ UN Resolution A/RES/70/235 (n 45)

⁴⁸ EU Commission Joint Staff Working Document, ‘Synopsis on the outcome of the consultation on international ocean governance’ *Accompanying the document* ‘Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – International ocean governance: an agenda for the future of our oceans’ (Brussels, 10.11.2016) JOIN(2016) 49 final

⁴⁹ Molenaar and Elferink (n 9)

general) is preoccupied with land and thus, is far more advanced to deal with land rather than sea issues.⁵⁰ It is easier to establish regulations on land as it is something tangible and accessible, whereas the high seas and the marine resources cannot be understood easily by regulators. This is another reason why the collaboration of the international community with marine scientists is essential to achieve an effective governance framework. Counting only on the law cannot guarantee the success of the regulation of ABNJ.

Moreover, getting states to adhere to international law has always been a slippery slope. Even when legislation is drafted, international bodies are faced with the reluctance of states to recognize and admit the existence of a problem which must be addressed in this way. Therefore, states often do not ratify international legislation if it is too 'binding' i.e. if it imposes measures and legal rules that states must adhere to but go against their national interests. Furthermore, even if states ratify treaties, conventions, and regulations, this does not necessarily mean that they will proceed with the actual implementation and monitoring of the rules they have signed. In other words, implementing international law is problematic because it heavily depends on states' 'voluntary compliance'.⁵¹ It is for this reason that international legal regimes are often considered as 'soft law' meaning that they do not have a real impact on national legislation. However, states would secure benefits both for the short and the long-term if they could view such regimes as management tools and 'how-to' guides to implement their commitments,⁵² rather than threats to their national sovereignty.

This analysis brings up a conclusion which is reinstated throughout this thesis as it is a crucial one. Effective ocean governance cannot be achieved through regulation alone; there is a need for compliance which translates into effective implementation and enforcement.⁵³ Of course, the real problem is to find a solution as to how this can be a realistic and achievable aim. For instance, Chapter 2 extensively analysed relevant UNLCOS provisions which are meant to provide ocean governance through an international legal regime. But the true problems remain somewhat unanswered: how can we manage and how can we govern ocean affairs to achieve the UNCLOS goals. The supplementing agreements of UNCLOS (one implemented in 1994 and another in 1995) aimed to modify the ineffective rules and/or the ones that were not being enforced due to political reasons. However, it seems to remain a reluctance to balance the

⁵⁰ Molenaar and Elferink (n 9)

⁵¹ Henderson Conway W., 'Understanding International Law' Wiley - Blackwell

⁵² Kimball (n 37) 45

⁵³ Ehlers (n 25)

UNCLOS legal rules with the rights and obligations of coastal states. Another critique of the current legal framework is that it represents a sectoral approach which fails to recognise that ocean problems are closely interrelated and should be addressed via a common approach. The critique is based on the fact that UNCLOS regulates ocean-related activities (e.g. fisheries, the seabed, mining etc.) in a separate manner and there is little interplay between each sector which results in ineffective regulation.⁵⁴ Yet, the validity of this argument is questionable. While indeed these are all ocean-related questions which need to be addressed, the extent to which all these problems can be addressed by common policies is equally doubtful. It could be easier to merge legal policies for the sake of creating coherent regulation but that could potentially reduce their value and effectiveness in resolving the actual issues.

Ehlers in his analysis on these issues makes interesting and important remarks which are summarized below and are worth considering. As per the definition of ABNJ which has already been discussed, the seas are evidently not owned by a single state but belong to all and can be enjoyed in accordance with the provisions of the UN Convention. Consequently, it could be argued that if ABNJ belong to all states then they are all commonly responsible for governing the oceans and legislating in favor of their protection. But there is also a need for these legislative procedures to be monitored and this cannot be done by states themselves. In other words, states should not both be legislating for ocean governance and monitoring their compliance with the legislative rules. Instead, this process should be carried out by independent bodies to ensure accountability and transparency. This is potentially where international organisations could play an important role, examples of which will be shown in the following chapter. Additionally, the extent to which these organizations can truly improve ocean governance depends on whether states will truly embrace their work and their recommendations. If the UN General Assembly, the International Maritime Organisation (IMO - although this one is mostly dealing with regulating shipping and not the oceans per se) or any other international body preoccupied with sea matters only conclude numerous international agreements, leaving their implementation up to member states, then it is likely that ocean governance will not improve through international law. Possibly, ‘opening up’ the conversation to more actors such as non-governmental organisations and civil society to create a more democratic system of ocean governance could be a goal to work towards to. Also, granting more competencies to international organisations or increasing their financing to have the means to implement policies could also be an option. Once again, state cooperation and

⁵⁴ Global Ocean Commission, ‘Modernising ocean governance’ (2013) Policy Options Paper 10

willingness to effectively enforce UNCLOS provisions with a view to protect the oceans and using their resources for the benefit of all mankind is of key importance to achieve ocean governance.

