

The Legal Regime of Areas beyond National Jurisdiction Viewed through the Lenses of Power, Knowledge, Justice and Space

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1 Introduction

When we embarked on the journey that eventually brought us to this concluding chapter, we as editors had some general idea about what might be expected in terms of outcomes in relation to the four themes of the project that we had selected, ie power, knowledge, justice and space.¹ Having read and commented upon all of the chapters of our contributors on various occasions, we are fully convinced that this was a journey worth undertaking. All contributors, through the analysis of their individual topics, offer their own perspective on the themes. In doing so, the individual chapters both display commonalities and variations. In this concluding chapter we cannot possibly do justice to the rich harvest that our contributors have to offer, nor do we need to do that. The chapters are there to be read. What we do want to do in this concluding chapter is look at the broader picture. What are these main commonalities and variations in relation to the themes that we identified? Apart from revisiting the four themes, the current chapter also intends to reflect 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 areas beyond national jurisdiction (ABNJ). These issues are linked to the four themes of the book, but by also considering them separately we will be able to add more focus and detail. As a consequence, the remainder of this chapter is set up as follows. Section 2 revisits the themes of power, knowledge, justice and space. The themes are first discussed separately, while the final subsection looks at their interlinkages. The chapter finishes with two other issues that come up throughout the chapters of this volume. Section 3 looks at the relationship between ABNJ and areas within national jurisdiction (AWNJ), while section 4 considers the future

1 On the selection of these themes see Introduction, this volume, and especially section 4 therein.

development of the regime for ABNJ, including the question what role a future agreement for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ Agreement) might play in this respect.²

2 Revisiting the Themes of Power, Knowledge, Justice and Space

2.1 *Power*

As a social construct that is shaped by human action, law reflects in many and variable ways the distribution of power and interests in society. As was set out in the introductory chapter to this volume, we asked our contributors to reflect on the way power is distributed and how it affects decision-making in relation to ABNJ, and to consider how the distribution of rights and obligations, jurisdiction over ocean areas as well as activities, and participation in the relevant legal and governance processes play out in ABNJ. Individual chapters discuss how power operates during the negotiation of rules and after they have become the operational framework for ocean governance, as well as more broadly how power may determine the particular ways in which oceans are conceived, mapped, delineated, regulated and governed. The exercise of power is however often tempered by other considerations, such as ethical aspirations, political compromise or material limits. For example, the need to reach a broadly acceptable regime often requires addressing equity and fairness to a larger extent than powerful States might otherwise be willing to accept, while the need to reach a legitimate regime may lead to more inclusive decision-making procedures.³ Yet power relations and the balance between conflicting interests remain ultimately contingent on political compromise. Material and ecological limits are not always taken sufficiently into consideration precisely in light of the politics of international law making.

2 There are two draft texts to date: 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; 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.

3 On the issues of fairness and legitimacy in international law and decision making see eg, Thomas M Franck *Fairness in International Law and Institutions* (Clarendon Press 1995).

Once in existence, rules, while reflecting an existing power structure, may also be used by less powerful States as an additional tool to advance their interest.⁴ As the discussion in various chapters demonstrates, the development of (principles of) environmental law and a greater awareness of the environmental degradation threatening ABNJ have been central contributing factors towards the initiation of the BBNJ process, which is seeking to curb the power of individual States to unilaterally exploit the ocean. At the same time, the slow pace of the BBNJ process and in particular the strong opposition to bring fisheries under the remit of the BBNJ Agreement, as discussed by Barnes in chapter 10, illustrate that the power of States with major maritime interests remains a key driver for developing, or stalling the development, of the regime for ABNJ.

De Lucia in chapter 2 explores the entangled relation between law, power and space and how (sovereign) power underpins a particular spatio-legal imagination that is crucial for the construction of ocean space, and for the delimitation of ocean commons more particularly. The lasting impact of power on ocean law is detailed by Henriksen in chapter 4 of this volume. Mapping the debates that have emerged in the law of the sea, he shows that the power play has always had a clear bearing on the development of the law of the sea, specifically with regards to the regime for ABNJ. In particular, major maritime States strived to maintain the freedoms of the high seas for centuries, because they provided them with ample access to space and resources. The entry into the world community of new and mostly developing States who were proponents of community interests – or on a more cynical note, one might say, who used community interests and equity language to promote their own interests – provided the required support for the development of the common heritage of mankind (CHM) regime abrogating the regime of freedom of the high seas in relation to mineral resources. Nguyen in chapter 5 further observes that power continues to play a prominent role in the current negotiations on the BBNJ Agreement. As is detailed in various chapters, the interests of individual States or groups of States in using (the resources of) ABNJ continue to be the dominating driving force behind the discussions. As Nguyen further argues, the rift between, once again, developed and developing States regarding the principle to be applied in ABNJ, particularly with regards to marine genetic resources (MGRS), casts doubts over whether the BBNJ Agreement will eventually pursue

4 See further Shirley V Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' 1994 (5) *European Journal of International Law* 313.

the goal that it was set out to achieve, i.e., the conservation and sustainable use of BBNJ.

