CHAPTER 1

Areas beyond National Jurisdiction – Looking at and beyond the BBNJ Process

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1 Introduction

Considering developments in the law of the sea in recent times, an edited volume on areas beyond national jurisdiction (ABNJ) might strike one as not being overly original. However, as editors of this volume we believe that the particular focus we have adopted, which is further addressed in section 3 of this chapter, distinguishes the current work from much of the academic literature on this topic. Before considering that point, we believe it however pertinent to provide the reader with some primers on the term 'areas beyond national jurisdiction' as employed in the modern law of the sea (section 2). After these two sections, we provide the reader with an overview of the individual chapters that make up this volume in section 4 of this chapter, which is followed by some brief concluding remarks in section 5.

2 Locating Areas beyond National Jurisdiction in the Law of the Sea

The term 'areas beyond national jurisdiction' has only recently made its appearance in the law of the sea. A search for the term in the WorldCat database,[1] which was accessed through the website of the Library of the Peace Palace,[2] gives no hits for the period 1950–2000, 89 hits for the period 2001–2010 and 351 hits for the current decade.[3] However, compelling as they may be, what do these figures actually tell us?

1 According to Wikipedia, WorldCat 'itemizes the collections of 17,900 libraries in 123 countries and territories … The subscribing member libraries collectively maintain WorldCat's database, the world's largest bibliographic database' see <https://en.wikipedia.org/wiki/WorldCat> accessed 16 December 2020 (footnotes omitted).

2 *Peace Palace Library; The international law library* available at <www.peacepalacelibrary.nl/> accessed 16 December 2020.

3 Moreover, of the 89 hits for the period 2001–2010, 84 hits concern the period 2005–2010. A search for the acronym 'ABNJ' commonly used for the term 'areas beyond national

The ocean beyond national jurisdiction of coastal States, in the modern law of the sea, with its inception in 17th century European colonial expansion, was first identified by the term 'high seas'. Traditionally, the high seas compromised most of ocean space, except for a narrow band of territorial sea, for which most States claimed a breadth of 3, 4 or 6 nautical miles. As detailed in chapters 2, 4 and 5 of this volume, the second half of the 20th century witnessed a gradual demise of the spatial extent of the high seas and a gradual curtailment of the freedom of the high seas. Coastal State jurisdiction over the water-column was extended to 200 nautical miles and, in the case of the continental shelf, beyond that distance, provided the relevant conditions of Article 76 of the United Nations Convention on the Law of the Sea (LOSC) are met. The freedom of the high seas has been restricted in two ways. First, by declaring the seabed and ocean floor and the subsoil beyond national jurisdiction (Area) to be the common heritage of mankind (CHM).[4] Secondly, as is discussed in further detail in a number of the chapters that are to follow, high seas freedoms are currently accompanied by increasingly stringent regulation to *inter alia* sustainably manage resources and protect and preserve the marine environment. Still, the high seas and the Area collectively remain a vast expanse. One study from 2011 indicates that the oceans cover 335 million square kilometers, of which 130 million square kilometers are part of the exclusive economic zone (EEZ) and continental shelf within 200 nautical miles from the baselines of coastal States. In addition, the continental shelf beyond 200 nautical miles from the baselines covers some 28 million square kilometers of ocean space.[5] This implies that the water column beyond national jurisdiction actually covers 205 million square kilometers and the Area 178 million square kilometers, or respectively about 61 and 53% of the surface area of the oceans. In addition, it should be realized that the volume of these areas, due to their greater average water depth than that of areas within national jurisdiction (AWNJ) covers an even greater part of the world's oceans.

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jurisdiction' resulted in zero relevant hist for the period 1950–2000, 7 for the period 2001–2000 and 131 for the current decade.

