The Inclusion of Fisheries in a New Internationally Legally

DISCLAIMER

List of Acronyms

ABNJ: Areas Beyond National Jurisdiction

BBNJ: Biodiversity Beyond National Jurisdiction

CBD: Convention on Biological Diversity

COFI: FAO's Committee on Fisheries

DWFM: Distant Water Fishing Nation

EEZ: Exclusive Economic Zone

EFZ: Exclusive Fisheries Zone

EIA: Environment Impact Assessme

SIOFA: South Indian Ocean Fisheries Agreement

SWIOFC: Southwest Indian Ocean Fisheries Commission

The Code: FAO Code of Conduct for Responsible Fisheries

UN: United Nations

UNCED: United Nations Conference on Environment and Development

UNCLOS: United Nations Convention on the Law of the Sea

UNCLOS 1: First United Nations Conference on the Law of the Sea

UNCLOS II: Second United Nations Conference on the Law of the Sea

UNEP: United Nations Environment Programme

UNFSA: United Nations Fish Stocks Agreement

UNGA: United Nations General Assembly

WSSD: World Summit on Sustainable Development

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Abstract

Millions of people rely on fish as a main source of protein, and fishing is the principal livelihood for millions of people around the world, supporting many economies, particularly in less developed countries. For hundreds of years, our oceans and its resources have been considered as resilient and inexhaustible. However, increasing fishing efforts together with unsustainable and destructive fishing practices, particularly over the last few decades are pushing many fish stocks to the point of collapse. According to FAO's 2016 State of Fisheries and Aquaculture Report, approximately 90 per cent of the world's fisheries are either overfished or fully fished. With that said, the damaging impacts of overfishing do not stop at the targeted fish species or at those species incidentally caught such as sea turtles and marine mammals. It goes further, impacting marine habitats and increasingly affecting entire marine ecosystems. It is well known that marine ecosystems are highly complex and interdependent and that the continuous degradation of ocean ecosystems could have serious environmental and socio-economic consequences.

As a way to better manage the world's fisheries, particularly high seas fisheries, the international community has generated a large body of binding and non-binding instruments ranging from UNCLOS, UNFSA and instruments under FAO. These instruments have attempted to address an array of problems associated with fisheries, and each is recognised for bringing some form of contribution towards the conservation, management and sustainable use of living marine resources and their ecosystems. Regardless of this, many argue that more must be done to improve the world's fisheries resources and general health of biodiversity, given their current status. On the other side of the coin, some are arguing that fisheries is already adequately regulated and the focus should be on ratification and implementation of the key instruments already in existence rather than the introduction of new ones. Regardless of this, the international community is once more around the table to discuss the development of a new internationally legally binding instrument, this time around with a focus on biological diversity of areas beyond national jurisdiction. With the large body of international fisheries instruments already in existence and with fisheries being the rdl 2JETu22.95 3(c)7(o)-20(m)7(m)7(ui(not)-13( )-374((a)7(s

Introduction

The ocean is the lifeblood of planet Earth and humankind. It covers over two-thirds of our planet, makes up 97 per cent of all the water on the surface of

is estimated that up to 26 million tonnes of fish a year, or more than 15 per cent of the world's total capture fisheries output is unaccounted for through illegal, unreported and unregulated (IUU) fishing.[4] In light of this,

an EEZ or EFZ) known as the high seas but also include areas of the

known

Part I: The Evolution of the General Principles

sea by positing that the sea is amenable to ownership by persons or States. Thus, whoever may bring any part of the oceans under his dominion may validly restrict its use by others, challenging Grotius' argument of res communis seas.

registry, the minimisation of interference among fishing operations in the same area and the monitoring of infractions.[24]

Eventually, overfishing began generating significant disputes between some coastal States that wished to safeguard offshore fisheries beyond the territorial sea and fishing states that sought to preserve the greatest

of the technically underdeveloped countries, freedom of fishing was illusory because they had no practical possibility of making use of it.

The 1958 Convention on the Territorial Sea and the Contiguous Zone codified the customary position in relation to resource sovereignty in the territorial sea, which included unfettered control over fisheries resources, subject to no limitation on conservation.[28] The Continental Shelf Convention gave to coastal States rights over sedentary fisheries on the continental shelf, again accompanied by no duty of conservation.[29] The High Seas Convention affirmed the freedom of fishing as one of the high seas freedoms, and imposed no limitation on fishing activities beyond the territorial sea, other than the vague stipulation that the freedom to fish must be exercised with reasonable regard to the interests of other States