Chapter 13 by Mossop illustrates the above-mentioned nuanced impact of power in the operation of legal regimes. The chapter discusses the impact of power dynamics both on the inclusion of a compulsory dispute settlement system in the United Nations Convention on the Law of the Sea (LOSC)⁵ and on individual disputes. Mossop argues that the development of a robust dispute settlement process was possible because the interests of all States converged to a large enough extent. The set-up of Part XV means that less powerful States can engage with more powerful States on an equal footing and be able to hold them accountable to the rules reinforced by an international system based on justice and the rule of law. At the same time, more powerful States are assured that there is a clear, relatively efficient, process for resolution of tensions. The fact that highly sensitive disputes were excluded from compulsory jurisdiction provided reassurance to both powerful and less powerful States that they would retain control over the outcome of vital issues.

In chapter 7, Oude Elferink and Kerr through a study of the relationship between the United Nations General Assembly (UNGA), the LOSC and the Convention on Biological Diversity (CBD),⁶ illustrate the power of international institutions and their interactions on the framing of legal issues and the development of the legal regime for BBNJ. The central role that the UNGA has played in the BBNJ process resulted in a stronger focus on LOSC than the CBD, resulting in the development of the BBNJ Agreement under LOSC, and not the CBD. The appeal of the UNGA for elaborating the regime of BBNJ lies in its central role in international policy making in relation to oceans and law of the sea. At the same time, the relevance of the CBD and international environmental law more generally for the BBNJ Agreement, can be seen in the institutional arrangements of the Agreement, which are more akin to a multilateral environmental agreement than the LOSC. In chapter 8 Oude Elferink engages with the theme of power from the angle of decision-making power under LOSC in respect of MPAs and ABMTs. As he observes, the LOSC provides sectoral bodies with the competence to adopt ABMTs in relation to the specific activities they are competent to regulate, but it does not create a similar competence to identify, designate and manage marine protected areas (MPAs). In that sense, the division of decision-making power under the LOSC made the development

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

6 Convention on Biological Diversity (signed 5 June 1992, entered in force 29 December 1993) 1760 UNTS 79 (CBD).

of a comprehensive approach to the protection and the preservation of the marine environment in particular in ABNJ problematic.⁷ Whether a future BBNJ Agreement will be successful in addressing the absence of a competence to holistically manage MPAs remains to be seen, but the requirement of consistency with the LOSC and the apparent deferral to existing bodies and instruments through the ‘not-undermining’ requirement does not bode well and may well further cement the existing power imbalance between user interests and non-user interests. That same imbalance is also teased out in other chapters of this volume. For instance, Barnes in chapter 10, after discussing Ranganathan’s analysis of how the regime for the Area, focusing on mining interests, has muted other voices, discusses how a future BBNJ Agreement may or may not create similar imbalances. Poto in discussing decision-making power, in chapter 6 calls for a rebalancing of the division of power between decision-makers, arguing that procedural rights for nature and the rights of nature should be acknowledged and enshrined in a future BBNJ Agreement. She argues in particular that such a recognition should result in an alternative approach to Part IV of the current Revised Draft Agreement on environmental impact assessments (EIAs), which gives States the last word on the final decision, and thus the power to accept or dismiss the opinion of non-State actors on the environmental impacts of the activity under review. In a sense, chapter 6 draws attention to giving or returning power to the ocean, for it to be heard, to be represented and not merely be used as an object under the hands of humans.

2.2 *Knowledge*

Under the theme of knowledge, we invited our contributors to reflect upon the role 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 that knowledge, or the lack thereof, plays in the construction of legal principles and regimes. As the preceding analysis indicates, the production of and access to knowledge or absence thereof has been critical to shaping the legal regime of ABNJ and its implementation. Knowledge about the mineral resources of the deep seabed provided an important impetus for the negotiations of what eventually became Part XI of the LOSC. The absence of knowledge about life in the deep sea, and its potential economic

7 This is less of an issue in AWNJ, because the coastal State has regulatory competence in relation to most activities and may unilaterally establish MPAs that allow regulating all of the activities concerned. At the same time, the division of competences between government agencies may lead to similar issues of coordination as those existing at the international level.

value, resulted in the LOSC not making any specific reference to the regime for the exploration and exploitation of those resources. Knowledge about these resources that became increasingly available in the 1990s led to the inclusion of the topic of access and benefit sharing of MGRs in the BBNJ process package. Knowledge will be essential to the implementation of all elements of that package as a part of a future BBNJ Agreement.

Knowledge as a tool for organizing our world view and assigning meaning has had a fundamental impact on our legal ordering of the ocean. As detailed by Henriksen in chapter 4, the conception of the ocean as a boundless space beyond the control of sovereign States provided an underpinning for the regime of freedom of the high seas as initially advocated by Grotius. As argued by De Lucia in chapter 2, the subsequent extension of coastal State jurisdiction through processes of territorialization, which found its culmination in the LOSC, and still casts a long shadow on the BBNJ negotiations, prevented a meaningful engagement with the materiality of the ocean. This approach, as he points out, is based on a western tradition of international law for ordering individual polities through territorial boundaries and sovereign legality. As a counterpoint to this position, Poto in chapter 6, discusses the key role played by indigenous knowledge in realizing ocean-centrism and ocean protection and using that knowledge as a building block for ocean-centered governance. To that end, the chapter proposes, among others, integrating a specific reference to the rights of nature and to the rights of the ocean in particular, tying rights of nature to duties and obligations of States and communities to protect and restore the marine environment. In addition, it is suggested that there is a need of revisiting the adoption of certain terms that reflect Western ideological hegemony of the human domination over nature.