4 UNGA Res 2749 (XXV) of 17 December 1970.

5 See Tina Schoolmeester and Elaine Baker (eds), *Continental Shelf; The Last Maritime Zone; Status in Sept. 2010* (UNEP/GRID-Arendal 2011) 16. It may be noted that the latter figure only concerns the continental shelf beyond 200 nautical miles in respect of which coastal States have submitted (preliminary) information in accordance with LOSC art 76. A number of States with significant continental shelf areas beyond 200 nautical miles, including Canada, Denmark and the United States had not submitted such information in 2011, indicating that the actual area of continental shelf beyond 200 nautical miles is more than 28 million square kilometers.

As the references to 'beyond the limits of national jurisdiction' included in resolution 2749 (XXV) and the LOSC indicate,[6] the bifurcation between areas within and beyond national jurisdiction obviously was already recognized by the law of the sea prior to the coining of the term 'areas beyond national jurisdiction'. The use of this term, however, is not without problems. First, the reference to 'national jurisdiction' in both terms is to coastal State jurisdiction. In that sense, the term 'areas within national jurisdiction' to a certain extent is a misnomer, as coastal States only have limited sovereign rights and jurisdiction in the EEZ and the continental shelf, while other States have primary jurisdiction over certain activities in these zones. The term 'areas beyond national jurisdiction', although expressing the absence of coastal State jurisdiction, otherwise could be said to be misguided. Control over activities in the high seas and the Area largely remains based on the exercise of jurisdiction by the flag State over vessels flying its flag.[7] Second, it may be noted that the Revised Draft Agreement provides that 'Areas beyond national jurisdiction means the high seas and the Area'.[8] Part VII of the Convention implies that high seas regime applies to the continental shelf beyond 200 nautical miles.[9]

Notwithstanding LOSC's reference to ABNJ as seemingly constituting a single ocean space, and although it contains some recognition of the ambition expressed in its Preamble 'that the problems of ocean space are closely interrelated and need to be considered as a whole',[10] the Convention mainly approaches the high seas and the Area as distinct areas, in which activities are mostly regulated on a sectoral basis.[11] In that sense, the current recourse

6 The LOSC uses the wording 'beyond the limits of national jurisdiction' in two instances, namely in the 6th preambular paragraph, which refers to resolution 2749 (XXV) and art 1(1)(1) which defines the Area as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'. In addition, art 142(1) and (2) of the LOSC respectively refer to mineral recourses 'across limits of national jurisdiction' and mineral resources 'lying within national jurisdiction'.

7 In practice the absence of effective control and exercise of jurisdiction remains one of the main challenges to the sustainable use and conservation of the high seas and the Area. See also Ringbom (ch 11) in this volume.

8 Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (17 November 2019) (UN Doc a/conf.232/2020/3) (Revised Draft Agreement) available at <https://undocs.org/en/a/conf.232/2020/3> accessed 27 July 2021, art 1(4).

9 For a further discussion of how the law (of the sea) has grappled with the complexity of the ocean environment, and, as is argued, has failed to come up with a fully satisfactory answer, see De Lucia in ch 2 of this volume.

10 LOSC 3rd preambular paragraph.

11 In light of the drafting history of the LOSC, that approach in relation to the high seas and the Area could be said to represent a more than logical outcome. The ideological

to the term 'areas beyond national jurisdiction' could be said to be more than a convenient shorthand for referring to the high seas and the Area. Rather, it reflects a recognition of the need for a common approach to governing this part of ocean space. This reflection is borne out by the current negotiations on the agreement on the conservation and sustainable use of marine BBNJ. The four thematic elements addressed by the agreement (area-based management tools (AMBTs) including marine protected areas (MPAs); environmental assessments; marine genetic resources (MGRs); and capacity building and transfer of technology) all are equally relevant to the high seas and the Area. Obviously, a common approach to both areas in a future agreement on the conservation and sustainable use of marine BBNJ does not in itself achieve a coherent governance regime for the oceans. First, as regards ABNJ themselves, the agreement will be an add-on to the existing regime. This for instance implies maintaining the existing jurisdictional scheme, based on flag state jurisdiction, with its all too well-known limitations as regards effective control of activities taking place on the high seas.[12] Second, a future Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement) will consolidate the existing division of the oceans in areas within and beyond national jurisdiction.[13] The current negotiations on that agreement demonstrate the tenacity with which coastal States defend their interests in relation to their maritime zones. This remains a major obstacle to achieving an integrated ecosystem-based approach to ocean governance.[14]

