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Area-Based Management Tools: from UNCLOS to BBNJ and beyond

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Abstract: The conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (ABNJ), commonly referred to as the high seas, has long posed significant challenges for international governance due to the lack of a unified legal framework. Despite the United Nations Convention on the Law of the Sea (UNCLOS) providing the overarching legal structure for ocean activities, its provisions were insufficient to fully regulate and protect marine biodiversity in these vast, shared spaces. In response, over 190 United Nations Member States adopted the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) in June 2023, marking a critical step forward in global ocean governance. The BBNJ Agreement introduces several new tools and measures, including area-based management tools (ABMTs) aimed at addressing environmental degradation, overexploitation, and biodiversity loss in the high seas. This paper provides a detailed analysis of the ABMT provisions under Part III of the BBNJ Agreement, comparing them with existing legal frameworks and assessing their potential impact on international ocean governance. It explores the historical development of ABMTs, reviews the challenges of implementing such measures in ABNJ, and examines how the BBNJ Agreement's framework can potentially transform the management and protection of marine biodiversity in these areas. Through a doctrinal and comparative approach, this paper critically evaluates the BBNJ Agreement's capacity to advance global conservation efforts and address key governance gaps in the ABNJ.

Abstrakt: Der Schutz und die nachhaltige Nutzung der marinen Biodiversität in Gebieten außerhalb der nationalen Gerichtsbarkeit, auch als "Hohe See" bekannt, stellen seit langem erhebliche Herausforderungen für die internationale Governance dar, da es an einem einheitlichen Rechtsrahmen mangelte. Obwohl das Seerechtsübereinkommen der Vereinten Nationen den übergeordneten rechtlichen Rahmen für Aktivitäten auf den Weltmeeren bietet, reichten seine Bestimmungen nicht aus, um die marine Biodiversität in diesen weiten, gemeinsamen Räumen umfassend zu regulieren und zu schützen. Als Reaktion darauf haben im Juni 2023 über 190 Mitgliedstaaten der Vereinten Nationen das Abkommen über den Schutz und die nachhaltige Nutzung der biologischen Vielfalt in Gebieten außerhalb der nationalen Gerichtsbarkeit verabschiedet und kann als ein wichtiger Schritt in der internationalen "Ocean-Governance" verstanden werden. Das BBNJ-Abkommen führt mehrere neue Instrumente und Maßnahmen ein, darunter gebietsbezogene Managementinstrumente die darauf abzielen, Umweltzerstörung, Übernutzung und den Verlust der Biodiversität auf der Hohen See zu bekämpfen. Diese Arbeit bietet eine detaillierte Analyse der ABMT-Bestimmungen in Teil III des BBNJ-Abkommens, vergleicht sie mit bestehenden Rechtsrahmen und setzt sich mit potenziellen Auswirkungen auf die internationale Ocean-Governance auseinander. Neben einer Untersuchung der historischen Entwicklung von ABMTs, werden insbesondere die Herausforderungen bei der Umsetzung solcher Maßnahmen in den ABNJ untersucht, und analysiert, wie der Rahmen des BBNJ-Abkommens das Management und den Schutz der marinen Biodiversität in diesen Gebieten potenziell verändern kann. Durch einen doktrinären und vergleichenden Ansatz bewertet diese Arbeit kritisch die Fähigkeit des BBNJ-Abkommens, die globalen Naturschutzbemühungen voranzutreiben und zentrale Governance-Lücken in den ABNJ zu schließen.

Table of Contents

I. Introduction.....	2
II. Historical Context and Evolution of Area-Based Management Tools	5
A. Overview of UNCLOS.....	8
B. Key Concepts, Bodies and Agreements related to ABMTs.....	10
C. Regional Efforts	21
D. Case Law	27
III. The BBNJ Agreement - 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.....	30
A. Overview of the BBNJ Agreement	32
B. Comparison of ABMT Provisions of BBNJ Agreement with Relevant Existing Frameworks.....	33
a. Objectives.....	33
b. Area of application	37
c. Proposal mechanism.....	40
d. Emergency measures.....	49
e. Functioning and competencies of bodies	51
f. Working methodology.....	55
C. Key Questions	61
a. Are the seas still free?	61
b. How does it affect the third states?	64
c. How does the new BBNJ regime relate to the existing ABMTs?.....	67
IV. Conclusion	71
V. Bibliography	74

I. Introduction

Covering more than half of the Earth's surface, marine areas beyond national jurisdiction (ABNJ), commonly referred to as the "high seas," has long posed complex challenges for international law and governance since their regulation and protection requires consolidated efforts from the world community. The United Nations Convention on the Law of the Sea (UNCLOS / Convention)¹ provides the legal framework within which all activities in the oceans and seas must be carried out, including the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction. However, despite efforts in Part VII of UNCLOS to protect and preserve the marine environment in ABNJ, these areas have historically been inadequately regulated under a single treaty or body. While states enjoy the right to use the high seas, activities in ABNJ are subject primarily to the jurisdiction of the flag State, which often causes inconsistent enforcement, leading to certain lack of control over states' activity in such areas and produced significant threats such as overfishing, habitat destruction, pollution and unregulated exploitation of marine genetic resources.

Being aware of this deficit, countries embarked on negotiations to protect the oceans, what was accompanied by the creation of an Ad Hoc Open-ended Informal Working Group in 2004 and was further intensified following the Rio+20 Conference in 2012. After nearly two decades of discussions, on 19 June 2023, over 190 United Nations Member States adopted an Implementing Agreement under the UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement / BBNJ / Agreement)² by consensus.

The BBNJ Agreement builds upon earlier international environmental frameworks, notably the Convention on Biological Diversity (CBD)³. A key forerunner, the CBD laid the groundwork for addressing the conservation of biodiversity globally, but it primarily focused on terrestrial and coastal areas. The BBNJ Agreement extends these principles to areas beyond national jurisdiction, addressing the pressing need to protect biodiversity in the high seas. The preamble of the BBNJ reflects these priorities, emphasizing the conservation and sustainable use of

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNGA)

² 2023 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 (adopted 19 June 2023) C.N.203.2023.TREATIES-XXI.10 (UNGA)

³ Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 69 (UN)

marine biodiversity, while recognizing the vulnerability of marine ecosystems due to overexploitation and environmental degradation. This agreement marks a significant evolution in international efforts to ensure the sustainable management of the world's oceans and comprises obligatory and voluntary measures, aims to enhance the implementation of the UNCLOS, with a specific focus on protecting and conserving the extensive areas in the oceans beyond national jurisdiction through improved cooperation and coordination among diverse stakeholders.

The BBNJ Agreement is the third implementing agreement under the UNCLOS after the 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982,⁴ which focuses on the governance of deep seabed mining beyond national jurisdiction. Another subsequent legal instrument includes 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, the so-called UN Fish Stocks Agreement,⁵ which introduced the concept that management of the relevant fish stocks must be based on the precautionary approach and the best available science. Now, the BBNJ Agreement as highlighted in its Preamble and operative text, aims to assist the international community in addressing biological diversity loss and degradation of ocean ecosystems caused inter alia by climate change impacts, including warming ocean deoxygenation, and acidification, as well as unsustainable use and pollution such as plastic pollution. It also seeks to promote global scientific research and ensure compatibility with the existing roles and responsibilities of various stakeholders while addressing existing inequalities in sharing the benefits accrued from the organisms of ABNJ and the associated digital sequence information.

The Agreement introduces a package of measures such as area-based management tools, including marine protected areas⁶; environmental impact assessments⁷; and capacity-building and the transfer of marine technology.⁸ This paper focuses on the area-based management tools (ABMTs) provisions within the BBNJ Agreement, which are designed to bring coherence

⁴ 1994 Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) 1836 UNTS 3 (UNGA)

⁵ 1995 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 (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNGA)

⁶ BBNJ (n 2) Part III

⁷ BBNJ (n 2) Part IV

⁸ BBNJ (n 2) Part V

and structure to the protection of marine biodiversity in ABNJ. ABMTs, including marine protected areas (MPAs) and other spatial planning measures, have long been recognized as essential tools for conserving marine ecosystems, yet their implementation beyond national jurisdiction has been limited by legal, technical and geopolitical challenges. The BBNJ Agreement now aims to overcome these obstacles by establishing a framework for the global designation and management of ABMTs, addressing gaps in previous governance structures that were largely regional, sectoral or ad hoc in nature.