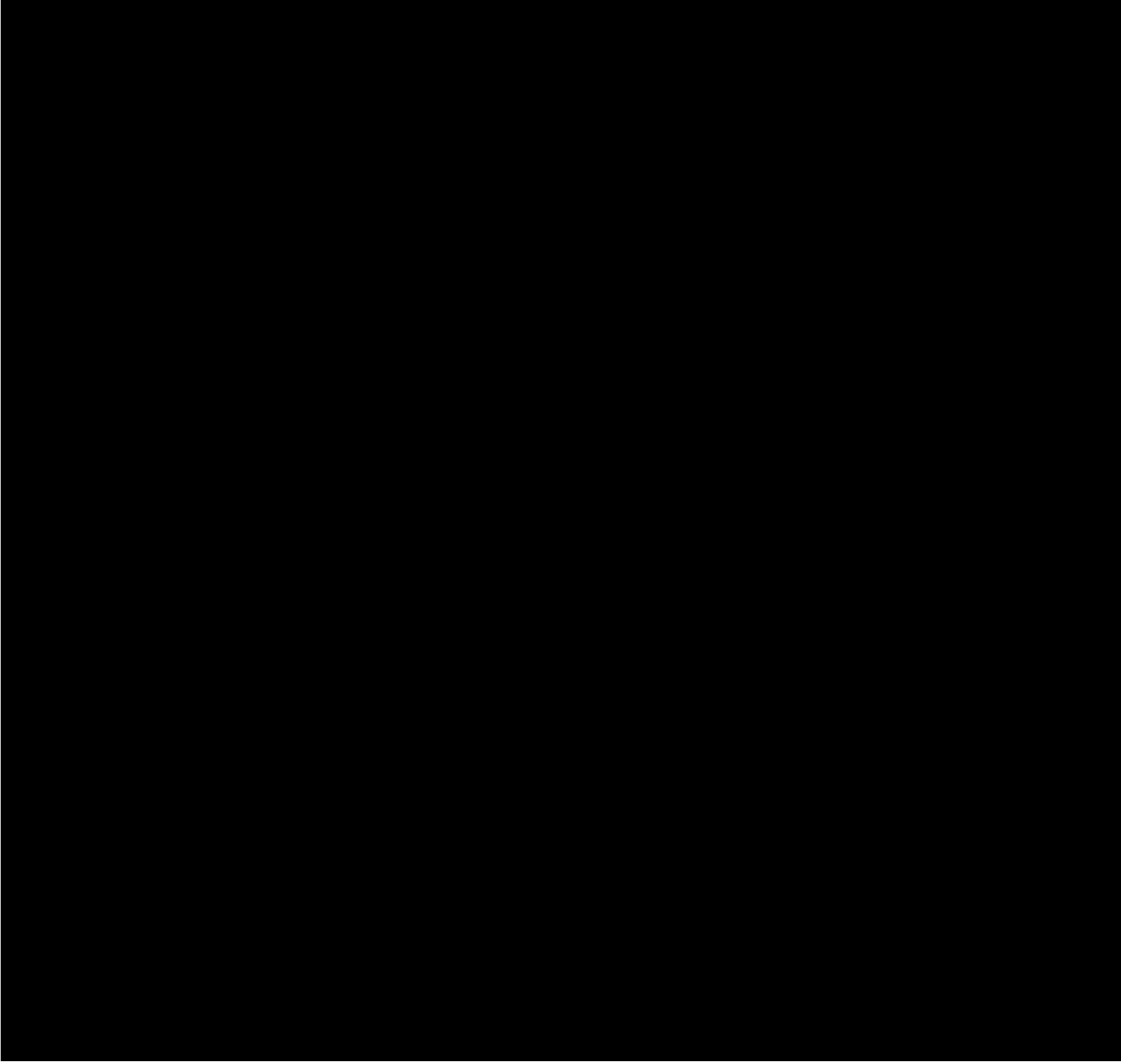
more countries are engaged in fishing of the same stocks, they shall enter into negotiations with a view to agreeing upon measures to conserve the living resources affected. The Convention did not however enter into force until 1966 and never attracted widespread ratification and as such never thought a success. With that, although the Convention did not deal with the

High Seas Fisheries Conservation and Management under the United Nations Convention on the Law of the Sea 1982

After years of

UNCLOS and other rules of international law.[45] In addition to extending the territorial sea, a new sui generis zone was also created called the Exlcusive Economic Zone (EEZ). Under UNCLOS, the EEZ which has a limit of 200 nautical miles from the State's established baseline is neither territorial sea nor high seas from a jurisdictional point of view. The EEZ

high seas, and also



Post UNCLOS Developments: The United Nations Fish Stocks Agreement (UNFSA), 1995

Although UNCLOS is considered the most comprehensive international agreement on oceans, codifying long-standing customary law, delineating jurisdictional zones and with extensive provisions on the conservation and management of resources, both living and non-living, it however fell short of specifying measures to deal with the conservation and management of living resources in areas beyond national jurisdiction, which was being subjected to increasing pressures particularly to fishing.

In light of this, it was clear that the conservation and management of such resources particularly the straddling and highly migratory fish stocks had been inadequately addressed and that these stocks were under increasing threat of over-exploitation. Although UNCLOS through its articles 63, 64 and 116 to 120 was undoubtedly an improvement over the previous international instruments relating to high seas fisheries, gaps in the international framework governing transboundary fish stocks were of increasing concern to the international community linked to changesresources

measures adopted also take into account the effect of fishing activities on species belonging to the same ecosystem or dependent on the target stocks. States must also use selective,

Further to the above, the duties of flag States are also addressed and the agreement places a duty on them to ensure that they exercise appropriate level of supervision and control over the vessels flying their flag and that those vessels are not engaging in activities that undermines the effectiveness of the measures adopted by the relevant RFMO.[63] In the event of non-compliance, flag States are under a duty to take appropriate actions against those vessels.[64] UNFSA also sets out an improved regional cooperation in high seas enforcement. Parties to UNFSA which are also members of an RFMO can use duly authorised inspectors to board and inspect fishing vessels flying the flag pf another party to the agreement. Such boarding should however take place according to established procedures by the RFMO.[65] To further ensure compliance with the RFMO's conservation and management measures, Port States are also placed under

carried out. The FCA

data to both flag States and coastal States for fisheries management, and trade restrictions intended

international level has been made an integral part of countries' regular biennial reporting to FAO on their implementation of the Code of Conduct.[77]