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divide between developed and developing States, with the latter espousing the new international economic order and the common heritage regime in relation to the Area and its mineral resources, and the latter intent of safeguarding traditional high seas freedoms, made a common approach to both areas problematic.

12 See also Ringbom (ch 11) in this volume.

13 On the use of the term 'BBNJ Agreement' and related terms see below, section 3.

14 For an excellent discussion of the different aspects of the relationship between areas within and beyond national jurisdiction see Tullio Treves, 'Principles and objectives of the legal regime governing areas beyond national jurisdiction' in Alex Oude Elferink and Erik J Molenaar (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Brill 2010) 7–25, 8–12. Treves among others observes:

> Why are States insisting to act on the basis of the 'high seas only' approach? The reasons are ideological and historical. State sovereignty is seen as the supreme value: any idea that could question recently obtained and hard fought extensions of it are considered with suspicion and rejected offhand by a substantial number of States. In the present situation of the world, the vast majority of States does not seem to be ready to consider rules – and, even more so, institution-based management – that could be perceived as taking away parcels of their newly-acquired sovereign rights and jurisdiction over adjacent seas. The very LOS Convention, notwithstanding the many nuances one can find in its provisions, is seen by most States as the consecration of the coastal State approach (ibid 12).

See also De Lucia (ch 2) in this volume.

3 A Brief Primer to Recent Developments in Relation to the Legal Regime for ABNJ

The legal regime of ABNJ has received much attention in the last decade. As noted above, the issue currently is primarily considered at the intergovernmental conference (IGC), which has been convened ty the United Nations General Assembly (UNGA) to negotiate the agreement on the conservation and sustainable use of marine biological diversity of ABNJ. This process was initiated under the aegis of the UNGA in the early 2000s, and is also referred to as the BBNJ process. The negotiating agenda is comprised of four main items: ABMTs, including through the establishment of MPAs; MGRs, including the sharing of benefits arising from their utilization; environmental impact assessments; and capacity building and technological transfer.[15]

15 As is also indicated by the discussion in the chapters included in this volume, developments in relation to the legal regime of ABNJ have also taken place and will continue to take place beyond the remit of the BBNJ process. A good point in case is ch 11 by Ringbom, discussing developments in relation to flag State jurisdiction, an issue that will likely not be developed upon in the BBNJ Agreement at all. For recent literature on the BBNJ process see eg. Robert Blasiak and others, 'The role of NGOs in negotiating the use of biodiversity in marine areas beyond national jurisdiction' (2017) 81 Marine Policy 1; Robin Warner, 'Strengthening Governance Frameworks for Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction: Southern Hemisphere Perspectives' (2017) 32 International Journal of Marine and Coastal Law 607; Kristina Gjerde and others, 'Conservation and sustainable use of marine biodiversity in Areas Beyond National Jurisdiction: Options for underpinning a strong global BBNJ Agreement through regional and sectoral governance' (2018) STRONG High Seas Project 17 available at <www.prog-ocean.org/wp-content/uploads/2018/08/STRONG-High-Seas-Policy-Brief_Options-for-underpinning-BBNJ-agreement.pdf> accessed 21 May 2021; Penelope Ridings, 'Redefining environmental stewardship to deliver governance frameworks for marine biodiversity beyond national jurisdiction' (2018) 75 ICES Journal of Marine Science 435; Margaret A Young and Andrew Friedman 'Biodiversity Beyond National Jurisdiction: Regimes and Their Inter-action' (2018) 112 AJIL Unbound 123; Vito De Lucia, 'The Ecosystem Approach and the negotiations towards a new Agreement on Marine Biodiversity in Areas beyond National Jurisdiction' (2019) 2 Nordisk miljörättslig tidskrift/Nordic Environmental Law Journal 7; David Freestone 'The UN Process to Develop an International Legally Binding Instrument under the 1982 Law of the Sea Convention: Issues and Challenges' in David Freestone (ed), Conserving Biodiversity in Areas beyond National Jurisdiction (Brill 2019); David Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction' (2019) 99 Marine Policy 21; Joanna Mossop, 'Dispute Settlement in the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction' (23 December 2019) NCLOS Blog available at <http://site.uit.no/jclos/files/2019/12/J-Mossop-Dispute-Settlement-in-the-BBNJ-Treaty-NCLOS.pdf> accessed 12 May 2021; Alex G Oude Elferink, 'Exploring the future of the institutional landscape of the