Banks in chapter 3 demonstrates, through the application of Hohfeld's idea of fundamental legal concepts to the LOSC and the current Revised Draft Agreement, how legal science may offer a clearer understanding and constructing legal relationships. The chapter views the LOSC as a power-conferring instrument, but considers that it uses terms that are not precise enough to convey the different types of relationships between different actors and observes that the Revised Draft Agreement is built upon this imprecision. Banks calls attention to the need to use more precise language to avoid future controversy about the implications of treaty language. Similar lessons may be drawn from chapter 10, in which Barnes submits the legal regime of ABNJ to a constructivist analysis. As he argues:

international law plays a critical role in constructing ocean space, but that an insensitive use of international law can limit the possibilities for

the more effective governance of oceans space and limit the opportunities for certain interests to feed into debates and decisions about how to regulate activities in ABNJ.

A third example of the relevance of producing knowledge about possible formats for governance of ABNJ is offered by Dalaker's use of Ostrom's model of polycentric governance to investigate the role of regional environmental management regimes in chapter 12.

Several chapters acknowledge that the ever-changing nature of knowledge and increased knowledge provide the impetus for the development of the legal regime for ABNJ. For example, Ringbom in chapter 11 argues that future measures that may be taken by non-flag States to protect BBNJ will be mainly in the domain of ex-post enforcement measures, which may be made possible and develop due to technological advances leading to the availability of information to a broader circle of actors than previous was the case. Oude Elferink and Kerr for their part in chapter 7 detail that increased knowledge about resources in the Area, as well as ecologically or biologically significant areas (EBSAs), for example, helped garner support for the creation of a specific regime for ABNJ. Similarly, Henriksen in chapter 4 argues that increased understanding of the existence and the condition of the resources in ABNJ, such as of ocean biodiversity and ecosystems, and new knowledge concerning MGRs and their potential, drove the negotiations on and underlie the stalemate on the regime to exploit these resources. The question as to who is or should be the holder of knowledge is thus important in the governance of ABNJ. Chapter 8 by Oude Elferink indicates that knowledge is central to the identification, establishment and management of MPAs and areas-based management tools (ABMTs). Again, this makes it critical to establish what extensive a knowledge base is required, who holds that knowledge and/or is responsible for gathering it, and how it will be disseminated.

Morgera's chapter 9, linking the current development of the regime for BBNJ to human rights law and specifically the right to science, urgently illustrates the importance of an integrated approach to the production and sharing of knowledge. Framing ocean science and knowledge as a human rights issue, and not exclusively as a law of the sea issue, leads to a fundamentally different understanding of how the relevant legal framework for the sustainable use and conservation of BBNJ might and should be structured. It may be noted that there is a parallel with the interaction between the law of the sea and environmental law. For instance, as a number of chapters argue, the institutional architecture of that Agreement should not emulate that of the LOSC, but

rather should take shape by borrowing from the knowledge base relating to the institutional architecture of multilateral environmental agreements.

As Morgera reiterates, deep-sea knowledge allows for enhanced understanding of the need for, and effectiveness of, conservation and sustainable use in ABNJ. However, in practice, there is only a restricted number of countries that can afford the costs and risks of deep-sea research vessels and therefore can control who has access to that source of knowledge. This situation is particularly detrimental for the ongoing BBNJ process. Morgera argues that all the topics under negotiation are underpinned by science and science plays a crucial role to support the assessments of cumulative and transboundary impacts on marine biodiversity, which makes the creation of broad access to knowledge a much-needed innovation of a future BBNJ Agreement.

2.3 *Justice*

The theme of justice for this project was specifically operationalized in terms of access to and utilization of marine resources, both in relation to the intra- and the intergenerational dimensions of justice. Framed in this way, this theme pervades the entire history of the law of the sea. Attributing access rights to specific actors implicitly denies those rights to others. This is done by the operation of specific rules of law, such as the attribution of sovereign rights over the resources of the exclusive economic zone to individual coastal States—to the exclusion of the international community, or is the result of how specific rules work out in practice. The freedoms of the high seas benefit those that have the capabilities to effectively make use of them, calling into question intragenerational equity. More recently, the law of the sea has come to grapple with the need to balance use of the ocean with its preservation, bringing the intergenerational dimension of justice to the fore.

The intra- and intergenerational dimensions of justice are considered in a number of chapters. In chapter 5, Nguyen argues that while high seas freedoms and CHM may be converging, justice – or the lack thereof – remains the core difference between the two principles. The need for equitable access to resources is not a major concern in the distribution of fisheries in the high seas, whereas the collective interests that CHM purports to protect are much more grounded in considerations of justice, manifested in the involvement of developing States in the administration of mining activities, equitable sharing of benefits amongst stakeholders, and the protection, conservation, and preservation of marine biological diversity for the interests of future generations. In relation to the BBNJ process, Nguyen submits that the current Revised Draft Agreement focusses to a much greater extent on intragenerational equity. The focus on benefit-sharing mechanisms, without incorporating the broader

implications of CHM, moreover, moves the discussion back to interests of individual States.