This paper's central objective is to analyze the regulations established under Part III of the BBNJ Agreement, identifying the similarities and differences with existing legal frameworks. This analysis will assess whether the new regulations bring meaningful advancements to international ocean governance and whether they have the potential to shape the future of marine protection.

To evaluate the potential effect of the BBNJ ABMT provisions on ocean governance, it is essential first to situate this analysis within the broader legal and historical context. ABMTs have evolved over several decades, beginning with the foundational international principles which have also been enshrined in UNCLOS. Although UNCLOS provides the bedrock for modern ocean law, it offered only a broad framework for marine conservation, focusing primarily on national jurisdictions while leaving ABNJ largely unregulated, except the flag state jurisdiction and related rules. The establishment of ABMTs, particularly on the high seas, was historically left to regional and other sectoral bodies, leading to a patchwork of regulations with limited effectiveness.

The first chapter of the thesis examines the key UNCLOS articles, key concepts and international agreements and bodies that laid the groundwork for ABMTs. It also explores the development of ABMTs in ABNJ by regional and sectoral organizations over time, providing a critical analysis of the successes and challenges encountered by these bodies. The methodology employed includes a review of primary legal sources, such as treaties, agreements, and official documents, alongside a thorough analysis of scholarly articles. This comparative approach aims to capture the complexities and nuances of ABMT governance and its development. In addition to examining treaty law and policy frameworks, this section explores the evolving – although limited – jurisprudence related to ABMTs, focusing on decisions from international tribunals like the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ) through relevant advisory opinions, case

decisions and arbitral awards to understand how legal interpretations have shaped the ABMT mechanism.

With this foundation established, the thesis then transitions to an in-depth analysis of the specific provisions of the BBNJ Agreement concerning ABMTs. While the Agreement must be understood as an interconnected whole, Part III of the Agreement, which governs the ABMT regime, is scrutinized closely in this chapter. Key provisions analyzed include the objectives of ABMTs, the geographical scope of application, the proposal process for new ABMTs, the established mechanism for adopting emergency measures, the roles and competencies of BBNJ Agreement bodies and the outlined working methodologies of ABMTs in ABNJ. This section also compares the BBNJ Agreement regulations with existing legal instruments and governance frameworks, evaluating the extent to which the new Agreement builds upon or diverges from established practices. The methodological approach here is both doctrinal and comparative, focusing on textual analysis of Agreement provisions, supported by scholarly commentary and policy reports.

As we conclude the analysis, three important legal questions are addressed: How does the new BBNJ regime relate to the existing ABMTs? How does it affect the third states? Are the seas still free? These questions are crucial in understanding the broader impact of the BBNJ Agreement on the international law of the sea and global ocean governance. The answers will help determine whether the Treaty can effectively reconcile the establishment and functioning of ABMTs in ABNJ, in cooperation with other actors in ocean governance. The final assessment is based on an extensive review of relevant literature, combining legal analysis with policy considerations.

II. Historical Context and Evolution of Area-Based Management Tools

The practice of protecting marine areas has a long history, contrary to popular belief that it is a recent addition to the conservation “tool box.” Since ancient times, societies in regions like the Pacific, Asia, and Greece have managed marine environments primarily for economic benefits. Although nature conservation wasn’t their main goal, it was often achieved as a byproduct – much like what we see also today.⁹ In the last century, after the World War II, the

⁹ Wells S and others, ‘Building the Future of MPAs – Lessons from History’ (2016) 26 *Aquatic Conservation: Marine and Freshwater Ecosystems* 101 <<https://onlinelibrary.wiley.com/doi/full/10.1002/aqc.2680>> accessed 24 August 2024

development of technology led to the heavy exploitation of marine ecosystems through fishing and other human activities. With such developments, the need to adopt methods to manage and protect the marine environment and resources became more apparent.¹⁰ The international community has tried to solve the issues by establishing legal frameworks, initiatives, programmes, which today has led to the idea of having some instruments to protect marine biodiversity while still trying to have a blue economy.

ABMTs have got the attention and been promoted since the 1970s by several United Nations summits, as well as international NGOs.¹¹ The UNCLOS, the constitution of oceans that was signed in 1992, has contributed to an increase in the spatial area covered by MPAs. It will be discussed below in the first subheading how the UNCLOS strengthens capabilities of states in terms of managing marine areas, despite not explicitly mentioning MPAs. In particular, it grants states with sovereign rights in their territorial seas and exclusive economic zone (EEZ) for the purposes of managing and conserving natural resources and, at the same time, creating the duty to protect and preserve the marine environment.

Apart from UNCLOS, marine conservation was given a clearer framework with the 1992 UN Earth Summit in Rio¹², which also led to the agreement on the legally binding Convention on Biological Diversity (CBD) (came into force in 1993). CBD takes a holistic approach to conservation by considering the entire ecosystem, with protected areas seen as essential but not the only mechanism to achieve conservation. Later, the CBD Strategic Plan on Biological Diversity 2011-2020 adopted Aichi Target 11 on global biodiversity conservation coverage which, perhaps for the first time, brought MPAs and all other effective area-based conservation measures together as complementary tools contributing to a common goal of 10% coverage of protected areas and other effective ABMT in coastal and marine areas . Ten years later, the aim of “having 10% of coastal and marine areas ... conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas” was revised again in CBD Post-2020 Global Biodiversity Framework, which raised the bar by increasing the global coverage target to 30%. Later on, the importance of conservation of

¹⁰ The National Academies Press [2001] Marine Protected Areas: Tools for Sustaining Ocean Ecosystems <<https://nap.nationalacademies.org/catalog/9994/marine-protected-areas-tools-for-sustaining-ocean-ecosystems>> accessed 24 August 2024

¹¹ Garcia S M and others, ‘Area-based management tools and fisheries: History, definitions, roles, typologies, tensions, synergies, trade-offs, and effectiveness’ (2023) Brussels EBCD Gland IUCN-CEM-FEG <<https://www.ebcd.org/feg>> accessed 8 October 2024

¹² Report of the World Summit on Sustainable Development (26 August - 4 September 2002) A/CONF.199/20 (United Nations Earth Summit in Rio)

biodiversity and sustainable use of its component have been stated in different commitments such as Rio+20 (2012) and Sustainable Development Goals (2015). These various actions and many more have played a great role in ocean governance till today.

To achieve the stated objectives, it is necessary for the relevant authorities to take the required actions. It is easier to implement such measures in maritime zones under national jurisdiction compared to making a similar determination for the high seas. This is because in the high seas no individual state has the jurisdiction except the flag state and their statutes are rather contested as *res nullius* and *res communis omnium*.¹³ In either scenario, decision-making is significantly more complex compared to decisions within a specific state's jurisdiction, especially given the ongoing challenge of enforcing regulations against foreign vessels.

This is one of the reasons why protected areas in the high seas amount to only around 3 million km², while protected marine areas under national jurisdiction today amount to just over 26 million km².¹⁴ This means that out of all MPAs, 89% are established under national jurisdiction, despite the fact that the area of the high seas is more than twice that of marine areas under national jurisdiction.¹⁵ Examining another dataset, we find that in 35 countries, the proportion of marine areas declared as protected — regardless of the level of protection — is over 10% of total areas under jurisdiction. In contrast, the overall area of protected high seas constitutes only 1.5%.¹⁶ Analyzing the data, it becomes apparent that, while reasons may vary, declaring and implementing ABMTs is generally more feasible in areas under national jurisdiction. Such observation can be supported by a noteworthy achievement within the jurisdictional waters of EU countries, where the coverage of MPAs has more than doubled, escalating from 5.9% to 12.1% in a concise span of nine years. At the same time, no such success looks possible in the near future for ABNJ despite the years of debates and realizations.