4. CHAPTER 3: BRIDGING THE GOVERNANCE GAP THROUGH INTERNATIONAL COOPERATION

As it has already been mentioned, an interdisciplinary approach is needed to address the implementation issue, which will bring together national, regional, and global actors. Holthus articulated this in 1999 by highlighting that *‘The unique characteristics of oceans and coasts require that their sustainable development be addressed in a collective, comprehensive manner. At a minimum, there is a need for a global network to link business and industry with a stake in the future of oceans and coasts to ensure a more coordinated, comprehensive and proactive approach to the sustainable development of these areas.’*⁵⁵ This section provides a basic outline of the regional level mechanisms in the Europe area and international initiatives that have been formed to advance the protection of the marine environment. They can all be used by states to address the problem of safeguarding the biodiversity of ABNJ. It is essential to remember that one of the difficulties in solving the governance problem in ABNJ stems from marine resources belonging to mankind in general and so, to regulate marine activities the cooperation and agreement of different states is a requirement.

4.1 EXPANDING ON THE REGULATION AND GOVERNANCE PROBLEMS: THE EXAMPLE OF BIOPROSPECTING

Prior to examining one of the relevant topics on regional approaches to ABNJ, we must mention at least a few of the shortcomings of the current system, as the modernization of ocean governance requires first the recognition of these. While the literature written on the topic and the critiques are vast, the following points adequately summarise the issues at stake. The problems begin with states not conforming to the rules or not adequately implementing them. In addition, there are insufficient resources invested in monitoring and enforcement mechanisms and too much dependency on sectoral approaches. It is also argued that institutions are not yet well equipped to deal with governing ABNJ. Politics also play an important role as

⁵⁵ World Ocean Council (WCO) White Paper: ‘Ocean Governance and the Private Sector’ (June 2018), 4

political interests cause heralds in the implementation of legal rules, regional cooperation is not optimal and finally there is inequitable allocation of resources.⁵⁶

The above is a testament that this is truly a complicated topic that does not have a single solution. There are numerous examples of activities that are taking place within ABNJ which can be used to demonstrate the complicated nature of regulating ABNJ and to show that multi-level state cooperation seems to be the most realistic solution in bridging the ocean governance gap. Due to the space limitations of this paper it would not be possible to analyse all such activities. However, this section attempts to briefly present an example of one of these problems. So, one such issue is marine bioprospecting which is defined as the search for novel compounds from natural resources in the marine environment.⁵⁷ This activity belongs to the category of ocean activities in ABNJ that bring up issues of how we can conserve and sustainably use marine biological diversity in these areas. This is also a controversial topic because there appears to be a lack of governance and regulation in relation to bioprospecting in these areas and there is also an accessibility issue, as few states possess the technology to carry out bioprospecting.⁵⁸ Specifically, bioprospecting in ABNJ causes a problem because it is not properly regulated even though it should be due to its fast growth:

‘The marine realms contains a very rich variety of organisms, any of which remain undescribed ... Marine ecosystems are particularly suited for bioprospecting, a process that aims to identify and isolate natural compounds from genetic material ... the number of natural products from marine species is growing at a rate of four per cent per year.’⁵⁹

There are two issues one may observe in this case: first, we need legal provisions to clearly define how bioprospecting can work in ABNJ – possibly in line with the regulation of the Authority. It is interesting though to note that bioprospecting (or any other marine activity) could also be carried out by private actors, not states. It is therefore worth considering what happens in this scenario; specifically, whether private bodies would voluntarily abide by international law and international bodies such as the Authority to self-regulate their bioprospecting activities. Possibly, this may be an unrealistic as private actors have seldom

⁵⁶ Global Ocean Commission (n 55)

⁵⁷ Global Ocean Commission, ‘Bioprospecting and marine genetic resources in the high seas’ (November 2013) Policy Options Paper 4

⁵⁸ *ibid*

⁵⁹ *Ibid*

shown initiative to regulate their own operations, unless this does not affect their profit levels. Second, if states are to abide by the principle of common heritage then accessibility and usage of the high seas must be spread equitably among states. Having only a handful of states using advanced technology and benefiting from bioprospecting in the high seas seems like a fundamental breach of the concept of the ‘common use’ element of international law of the sea. Consequently, proper ocean governance could help ensure the extent that each state can benefit from bioprospecting and could set rules that require to share any benefits with the rest of the international community.

Nonetheless, it is evident that the above is easier said than done due to complexity of the issues that need regulation and due to the already mentioned argument – that it can be particularly challenging to ensure state cooperation. To be more specific, in relation to bioprospecting for instance, it is not even clear whether this activity falls under the jurisdiction of the Authority to regulate. It is clear however, that bioprospecting is one of the many examples of marine activities that require more rigid regulation and especially when it comes to ABNJ.