United Nations Resolutions on Sustainable Fisheries

The international community recognising the negative impacts of large-scale pelagic driftnets on target and non-target species

species

marine ecosystem particularly on the impact of bottom fisheries on vulnerable marine ecosystems and the long-term sustainability of deep0.00000887 0 595.25 842 reW*nBT/F3 12 Tf1 0 0 1 326.4

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levels that can produce maximum sustainable yield. In essence, the Plan urges States to ratify or accede and to effectively implement the relevant international and regional instruments.[83]

[83] M. A. Palma, M. Tsmenyi and W. Edeson, Promoting Sustainable Fisheries: The International Legal and Policy Framework to Combat Illegal, Unreported and Unregulated Fishing, Martinus Nijhoff Publishers, Leiden, 2010, pg 81.

Modern High Seas Fisheries Governance-A Regional Approach

Since the adoption of UNCLOS, international law has recognized the importance of regional cooperation as an important tool in the conservation and management of marine biodiversity. UNFSA went further by placing RFMOs and arrangements at the heart of international fisheries management. RFMOs are part of the wider cooperating mechanism of Regional Fisheries Bodies. RFMOs compared to other regional bodies which often have only an advisory role, have a management mandate and can amongst other things, adopt fisheries conservation and management measures that are binding on its member.[84] RFMOs were set up with the principal goal of facilitating cooperation between countries, with a common interest in the management of fish stocks, notably shared stocks. With the development of the UNFSA and the FAO instruments such as the Compliance Agreement which amplified the role of RFMOs placing them at the heart of international fisheries management,

also witnessed an increase in capture fisheries. Between 1950 and 2010, catches increased 00000 595.1.98 739.22 T from 861,000 tones to 11.3 million tonnes. In the Western Indian Ocean alone, in 2013 fish

adjacent seas, notably FAO areas 51 and 57 (Figure 1).[91] The Commission which is located in Victoria, Seychelles has as its main purpose, the promotion of cooperation among its Members with a view to ensuring, through approA0 1 329.4 739.22 Tm0e5739.22 Tm0 g0 G2W*5 84

English Name	Scientific Name
Narrow barred Spanish mackerel	Scomberomorus commerson
Indo-Pacific king mackerel	Scomberomorus guttatus
Blue Marlin	Makaira nigricans
Black Marlin	Makaira indica
Striped Marlin	Tetrapturus audax
Indo-Pacific sailfish	Istiophorus platypterus
Swordfish	Xiphias gladius

Table 1: Species managed by IOTC

Membership to the IOTC is open to Indian Ocean coastal States and to States or organisations which are members of the UN or one of its specialised agencies and are fishing for tunas DWFN as its members.

The Commission currently has 32 full members and 5 cooperating non-contracting parties who are not members of the IOTC.[93] Decisions at the Commission are generally reached through consensus by form of resolutions or recommendations. Resolutions are binding on the Members, unless there is a specific objection on the part of a Member, and require a two-thirds majority of Members present and voting to adopt them.[94] Recommendations are slightly different in that they

Unlike the IOTC, the SWIOFC is an RFB established in 2004 by Resolution 1/127 of the FAO Council under Article VI(1) of the FAO Constitution with the objective of promoting the sustainable

Figure 2: Area of Competence of SWIOFC

According to its statutes, the mandated stock of SWIOFC covers all living marine resources but without prejudice to the management responsibilities and authority of other competent fisheries and other living marine resources management organisations and arrangements in its area of competence. Although the Commission's mandate covers all living marine resources, the Scientific Committee of the Commission in its second meeting decided to focus on 8 species groups which they identified due to their regional distribution, assessment status and economic importance and include: spiny and rock lobsters, coastal tunas and related species, penaeid shrimps, sharks, slope water snappers, octopus, sea cucumber and bivalve molluscs. In addition to the focus groups, they have also 3 non-focus groups which include small pelagics, demersal fish and reef fish. Based on the aforementioned species, coastal States are required to pay special attention when making their national assessements and their reports should be presented at every Scientific Committee meeting. [96] It is important to note that compared to the IOTC, the SWIOFC only has an advisory role and cannot adopt binding management and conservation measures.

Southern Indian Ocean Fisheries Agreement (SIOFA)

SIOFA unlike the two other bodies mentioned above was established outside the FAO framework in 2006 and came into force in 2012 and has its headquarters based in La Reunion (French overseas territory). SIOFA came as a response to increasing

region and focus on the management of high seas fisheries in

SIOFA is primarily concerned with other species particularly demersal species such as the orange roughy, alfonsino and sedentary species.

It is also to be highlighted that SIOFA excludes from its scope sedentary species in areas under national jurisdiction. The Agreement has an overall aim of promoting the long-term conservation and sustainable use of fisheries resources in this area by incorporating principles such as the precautionary approach, ecosystem based approaches to fisheries management and encouraging the development of effective monitoring, control and surveillance to ensure compliance.