17

Recognizing the numerous efforts by diverse actors to enhance marine protection in ABNJ, it

¹³ Tuerk H and Hafner G, 'The United Nations Convention on the Law of the Sea, 1982: Reflections after 40 Years' (2022) 36 *Ocean Yearbook Online* 1 <https://brill.com/view/journals/ocyo/36/1/article-p1_1.xml> accessed 24 August 2024

¹⁴ 'Global Statistics' (Protected Planet) <<https://www.protectedplanet.net/en>> accessed 24 August 2024

¹⁵ *Ibid.*

¹⁶ '% All Protection Levels & Implemented' (Marine Protection Atlas) <<https://mpatlas.org/countries/list/>> accessed 24 August 2024

¹⁷ 'Marine Protected Areas in Europe's Seas' (European Environment Agency) <<https://www.eea.europa.eu/en/analysis/indicators/marine-protected-areas-in-europes-seas/>> accessed 24 August 2024

is clear that no single competent authority exists to govern the entire high seas. The only effective way to manage ABNJ is through collective action by states to establish shared rules. Various bodies have emerged to meet the needs of the international community and the conservation of biodiversity. These bodies aim to manage marine areas globally by providing specific forms of control through various ABMTs with a narrower scope, including sectoral ABMTs and, as a subset, MPAs, as well as multi-sectoral and cross-sectoral ABMTs. The second subheading of this chapter "Key Concepts and Bodies" provides detailed insights into these mechanisms and the specific organizations that try to establish rules in ABNJ for initiation and monitoring of such rules.

Furthermore, other types of organizations and agreements exist between the nations, which combine efforts in regulating particular marine region, restricting themselves and taking responsibility under common rules. While such rules typically apply to areas within their national jurisdiction, there have been also rules, introduced for the high seas adjacent to nations' own waters. Even though such approach is one of the most effective methods of protection of the high seas, it is not entirely clear what this entails for the protection, which is sought also from third countries. The specific details will be discussed in the third subheading below.

Inevitably, the commitment of nations to specific obligations within and beyond their national jurisdiction has led to the emergence of legally competent authorities created to address emerging disputes in this domain. Although the overall number of international maritime law cases is relatively limited, jurisprudence in areas like the ABNJ, characterized by challenging delineations of jurisdiction and responsibilities, is particularly sparse. Nevertheless, certain key cases provide valuable insights into the prospective governance of these areas. The last subheading in this chapter is dedicated to these noteworthy cases, examining their implications for the Agreement's discussions.

A. Overview of UNCLOS

The UNCLOS, which entered into force in 1994, sets out the rights and obligations of states with regard to the use of the oceans. It has now been ratified by 168 states and the European Union,¹⁸ but non-signatories are also bound by many of the provisions of UNCLOS as they are the rules of customary international law, which are reflected in the Convention. Among other

¹⁸ UNCLOS (n 1)

things, UNCLOS formalized EEZs, areas generally extending 200 nautical miles from coastal baselines, where nations have the sole right to make decisions about the use of natural resources. In addition, under Article 77 of UNCLOS, the coastal state has sovereign rights for the purpose of exploring and exploiting its natural resources of the continental shelf extending to 200 nautical miles and in special situations even more. As stated in UNCLOS Article 78, these rights are without prejudice to the legal status of superjacent waters or the airspace above them.

Beyond the EEZs lie the high seas and beyond the continental shelf lies the international seabed, which is defined in the UNCLOS as the 'Area.' The BBNJ Treaty aims to regulate areas beyond EEZ and Area, ABNJ, where all states have conditional freedoms, including navigation, fishing and marine scientific research. These freedoms also apply to the Area, except for deep-sea mining, which is regulated by the International Seabed Authority (ISA), an international body established under UNCLOS. However, according to Preamble of the UNCLOS and Article 192, there are general obligations imposed on states to protect and preserve the marine environment. Therefore, the individual states have to act accordingly in the high seas, and global and regional cooperation is encouraged to achieve such protection (Article 197).

While UNCLOS established the legal framework for activities in the oceans, it does not explicitly mention marine biodiversity or marine genetic resources (MGRs). For instance, the convention primarily focuses on navigation, fishing rights and territorial disputes, without addressing the growing concerns over biodiversity loss or the exploitation of marine biodiversity. There are some articles like 116-120 on the 'Conservation and Management of the Living Resources of the High Seas', but through the document, they are quite vague, providing general principles rather than clear guidelines on sustainable practices or specific protections for vulnerable species.

At the same time, the legal basis for establishing ABMTs can be found in Part XXI, more specifically in Article 194(5) of UNCLOS, which requires rare or fragile ecosystems, and habitats of depleted, threatened or endangered species, as well as other forms of marine life, to be protected and preserved by the Parties. Other related articles include those on global and regional cooperation (Art. 197–201), monitoring of the risk of effects of pollution, publication of reports and assessment of potential effects of activities (Art. 204–206), and promotion of the development of marine technology through national and regional center or international

cooperation (Art. 270–273). However, UNCLOS has significant gaps in operationalizing these duties, including the absence of measures regarding ABMTs.

It is crucial to understand that the UNCLOS has two main principles that may sometimes conflict with each other when it comes to managing biodiversity in ABNJ. The first principle is the freedom of the seas, outlined in Section 1 of Part VII, while the second principle is the conservation and management of living resources in the high seas, described in Section 2 of the same Part. Additionally, general protection and preservation obligations under Part XII of UNCLOS supports the Section 2, stating that countries have a legal duty to protect and preserve biodiversity in ABNJ. They must collaborate rather than solely pursue their own interests, even though they have significant freedom in deciding their actions within these areas.

To sum up, while UNCLOS provides a comprehensive legal framework for ocean governance, it has notable gaps when addressing modern challenges, particularly regarding marine biodiversity and marine genetic resources. The Convention's focus on navigation, fishing rights and territorial disputes leaves the protection of vulnerable species and ecosystems largely underdeveloped. Though there are provisions for the conservation of marine life and ecosystems, they remain vague and lack specific guidance for sustainable management, especially in ABNJ. As the balance between freedom of the seas and the protection and preservation of marine biodiversity becomes increasingly relevant, global cooperation is essential to fill these gaps and ensure the effective management of areas in ABNJ.

B. Key Concepts, Bodies and Agreements related to ABMTs

The development of the BBNJ Agreement has contributed substantially to elaborating on the concept of ABMT. While such concept did not emerge during the treaty discussions, yet it is acknowledged that prior to the Agreement there was neither a definition of ABMT in international law nor a generally accepted non-legal definition.¹⁹

As such, the Treaty defines ABMTs as **tools**, including MPA, for a **geographically defined area** through which **one or several sectors or activities** are managed with the **aim of achieving particular conservation and sustainable use objectives** in accordance with the

¹⁹ Singh PA and Araujo FC, 'The Past, Present and Future of Ocean Governance: Snapshots from Fisheries, Area-Based Management Tools and International Seabed Mineral Resources' [2023] MARE Publication Series 113 <https://link.springer.com/chapter/10.1007/978-3-031-20740-2_6> accessed 25 August 2024

Agreement²⁰.