4.2 THE ROLE OF REGIONAL AND INTERGOVERNMENTAL MECHANISMS IN ENCOURAGING STATE COOPERATION

The previous section reinstated through an example that to effectively manage specific activities and to protect the marine environment, cooperation is a necessity. It is also important to remember that one of the goals of effective ocean governance is to ensure the sustainable use of marine resources found in ABNJ. This stems from international community’s commitment to the SDG and *The Future We Want* document which was mentioned in the introduction of this thesis. Building on these efforts, the 16th Global Meeting of the Regional Seas that took place in Athens, Greece in 2014 further developed the concept of sustainable development goals that emerged during the UN Conference on Sustainable Development in 2012. In the introduction of the document published it was clearly articulated that the social, economic, and environmental challenges our planet is facing are *‘interlinked and must be addressed through an integrated approach,’*⁶⁰ which is in line with the argument supported in this paper – i.e. that progress may be made if a variety of actors, states and stakeholders join forces and work together. While *The Future We Want* addressed numerous issues regarding

⁶⁰ UN Environment Programme, 16th Global Meeting of the Regional Seas Conventions and Action Plans ‘Sustainable Development Goals – Oceans’ UNEP (DEPI)/RS.16/INF.6.RS, 2

sustainable development, ocean-related outcomes had a prominent position in the document which speaks to the importance of their preservation for humanity's sake. But to be more specific in relation to the issues addressed in this thesis, the 16th Global Meeting of the Regional Seas particularly considered the role of the Regional Seas Conventions and Action Plans (RSCAP) which is important in the efforts to improve ocean governance in ABNJ through regional mechanisms. In other words, it was recognised that there is a regional dimension in the race towards sustainable development for the oceans. To be more precise, paragraph 98 states that: *'Regional frameworks can complement and facilitate effective translation of sustainable development policies into concrete action at national level.'* It was then also stated that *'... we urge these institutions [regional and sub-regional organisations] to prioritise sustainable development through, inter alia, more efficient and effective capacity building, development and implementation of regional agreements and arrangements as appropriate, and exchange of information, best practices and lessons learnt.'*

The document is interesting and added value to the potential pragmatic implementation of SDG in relation to ocean governance because it moved past than merely mentioning the set of goals for the international community. Instead, it considered and assessed in detail the ocean-related goals and considered which indicators (if any) could be given to monitor each one and ways that they can be implemented. This may seem encouraging; however, in breaking down the SDG to potential indicators one quickly realises that the chances of realizing these goals based on the indicators seems slightly unrealistic which is discouraging towards achieving sustainable ocean governance for ABNJ. This is because realizing these goals highly depends upon states' cooperation and the existence of political will to implement relevant policies. Unfortunately, common practice so far has demonstrated that this is difficult to achieve. Nonetheless, there is value in examining some of these indicators especially bearing in mind that they were published back in 2014 and the goals stated therein where originally meant to have been achieved by 2020, i.e. this year. Of course, this is still far from happening, but the international community and individual states should not put limits on working towards these goals which is why the indicators are worth considering, especially those that can assist in achieving effective ocean governance. We ought to mention though that the agenda of sustainable development goals has been updated to the '2030 Agenda for Sustainable

Development,’⁶¹ giving the international community more time to learn and gather the appropriate resources to address the sustainability of oceans and ABNJ.

It is worth mentioning and delving into one of the goals outlined in the 2014 document: goal 14.5 which states that ‘*by 2020, conserve at least ten per cent of coastal and marine areas, consistent with national and international law and based on best available scientific resources.*’ The indicators outlined for this goal were as follows: there must be political will to achieve this; 10 per cent is measurable but it is worthless if it is not effectively managed and monitored; it is feasible if the aim is only this ten per cent and there is sufficient financing.⁶² The document, importantly, outlined the RSCAP role in supporting member-states in implementing this goal and the others. The following are means through which the RSCAP can assist the states. First, setting national agendas and links to existing regional mechanisms and platforms; second, focus on capacity-building via the equitable distribution of technology; third, increase financing and lastly, monitor, report and further build on the existing regional mechanisms wherever this is possible.⁶³ Once again, it should be explicitly mentioned that these means of implementation are challenging to achieve. The actual adaptation of these policies and the acceptance of intervention by regional mechanisms continues to lay within the willingness of states to abide by international ocean law, provided they have recognised the importance of effective ocean governance.

4.3 EXAMPLES OF REGIONAL MECHANISMS AND THEIR WORK

It has already been mentioned that this dissertation has space limitations which does not allow for a complete analysis that mentions every single regional mechanism which is preoccupied with forwarding effective ocean governance in ABNJ and oceans in general. However, this section will demonstrate a few examples of such regional bodies that assist the international community in the efforts towards more effective ocean governance. To begin with, the European Environment Agency (EEA) has been set up to further promote sustainable ocean governance at multiple levels; internationally, regionally, and nationally. Its work is centred around supporting the European Commission in assisting member-states towards this goal and

⁶¹ Sustainable Development Goals Knowledge Platform, ‘Transforming our world: the 2030 Agenda for Sustainable Development’

<<https://sustainabledevelopment.un.org/post2015/transformingourworld>> accessed 02/10/2020

⁶² UN Environment Programme (n 61)

⁶³ *ibid*

also supports the UN 2030 Agenda for Sustainable Development which identified the conservation and sustainable use of the oceans, seas and marine resources as SDG 14.⁶⁴ This was a landmark development, as it is the first time that this issue was addressed among other pressing global problems.⁶⁵ The EEA helps further ocean governance by providing a strategic basis for data collection, assessments, and dissemination of information.⁶⁶ On an international level it collaborates with the International Council for the Exploration of the Seas (ICES) and participates in the Arctic Council's Working Group on Protecting the Arctic Marine Environment (PAME).