Figure 4: SIOFA's area of competence

Effectiveness of Regional Fisheries Organisations - The Indian Ocean Region

Cooperation amongst States through RFBs is today a fundamental principle underpinning the long-term conservation and management of marine fisheries resources. The importance of RFBs in fisheries governance is highlighted by their ability to implement key provisions of international fisheries instruments and their increasingly harmonised approaches to tackling emerging challenges.[99] In light of this, the international community in various fora has called upon States to fill the gaps in high seas fisheries governance by strengthening and extending RFBs' mandate and

The IOTC was adopted pre-UNFSA and the same year as the FCA, and as a result failed to take into account the various provisions brought about by these two binding instruments which led to several inconsistencies. However, it latter tried to bridge the gaps by bringing out various resolutions to bring conservation and management of fish stock in line with those international standards.

It has been noted that the IOTC Agreement is narrow relying on outdated concepts such as conservation and optimum utilisation of stocks, lacking reference to the UNFSA and modern fisheries management principles and failure to include broader concepts such as protection of the marine biodiversity and marine environment

cent from the 2014 level. In addition to the alarming status of the yellowfin tuna stock which as mentioned is a main targeted stock, IOTC also classified other species which are not necessarily targeted but are caught and retained as a byproduct in the red zone and thus being overfished and they include the black marlin, striped marlin, longtail tuna and narrow-barred spanish mackerel.

The resolutions adopted are mandated under Article V in accordance with Article IX of the IOTC Agreement which to a

with the precautionary approach, through Resolution 17/04, IOTC also introduced a ban on the discarding of bigeye, skipjack and yellowfin tuna and other non-target species caught by purse seiners in the IOTC area of competence in an attempt to minimise waste and reduce impacts of fishing on associated or dependent species.

In addition to the general conservation

SWIOFC compared to other RFBs in the region does not have a mandate to act beyond areas of national jurisdiction i.e it is limited to its member States' EEZ.[108] However, it can be argued that it has the ability to play a pivotal role in fisheries governance in the region. This is because it has the mandate to provide advice on a broad range of marine living resources within its area of competence. Additionally, in line with its

Al[illegible]h one of t[illegible]ssion is to provide advice to its member States, it [illegible] that the [illegible]s the Commission does not have a mechanism in pl[illegible] assess t[illegible]DFC management recommendations in addition to n[illegible]w-up [illegible] condition of the fish stocks on a regular basis.[111] F[illegible]more, [illegible] not provide species-specific fisheries management a[illegible] since [illegible] assessment of the exploited stocks in the area. The a[illegible] prov[illegible], has tend to be general in nature and more focused on t[illegible]eri[illegible]ies. However, the general nature of the advice is partly [illegible]e n[illegible]tocks occurring in the South West Indian Ocean region [illegible]ibution and are in many instances restricted

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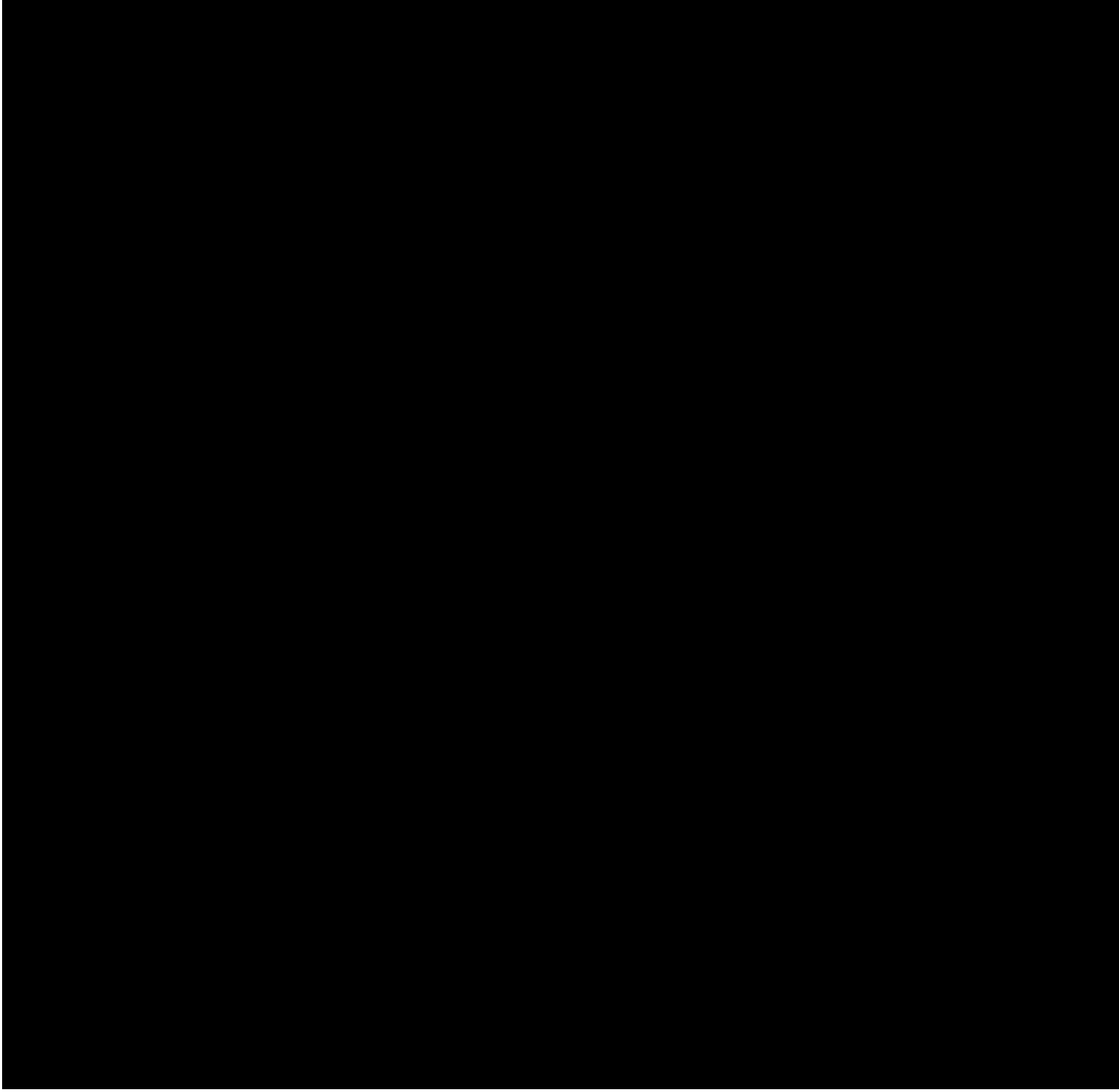
Southern Indian Ocean Fisheries Agreement (SIOFA)