A closer review of the given definition allows to single out ‘tools’ as its key component. While currently there is no unified approach to the notion of the ‘tool,’ certain attempts to clarify it were undertaken during the Agreement drafting stage. For instance, the World Conservation Union (IUCN) proposed to the Preparatory Committee the definition of “regulations of human activity in a specified area to achieve conservation or sustainable resource management objectives.”²¹ However, it was not used for the draft clause and the term ‘regulations’ was taken out of the final text, since ABMTs can cover a wide range of legal measures. Among which are the mechanisms developed internationally and regionally to identify sensitive marine areas on different ecological or oceanographic bases.²²

Considering the types of such tools, they can be classified as sectoral, multi-sectoral or cross-sectoral. Sector specific ABMTs focus on one human activity in ABNJ, such as navigation, dumping, fishing, scientific research or exploration and exploitation of non-living resources. Sectoral area-based tools traditionally aim to achieve better resource management but may have some indirect or direct biodiversity benefits.²³ Multi-sectoral ABMTs represents a tool which combines several sector specific ABMTs and regulates them under one tool. A multi-sector planning tool is typically used instead of single-sector to enable the application of the rules to restrict different human activities at the same time. As a result, they have the potential to encompass a comprehensive zoning approach.²⁴ Lastly, cross-sectoral tools are the ones where all human activities are controlled for a determined area.

Apart from ‘tools,’ the concept of a geographically defined marine area is another key aspect of the definition of ABMTs. Such concept is broad and can encompass any marine area, regardless of its legal status. Annex I of the Agreement provides indicative criteria for the identification of such areas, focusing mainly on such factors as conservation status and

²⁰ BBNJ (n 2) art 2

²¹ ‘Paper_v_understanding_abmt_a...’ (IUCN, 2016) <https://www.iucn.org/sites/default/files/2022-09/paper_v_understanding_abmt_and_mpa.pdf> accessed 25 August 2024

²² Lyons Y and others, ‘Moving from Mpas to Area-Based Management Measures in the South China Sea’ (2019) 35 *The International Journal of Marine and Coastal Law* 201 <https://brill.com/view/journals/estu/35/2/article-p201_2.xml> accessed 25 August 2024

²³ Greiber T [2022] *An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction* <https://www.iucn.org/sites/default/files/2022-09/paper_v_understanding_abmt_and_mpa.pdf> accessed 25 August 2024

²⁴ Singh PA and Ort M, ‘Law and Policy Dimensions of Ocean Governance’ [2019] *YOUMARES 9 - The Oceans: Our Research, Our Future* 45 <<https://www.rifs-potsdam.de/en/output/publications/2019/law-and-policy-dimensions-ocean-governance>> accessed 29 August 2024

ecosystem uniqueness, with no specific criterion regarding the size of the geographically defined area. However, it is important to note that Article 15 of the BBNJ Agreement clarifies that the geographically defined areas in the context of the BBNJ Agreement do not include areas within national jurisdiction.

As for the objectives of the ABMTs, the Agreement provides for the conservation and sustainable use of marine areas. At the same time, a more extensive list of objectives was reflected in the Oceans and Law of the Sea document of UN, which includes preservation of important ecological, biological or geomorphologic processes; conservation and management of species; protection of beautiful seascapes, cultural, archaeological, or historic sites; recreation and public enjoyment; separation of uses to prevent accidents, collisions or conflicts of use; environmental monitoring and assessment; and scientific research.²⁵ ABMTs are designed to achieve one or more of these objectives by managing the pressures from human uses, such as fishing and shipping, which negatively impact or have the potential to negatively impact the ecosystem and resources of a geographically defined area. The degrees of protection which can be adopted in such areas are very different, ranging from areas of strict protection where uses are excluded to areas where multiple uses are allowed and regulated.²⁶ As a result, ABMTs are a useful tool to implement an ecosystem approach as well as a precautionary approach.

The formulation of the above definition through extensive consultations stands as a collective achievement for the international community in delineating the core elements of an ABMT. Beyond this definitive characterization, an examination of various established ABMTs reveals additional common features, including a medium to long-term perspective of marine protection, an adaptive/iterative approach to management, reliance on the best available data, application of an ecosystem approach, promotion of information sharing, incorporation of performance monitoring, utilization of spatial and scenario analysis for decision support, and encouragement of transboundary and cross-jurisdictional cooperation.²⁷

For the context of BBNJ Agreement, which aims to establish a legal framework for the

²⁵ UNGA 'Report of the Secretary General Oceans and the Law of the Sea' UN GA 62nd Session Item 79 (a) of the provisional agenda UN Doc A/62/66/Add.2 (2007) para 117

²⁶ UNGA 'Cooperation between the United Nations and the Pacific Islands Forum' UN GA 57nd Session Item 22 (p) UN Doc A/RES/57/37 (2003)

²⁷ Vestergaard O, Fletcher S and Martin J (UNEP) <https://wedocs.unep.org/bitstream/handle/20.500.11822/20214/UNEP_EC_OG_WG3_PRE4_Brussels%20presentation%20Fletcher.pdf?sequence=1&isAllowed=y> accessed 25 August 2024

conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction, two types of ABMTs stand out — MPAs and Marine Spatial Planning (MSP). These approaches differ from those originally introduced to regulate just one sector such as ABMTs introduced by MARPOL, ISA or RFMOs, yet ultimately contribute to the protection of marine biodiversity. MPAs prioritize conservation objectives and aim to achieve comprehensive management of a specific area, and MSP aims to coordinate actions, separate conflicting uses, and optimize the use of marine space to achieve sustainable development of the ocean and its resources.²⁸ A more detailed review of both tools can be carried out to elaborate on their specifics and notion.

The concept of MPAs was created in 1962 in Seattle at the first World Conference on National Parks.²⁹ This tool is applied diversely around the world and under different names for similar policies, such as specially protected areas, marine reserves, preserves, sanctuaries, wilderness areas, specially managed areas and parks. These could be equally varied in purpose, from strict protection from all human use to zoned multiple use areas.³⁰

In the text of BBNJ Agreement, MPAs are considered as “a geographically defined marine area that is designated and managed to achieve specific long-term biodiversity conservation objectives and may allow, where appropriate, sustainable use provided it is consistent with the conservation objectives.”³¹ Before that commonly accepted definitions for MPAs had been introduced by CBD³² and IUCN,³³ which are similar to the concept mentioned in draft text of BBNJ Agreement and imply a) any defined area within or adjacent to the marine environment b) together with its overlying water and associated flora, fauna, historical and cultural features c) which has been reserved by law or other effective means, including customs d) with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings. In its turn, a slight difference can be seen in FAO’s definition of “any marine

²⁸ Greiber (n 23)

²⁹ ‘Mit Offenen Karten - Das Mittelmeer: Ein Bedrohtes Ökosystem - Die Ganze Doku’ (ARTE, 7 February 2024) <<https://www.arte.tv/de/videos/114573-007-A/mit-offenen-karten/>> accessed 25 August 2024

³⁰ ‘High Seas Marine Protected Areas and Deep- ...’ (FAO) <<https://www.fao.org/3/a1341e/a1341e02d.pdf>> accessed 25 August 2024

³¹ BBNJ (n 2) art 1

³² Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas, TECHNICAL ADVICE ON THE ESTABLISHMENT AND MANAGEMENT OF A NATIONAL SYSTEM OF MARINE AND COASTAL PROTECTED AREAS (Secretariat of the Convention on Biological Diversity 2004) <<https://www.cbd.int/doc/publications/cbd-ts-13.pdf>> accessed 25 August 2024 p 7

³³ ‘17th Session of the General Assembly of IUCN And ...’ (IUCN) <<https://portals.iucn.org/library/sites/library/files/documents/GA-17th-011.pdf>> accessed 25 August 2024 para 2(b)

geographical area that is afforded greater protection than the surrounding waters for biodiversity conservation or fisheries management purposes.” However, today we see fisheries management purposed areas are not considered as MPAs and more likely are a sectoral ABMT, while MPAs being cross-sectoral by their nature.³⁴

MPAs are established with varying objectives and regulations that cater to different conservation needs. These objectives can range from strictly protected scientific reserves and wilderness areas, to areas that aim to protect large-scale ecological processes, certain species, or habitats, to seascapes with low-level traditional or non-industrial use of natural resources that are compatible with nature conservation.³⁵ IUCN has provided a category system to differentiate the varying levels of management that such areas may be afforded.³⁶

On the high seas, the main rationales for creation of MPAs are similar to the one for coastal areas. Experiences in coastal and offshore waters under national jurisdiction have shown MPAs to be an important tool for biodiversity conservation and ecosystem-based oceans and fisheries management. When managed effectively, these areas can contribute to developing ocean resilience to climate change, preventing fisheries from collapsing, and preserving marine ecosystems.³⁷ MPAs are recognized globally as a means to fulfill a nation's responsibility to protect marine species and ecosystems, and to collaborate with other nations to achieve these objectives, in line with protection and preservation of the marine environment considerations brought by UNCLOS Part XII. Such ABMT is particularly relevant to implementation of the UNCLOS provisions, which grant nations with the freedom to exercise their rights in high seas but also mandate them to protect the marine environment and conserve natural resources. Moreover, the UN Fish Stocks Agreement highlights the importance of utilizing the best scientific information and adopting a precautionary approach to conserve marine biodiversity³⁸.