Moreover, if we look into the European area there are governance mechanisms (Regional Sea Conventions - RSC) which support regional sea protection and provide coherent and consistent marine assessments of specific regions.⁶⁷ These have been set up based on the different European seas with an aim to achieve preferable management. The seas in Europe are the Baltic, Black and Mediterranean Seas and the North-East Atlantic Ocean (including the North, Barents, Icelandic, Norwegian, Irish and Celtic Seas and the Bay of Biscay and the Iberian Coast). Accordingly, the RSC that have been set up are: OSPAR (Convention for the Protection of the Marine Environment of the North-East Atlantic); HELCOM for the Baltic Sea; Barcelona Convention for the Mediterranean Sea; and the Black Sea Convention (BSC).⁶⁸

The OSPAR Convention in particular, which is responsible for the protection of the marine environment in the North-East Atlantic ocean, has been identified by scholars as a regional convention framework which poses a promising example for state cooperation from which other states could learn. Under this convention, ministerial meetings have been conducted which have led to the adaptation of annexes; thus, creating a denser regulatory framework. One such annex related to the 'protection and conservation of the ecosystems and biological diversity of the maritime area.'⁶⁹ This was a positive development because it focused, amongst others, in protecting the marine environment by further regulating all aspects of human

⁶⁴ European Environment Agency (EEA) 'Ocean Governance' (2018)

⁶⁵ Ibid, 9

⁶⁶ Ibid, 6

⁶⁷ EEA (n 65) 9

⁶⁸ Ibid, 5

⁶⁹ OSPAR Convention 1992 Annex V On the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area'

<https://www.ospar.org/site/assets/files/1169/pages_from_ospar_convention_a5.pdf> accessed 26/08/2020

activities that could have a deteriorating effect in it. In this way, the convention urges member-states to collaborate to avoid sanctions. Based on this example, it could be argued that regulating ABNJ through regional conventions could better ensure the implementation of the rules because the international community can better monitor the situation by focusing on smaller ocean regions at each time. Also, OSPAR is innovative towards safeguarding ABNJ by implementing a process of identifying Marine Protected Areas (MPA) within ABNJ with an aim to address the issue of regulating human activities therein and establish a more coherent and holistic governance framework. The correct identification of MPA has been in the agenda of the international community since 2012; yet, there is still not a universally accepted definition because it has been challenging to come up with a definition in line with international law.⁷⁰ There is; however, a widely used definition which was established by the International Union for Conservation of Nature (IUCN) and reads as follows:

*'Any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.'*⁷¹

The above definition however is arguably vague, and this adds to the problem of effective regulation and appropriate governance. The problem remains that even if we accept this as a binding definition, it is still unclear who identifies these areas and who ensures their protection. Nonetheless, OSPAR's processes have been identified as positive ones towards a more coherent governance system. Whether it will be successful and thus form an example for other regional bodies to follow can only be shown through time.

As it is stated in the EEA Marine Roadmap, given that sixty per cent of oceans are outside of national jurisdiction, the EU action on international ocean governance has as its purpose to work based on the existing overarching UNCLOS framework. This reinstates once again the importance of cooperation on an international level which can then be diffused into regional management of specific areas to make oceans and their resources more realistically manageable. There are also important European and international bodies that have been set up to assist with marine scientific research. For instance, the EMODnet (European Marine

⁷⁰ Molenaar and Elferink (n 9)

⁷¹ *ibid*

Observation and Data Network) has brought together organisations which collect and process sea data and then disseminate the information. It is a particularly useful tool as it allows access to European marine data across sectors such as seabed habitats, biology, physics and chemistry.⁷² EMODnet is an ambitious effort towards unitizing marine data which will provide *‘a network of marine organisations that would provide a single entry point for accessing and retrieving marine data derived from observations, surveys or samples’* for the numerous existing databases.⁷³ Moreover, there is the ‘Marine Knowledge 2020’ initiative which is described as even more ambitious than the efforts of its predecessors in monitoring regional ocean governance and includes other services such as the European Earth monitoring programme (GMES), the Data Collection Framework in fisheries and the new pan-European research infrastructures identified by the European Strategy Forum for Research Infrastructures (ESFRI).⁷⁴