At the global level, the issue also has been on the agenda of the Conference of the Parties to the Convention on Biological Diversity (CBD).[16] Regional seas conventions and regional fisheries management organizations in a number of regions also have been paying increasing attention to the protection and preservation of the marine environment in ABNJ. However, most regional seas conventions remain focused on AWNJ and regional fisheries management organizations primarily remain focused on managing and conserving the fish stocks covered by their mandate and not the wider ecosystem.

These legal developments have been largely caused by advances in scientific knowledge and the development or expected future development or intensification of economic activities. The growing attention for ABNJ has raised the awareness that there are legal and regulatory gaps, which have been the main driver for the BBNJ process.[17] The controversies that emerged within the context of the ongoing BBNJ process offer a useful map of the divisions within the international community with respect to some of these issues,[18] which we have used in connection with the definition of the research focus of the project and the topics of its individual chapters.

At this point, we would like to provide the reader with a brief introduction to the use of the terms 'BBNJ process' and 'BBNJ Agreement' and related terms. The term 'BBNJ process' is used to loosely refer to the process that has its origins in the activities of the CBD and the UNGA in relation to BBNJ, and which culminated in the ongoing negotiations on a future BBNJ Agreement. Apart from the term 'BBNJ Agreement' much of existing literature instead refers to the Internationally Legally Binding Instrument under the United Convention on the Law of the Sea, using the acronym ILBI. For this volume, we have opted not to use this term, in light of the fact that there currently are two negotiating text of the BBNJ Agreement, prepared by the Ambassador Rena Lee, the

oceans beyond national jurisdiction' (2019) 28(3) Review of European, Comparative & International Environmental Law 236.

16 The relationship between the role of the UNGA and the CBD is further considered in ch 7 of this volume. Convention on Biological Diversity (signed 5 June 1992, entered in force 29 December 1993) 1760 UNTS 79 (CBD).

17 See eg, Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting Letter dated 29 June 2004 from the Co-Chairpersons of the Consultative Process addressed to the President of the General Assembly (UN Doc A/59/122 of 1 July 2004).

18 See for example, Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (UN Doc A/AC.287/2017/PC.4/2).

president of the IGC on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.[19] Those text do not title the agreement as an 'ILBI', but use the terminology on which we based our choice for the acronym BBNJ Agreement. The current volume does employ the term 'ILBI', in case this is called for by the specific context. Where specific refence is made to the two negotiating texts prepared by Ambassador Lee, the current volume refers to them as respectively the Draft Agreement and the Revised Draft Agreement.

4 Research Focus of the Current Project

A legal research project on ABNJ at this point in time necessarily will have to devote considerable attention to the BBNJ process. However, the project casts a significantly wider net than the negotiating agenda of the IGC, reflecting on broader theoretical questions, and questions that are not explicitly on that agenda but are nonetheless important for understanding the challenges that the legal regime for ABNJ may pose to the law of the sea. These include, for example: questions of principle such as that related to the role of the CHM in the legal regime for ABNJ; governance[20] and management questions related to the role of ecosystem approaches in a future BBNJ Agreement; questions related to the role of coastal States in relation to ABMTs and MPAs in ABNJ; and questions related to the appropriate institutional architecture for the governance of ABNJ, including the role of existing bodies and institutions vis-à-vis a global body that may, or may not, be set up under future BBNJ Agreement.