Unlike the IOTC and SWIOFC, SIOFA is a more recent fisheries agreement coming into force only in 2012 and is still in the process of being set up. Fisheries in that region have primarily been mid-



jurisdiction. Such States have open registers and allow fishing vessels to fly its flag without having a genuine link between the vessels and the flag State. A lack of such link makes it difficult for the flag State to effectively monitor and control those fishing vessels and as such prone to conduct and get away with illegal activities both within coastal States' EEZ and on the high seas.[124]

In addition to poor ineffective flag State jurisdiction, IUU fishing exists because it is economically profitable. High market value of the target species are purposely fished because the benefits derived outweighs the chances of being detected and caught. The economics behind it is as the market value of a particular fish increases, so does the chances of IUU fishing for that particular species as there now exist a wider

exist

Overfishing and destructive fishing practices

Overfishing, unsustainable fishing and destructive fishing practices together with open-access conditions are some main factors contributing to the continual decline of fish stocks and degradation of the marine environment. The direct and indirect impacts associated with high levels of by-catch, discarding, catching of juvenile and protected species, bottom trawling and dredging on benthic environments are a worldwide cause of concern. A reduction of fishing pressure is therefore an important step to achieve healthier fish stocks as it is a common fact that there is currently too many vessels chasing too few fish.

With 31.4 per cent of fish stocks classed as overfished and 58.1 per cent classed as fully fished,[127] progress needs to be made on making fisheries more sustainable and prevent other fisheries from reaching unsustainable levels. It is largely known that overfishing is link74v 536BT/F3 12

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best available scientific evidence, lack of compliance and enforcement measures, ineffective decision-making processes and the use of outdated environmental principles which does not reflect the precautionary and ecosystem principles and management tools such as environmental impact assessments. The international community through the FAO as a way to strengthen fisheries governance has urged all RFMOs to undertake performance reviews and to modernise their mandates so as to address these challenges and at the same time prepare them

Addressing the Challenges of High Seas Fisheries Governance

The current institutional and legal framework for ocean management provides many challenges for the conservation of high seas biodiversity including fisheries. To have a better understanding of today's challenges it is important to understand one of the underlying source of the problems. Fisheries management has always had as its principal objective the conservation of target fishery resources with little explicit concern and few operational measures for the broader biodiversity conservation. Fisheries management and marine conservation, although they share similar end goals have developed from two different perspectives.[130] Fisheries governance have been primarily concerned with the utilitarian aspect of conservation, focussing on the contribution of fisheries to human livelihood principally food security while marine conservation has focussed mainly on the intrinsic value of conservation and their provision of key ecosystem services. Over decades, these different approaches have led to tensions between these two components. However, over the past 50 years,

A large number of institutions and agreements are currently mandated to regulate sectoral issues in ABNJ which also includes fisheries. The current debate around the framework lies around the question of the creation of new institutions versus the strengthening of existing institutions. Some scholars argue that the mandate of existing international and sectoral bodies, particularly RFMOs should be strengthened and modernised.[131] There should be improvements in their transparency, accountability, compliance and reporting mechanisms so as to ensure that they are functioning effectively. There are also arguments for widening the mandates of existing institutions so as to include broader jurisdiction in ABNJ, extending their mandated species from one to multi-species and also including broader environmental principles so as to encompass biodiversity protection. The precautionary and ecosystem approaches to management are recognised as being fundamental for the effective conservation and management of high seas biodiversity when backed by environmental impact assessments and best available scientific evidence.[132] As such, regional bodies should ensure that these approaches are included in their mandates in addition to ensuring that a holistic approach is adopted with regards to resource management and conservation and thatdtion

draft text of an international legally binding instrument under UNCLOS.[137] After its fourth and final meeting in July 2017, the BBNJ PrepCom agreed to take the next step towards negotiating a new international legally binding instrument to govern marine biodiversity in ABNJ.[138] The UNGA in its coming sessions before the end of 2017 should propose a resolution to convene an intergovernmental conference based on the recommendations of the BBNJ PrepCom. The new instrument

and in response, in 2004, the UNGA in paragraph 73 of its resolution 59/24, recognising the gaps and weaknesses in the current international framework governing biological diversity in ABNJ, decided to establish an ad hoc open-ended informal working group to clarify and examine these issues affecting the effective conservation and sustainable use of marine biodiversity in those areas.[144]