Aspects of inter- and intragenerational equity are also discussed in chapters 7 and 8. Remarking on the relationship between the LOSC and the CBD, Oude Elferink and Kerr in chapter 7 argue that the two conventions are aligned as regards inter- and intra-generational and environmental justice by incorporating these concepts through the subsequent development of general international law. That obviously does not exclude the possibility that both conventions in their implementation of specific rights and obligations will yield different outcomes on these parameters. In this connection, it may be noted that the authors argue that the CBD represents a broader vision of ocean justice, implying a recognition that the freedom of the high seas needs to be regulated in line with this objective. In chapter 8 Oude Elferink addresses the need to safeguard and rebuild a healthy ocean for future generations through ABMTs and MPAs. In light of tensions between the future sustainability of the ocean and actual user interests, the chapter calls for a meaningful voice to be given to future generations, while also admitting that this is a difficult task, given the current power structure of international law. In addition to giving a voice to future generations, Poto in chapter 6 argues that in order to operationalize justice meaningfully, it would be important to give representation to nature in the form of participatory rights for nature, both in decision-making and in access to justice system on behalf of nature.

Morgera in chapter 9 deals head on with the theme of justice. After discussing the vital role that knowledge of the deep sea plays in the conservation of ABNJ, Morgera points out the existence of an equity gap in deep-sea knowledge production, which disproportionately affects the opportunities of countries in the Global South to influence the further development of the law of the sea. Against that background, Morgera proposes recourse to the notion of fair and equitable benefit-sharing as part of the ecosystem approach in order to address equity concerns in the production of ocean science. She argues that the twin expression 'fair and equitable' makes explicit both procedural dimensions of justice (fairness) that determine the legitimacy of certain courses of action, as well as substantive dimensions of justice (equity). The notion of fair and equitable benefit-sharing is reflected through the lens of the human right to science, which focuses on the agency for developing countries, as well as indigenous and local knowledge holders and seeks to co-identify more equitable modalities for international scientific cooperation for the protection and full realization of other human rights with an emphasis on the vulnerable.

In chapter 13, Mossop considers how compulsory dispute settlement mechanisms and reporting and compliance mechanism may contribute to delivering

justice. Due to its (mostly) bilateral nature, compulsory dispute settlement is able to render justice in the individual case, but is less suitable for addressing issues of justice in a multilateral setting, including the protection of common interests. As, however, also is clear from Mossop's argument, bilateral dispute settlement under the LOSC in a number of instances has clarified the law in relation to the protection and preservation of the marine environment in a way that is conducive to contributing to furthering intra- and intergenerational justice. She further argues that approaches other than traditional dispute settlement could be included to increase the 'justice' available in cases where bilateral disputes are infeasible or impractical. Options that could be entertained are allowing a BBNJ Agreement Conference of the Parties (COP) requesting an advisory opinion or the establishment of NCPS. The experience with advisory opinions in the framework of the LOSC suggests that these might play a similar role under a future BBNJ Agreement. Depending on how they will be set up, reporting and compliance mechanisms may also have an important role to play in that respect.

2.4 *Space*⁸

ABNJ refers to a four-dimensional space that exists in physical reality. At the same time, ABNJ is a legal construct that poorly reflects that reality. Under current international law, ABNJ constitute those parts of the ocean that are not enclosed within the limits of national jurisdiction. The implications of that spatial fragmentation of the ocean are discussed in various chapters of this volume and will be further considered in section 3 below. Time, the fourth dimension of ocean space, also confronts the law, with its shortcomings. As was pointed out in the preceding section, the current law remains poorly equipped for dealing in a satisfactory manner with balancing current use with long-term sustainability.

Turning more specifically to ABNJ, they consist of commons areas underpinned by the concept of *res communis*. However, the legal regimes that regulate these commons areas differ, namely freedom of the high seas and CHM. These principles illustrate a different balance between individual freedom and collective interests that are struck in the high seas and the Area. However, as argued by Nguyen in chapter 5, the challenges posed to these two principles by the development of the law of the sea over the past decades have resulted in a narrowing gap between high seas freedom and CHM, and requires a shift in the regulatory approach which moves away from individual freedom to

⁸ The theme of space is also (implicitly) revisited in section 3 below.

ensuring collective interests. In addition to the law of the sea, as argued by Oude Elferink and Kerr in chapter 7, developments in international environmental law, particularly the CBD's emphasis on community interests further downplay the role of individual high seas freedoms, leading to a tendency to unify ocean space beyond national jurisdiction.

It is submitted that the larger emphasis on community interests would justify a new approach to ocean governance in ABNJ. Several chapters engage with this question from different perspectives. In chapter 11, Ringbom challenges the understanding that ABNJ is a space largely reserved for exclusive flag State jurisdiction, and discusses different legal bases for the exercise of non-flag State jurisdiction in ABNJ. Ringbom further argues that a future BBNJ Agreement would offer the opportunity to strengthen and clarify the role of non-flag States in order to ensure that ABNJ represent a shared concern, which currently is not protected sufficiently by international law. To what extent a future BBNJ Agreement will address this issue remains to be seen, and the likelihood exists that clarification and development of the law will mainly take place through State practice and the jurisprudence.