An interesting analysis on the topic of regional approaches is provided by Juan Luis Suarez de Vivero and Juan Carlos Rodriguez Mateos in their chapter ‘Marine Governance in the Mediterranean Sea’ which is examined under this section. Another region that is worth examining more closely for its approach towards sea governance is the Mediterranean Sea which is also linked to EU initiatives. What was observed was a shift from a multilateral approach to a regional one, mostly governed by the EU. The ‘packet’ of regional marine governance contained two key elements: the Action Plan (based on regulatory and legal mechanisms) and the EU itself i.e. EU policies. For the purposes of this thesis it is important to note that it is considered that thirty per cent of the Mediterranean (2,509,000 million square kilometers) belongs to the high seas and so the approach towards its ocean governance can be a useful example to follow. The UNEP Regional Seas Programme which was established in 1972 and the Mediterranean Action Plan which was signed in 1975 form the pioneering European initiative for ocean governance in the area. The two authors identify different maritime governance structures: legal, political, and economical; of which the first one is the most developed – arguably due to UNLOS, while the other two factors appear to pose problems for the proper implementation of effective ocean governance. As the authors observed, there have been significant developments of regional legal mechanisms; however, states which in

⁷² EEA (n 65) 9

⁷³ EU Commission, ‘Marine Knowledge 2020’ (Green Paper) Luxembourg: Publications Office of the European Union, 2012

⁷⁴ *ibid*

the end have to incorporate regional law into their national system, are not adequately equipped financially or technologically to successfully implement regional policies. Ultimately, the burden falls onto each state and the numerous executive powers that exist in the EU which is one of the most difficult problems to overcome.⁷⁵

Looking into the EU's approach in more depth there are further arguments to be made in favor of, what Maier and Markus described in their paper (2013) as 'regionalising ocean governance'. They identify the problems of ocean governance quite in the same way as most academics and scientists in their research: *'the interconnected nature of marine ecosystems, their fluctuating resources, the transboundary effects of human activities in the sea, as well as the lack of a comprehensive integrating framework for various existing sectoral marine conservation measures.'*⁷⁶ As a response, the EU drafted a regulatory framework to address the protection of the marine environment and consequently, all the problems that have been identified. This regulatory framework was named the 'Marine Environmental Policy' and it includes policies from different sectors each of which have their own regulatory framework based on secondary legislation. Some of the issues addressed include marine pollution and protection from over-fishing activities.⁷⁷ What is instantly evident is that this is yet another set of measures and policies adding to an already complicated structure of regional governance. Indeed, it can be easy for one to lose sight of the far too many policies, treaties, implementation agreements and many more regulatory measures that have been taken to address ocean governance in a regional manner. That is not to say that 'regionalising' the problem is not necessarily the correct way to go about it. Yet, it seems to be a valid argument that *too* many documents can hinder the resolution of the problem because they make it even more complicated than it already is. On the other hand, it can be argued that a complicated problem cannot have a non-complicated solution. A potential solution to this came with the Marine Strategy Framework Directive (MSFD) adopted in June 2008, which has been a key legal instrument for the protection of the

⁷⁵ Juan Luis Suarez de Vivero and Juan Carlos Rodriguez Mateos, *Chapter 11: Marine Governance in the Mediterranean Sea* from Michael Gilek, Kristine Kern (eds), *Governing Europe's Marine Environment: Europeanisation of Regional Seas or Regionalisation of EU Policies?* (2015) Ashgate Publishing

⁷⁶ Nina Maier and Till Markus, 'Dividing the common pond: Regionalising EU ocean governance' (2013) *Marine Pollution Bulletin* 67, 66-74

⁷⁷ *ibid*

marine environment across Europe.⁷⁸ The goal has been to create a framework within which all ‘Member states shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 the latest’ through a ‘transparent and coherent legislative framework which enables coordinated, consistent and properly integrated action under other Community legislation and international agreements.’⁷⁹

The EU’s regional response via the MSFD that was examined in the previous chapter has produced a very recent report (June 2020) adopted by the Commission, which assesses the progress of implementing the Directive and suggests the points on which the region should focus in order to move forward. Notably, the report was produced as a requirement of Art 20 of the Directive which reads:

‘(1) The Commission shall publish a first evaluation report on the implementation of this Directive within two years of receiving all programmes of measures and, in any case, by 2019 at the latest.

(2) The Commission shall publish further reports every six years thereafter.’⁸⁰

Reporting therefore should be continued in moving forward in accordance with the above Directive. Furthermore, the report’s findings revealed that the existing framework is rigid and aims high, but it must be enhanced even more in order to tackle the problems which currently are the most troublesome – mainly overfishing and unsustainable fishing practices, plastic waste, excess nutrients, underwater noise and the various types of pollution.⁸¹ There are two issues that we need to highlight in relation to the Directive and its approach. Of course, the added emphasis given in protecting the marine environment through these efforts is applaudable and should continue to be encouraged by the EU. Nonetheless, we need to bear in

⁷⁸ European Commission, ‘Our Oceans, Seas and Coasts: The Marine Strategy Framework Directive’ <https://ec.europa.eu/environment/marine/eu-coast-and-marine-policy/marine-strategy-framework-directive/index_en.htm> accessed 25/10/2020

⁷⁹ Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (26/06/2008) Official Journal of the European Union <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0056&from=EN>> accessed 25/10/2020, Art 1

⁸⁰ Ibid, Art 20

⁸¹ European Commission (n 79)

mind that directives are not as binding as regulations under EU law. The meaning of this is that states can adopt a directive, but they are free to incorporate it in their national legislations as they see fit which could essentially lead to non-compliance. EU regulations on the other hand have a more binding legal nature as states are required to precisely incorporate their rules into their legislative systems. What this shows is that regardless of the numerous policies adopted in the fight towards more effective ocean governance, the protection of our oceans is still not a top priority for states. The mere fact that this policy was a directive and not a regulation could be attributed to fears that states would protest to a legislation with a more binding nature. The second issue, is that the report does not refer at all to ABNJ and thus, it does not refer at all to the increased difficulties the international community is facing in addressing the protection of the marine environment in these areas. It is hoped that the next report that is meant to be published, albeit expected in a few years from now, will have recognised the importance of ABNJ and will provide a comprehensive analysis of how to protect these areas.