The impact of human activities on marine biodiversity in ABNJ has become a growing concern

³⁴ ‘High Seas Marine Protected Areas and Deep- ...’ (FAO) <<https://www.fao.org/3/a1341e/a1341e02d.pdf>> accessed 25 August 2024

³⁵ Greiber (no 21)

³⁶ Day J and others, ‘Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas’ (IUCN, 2019) <<https://portals.iucn.org/library/sites/library/files/documents/PAG-019-2nd%20ed.-En.pdf>> accessed 25 August 2024 p 10

³⁷ Trouillet B and Jay S, ‘The Complex Relationships between Marine Protected Areas and Marine Spatial Planning: Towards an Analytical Framework’ (2021) 127 Marine Policy 104441 <<https://www.sciencedirect.com/science/article/abs/pii/S0308597X21000518>> accessed 29 August 2024

³⁸ Fish Stock Agreement (n 5) art 5(c)

for many states, scientists, conservation organizations and the public. This concern has led to the development of the idea to extend MPAs to high seas as a solution.³⁹ However, it has become clear that for comprehensive biodiversity consideration, there should be a greater authority that monitors all MPAs, as the ocean environment is indivisible, with highly migratory species making protection efforts more complicated. Today, it is acknowledged that in the high seas, MPAs networks would create meaningful links across habitats, benefiting highly migratory species such as whales and turtles. A well-connected MPA network can protect important places along their routes, such as feeding or breeding grounds. Therefore, well-designed, well-connected MPA networks are critically important for protecting these species. Earlier, the international community has committed itself to establishing a coherent network of MPAs.⁴⁰ Three basic but challenging requirements have been attached to this goal: the network of MPAs has to be coherent and representative, consistent with international law, and based on scientific information.⁴¹ Despite this commitment, the goal set for 2012 has still not been achieved.

Turning to the concept of MSP, it defined as "a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic, and social objectives specified through a political process" by Secretariat of the CBD.⁴² While MPAs and their networks are crucial for conservation and sustainable use, MSP offers a more comprehensive approach to integrating human activities without compromising these values. The process engages authorities in planning specific maritime areas, addressing various activities and preservations. Through MSP, stakeholders can put forward their vision for an area, identify where human activities currently occur and where they might occur in the future, and determine actual or potential conflicts between different ocean uses, balancing between human activities and desired conservation outcomes. The resulting spatial plan can provide for sustainable use while also conserving specific areas through MPAs and other

³⁹ 'High Seas Marine Protected Areas and Deep- ...' (FAO) <<https://www.fao.org/3/a1341e/a1341e02d.pdf>> accessed 25 August 2024

⁴⁰ Molenaar EJ and Oude Elferink AG, 'Marine Protected Areas in Areas beyond National Jurisdiction
the Pioneering Efforts under the OSPAR Convention' (2009) 5 Utrecht Law Review 5 <<https://utrechtlawreview.org/articles/10.18352/ulr.92>> accessed 29 August 2024

⁴¹ Report of the World Summit on Sustainable Development (26 August - 4 September 2002) A/CONF.199/20 (The 2002 World Summit on Sustainable Development in Johannesburg) para 32(c)

⁴² 'Marine Spatial Planning in the Context of the Convention on Biological Diversity A study carried out in response to CBD COP 10 decision X/29' (Secretariat of the Convention on Biological Diversity and the Scientific and Technical Advisory Panel, 2012) <<https://www.cbd.int/doc/publications/cbd-ts-68-en.pdf>> accessed 25 August 2024

appropriate measures in a manner that avoids potential conflicts.⁴³

Various countries/territories have started to use MSP to achieve sustainable use of their marine space, including for the purpose of developing a “blue economy” and biodiversity conservation in ocean and coastal areas under their jurisdiction. Currently, about 100 countries/territories have MSP initiatives, with implementation ranging from early stages (new authority and funding arrangements) to plan revisions and adaptation.⁴⁴ For instance, in Europe, MSP became part of the overarching Integrated Maritime Policy of the EU with the Directive 2014/89/EU, which has the objective of "supporting the sustainable development of seas and oceans and developing coordinated, coherent and transparent decision-making in relation to the European Union's sectoral policies affecting the oceans, seas, islands, coastal and outermost regions and maritime sector." This directive obliges the 22 coastal Member States to have a national MSP since 31 March 2021 and lists several minimum requirements for their MSPs regarding different elements from data-sharing to environmental approaches.⁴⁵

It is clear that the successful implementation of MSP for European Seas was made possible by a top-down approach and clear jurisdiction. When attempting to apply the same solution to the high seas — where the space is free and open for the use of all humanity — it becomes challenging to adopt a top-down approach given lack of a centralized authority. Therefore, establishing a legal and policy framework becomes essential to empower application of MSPs in ABNJ, which is not an easy task considering the multitude of competing social interests in the high seas. Simultaneously, significant technical and scientific knowledge is required to comprehend the unique needs of the area, and dealing with such a vast portion of the world does not seem either simple or cost-effective.

While the Agreement provides for general concepts of ABMTs (including MPA and MSP), other sectoral legal frameworks (CBD, fisheries, etc.) were developed to introduce their specific ABMTs, which are tailored to the needs of marine environment and peculiarities of the human activities. There were more than twenty organizations, which participated in the

⁴³Vierros M and others [2016] Space for conservation and sustainable use: area-based management in areas beyond national jurisdiction <https://www.researchgate.net/publication/342339360_Space_for_conservation_and_sustainable_use_area-based_management_in_areas_beyond_national_jurisdiction> accessed 29 August 2024

⁴⁴ ‘MSP around the World’ (MSPGLOBAL2030) <<https://www.mspglobal2030.org/msp-roadmap/msp-around-the-world/>> accessed 29 August 2024

⁴⁵ ‘Introduction to MSP’ (The European Maritime Spatial Planning Platform) <<https://maritime-spatial-planning.ec.europa.eu/msp-eu/introduction-msp>> accessed 29 August 2024

BBNJ Agreement discussions related to ABMTs and hold governance power in the high seas. While these bodies vary greatly in their mandates (such as fisheries management, shipping regulation, and seabed mining management), none of these organizations possess a comprehensive cross-sectoral mandate with regulatory authority specifically focused on conservation in areas beyond national jurisdiction.⁴⁶ Nevertheless, these global mechanisms and international agreements offer opportunities to bolster protection in specific areas of ABNJ by adopting ABMTs within their respective mandates.

Some of the already above-mentioned tools have also the potential to meet ‘other effective area-based conservation measures’ criteria (OECMs) that has been newly established and described by the parties to the CBD during the final stages of negotiations of Aichi Biodiversity Target 11. Such target aims to promote “geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in-situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.” The OECM concept represents a new opportunity for states to recognize biodiversity conservation potential from a wider range of spatial management measures than ever before. Various international efforts have been pursued to define, operationalize, and provide guidance on OECMs across multiple sectors.⁴⁷

In addition to OECMs, CBD refers to another term — ecologically or biologically significant areas (EBSAs) — which should be distinguished from ABMTs. While EBSAs are often discussed in the context of ABMTs, they cannot be qualified as such. These are the areas recognized by States Parties to the CBD based on scientific criteria. While EBSAs provide an important scientific basis for identifying areas that are important, they do not have associated management measures and thus should not be considered ABMTs.