From a broader perspective, Dalaker in chapter 12 sees ABNJ as a space for testing a polycentric approach to governance, particularly Ostrom's theory of polycentric governance to help determine the optimal distribution of power and knowledge across levels of governance. As she argues, ABNJ are a space in which a patchwork of global, sectoral and regional agreements exists in a fragmented manner, both substantively and spatially. Thus, a polycentric governance model could be used for ensuring the long-term health and sustainable use of these areas. Also calling for a more inclusive model of governance, Poto in chapter 6 advocates for 'ocean-centered governance' which places the oceans in the center to replace the current State-centered system with its emphasis on the sovereign rights of States. The chapter develops ocean-centered governance within a participatory-constructed frame which recognizes the ocean as an inseparable part of life on Earth, a natural space that in itself needs to be respected for its intrinsic value, and not regarded merely as a host for resources that may be exploited for human consumption. Echoing the call to move from State-centric or sectoral approaches, Barnes in chapter 10 argues that the law has an important role to play in structuring social interactions in ABNJ. However, at the same time, law risks marginalizing certain interests and tends to ignore the material space of the ocean, ie, by ignoring the physical values of the ocean. Barnes sees a future BBNJ Agreement as a chance to newly define the frame for social interactions for ABNJ and to that end, calls for that Agreement to connect the law with the material condition of ocean space and for inclusive processes for governing ANBJ. At the same

time, he cautions that a future BBNJ Agreement stands the risk of maintaining or further exacerbating the structural shortcomings of the ABNJ regime that is 'not structured in a way that drives a holistic, integrated construction of social space in ABNJ'.

Finally, space is the central dimension of chapter 2. Bringing together law, power and space, De Lucia discusses how international law is underpinned by a 'cartographic' understanding of space, which 'as a science of map-making and as a technology of power' has been crucial for how ocean spaces, and ocean commons, are understood and constructed by sovereign legality. A 'cartographic understanding of ocean commons', De Lucia suggests, 'reflects and refracts a fundamental spatio-legal ordering' that 'proceeds' from territorial thinking. 'Law of the sea', De Lucia continues,

is permeated by such territorial thinking, and indeed has developed through increasing incursions and projections of territorial sovereignty into oceanic spaces. Thus, sovereignty has been all along the arbiter of the commons, it has been the crucial lens for deciding what the commons are (spaces outside of sovereignty) and where they are (beyond the limits of sovereign space).

Sovereign legality, observes De Lucia, 'has in other words *always* negatively defined the commons through its absence'. De Lucia however aims at problematizing such cartographic spatiality and sovereign legality, and at opening a 'conversation on other ways to think about ocean commons'.

2.5 *Interactions between Power, Knowledge, Justice and Space*

As the preceding discussion already should have made abundantly clear, the themes of power, knowledge, justice and space interact with each other in various ways. Without exhaustively unearthing these interactions, we briefly want to provide our readership with some pointers to assist them in reflecting upon the aspect of the individual chapters of this volume. Knowledge may empower the powerless, but may also be monopolized by knowledge holders to further cement existing power disparities. The legal ordering of the oceans is a social construct, whose specific spatial layering has been developed through interactions between power, knowledge and justice. As various chapters indicate, justice oftentimes is subordinated to considerations of power. This reflects one of the basic tensions of current international law. To make the law inclusive and universally applicable, a balance will have to be struck between accommodating the powerful and empowering the weak. As Henriksen argues in chapter 2, the law of the sea in general has opted for what he terms as a 'pragmatic' approach.

In the case of the LOSC, this led to far-reaching amendments to the regime for mining in Part XI through the 1994 Implementation Agreement to ensure universal participation in the Convention, including from the industrialized West.⁹ Delegations at the intergovernmental conference (IGC) negotiating the future BBNJ Agreement eventually likely may have to face a similar choice between universal participation, including that of the powerful, and environmental and intra- and intergenerational justice.¹⁰ De Lucia however draws out a general tendency towards the sovereign territorialization of the oceans and that such a tendency, while incomplete and subject to the contingencies of history, still remains operational in relation to how ocean space, including ocean commons, is legally ordered. Other examples of the interactions between the different themes are provided by Morgera's discussion of the linkages between knowledge and equity and Mossop's conclusion that the dispute settlement system of the LOSC promotes justice and 'lessens the power dynamic' between the parties to a dispute, although that promotion of justice at the same time is bound by the four corners of the law.