The ad hoc open ended working group on BBNJ conducted its first meeting in 2006 and continued with a series of meetings until 2015. During the various meetings a range of pertinent issues affecting ABNJ were identified including the absence of a comprehensive set of overarching governance principles, fragmented institutional framework, lack of international cooperation and coordination amongst sectors, absence of a global framework to establish MPAs and conduct EIAs and SEAs and uneven and ineffective high seas fisheries governance.[145] With that said it is worthy to note that there was a lack of consensus and even disputes amongst the delegates concerning elements of the various topics. Disputes ranged from whether there were any real deficiencies in the current legal framework with some even arguing to maintain the current status quo to the legal status of MGRs, particularly on accessing such resources and sharing the benefits acquired, due to the interlinkages between MGRs and the seabed. [146]

Regardless of the lack of consensus on certain aspects of the discussions, delegates recognised the need to improve implementation of current global and regional agreements relevant to biodiversity in ABNJ, the fundamental importance of using approaches such as precautionary and ecosystem based approaches and using tools such as best scientific information and environmental impact assessments to inform decisions.[147] The integral role regional and sectoral bodies play in improving the conservation and management of biodiversity in ABNJ was also highlighted. In light of this, delegates acknowledged the need to strengthen the management of such bodies by updating and modernising their mandates

[144] A/RES/59/24, para 73.

[145] Report of the Ad Hoc Open-

and to also develop and strengthen their accountability mechanisms.[148] Delegates also stressed on the need to increase cooperation and coordination between existing mechanisms in the short term, so as to enhance the conservation and sustainable use of biological diversity in ABNJ, since negotiations for a new instrument takes a long time.[149]

In that light, in 2011, at its fourth meeting, in accordance with paragraph 163 of UNGA resolution 65/37, the BBNJ working group amongst other things adopted by consensus a package of issues to be addressed as whole including MGR, benefit sharing, environmental impact assessments, area-based management tools including MPAs, capacity building and marine technology transfer.[150] The package of issues was one year later presented as a element recommendations to the UNGA as requested in paragraph 168 of resolution 66/231[151] which was also endorsed by heads of States and Governments at the UN Conference on Sustainable Development in

Preparatory Committee to [redacted] stantive recommendations to the G[redacted]sembly on the elements of a draft te[redacted]LBI under UNCLOS based on t[redacted]e of issues identified by the BBNJ wor[redacted]in 2011.

The BBNJ PrepCom conducted [redacted]s between 2016 an[redacted]the last meeting held in July 2017. During this p[redacted]n 69/292, delegate discussed an array of issues both in plen[redacted]established working groups around the identified themes of marine genetic resources

The Discussions about Fish and Fisheries in ABNJ

Growing market demand, advances in the technology to catch, process, store and transport fish together with a large expansion in the size and capacity of fishing fleets has enabled vessels to go farther and deeper thus enhancing our ability to exploit open ocean and deep seabed resources like never before. Because these areas lie beyond coastal States' EEZ, together with the open access nature of these waters, sustainable management of fisheries resources and biodiversity conservation is proving challenging. With that said, although other factors such as shipping, pollution and climate change also threaten marine biodiversity and ecosystems, fisheries currently presents the greatest threat to biodiversity in ABNJ. The ability of humans to exploit resources in those areas has outpaced by far our limited understanding of what is necessary for sustainable use. Propelled by freedom of fishing, enshrined both in UNCLOS and customary international law, many States have done little to regulate fishing activities beyond their national EEZ which in consequence has promoted excessive high seas fishing, illegal, unreported and unregulated activities together with destructive fishing practices causing many fish stock population to dwindle below biologically sustainable levels and some even pushed on the brink of extinction.[153]

In light of the above, together with other concerns, the international community has been discussing options to better conserve and sustainably use marine biodiversity in ABNJ since 2006. In 2015, States took the historic decision to develop a new international legally binding instrument on the conservation and sustainable use of marine biological diversity of ABNJ, under the framework of UNCLOS.[154] Specifically, it was recommended that negotiations address the topics identified in the agreed 2011 package namely the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology.

[153] According the FAO's SOFIA Report, 58.1% of global fish stocks are fully fished and 31.4% are fished at biologically unsustainable level.

[154] UN Doc A/Res/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.