19 Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (17 May 2019) (UN Doc A/CONF.232/2019/6) (Draft Agreement) available at <https://digitallibrary.un.org/record/3811328?ln=en> accessed 27 July 2021.

20 Brian C Chaffin, Hannah Gosnell, and Barbara A Cosens, 'A decade of adaptive governance scholarship: synthesis and future directions' (2014) 19(3) Ecology and Society Art 56. To provide some guidance on the notion of governance, we refer to Chaffin, Gosnell and Cosens (at 1) who submit that 'environmental governance' refers to a 'set of regulatory processes, mechanisms and organizations through which political actors influence environmental actions and outcomes' and that 'environmental governance is the system of institutions including rules, laws, regulations, policies and social norms, and organizations involved in governing environmental resources use and/or protection'.

Importantly, different legal principles, regulatory perspectives, and institutional solutions are underpinned by different and at times conflicting social constructions of global ocean spaces and of ABNJ in particular. As Philip Steinberg observed in his book *The Social Construction of the Ocean*, the ocean is

> a space that simultaneously is constructed as a fecund (and/or endangered) space of nature, an empty space that facilitates movement, a frontier suitable for expropriation and territorialization, an arena for scientific research, a force-field for military adventures, and a laboratory wherein alternative futures are imagined and practiced.[21]

These different constructions in turn reflect and are used to justify particular legal visions and regimes: CHM, freedoms of the high seas, sovereignty, environmental stewardship, scientific cooperation. Some of these constructions may also co-exist and compete, as evident in the ongoing discussions regarding MGRs, located at the intersection of multiple and conflicting views about ocean space and its resources.[22]

Against this backdrop and in light of current developments in relation to the legal regime for ABNJ, the present book aims at offering an in-depth consideration of the following questions:

- competing constructions of the oceans, and of ABNJ in particular, and their role in the creation and articulations of legal principles;
- the legal principles underpinning the legal regimes of ABNJ and their role in the development of those regimes;
- the legal regimes applicable to ABNJ and the challenges they face;
- the spatial dimensions of the legal regimes applicable in ABNJ; and
- institutional architectures, interplays and conflicts in ABNJ governance.

On the basis of these issues, the editors in turn mapped a set of four themes that frame the project:

- *justice* – understood in terms of access to and utilization of marine resources, living and non-living, both in relation to the intra- and the inter-generational dimension;

21 Philip Steinberg, *The Social Construction of the Ocean* (Cambridge University Press 2001). This summarizing quotation is taken from Steinberg's own website, see <https://philsteinberg.wordpress.com/research/ocean-space/> accessed 30 July 2021.

22 See further chs 2, 4, 6 and 9 in this volume.

– *space* – broadly speaking with reference to the way space is understood and regulated in the law of the sea with regards to ABNJ. This theme also invites individual contributors to look at ABNJ from a series of non-doctrinal, socio-legal perspectives, such as eg law and geography;
– *knowledge* – this theme is intended to capture knowledge in its various dimensions, eg as expressed in the political epistemology embedded in law of the sea, marine scientific research and the right to science, the role knowledge, or its lack, plays in the construction of legal principles and regimes; and
– *power* – this theme centers on the ways power is distributed and how it affects decision-making in relation to ABNJ, the distribution of rights and obligations, jurisdiction over ocean areas as well as activities, and participation in the relevant legal and governance processes.

These themes were selected as each in a different yet complementary manner enables a contextual analysis of the law of the sea, its emergence, its biases, its impacts. Additionally, these themes allow assessing the environmental and socio-economic outcomes that the current and proposed law applicable to ABNJ (will) produce(s). What interests are served by the law, who and what is left out and how might different approaches lead to different outcomes?