A recurring theme throughout this volume is the opposition between those involved in activities and those who are not. This is variously expressed as involving user States and non-user States or the interest of individual States engaged in activities in ABNJ and the community interest in preserving the sustainability of the ocean. All four themes are engaged in this dynamic. User states through their activities will have interests that are represented by a power-base in their government delegations during the BBNJ process and other intergovernmental governance structures more generally, while community interests may be much more diffuse. Knowledge about impacts of activities on the environment may also be unevenly spread between those engaged in activities and others. As various chapters argue, the spatial governance of the oceans is influenced by a push for allowing the continuation of existing activities or allowing the development of new activities. And although there may

9 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (signed 18 July 1994, entered in force 16 November 1994) 1836 UNTS 3 (1994 Implementation Agreement). It may of course be asked whether the developing States had a viable alternative to agreeing on a watering down of the common heritage regime through the 1994 Implementation Agreement. For a reflection of this question and an alternative history of the law of the sea and the LOSC see Alex G Oude Elferink, 'What if the United Nations Convention on the Law of the Sea had entered into force unamended; Business as usual or dystopia?' in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in international law; On the possibility of different legal histories* (Oxford University Press 2021) 215–30.

10 See further section 4 below.

be a strong moral ring to ensuring intra- and intergenerational equity, their realization in the law of the sea has been proven to be difficult to the extent they are not aligned with current individual interests.

3 ABNJ and AWNJ

From a legal perspective, the regimes of ABNJ and AWNJ represent a fundamental divide.¹¹ That divide has obvious consequences for ocean governance and the future development of the law of the sea. As the introductory chapter to this volume observed:

a future [BBNJ Agreement] will consolidate the existing division of the oceans in areas within and beyond national jurisdiction. 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 against achieving an integrated ecosystem-based approach to ocean governance.

What does the current Revised Draft Agreement actually have to say about its scope of application and the relationship of ABNJ and AWNJ? Its Article 3(1) is straightforward, providing that '[t]his Agreement applies to areas beyond national jurisdiction'.¹² It may be noted that the Revised Draft Agreement in this respect differs from the Fish Stocks Agreement (UNFSA), which, although generally applicable to 'the conservation and management of straddling fish stocks and highly migratory fish stocks beyond national jurisdiction', provides that Articles 6 and 7 on the precautionary approach and compatibility of conservation measures within and beyond national jurisdiction are also

¹¹ But see De Lucia (ch 2) in this volume, for a discussion of how both 'types' of ocean space remain subject to the same logic.

¹² Art 1(4) of the Revised Draft Agreement indicates that the term "Areas beyond national jurisdiction" means the high seas and the Area. It may be noted that this definition implies a definitional inconsistency that is carried over from the LOSC. As art 1(1)(1) of the LOSC indicates, the Area comprises the seabed and subsoil 'beyond the limits of national jurisdiction', ie, the outer limits of the continental shelf at and beyond 200 nautical miles established in accordance with art 76 of the Convention. At the same time, Part VII of the LOSC on the regime of the high seas indicates that it is applicable to the part of the continental shelf beyond 200 nautical miles, as art 86 provides that its provisions 'apply to all parts of the sea 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'.

applicable to ‘the conservation and management of such stocks within areas under national jurisdiction’, while coastal States are also required to apply the general principles contained in Article 5 of the UNFSA, *mutatis mutandis*.¹³ It may be noted that the Revised Draft Agreement in its Article 5 contains a list of general principles that in general are no less relevant to AWNJ than the general principles contained in Article 5 of the UNFSA.

A comparison of the Revised Draft Agreement with the UNFSA is also not without interest as regards their relationship clauses. The UNFSA has a one-paragraph article—Article 4—on its relationship with the LOSC, providing that ‘nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention’. That relationship clause is repeated *verbatim* in Article 4(1) of the Revised Draft Agreement. However, the Revised Draft Agreement in its relationship clauses further provides that ‘the rights and jurisdiction of coastal States in all areas under national jurisdiction, including the continental shelf within and beyond 200 nautical miles and the exclusive economic zone, shall be respected in accordance with the Convention’.¹⁴ This paragraph is followed by two further relationship clauses, one of those being the so-called not undermine provision, which currently reads ‘this Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies’.¹⁵ As is argued in a number of chapters, this provision may limit the potential of a future BBNJ Agreement for accomplishing a holistic approach to ocean governance. A comprehensive comparison of the relationship clauses of the Revised Draft Agreement and the UNFSA is beyond the scope of the present chapter,¹⁶ but the Revised Draft Agreement seemingly is

13 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (opened for signature 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNFSA) arts 3(1) and 3(2).

14 Revised Draft Agreement art 4(2).

15 *ibid* art 4(3).

16 For one thing, the setting of the negotiations of the two agreements is different. While in the case of the UNFSA the main goal was to develop a regime for transboundary resources, that is not the case for the BBNJ Agreement, with its focus on ABNJ. Or, as formulated by Henriksen in ch 4: ‘In the BBNJ process, as the primary focus is on the ABNJ, the emphasis is on preventing negative effects of measures taken in the ABNJ on the rights and jurisdiction of adjacent coastal States’.

a step back as regards the conservation of and sustainable use of the ocean across jurisdictional boundaries.