For fisheries management in ABNJ, the so-called UN Fish Stocks Agreement is an important treaty which provides clarity on the provisions of UNCLOS related to straddling and highly migratory fish stocks.⁴⁸ While the UNCLOS provides the fundamental and overarching

⁴⁶ Langlet A, ‘Dataset IOs in BBNJ Regime Complex’ (PHAIDRA, 2022) <<https://phaidra.univie.ac.at/detail/o:1613830>> accessed 29 August 2024

⁴⁷ Other Effective Area Based Conservation Measures (November 2020) COFI/2020/Inf.15.3 (FAO Committee on Fisheries 34. Session)

⁴⁸ ‘Background Information on Ocean Governance and the BBNJ Treaty’ (Background information on Ocean Governance and the BBNJ Treaty) <<https://bbnj-mgr.fas.harvard.edu/background-information-ocean-governance>> accessed 29 August 2024

legally-binding framework for fisheries management in ABNJ, the UN Fish Stocks Agreement elaborates on requirements for the conservation and management of straddling fish stocks and highly migratory fish stocks in the high seas. It established the concept that management of such fish stocks must be based on the precautionary approach⁴⁹ and the best available science. It obliges states to ensure the long-term sustainability of target stocks, conservation and management of marine biodiversity⁵⁰ and provides for obligations for international cooperation⁵¹. Subsequently, governments pursue these collaborations through their membership in regional fisheries management organizations (RFMOs), which are international bodies with the mandate to manage shared fish populations. The details of this process will be discussed in the following section.

Among the actors in the field of fisheries, the FAO holds a strong mandate in overseeing fishing on a global scale, with the help of RFMOs on a regional level. Vulnerable Marine Ecosystems (VME) were introduced as a type of ABMTs designated by some RFMOs, based on criteria developed by the FAO and pursuant to the UNGA resolution.⁵² However, the effectiveness of governance by RFMOs is often limited to single-sector initiatives and disconnected efforts. This approach fails to address growing concerns about marine ecosystems, particularly in older, tuna focused RFMOs. The best available science is not always implemented in practice. Challenges such as capacity limitations, costs, ineffective communication among stakeholders, lack of data, and specially consensus-based decision-making further complicate matters.⁵³ In the following section on regional treaties, some of the best functioning RFMOs in ABNJ will be discussed in more details.

The FAO has also developed relevant instruments to promote responsible fisheries practice, including the FAO Code of Conduct for Responsible Fisheries and the FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing

⁴⁹ Fish Stock Agreement (n 5) art 6

⁵⁰ Fish Stock Agreement (n 5) art 5

⁵¹ Fish Stock Agreement (n 5) art 8–16, 17

⁵² UNGA ‘Resolution on Sustainable fisheries, including through the 1995 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 and related instruments’ UN GA 61st Session Item 71 (b) UN Doc A/RES/61/105 (2007)

⁵³ FAO Fisheries management in the Areas Beyond National Jurisdiction (2016) <<https://openknowledge.fao.org/server/api/core/bitstreams/ef78b580-4d58-4cc1-85e6-1b892c67eedc/content>> accessed 29 August 2024

Vessels on the High Seas.⁵⁴ The Code of Conduct is a voluntary instrument that establishes international standards for responsible practices. It aims to ensure the effective conservation, management, and development of living aquatic resources while respecting the ecosystem and biodiversity. On the other hand, the Compliance Agreement⁵⁵ is a binding instrument for the 45 state parties. Its objective is to enhance the role of flag states and ensure that they strengthen control over their vessels to comply with international conservation and management measures. The FAO's recent work on area-based management has also focused on the implementation of spatial management measures, with a particular focus on OECMs. This work includes actions to manage and conserve ecosystems through support for the implementation of spatial management measures in fisheries.

Another sector regulated in ABNJ is the exploration and exploitation of mineral resources, governed by the ISA. It is an autonomous organization established under the UNCLOS and the 1994 Agreement relating to the Implementation of Part XI of the UNCLOS.⁵⁶ ISA uses a mechanism called Regional Environmental Management Plans (REMPs) to protect the seabed. It involves introducing networks of Areas of Particular Environmental Interest (APEIs) as networks of protected areas designated through scientific spatial analysis and principles. The ISA describes APEIs as large areas with self-sustaining populations and a broad range of habitat variability that should not be affected by physical activity or mining effects. APEIs are a combination of ABMTs and offer higher protection than their surrounding areas. They regulate mining activities in the Area for the benefit of humankind as a whole and aim at the in situ conservation of marine ecosystems. The ISA uses scientific principles to ensure the effective protection of the marine environment from harmful effects that may arise from deep-seabed-related activities.⁵⁷

The International Maritime Organization (IMO), a specialized agency of the UN, plays a crucial role in ensuring the safety of shipping and preventing pollution from ships. It offers a

⁵⁴ European Parliament, 'The Implications Of The Un Fish Stocks Agreement (New York, 1995) For Regional Fisheries Organisations And International Fisheries Management' (Working Paper) FISH 112 EN 01-2004, November 2023

⁵⁵ Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (adopted 24/11/1993, entered into force 24 April 2003) 2221 UNTS 91 (Food and Agriculture Organization of the United Nations)

⁵⁶ Robb S, Jaekel A and Blanchard C, 'How Could the BBNJ Agreement Affect the International Seabed Authority's Mining Code?' (2023) 34 *Ejil Talk* <<https://www.ejiltalk.org/how-could-the-bbnj-agreement-affect-the-international-seabed-authoritys-mining-code/>>

⁵⁷ 'About ISA - International Seabed Authority' (International Seabed Authority - International Seabed Authority, 5 July 2023) <<https://www.isa.org.jm/about-isa/>> accessed 29 August 2024

variety of measures – both recommendary and mandatory – to protect the marine environment from the negative impacts of international shipping. It may more strictly regulate vessel discharges in certain areas through the designation of Special Areas under the International Convention for the Prevention of Pollution from Ships (MARPOL). By contrast, constraints that are set by MARPOL on the freedom of navigation are limited and are generally applicable to states only via adoption at the international level by the IMO through instruments. The IMO can also designate Particularly Sensitive Sea Areas (PSSAs), which is described as an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be vulnerable to damage by international maritime activities.⁵⁸ In particular, it can include routing measures, strict application of MARPOL discharge and equipment requirements for ships, such as oil tankers, and installation of Vessel Traffic Services. Currently, there are 18 PSSAs established, but none of them are located in ABNJ.⁵⁹ However, there are no legal barriers that would prevent the IMO from establishing a PSSA in ABNJ. In fact, IMO has recently initiated discussions with stakeholders to establish a PSSA in the Sargasso Sea.⁶⁰

Other sectoral instruments have mandates related to ABMTs in ABNJ include the International Convention on the Regulation of Whaling, which establishes whale sanctuaries, such as those in the Indian and Southern Oceans. Moreover, the Convention on the Conservation of Migratory Species of Wild Animals empowers parties to take direct action and collaborate on the conservation and management of migratory species, using the term "Range State"⁶¹ to encompass states whose flagged vessels operate beyond national jurisdictional limits in harvesting such species.⁶²

In conclusion, the development of the BBNJ Agreement has significantly advanced the understanding and application of ABMTs in marine conservation. Prior to this Agreement, the

⁵⁸ Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (adopted 1 December 2005) Resolution A.982(24) (IMO)

⁵⁹ 'Particularly Sensitive Sea Areas' (International Maritime Organization, 2024) <<https://www.imo.org/en/ourwork/environment/pages/pssas.aspx>> accessed 29 August 2024

⁶⁰ 'WMU Hosts Particularly Sensitive Sea Areas (PSSA) on the High Seas Workshop' (RSS, 22 November 2023) <<https://www.wmu.se/news/wmu-hosts-particularly-sensitive-sea-areas-pssa-on-the-high-seas-workshop>> accessed 29 August 2024