Nonetheless, the MSFD being also a recent development, has arguably contributed positively towards the improvement of ocean governance at least on a regional level. It has been repeated throughout the analysis that key to effective implementation is the proper coordination and collaboration of states which in essence requires a proper organisation model. Van Tatenhove et al have published an article explaining the different governance models that support this coordination and collaboration based on the MSFD model; their analysis being insightful but also quite vague which is not particularly helpful in resolving the problem of achieving effective state cooperation to bridge the ocean governance gap. They begin by explaining the ‘institutional building blocks’ which refer to outlining the decision-making process for the implementation of the MSFD as the Directive itself ‘*does not provide any legal nor institutional model, nor specific criteria on how to ensure effective stakeholder involvement*’.⁸² The authors identify these building blocks to be participation and decision-making; without explaining what this means in practice and without naming specific examples of who will be the participants and who will be the decision-makers. They merely go on to describe them as: ‘*the rules through which actors are involved and whether decisions are binding or non-binding. The process of decision-making refers to the way the decision-making process is organized, e.g. top-down-bottom-up; centralized -decentralised. [...]*’.⁸³ Evidently, the above

⁸² Jan Van Tatenhove et al, ‘Regional cooperation for European seas: Governance models in support of the implementation of the MSFD’ (18 March 2014) *Marine Policy* 50, 364-372

⁸³ Van Tatenhove et al (n 83)

phrasing is not specific at all and leaves the reader wondering what such actors would be. As mentioned, their analysis is indeed insightful but to ensure the future of regional (and international) ocean governance will be clear-cut rules which will ensure state coordination and the implementation of important policies such as those introduced via the MSFD.

4.4 INTERGOVERNMENTAL APPROACHES

Furthermore, the ICES which has been previously mentioned, is an intergovernmental organisation aimed at developing scientific knowledge on the marine environment.⁸⁴ It is extremely important for states to take advantage of this resource because the use of science can assist governments to take effective measures to protect marine environment and ecosystems. There is also the Intergovernmental Oceanographic Commission (IOC) that has been established since 1960 as a body within UNESCO, it is ratified by 148 member-states and runs various marine scientific projects and technology transfer. This is a powerful and well-respected body that can empower international and regional bodies which in turn can facilitate global and regional cooperation which can lead to the dissemination of information and knowledge on ABNJ. Additionally, organisations like this are useful because marine scientific research is considered the first step towards accessing marine genetic resources in ABNJ. Such mechanisms can help regulate the use of these resources in the high seas which would benefit the ocean governance framework. Of course, at the end of the day the key concept to improve the current situation is international cooperation, without which these mechanisms cannot be effective. This is needed because scientists can secure better access to ABNJ and also because they collect large volumes of data which need to be processed and managed appropriately, which arguably cannot be done as effectively by states acting on their own.⁸⁵

The private sector has also engaged in the efforts to strengthen ocean governance. For instance, the World Ocean Council (WOC) even though it was established as an NGO it brings together companies working in the ocean business *'to work together on the shared challenged and opportunities of ocean sustainable development [and] science'*.⁸⁶ More specifically, in relation to ABNJ, the WOC has taken steps to raise awareness and provide information to the business

⁸⁴ De Vivero and Mateos (n 76) 9

⁸⁵ Harriet Harden-Davies, 'Marine science and technology transfer: Can the Intergovernmental Oceanographic Commission advance governance of biodiversity beyond national jurisdiction?' (2016) Australian National Centre for Ocean Resources and Security (ANCORS), University of Wollongong

⁸⁶ WCO (n 56)

community on the UN process on UNCLOS Biodiversity and it has also been monitoring the situation and reports its findings to interested parties.⁸⁷

In taking an interdisciplinary approach to bridge the governance gap, it is important to recognise that many states and regions may not have the necessary resources to equally assist in the protection of ABNJ. Involving the private sector (e.g. shipping companies) in the efforts to protect marine biodiversity especially in these waters could be a positive development as they could assist in monitoring the situation and ensuring the ocean governance development are implemented.⁸⁸ Of course, this must be done with caution and parallel monitoring by UN bodies to ensure the honest approach of the private sector towards this goal. Also, it is an opportunity for the business sector to fully recognise the importance of ocean governance and that protecting the marine environment should be a priority for them as well as their business also depends on the oceans.