Another issue concerning the relationship between ABNJ and AWNJ is future regulatory density. It might be seen as somewhat of an irony that the BBNJ process, which was initiated to address the governance gaps in the regime for ABNJ, likely is going to result in a situation where the obligations of States in relation to ABNJ are spelled out in more detail than for AWNJ, at least at the level of general law of the sea instruments.¹⁷ For instance, while a future BBNJ Agreement will contain detailed provisions on ABMTs and MPAs, the LOSC hardly makes reference to these tools – neither for ABNJ nor for AWNJ. A similar observation applies to the EIAs regime of the Agreement as compared to the LOSC's assessment and monitoring requirements contained in its Part XII, section 4. At the same time, the picture may not be as bleak as it appears at first instance.¹⁸ Take, for instance, the relationship clause contained in Article 4(2) of the Revised Draft Agreement on respect for the rights and jurisdiction of coastal States. As Article 4(2) indicates, such rights and jurisdiction 'shall be respected *in accordance with the Convention*'.¹⁹ This implies that a coastal State in exercising its rights and jurisdiction also has to act in accordance with its obligations on the protection and preservation of the marine environment, including the duty to cooperate as defined in Article 197 of the LOSC. In relation to the not-undermine provision, it should be noted that its implications remain undefined in the Agreement and it is open to different interpretations, thus how it will play out in practice remains to be seen. Furthermore, if a future BBNJ Agreement were to live up to the promise of being a reflection of the state of the art as regards environmental protection, it has to potential to have a spill-over effect to AWNJ for various reasons. Practice under a future BBNJ Agreement may for instance be relevant to interpreting general principles of environmental law that not only are applicable to ABNJ, but also to AWNJ. In addition, it is to be expected that regional conventions on the protection and the preservation of the marine environment, most of which are currently only applicable to AWNJ, will extend their spatial scope of application to ABNJ.

17 See also Erik Molenaar, 'Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations' (2021) (36) *International Journal of Marine and Coastal Law* 5, 54–55; Tullio Treves, 'Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction' in Erik J Molenaar and Alex G Oude Elferink (eds), *The International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments* (Martinus Nijhoff 2010) 7–25, 10.

18 For a discussion of the implications of the relationship clauses of the Revised Draft Agreement see also Molenaar (n 17) 32ff and 56–57.

19 Emphasis provided.

Implementation of obligations for the conservation and sustainable use of BBNJ may create a spill-over effect to AWNJ.

4 The Future of the Legal Regime of ABNJ and a Future BBNJ Agreement

The regimes of the high seas and the Area are part and parcel of the LOSC. That anchoring indicates that the high seas and the Area are here to stay as long as the LOSC continues to be accepted as the jurisdictional framework of the ocean. Although there have been challenges to that jurisdictional framework, these have been largely unsuccessful.²⁰ The stability that the LOSC has provided to the law of the sea in the last four decades is strikingly different from the instability of the law of the sea in the preceding four decades, notwithstanding attempts to codify the law of the sea through the four conventions adopted at the Geneva Conference on the law of the sea of 1958. In view of the vested interests in the current legal regime of the ocean, it is highly unlikely that it will be directly challenged in the foreseeable future. As developments after the adoption of the LOSC in 1982 indicate, that does not mean that the law has been set in stone. Piecemeal adaptation and development of the law has been taking place and will continue to do so. What does all of this mean for the regime of ABNJ? In this connection, a distinction may be made between the spatial extent of ABNJ and their substantive regime.

The LOSC defines the spatial extent of the high seas and the Area with reference to the outer limits of national jurisdiction.²¹ Existing analyses of State practice indicate that the LOSC provisions on the limits of AWNJ demonstrate a large measure of compliance, notwithstanding challenges in individual cases.²² Coastal States with a continental shelf beyond 200 nautical miles have invested significant resources in determining the outer limits of that continental shelf. Although the implementation of Article 76 is far from complete, this process will result in final and binding limits of the continental shelf around

20 For a further discussion see Donald R Rothwell and others (eds), 'Charting the Future for the Law of the Sea' in Donald R Rothwell and others (eds), *The Oxford Handbook for the Law of the Sea* (Oxford University Press 2015) 888–912, 889–92 and 904–12; Molenaar (n 17).

21 See above text at and n 12.

22 See eg Rothwell (n 20) 889–90; Robin R Churchill, 'The Impact of State Practice on the Jurisdictional Framework Contained in the LOS Convention, The Impact of State Practice on the Jurisdictional Framework contained in the LOS Convention' in Alex G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers 2005) 91–143.

the globe, definitively setting the limits between the continental shelf and the Area. A similar process is lacking in relation to the outer limits of the EEZ, but the fact that in this case the outer limit is determined by a fixed distance-based limit makes any direct challenge easily detectable and open to credible protest by States interested in maintaining the jurisdictional limits set by the LOSC.²³