As might be observed, the objective of the new instrument is described in rather general terms with the approved package elements not referring explicitly to fisheries. However, since the beginning of the work on marine biodiversity in areas beyond national jurisdiction under the

agreement between States cannot benefit or harm third States without their consent.[158] As a compromise, some delegates sugi0M7(sa)7(t)7()7(rd)] TJETQ0.00000887 0 595.25 842 reW*nBT/F3 12 Tf1

Fish as a Commodity

Reduction in biodiversity,

“Such measures shall also be designed to maintain or restore populations of harvested

species that are associated with or dependent upon target species. The agreement also calls for the use of precautionary reference points in achieving these broader conservation objectives, the protection of habitats of special concern, and the use of selective fishing gear to minimise by-catch. Additionally, the FAO's Code of Conduct for Responsible Fisheries explicitly calls for conservation of marine ecosystems and the protection of living marine resources and their environments.

While convergence towards

engaging in such

For instance, deepsea sharks such as the Greenland shark (Somniosus microcephalus) which live in very cold waters in the north Atlantic to depths up to 1800 metres, although not targeted for its genetic properties are often targeted for its liver oil which is used in omega-3 dietary supplements.[169] The hormone calcitonin, extracted from salmon, although not a deepsea species, has been found effective in preventing osteoporosis. Protamine sulfate, also derived from salmon,

fragmented and not comprehensive failing to address issues such as the conservation of, access to, and benefit-sharing related to such resources. UNCLOS, which is considered the constitution of the ocean failed to address biological resources in the Area focussing mainly on mineral resources. Because of this, the legal regime

objective of the CBD, namely fair and equitable sharing of benefits. However, under article 4 of the CBD, the jurisdictional scope of the convention is limited to components of biodiversity found in areas within the limits of national jurisdiction and has limited application in ABNJ. In ABNJ, CBD only provides that States must cooperate directly with each other or through competent international organisations for the conservation and sustainable use of biodiversity living much of the MGR in the ABNJ unregulated.

Marine Scientific Research

UNCLOS similarly does not define marine scientific research although it is used throughout the convention. According to Articles 87 and 89 of UNCLOS, MSR is an established freedom of the high seas together with other freedoms such as fishing, navigation and overflight, open to all States but which however needs to be exercised with due regard for other State's interests in their exercise of these same freedoms with it principles outlined in Part XIII of the convention. UNCLOS prescribes that MSR shall only be conducted for peaceful purposes and in line with relevant regulations adopted for the protection and preservation of the marine environment.[173] Furthermore, UNCLOS states that all MSR shall not constitute the legal basis for any claim to any part of the marine environment or its resources.[174] Although UNCLOS contains no clear provisions distinguishing MSR for commercial purposes and those research that does not have direct commercial potential, according to established principles, MSR can be either pure or applied based on the purpose for which the research is undertaken. The objective of pure MSR is to advance human knowledge about the marine environment and it is characterised by the principles of openness, transparency and attracts the obligation to disseminate

as the exploration of biodiversity for commercially valuable genetic and biochemical resources and further as the process of gathering information from the biosphere on the molecular composition of genetic resources for the development of new commercial products.[175] Due to the commercial potential of the research undertaken, the information and data collected during bioprospecting activities are not usually freely available to the public which goes against MSR principles, as such information and data are

and targeted for its liver oil, if not carefully managed risks becoming extinct due to its later maturing nature

BBNJ and Existing Instruments

It is widely known that the challenges currently faced by the oceans including the ABNJ are closely interrelated. Although there are many sectoral and regional instruments tackling different elements of the ocean, many argue that there is an urgent need for a new global instrument that will be able to guide and adopt comprehensive and cross-sectoral measures based on an ecosystem approach. This is because our oceans are threatened by a variety of anthropogenic threats such as environmental degradation, depletion of fish stocks and loss of biodiversity which is to a large extent affiliated to a lack of an overarching framework for conserving and managing these vast areas. To ensure that an integrated ocean management is achieved, a holistic approach to tackle these threats which includes the protection and conservation of marine ecosystems, implementing ecosystem-based and precautionary

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and consistency between the various bodies and at the same time bring about greater understanding and ability to address cumulative impacts.

It is well recognised that marine conservation and management are best delivered at a regional scale guided by global principles and standards. Because of the already established network of bodies addressing a range of issues which also share similar challenges, establishing new bodies are not always

with some expressing their wish for certain specific terms to remain undefined such as MSR and bioprospecting and left to States for interpretation.

on the wider marine environment.[181] Reasons for this appears to be multifold and amongst the most debated are inconsistency in the implementation of existing instruments, fragmentation of international fisheries law, gaps in effective coherent structures for fisheries management and the lack of coordination and cooperation between the various instruments and institutions operating in ABNJ. Including fisheries in the new instrument, which is meant to tackle the conservation and management of biodiversity in areas beyond national jurisdiction would ensure that fisheries, one of the main components of biodiversity in the ABNJ is no longer handled in isolation but in a holistic manner together with other biodiversity components.