5. CHAPTER 4: MOVING FORWARD

So far, this thesis has not only explicitly analysed multiple issues in relation to the ocean governance problem the internationally community is faced with; but it has also looked into practical recommendations that could assist bridging the existing gap. It is important to remember that UNCLOS and any other legal instrument that the international community has or will put in place is effective only if states are willing to implement the rules contained therein. Further to what has already been mentioned, this chapter explores the changes and practices that states may realistically implement to ameliorate the situation of ocean governance in ABNJ. The purpose is to complete the presentation of this research by demonstrating the ways that could assist in setting up new mechanisms or developing further existing ones for ABNJ and their resources to be more effectively managed.

For the international community to take the correct steps forward it must consider that the viability our oceans and consecutively the preservation of ABNJ through coherent governance affects the world at a much greater scale. We must not forget that our oceans are '*an intensively used economic area which is becoming more congested daily*' and while states have designed

⁸⁷ WCO (n 56), 8

⁸⁸ Ibid, 9

EEZ and expanded their rights and jurisdiction in accordance with international law to exploit the area for economic purposes, the concept of ‘blue economy’ goes beyond of this.⁸⁹ This ‘blue economy’ which includes activities for the exploitation and exploration of the seas that can financially benefit people across the globe – and states of course – does not only exist within the limits of coastal states. It also includes the marine environment of ABNJ. More recently, the ‘European integrated maritime policy’ has demonstrated a holistic approach that both enhances the maritime industry and also protects the environment and societies as whole.⁹⁰ Such developments should definitely be considered by states as instructions to good policies that can assist in the appropriate implementation of UNCLOS and the existing governance framework. The way to move forward is to find a balance between the use and the protection of the seas. When it comes to ABNJ, we need to be especially wary of the five sectors that have high growth potential and so need to be central to any future regulation to ensure the abovementioned balance: aquaculture, blue tourism, marine biotechnology, ocean energy and seabed mining. The international community instead of trying to identify the limits of oceans and seas can focus on establishing clear rules on these sectors that most states can more easily follow.

Another issue that has been highlighted is that not all states have the same resources to assist in effective ocean governance. For example, as it has been discussed in previous chapters that not all states are equally technologically advanced. This brings up the issue of equitable sharing of marine resources that are acquired from ABNJ. Additionally, an important issue linked to this equal sharing of benefits and resources as mandated by UNCLOS and the ‘common heritage of mankind’ principle is the dissemination of data collected by international and regional organizations. It has been shown that bodies such as ICES and the EMODnet collect valuable marine data that can be of great value towards monitoring the state of the oceans. Such information can be used by states in collaboration with scientists to draw appropriate policies based on international ocean law. State collaboration can be ensured through a commitment to exchanging information and to develop best practices and agree on strategic guidelines while also setting a timeframe for their adoption.⁹¹

⁸⁹ Ehlers (n 25)

⁹⁰ *ibid*

⁹¹ EU Commission Communication (COM 2012), Blue Growth: Opportunities for Sustainable Growth

The technology issue described above is intricately linked to the need for marine scientific research. For such research to be effective, states should invest into the appropriate organisations so that the international community can acquire all the essential information in relation to the condition of ABNJ. Moreover, it has been suggested that marine research is also necessary to help develop any subsequent international legal documents which aim to the conservation and sustainable use of marine biological diversity. Efforts towards improving scientific research should be focused on key issues such as the transfer of marine technology among states and capacity development.⁹² On a positive note, this development is not deemed unrealistic. There have been suggestions of ways that can actually improve the sharing of research findings and available data. These include strengthening the IOC, furthering the cooperation between regional and international organisations like the OSPAR and HELCOM, creating international research alliance and synergies between research programmes and encouraging the dialogue between scientists and policy makers which can be achieved via holding international conferences.⁹³

Moreover, international and regional bodies can assist states by promoting education on oceans and marine resources. Of course, for this to be effective, countries must be willing to circulate such information to the public. Designing training programmes can also help with increasing capacity-building in states and awareness on the importance of protecting ABNJ. States should make use of the existing mechanisms and request reports from regional or international bodies which document the state of the oceans and can suggest tailor-made actions to states. One of the actions that the assembly should carry on with is to consult with states and stakeholders, both public and private, to develop holistic policies. This is the way towards achieving sustainable use of the marine resources in ABNJ through effective governance. To this end, states and relevant organizations should continue to regularly report and assess the state of the marine environment.