⁶¹ Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 01 November 1983) 1651 UNTS 333 (Convention on the Conservation of Migratory Species of Wild Animals Secretariat) art 1(h)

⁶² De Lucia V, Elferink AO and Nguyen LN, *International Law and Marine Law beyond National Jurisdiction: Reflections on Justice, Space, Knowledge and Power* (Brill 2022) <<https://brill.com/edcollbook/title/61595?language=en>> accessed 29 August 2024

concept of ABMTs was neither clearly defined in international law nor widely accepted in non-legal contexts. Through extensive consultations, the BBNJ Agreement has formalized the concept of ABMTs as tools, designed to manage specific human activities within geographically defined areas to achieve conservation and sustainable use objectives. This definition as well as the Part X of the Agreement now provides a clear framework for both the creation and implementation of ABMTs. There is a certain classification of ABMTs into sectoral, multi-sectoral, and cross-sectoral tools, each tailored to managing the marine areas in different scopes. Sectoral tools address singular activities, while multi- and cross-sectoral tools provide more integrated approaches, regulating multiple activities simultaneously or managing all human actions within a defined area. Now, the BBNJ Agreement serves as a milestone in shaping international marine governance by defining ABMTs and laying the groundwork for collaborative efforts in marine conservation, with MPAs and MSP standing as the most prominent examples of these tools. As the ocean governance systems move forward, the challenge will be to integrate ABMTs across sectors, enhance international cooperation, and ensure their effective implementation to address the growing pressures on marine ecosystems.

C. Regional Efforts

Various measures have been taken by countries with regard to regional seas to ensure the protection of respective adjacent waters and areas under their jurisdiction. One of the prominent actors in this domain is the United Nations Environment Programme (UNEP), with its Regional Seas Programme playing a central role in facilitating collaboration among over 143 nations since 1974. There are currently 18 Regional Seas Programmes (RSPs) across the world that instrumental for the implementation of Part XII of the UNCLOS, which provides the legal framework for the conservation and sustainable use of oceans and their resources, as recalled in paragraph 158 of “The future we want”. The RSPs function through their own legal frameworks in the form of a convention and associated protocols on specific issues.

In the context of this paper, certain international conventions stand out for their inclusion of ABNJ in their geographical scope. Primarily, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)⁶³, the Convention on the

⁶³ Convention For The Protection Of The Marine Environment Of The North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) UNTS 22301 (Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) / Secretariat of the Antarctic Treaty (ATS))

Conservation of Antarctic Marine Living Resources (CAMLRL Convention)⁶⁴ and the Barcelona Convention⁶⁵ warrant particular attention as they have already established MPAs in ABNJ. Likewise, the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea Convention)⁶⁶ and the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima Convention)⁶⁷ confer mandates to their parties regarding ABNJ. Article 5(1) of the Noumea Convention empowers parties to prevent, reduce, and control pollution in the Convention area from any source; ensure sound environmental management and development of natural resources; and harmonize policies at the regional level within the EEZ and high seas areas enclosed by all sides of various States' 200-nautical-mile zones (Article 1). Similarly, Article 1 of the Lima Convention delineates its scope as the sea area and coastal zone of the South-East Pacific within the 200-mile maritime area of sovereignty and jurisdiction of the High Contracting Parties, as well as the high seas up to a distance within which pollution of the high seas may affect that area.

Furthermore, under the Abidjan Convention for Cooperation in the Protection, Management, and Development of the Marine and Coastal Environment of the Atlantic Coast of the West, Central, and Southern Africa Region; the Nairobi Convention for the Protection, Management, and Development of the Marine and Coastal Environment of the Western Indian Ocean; and Comisión Permanente del Pacífico Sur (CPPS) covering the South East Pacific, member states have initiated examinations of issues related to marine biodiversity in ABNJ.⁶⁸ Yet, there are no ABMTs in ABNJ established by these bodies.

When discussing regional conventions, it is important to bear in mind that there are certain

⁶⁴ 1980 Convention on the Conservation of Antarctic Marine Living Resources (adopted 16 February 1976, entered into force 12 February 1982) 2354 UNTS 67 (OSPAR Commission)

⁶⁵ 1976 Convention for the Protection of the Mediterranean Sea Against Pollution (adopted 20 May 1980, entered into force 22 August 1990) 1102 UNTS 27 (Secretariat of the Pacific Regional Environment Programme)

⁶⁶ Convention For the Protection Of The Natural Resources And Environment Of The South Pacific Region (adopted 24 November 1986, entered into force 24 November 1986) [1990] ATS 31 (United Nations Environment Programme Mediterranean Action Plan Coordinating Unit)

⁶⁷ Agreement On the Protection Of The Marine Environment And The Coastal Area Of The Southeast Pacific (adopted 12 November 1981, entered into force 19 May 1986) UNTS 1648 (Permanent Commission for the South Pacific)

⁶⁸ 'Report of the Preparatory Committee on Development of an international legally-binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction under the United Nations Convention on the Law of the Sea' Regional Seas Programmes and other UNEP Activities Relevant to Marine Biodiversity in Areas beyond National Jurisdiction (26 August 2016) <https://www.un.org/depts/los/biodiversity/prepcom_files/UNEP_and_BBNJ_PrepCom2.pdf> accessed 29 August 2024

limitations that need to be taken into account. While the high seas are considered part of the global commons, only the countries in the region are members of the RSOs and only countries that are members of the regional organizations are responsible for enforcing protection. As a result, it is also controversial how these agreements can be binding on third countries, since they aren't part of the respective agreements.

Apart from legal constraints, certain regions lack dedicated regional seas organizations or an organization equipped to address the issues in ABNJ, making it difficult to provide comprehensive protection and management. For instance, the Saragossa Sea Project, which was established in 2010 by the Government of Bermuda together with a network of international partners, seeks international recognition and protection for this unique open ocean ecosystem without having a regional seas body for non-tuna species for the vast majority of the Sargasso Sea.⁶⁹ Saragossa Sea is described as an EBSA by CBD, however, there is still no ABMTs established to govern this special marine area.

Another constraint to effective marine protection relates to duplication of the efforts undertaken by relevant actors since some RFMOs may have similar geographical scope of mandates, which can lead to similar marine protection activities. In many ocean regions, RFMOs are active in seeking for improvement of the environmental status in waters under national jurisdiction and in some cases in ABNJ. For example, OSPAR and North-East Atlantic Fisheries Convention (NEAFC) have established networks of MPAs and bottom fishing closures in the same marine areas, located in ABNJ in the North-East Atlantic since 2010. Both RFMOs are seeking cross-sectoral practical implementation of the MPA's conservation objectives through a so-called 'Collective Arrangement Between Competent International Organizations on Cooperation and Coordination Regarding Selected Area in Areas Beyond National Jurisdiction in the North East Atlantic,' formalized in 2014. Until today OSPAR and NEAFC are the only active partners in this manner.⁷⁰

Beyond the framework of RSPs and RFMOs, other regional initiatives with potential impacts

⁶⁹ Gjerde K and others [2020] Area-Based Management Tools in Marine Areas Beyond National Jurisdiction, A Report of the IUCN Workshop 8-10 October 2019 <https://iucn.org/sites/default/files/content/documents/2020/iucn_abmt_-_report_final_web.pdf> accessed 29 August 2024

⁷⁰ Christiansen S and others, 'Towards an Ecosystem Approach to Management in Areas beyond National Jurisdiction: Reforms for Deep Seabed Mining and the Proposed BBNJ Instrument' (2022) 9 *Frontiers in Marine Science* <<https://www.frontiersin.org/journals/marine-science/articles/10.3389/fmars.2022.720146/full>> accessed 29 August 2024

on ABNJ have been launched by various actors sharing common goals and interests in marine environmental protection. For instance, concept of Large Marine Ecosystems (LMEs) developed by US National Oceanic and Atmospheric Administration (NOAA), serve as platforms for implementing ecosystem-based management measures. Additionally, regional initiatives have been undertaken by political and economic organizations such as the EU, the African Union (AU), the Association of Southeast Asian Nations (ASEAN), and the Caribbean Community (CARICOM), as well as by ad hoc groups like the Sargasso Sea Commission. These initiatives must also be considered in any polycentric approach to addressing ABNJ concerns.