With paragraph 3 of UN general assembly resolution 69/292 in mind, the new instrument would be a good opportunity to build on the challenges of the current mechanisms dealing with international fisheries governance without undermining those mechanisms. Fisheries have the potential of being integrated in the new instrument both through multiple elements of the package deal such as ABMTs and EIAs as well as through overarching provisions. Including fisheries in the new instrument would help complement the existing fisheries instruments particularly the UNFSA and the FAO instruments and also provide much needed support to sectoral and regional bodies particularly fisheries bodies. The new instrument could place specific obligations on States to take action in relation to fisheries management that complement existing instruments such as requirement for cooperation.[182]

Because of the lack of a formal global coordinating mechanism which takes into account cumulative impacts on biodiversity in ABNJ and the lack of an overarching mechanism coordinating and overseeing conservation and management measures of bodies in the ABNJ, these regional bodies often operate in isolation with each other. This occasionally leads to considerable diversity and varying rates of progress in their management and conservation objectives making it hard to monitor their performance against best practice standards. Operating in isolation makes data exchange and information dissemination difficult and such a lack of cross sectoral exchange of information makes it challenging to address global issues such as the conservation of species, protection of habitats and controlling IUU fishing.
Including fisheries in the new instrument would also be a good opportunity to bridge the gap between fisheries management and biodiversity conservation by serving as a platform to align

necessary to coordinate and ensure the conservation and development of such stocks.[183] Moreover, its Part XII provides for the protection of marine environment and stresses on the protection of rare or fragile ecosystems, and where living marine resources are depleted, threatened or endangered, their habitats are to be protected.[184] The FAO Compliance Agreement builds on UNCLOS and emphasises the primary responsibility of flag States to exercise control over vessels entitled to fly its and the UNFSA complements and build on Articles 116 to 120 of UNCLOS by promoting the duty of States to cooperate in the conservation and management of straddling and highly migratory fish stocks.

Furthermore, the United Nations through its General Assembly Resolutions has also recognised various fishing-related issues such as sustainable fisheries, deep sea fish stocks, by-catch and discards, and large-scale pelagic drift-net fishing and consequently has adopted multiple resolutions to that effect. In the ABNJ, concrete measures have been set in place to

on EIAs by encouraging flag States and RFMOs to conduct assessments to establish if deepsea fishing activities are likely to produce significant adverse impacts in a given area.

The above shows that it is there is a plethora of instruments available to effectively manage fisheries in ABNJ. The broad principles and approach for effective and responsible fisheries management mentioned above are not new. As such, do we need to include fisheries as a whole or in part in the new instrument to include to the already long list of fisheries instrument? Is there a legal gap to fill or should Sq0.00000000P7 0 595.25 842 reQ0.00000887 0 595.25 842

The Importance of the new ILBI to SIDS

Small Island Developing States (SIDS) are a distinct group of developing countries that face common social, economic and environmental challenges. These include small populations, high dependency on development assistance and international trade, susceptibility to external shocks, and high vulnerability to the impacts of climate change. For most SIDS, the ocean constitute a much larger geographic area than their land territory, especially when their EEZ is taken into account. The Seychelles, for example, have a land area of approximately 455 square kilometres and an EEZ of approximately 1.4 million square kilometres.

While oceans play an important role in everyone's lives, no one is more dependent on them than small, vulnerable and isolated island developing states surrounded by the sea who attaches great economic, social, cultural and environmental importance to it. The importance of the oceans to SIDS has been widely acportance

cent of their total gross domestic product (GDP). In some SIDS, fisheries can contribute 10 per cent or more of GDP and furthermore, may account for up to 90 per cent of

by complementing, uniting and strengthening those instruments so as to bring much needed uniformity in the application of approaches, incorporation of reviewing mechanisms for regional bodies which implement those principles and approaches, enhanced cooperation and coordination amongst those various bodies and more transparent and effective living resource management systems, whilst at the same time ensuring that existing instruments such as UNFSA are not undermined or watered down. Furthermore, the new instrument

also causes deoxygenation and acidification which alters open and deep ocean environments causing physical, chemical and biological changes. The projected impacts of these changes in ABNJ which contain a large percentage of the ocean's biodiversity include loss of breeding grounds, impacts on breeding success, changes in foraging habits due to changes in plankton availability, changes in species growth rates, maturity age and natural mortality, changes in migration patterns, poleward movement of species to colder waters leading to a decrease of primary productivity in the tropics, the shifting of whole

UNFSA could be incorporated to ensure that SIDS are not burdened disproportionately and at the same time ensure that SIDs can effectively participate and contribute in the conservation and management of biodiversity in ABNJ.

Extended Continental Shelves

States have acknowledged that the new instrument for the conservation and sustainable use of marine biodiversity in ABNJ should take into account the interests of coastal States with continental shelves extending beyond 200nm. While coastal States have sovereign rights for the

Conclusion

This paper examined the inclusion of fish and fisheries in a new internationally legally

With that said, it is important to highlight that commercial exploitation of marine living resources in areas

15. Giuseppe Notarbartolo di Sciara, The Pelagos Sanctuary for the conservation of Mediterranean marine mammals:

29. Letter dated 15 May 2008 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction addressed to the President of the General Assembly, UN Doc A63/79, para 13.

30. Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the

of General Assembly Resolution 59/25 on sustainable fisheries, regarding the impacts of fishing on vulnerable marine ecosystems, United Nations General Assembly, 61st Session.

45. United Nations, Report of the United Nations Conference on Environment and Development, Conference on Environment and Development, 13 August 1992, Rio de Janeiro.

46. W Edeson, Fisheries and Aquaculture topics: FAO Compliance Agreement-Topics Fact Sheets In, FAO Fisher

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2. United Kingdom v Norway (Fisheries Case), Merits, Judgment, [1951] ICJ Rep 116, ICGJ 196 (ICJ 1951), 18th December 1951, International Court of Justice.

3. Case No 21, Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), 2 April 2015, ITLOS.