To add to the goal of filling in the gaps of the international ocean government framework, there must be better organisation and effectiveness which can be achieved via the encouragement of regional management of the seas and their resources. Scholars have also been advocating that other factors should also be born in mind while designing more efficient ocean governance

⁹² Harden-Davies (n 68)

⁹³ EU Commission Joint Staff Working Document (n 49)

policies. Such factors include the challenges of modern economies, societies, and political realities – all of these have already been recognised as driving forces behind the sustainable development goals. In moving forward, we must recognise that our oceans form a public good, a ‘common heritage’ which falls under the jurisdiction of the whole of the international community to protect and sustain for future generations. The ocean governance framework of the future should continue to be based on UNCLOS as it provides the basic legal rules, political processes, and institutional structures through which those rules are applied and enforced.⁹⁴

Another way for moving forward has been shown by the MSFD, which was analysed in the previous chapter and there is also the new EU Biodiversity Strategy for 2030 (adopted May 2020) which is aimed at restoring and strengthening the protection of marine ecosystems. The developments of the strategy that could enhance effective ocean governance for ABNJ include the expansion of protected areas as well as the establishment of strictly protected areas for habitats and fish stocks recovery.⁹⁵ More specifically, the strategy established a *‘larger EU-wide network of protected areas on land at sea’ ... with strict protection for areas of very high biodiversity and climate value.*⁹⁶ Of course, as the previous aims set out by the international community have shown these goals and aims are often not achieved within the years that they are supposed to. It is highly likely that this biodiversity strategy will not have achieved its goals by 2030 but it is certainly a very useful tool for regional ocean governance and it gives hope that better action will be taken in the upcoming years. All in all, any future framework should be built on the above which in essence means that there must be rules which can and will be implemented by each national government but based on cooperation of both states and institutions. The ultimate aim is to safeguard our seas and oceans, and this should remain the overarching purpose of any policy.

6. CONCLUSION

This paper demonstrated the existing legal framework that governs ABNJ and provided an analysis of the current ocean governance methods and their shortcomings. The ultimate purpose that this thesis hopefully achieved was to contribute to the ongoing conversation on how the

⁹⁴ Global Ocean Commission (n 58)

⁹⁵ European Commission (n 79)

⁹⁶ European Commission, ‘EU Biodiversity Strategy for 2030’

<https://ec.europa.eu/environment/nature/biodiversity/strategy/index_en.htm> accessed 25/10/2020

international community should further build on existing mechanisms to bridge the gaps in ocean governance practices. Making governance more effective can assist in improving the ‘health’ of our seas. This requires first a consensus that ongoing policies need further support to be effective; essentially, we need to recognise that change is needed. This is evident by the current deteriorating situation of the ocean environment with many scientists have highlighted. What the paper has shown, is that better ocean governance in ABNJ will ensure the sustainable development according to *The Future We Want* document and the commitments of the international community to the sustainable development goals.

The research has clearly presented that the implementation of the existing international legislation that aims to protect ocean biodiversity is a challenging task. Where each state’s jurisdiction finishes and we enter the high seas and ABNJ, it is more difficult to protect the marine environment as states are often reluctant to recognise and act based on their legal duties imposed mainly by UNCLOS. To summarise what needs to be done, the international community should work together to achieve the effective implementation of legal rules by ensuring compliance and improved enforcement. Regional and international cooperation respectively, through the works of various mechanisms can strengthen ocean governance in ABNJ. These factors must be kept in mind when the international community and various regulating actors attempt to address the challenges and must be the driving forces behind recommendations made and/or followed. Nonetheless, it should be born in mind that as the analysis showed, there are factors that can hinder the achievement of the goal of a more effective ocean governance framework such as political interests and inadequate financing.

To take effective action, states must be exposed to the appropriate expert scientific knowledge, but they also need to demonstrate willingness to abide by the instructions of marine scientists and adopt their recommendations. The current situation could change via the proper implementation of law and policies and enhanced compliance which should form the backbone of any such recommendations. But they should also be largely based on promoting the technology and meeting demands of resources because they must target and address the true problems without however contrasting the already established framework of UNCLOS. In order to resolve the issue, states must cooperate and engage multiple actors into the efforts to overcome existing barriers. Much of the literature supports that this interdisciplinary approach could be the solution. Academics and scientists suggest an increased ‘interdisciplinary dialog’

which will involve the academic community, policy actors and the private sphere which could lead to outcomes that consider all aspects at stake.⁹⁷

To conclude, there is a final remark that must be stated although it could be understood as an implied conclusion stemming from the analysis presented. The overarching problem of effective ocean governance in ABNJ is that it may very well be the case that there is not a solution to it. The chapters above have presented various topics linked to the issue in significant detail; yet the reader can easily observe that the complicated nature of the problem leaves the international community with tied hands. Regardless of strengthening the legal frameworks and incorporating the recommendations, getting states to work together so closely for a common aim is extremely difficult and it may never be wholeheartedly achieved. This realization though, is not something that should discourage the efforts made – on the contrary, being realistic about the true nature of the problem faced by our oceans can help design and implement the correct policies that could realistically be implemented by states. Another issue that surfaced during the research stage was that although the literature is vast, not that many sources explicitly address the ocean governance problem from the lens of ABNJ. It is the author's hope that this paper achieved its purpose of adding some value to the future research on the topic by reinstating the need to look into ABNJ as the next priority for effective ocean governance. By putting these chapters together in this sequence, the aim to provide the overview of the existing situation and critique some of the literature in order to concentrate into specific points that could help the international community to move forward. At the end of the day, the effective management of ABNJ has only positive results for the whole of the international community and for each individual in our planet respectively, as we are all benefiting on way or another from the extremely diverse range of ocean resources.

⁹⁷ Merrie et al (n 10)

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