The substantive regime of ABNJ has been continuously developing since the adoption of the LOSC, both through the practice of States and institutional frameworks. In that sense, the BBNJ process is not unique and, also if successfully concluded with the adoption of a BBNJ Agreement, will not put a stop to that development. The BBNJ process is unique as regards its scale and ambition as it could result in an effective overarching regime for the sustainable conservation and use of BBNJ and the marine environment of ABNJ more in general that is conspicuously lacking in the LOSC. To what extent that ambition will be realized remains to be seen. As is among others remarked by Henriksen (in chapter 4) and Oude Elferink and Kerr (in chapter 7), the BBNJ process in any case was never intended to remap the legal regime of ABNJ, and as the Revised Draft Agreement indicates, it is intended to operate within the jurisdictional limits set by the LOSC. But what impact may a BBNJ Agreement have while staying within those limits? As Bankes observes in chapter 3, the current negotiating text fails 'to be specific about the legal relationships as between ... States and as between the natural and juridical persons of those ... States exercising parallel and potentially competing freedoms'. A failure that may be explained by intention of a future BBNJ Agreement to not affect the jurisdictional framework of the LOSC. However, as Ringbom argues in chapter 11 in relation to the jurisdiction over the activities of vessels in ABNJ, although a future BBNJ Agreement will not clarify the extent of non-flag State jurisdiction, that development will continue to be driven by State practice and third-party dispute settlement procedures.

23 The main challenge in determining the validity of the outer limits of the EEZ is likely the use of baselines that are controversial. Although there are many examples of straight baselines that have been challenged, the impact of those baselines on the outer limits of the EEZ is in general limited. The use of insular features that may or may not fall under the scope of art 121(3) of the LOSC has a much larger impact on the extent of the high seas and the Area. However, the fact that States almost invariably claim an EEZ and continental shelf from such features excludes that disregard for art 121(3) will lead to further inroads on the extent of the high seas and the Area. Finally, it may be noted that the predicted rise of sea levels during the coming decades and beyond implies that the main issue in relation to the outer limits of ABNJ will be whether and if so how to prevent the landward shift of the outer limits of maritime zones or in the case of the submergence of islands, the complete loss of coastal State maritime entitlements.

Many of our authors express, albeit in different terms, that the question to what extent a future BBNJ agreement could be successful in fulfilling the ambition of providing an effective overarching regime for the sustainable conservation and use of BBNJ and the marine environment of ABNJ is up in the air. For instance, Henriksen in chapter 4 first submits that the BBNJ process 'does not seem to provide room for any fundamental rethinking or transformation of the law of the sea, but seems locked to the status quo and opening only for minor amendments or gradual evolution, consistent with the interests of the major States', but subsequently observes:

[W]ith increasing negative effects of climate change on the oceans, marine species and ecosystems, the question is whether the debate will take another direction, giving environmental protection and justice a stronger voice and the recognition of the need for more coherent approaches that challenge the law of the sea.

In chapter 6, Poto expresses similar doubt about the capacity of the BBNJ process to deliver:

Though the doubt remains as to whether the BBNJ negotiations are whitewashing history, and green/blue washing domination with many labels (protection, stewardship, and even nature's rights), the hope is still that the negotiations on a treaty on marine biodiversity in ABNJ will go in the direction of including elements of an ocean-centric model where the human communities responsibly protect the oceans.

Barnes, in chapter 10, submits that the 'current legal regime for ABNJ is not structured in a way that drives a holistic, integrated construction of social space in ABNJ. And the [BBNJ Agreement] risks further exacerbating this'. At the same time, he details how a future BBNJ might avoid doing so, among other pointing to the importance of the institutional design of the Agreement.²⁴

It is however possible, and perhaps even urgent, as De Lucia suggests in chapter 2, to open new conversations that may open up new trajectories, new imagination, precisely at a time when a new global treaty is being negotiated.

24 On the importance of institutional design see also eg, Elizabeth M de Santo, 'Protecting biodiversity in areas beyond national jurisdiction: An earth system governance perspective' (2019) 2 *Earth System Governance* 1, 3–5; Alex G Oude Elferink, 'Exploring the future of the institutional landscape of the oceans beyond national jurisdiction' (2019) (28) *RECIEL* 236.

The question as to what level of ambition a future BBNJ Agreement should reach will also have to be considered by the delegations at the IGC. This both requires determining how much support there is for different options and how inclusive one wants a future BBNJ Agreement to be. Aiming for inclusiveness may result in a treaty text that does little to improve on the current status quo, while it is not a guarantee that those wanting to safeguard the status quo will actually become parties to the resulting Agreement.²⁵ Were it possible to agree on a higher level of ambition for a future BBNJ Agreement, its number of States parties may remain even more limited. However, if the number of parties would allow them to weigh in on decision-making in regional and sectoral bodies dealing with ABNJ, such an outcome might be preferable from an environmentalist perspective. The Agreement in that case might also be a point of reference for those advocating for the progressive development of the environmental regime for ABNJ.²⁶

25 See also Shirley Scott, *International Law, US Power. The United States' Quest for Legal Security* (Cambridge University Press 2012) 239–42. As Scott (at 241) observes in relation to the US position on the LOSC:

the United States has still not ratified it ... meaning that the treaty has bound the world at large to the provisions the United States wanted while the United States itself, preferring to rely on customary international law of the sea, has effectively reneged on the initial deal.

26 See also the chapter by Dalaker (ch 12) in this volume, who argues that a failure of the BBNJ process to come up with an effective global regime, will put:

the burden and responsibility for the conservation and sustainable use of BBNJ would therefore fall to existing regional, sub-regional, national and sectoral bodies and frameworks. Such an outcome would do little more than maintain the status quo, calling into question the very purpose and need for the BBNJ negotiations.