From the outset, the editors acknowledged that these themes would traverse the chapters differently, not necessarily being equally relevant to all of them. What is to be underlined though is that by operating as a framing that traverses the entire book, these themes would ensure a coherent set of chapters that justifies their publication as part of an edited volume. Additionally, these themes will allow the chapters to be read together rather than as separate discussions of broadly related issues, and to extract some general trends, ideas and reflections related to the future of ABNJ governance, which provide the basis for a substantive concluding chapter.

5 Introduction of the Individual Chapters

Based on the key issues presented above, the editors identified a list of specific topics and invited contributing authors. We asked our authors to consider how the topic under consideration in their chapter related to questions and themes identified in section 4 above. As we explained in that connection, the current project was intended to cast a significantly wider net than the negotiating agenda of the IGC. At the same time, in light of the centrality of the BBNJ process to the development of the regime for ABNJ, we asked the authors to also

reflect upon the question how the topic under consideration in their chapter related to the BBNJ process, and if so, how?

Vito De Lucia in chapter 2 explores the role of the circular relation between sovereign legality and 'territorial thinking' on the one hand, and a cartographic understanding of space on the other, in the construction of ocean commons as spaces that fall outside of the scope of sovereign power. The chapter offers a problematization of territorial thinking and the sovereign spatial ordering of the sea that it underpins, with the aim of opening a conversation on other ways to think the sea, law, space and, ultimately, about ocean commons.

Chapter 3 by Nigel Bankes explores the application of Hohfeld's idea of fundamental legal concepts to the LOSC and the Draft Agreement on the conservation and sustainable use of marine BBNJ. As Bankes concludes, the importance of a Hohfeldian approach to the BBNJ process is that it helps us focusing on how the law defines relationships and in this way helps us to look beyond 'superficially conclusory labels', of which the term 'areas beyond national jurisdiction' is yet another example, as should also be apparent from the discussion in section 2 above.

In chapter 4, Tore Henriksen maps key past and current debates on the regime of the part of the oceans beyond coastal State jurisdiction. As is also pointed out by Henriksen, this debate has received considerable attention in the law of the sea literature. However, this history remains an essential background to understanding the current debate on ABNJ, and the chapter is one of the first attempts to include the BBNJ process in a long view on the history of the law of the sea.

Lan Ngoc Nguyen in chapter 5 examines the development and application of the principles of freedom of the high seas and CHM in order to understand the balance to be struck between individual freedom and collective interests in ABNJ. Nguyen argues that given the narrowing gap in the application of the two principles, at least in terms of resources, they can no longer be viewed as opposing principles, but are now aligned along a gradient of fading differences. As a result, the governance regime for ABNJ need not be overly concerned with the issue of which guiding principle should prevail but should rather focus on the collective interests that need to be protected based on the consideration of equity.

In chapter 6, Margherita Paola Poto confronts the current State-centered vision of ocean governance based in the LOSC with an ocean rights perspective. Although the latter perspective might seem distant from the actual trajectory of the BBNJ process, which remains firmly grounded in the State-centered vision, it does provide an alternative frame to investigate the failure of the current law to achieve ocean sustainability.

Chapter 7 by Alex Oude Elferink and Baine Kerr considers how the BBNJ process came about and focusses on developments in the framework of the UNGA and the CBD, which both have addressed the four thematic issues covered by the BBNJ process. What explains the central role of the UNGA and might a process driven by the CBD have resulted in a different approach?

In chapter 8, Oude Elferink considers how the relationship between ABMTs and MPAs in ABNJ has developed in general terms in relevant global frameworks, starting from the LOSC up to the current negotiating text of a future BBNJ Agreement. The chapter next considers developments in a number of specific regimes, to see how they compare to the developments in the relevant global frameworks discussed previously. The chapter argues that the existing regime of ABMTs and MPAs is permeated by a sectoral approach and that ABMTs in legal terms are therefore 'favored' over MPAs, hindering a holistic approach to the protection and of the marine environment.

Science is essential to producing knowledge about the oceans and shaping decisions about its governance regime and the sustainable use and conservation of ocean space and its resources. Chapter 9 by Elisa Morgera considers the relationship between the regime for science in the law of the sea and the human right to science. The chapter argues that to achieve an equitable regime for ABNJ, it is essential to have a regime for marine science that is fully aligned with the right to science.

In chapter 10, Richard Barnes takes fisheries in ABNJ as an example of how the 'development of a legal regime for ABNJ is closely bound up with wider social, political and economic concerns'. Fisheries nowadays is by far the human activity in ABNJ that impacts most on the sustainable use and conservation of biodiversity in these areas. At first sight, there would seem to be every reason to bring fisheries under the purview of a future BBNJ Agreement. However, fisheries interests have largely succeeded in keeping this activity outside the BBNJ process, making the question how this exclusion is justified by legal and non-legal arguments of particular importance.

As was also observed above, a future BBNJ Agreement will be based on the existing jurisdictional framework contained in the law of the sea and public international law generally, implying the primacy of flag State jurisdiction in relation to activities in ABNJ. In that light, Henrik Ringbom in chapter 11 considers the nature and extent of flag State jurisdiction and how other forms of jurisdiction may complement flag State jurisdiction, where it fails to sufficiently protect the common concern of the international community in ABNJ. Another key feature of a future BBNJ Agreement will be its institutional architecture. The main issue is how the newly created architecture of a future BBNJ

Agreement will relate to existing institutions dealing with issues and activities in relation to BBNJ. This issue is addressed by Kristine Elfrida Dalaker in chapter 12, who, applying Elinor Ostrom's theory of polycentric governance, concludes that 'an [expanded regional seas program as defined in the chapter] … would likely meet Ostrom's institutional design principles, resulting in a robust set of institutional arrangements for the conservation and sustainable use of marine biodiversity in ABNJ'.

The provisions on dispute settlement to be included in a future BBNJ Agreement until now have received limited attention at the IGC. As the analysis by Joanna Mossop in chapter 13 points out, although compulsory dispute settlement under the LOSC has shown to have a potential to clarify the law also as regards ABNJ, the nature of ABNJ and legal relationships pertaining to them also point to the limitations of compulsory dispute settlement in this respect. Mossop considers in particular how these problems might be overcome and *inter alia* considers the options of giving the Conference of the Parties to a future BBNJ Agreement the power to request advisory opinions and make use of non-compliance procedures, which are commonly used in multilateral environmental agreements.

In chapter 14, the editors look at the main commonalities and variations in relation to the themes that we identified in the preceding chapters. Apart from revisiting the four themes, chapter 14 also reflects on a number of other issues that we consider deserve separate mention in the concluding chapter of a book dealing with the legal regime of ABNJ, namely, firstly, the relationship between ABNJ and AWNJ, and, secondly, the future development of the regime for ABNJ, including the question what role a future BBNJ Agreement might play in this respect.

6 Concluding Remarks

With the draft of future BBNJ Agreement still under consideration at the IGC, a book on the regime of ABNJ might seem to be untimely. However, we are convinced that much of what is discussed in the present volume will remain current in the years to come. As is explained in the preceding sections, the focus of the volume is not solely on the negotiation of the future BBNJ Agreement, but rather seeks to (also) paint the broader picture of the legal and extra-legal considerations that have shaped the regime for ABNJ, as well as to open novel conversations. As should already be apparent from this introductory chapter,

a future BBNJ Agreement, although it likely is the last major elaboration of the LOSC and will play a key role in the governance of ABNJ, will at the same time operate as part of the law of the sea and public international law generally, and hence has to be viewed in that broader context.