Today, there are three significant MPAs in ABNJ, established by the parties of the RSPs and managed in a fragmented manner under different regional treaties. These areas include the South Orkney Islands South Shelf MPA, the Ross Sea region MPA, and the OSPAR network of MPAs.⁷¹ In addition to these, there was also the MPA established in 1999 under the Barcelona Convention in the Mediterranean Sea, called Pelagos Sanctuary. It was the first high seas MPA practice, as in the beginning it included some areas beyond national jurisdiction of France, Italy and Monaco. However, with France's declaration of the establishment of an EEZ in the Mediterranean Sea in 2012, there is no high seas area anymore in the Pelagos Sanctuary and under the Barcelona Convention's Protocol concerning Specially Protected Areas and Biological Diversity (SPA/BD Protocol).

As for the current largest high-seas MPAs, it is worthy to examine the characteristics of OSPAR Convention and CAMLR in greater depth to understand challenges and opportunities presented by having regional initiatives in the field of marine protection.

The CAMLR Convention is the primary basis for the governance of the South Orkney Islands South Shelf MPA and the Ross Sea Region MPA, with conservation measures developed in accordance with this Convention. It was adopted in the early 1970s in response to concerns about unregulated fishing for Antarctic Krill. It is an integral part of the Antarctic Treaty System (ATS), which also includes the Antarctic Treaty, associated international instruments and measures in force under these instruments.

⁷¹ Jiang R and Guo P, 'Sustainable Management of Marine Protected Areas in the High Seas: From Regional Treaties to a Global New Agreement on Biodiversity in Areas beyond National Jurisdiction' (2023) 15 Sustainability 11575 <<https://www.mdpi.com/2071-1050/15/15/11575>> accessed 29 August 2024

To implement the CAMLR, the Parties established the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), which comprises the original signatories and acceding parties, as well as formed the Scientific Committee, which may establish further subsidiary bodies. The primary objective of CCAMLR, as set out in Article II of the CCAMLR Convention, is to promote implementation of "the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments."⁷² Within its functioning, it can establish MPAs, protect the environment, regulate fishing gear and address other related issues.⁷³

CCAMLR is open to all states with an interest in marine scientific research and fishing activities in the Convention Area, and currently has 27 parties and 10 acceding states.⁷⁴ In 2009, following a proposal and active promotion by the UK, CCAMLR established the South Orkney Islands South Shelf MPA. In 2017, the 35th Meeting of the Commission decided to establish another high seas MPA in the Antarctic Ross Sea region, following a joint proposal and promotion by the US and New Zealand. The Ross Sea MPA is currently the largest MPA implemented in the ABNJ.⁷⁵

The OSPAR Convention was derived from the merger of the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (Oslo Convention) and the Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris Convention). Initially signed by 14 states, comprising the original contracting parties of the Oslo and Paris Conventions, OSPAR's membership has since expanded to 16 parties, with the inclusion of Luxembourg and Switzerland, predominantly representing Western Europe. Compared to other regions in the world, OSPAR regime is an overall positive example of regional collaboration, since it benefits from incommensurably high level of regional cooperation and integration between OSPAR Contracting Parties, and specifically within the system of the European Union.

⁷² CCAMLR (n 63) art II (1)

⁷³ Haward M, 'Biodiversity in Areas beyond National Jurisdiction (BBNJ): The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the United Nations BBNJ Agreement' (2021) 11 *The Polar Journal* 303
<https://www.researchgate.net/publication/355301998_Biodiversity_in_Areas_Beyond_National_Jurisdiction_BBNJ_the_Commission_for_the_Conservation_of_Antarctic_Marine_Living_Resources_CCAMLR_and_the_United_Nations_BBNJ_agreement> accessed 29 August 2024

⁷⁴ 'CCAMLR Acceding States' (CCAMLR, 2024) <<https://www.ccamlr.org/en/organisation/acceding-states>> accessed 29 August 2024

⁷⁵ 'Convention for the Conservation of Antarctic Marine Living Resources Conservation Measure 91-03' (CCAMLR, 2009) <<https://cm.ccamlr.org/en/measure-91-03-2009>> accessed 25 August 2024

Implementation of the OSPAR Convention and its strategies is taken forward through the adoption of legally binding decisions, recommendations and other agreements, which set out actions to be taken by the Contracting Parties.⁷⁶ In 1998, OSPAR Ministers agreed to promote the establishment of a network of marine protected areas. Following a period of preparatory work, the 2003 OSPAR Ministerial Meeting in Bremen adopted Recommendation 2003/3 on a network of marine protected areas with the purpose of establishing an ecologically coherent network of well-managed MPAs in the North-East Atlantic. This network is expanded through nominations by Contracting Parties within their national jurisdiction and through OSPAR Decisions for MPAs in the ABNJ. To guide this process, OSPAR has established guidelines for the identification and selection of Marine Protected Areas within its Maritime Area.⁷⁷ These guidelines outline both the internal OSPAR process and the scientific criteria to be used in developing nomination proforma, employing a specific criteria system. If a new proposed site is within national jurisdiction, then the nomination proforma considerations are completed nationally within the concerned Contracting Party. But if it is in ABNJ, then the nomination proforma is prepared as a concerted effort by all OSPAR Contracting Parties. The process of preparing a site nomination proforma for a proposed new MPA in the ABNJ may require continuous work for a few consecutive years.⁷⁸

Currently, there are seven MPAs in the ABNJ within OSPAR's network.⁷⁹ It is also important to emphasize that Annex V allows the OSPAR Commission to adopt programmes and measures to safeguard against harm to marine ecosystems and biodiversity resulting from all other existing or new activities. This provision grants the OSPAR Commission a de facto authority in instances where there is no competent international organization at the global level, particularly concerning new and emerging activities.

Despite the limitations of RSPs and the need for broader international cooperation, these initiatives represent a significant step forward in marine protection beyond national jurisdiction. The establishment of MPAs in the ABNJ for the first time by two regional

⁷⁶ 'UNEP Regional Seas Reports and Studies No. 22 Rev. 2' (UNEP, 1985) <<https://wedocs.unep.org/bitstream/handle/20.500.11822/28270/Sea22Rv2.pdf?sequen%E2%80%A6>> accessed 25 August 2024

⁷⁷ (OSPAR Agreement 2003-171)

⁷⁸ 'Regional Seas Application of Area-based Management Tools, including Marine Protected Areas – Case Studies' (UNEP, 2019) <https://www.ascobans.org/sites/default/files/document/ascobans_ac25_inf2.7d_reg-seas-application-area-based-mgt-tools.pdf> accessed 25 August 2024

⁷⁹ 'Key Figures of the MPA OSPAR Network' (OSPAR, 2024) <<https://mpa.ospar.org/home-ospar/key-figures>> accessed 29 August 2024

organizations, the OSPAR Commission and the CCAMLR, demonstrates the potential for regional collaboration to address the challenges facing the high seas. However, moving forward, a more comprehensive approach that includes all stakeholders and deals with issues like statutes of third states or duplication of effort will be crucial for ensuring the long-term health of our global oceans.

D. Case Law

This sub-chapter examines the dynamic relationship between case law and the evolution of ABMTs in the ocean governance. While legal precedents in this area are scarce, there have been decisions delivered by international courts and tribunals that shed some light on the legal basis for these tools and their application in marine biodiversity protection.

It is essential to recognize that there are several avenues for resolving disputes arising from UNCLOS. Article 283 states that "when a dispute arises between States Parties concerning the interpretation or application of the provisions of the Convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means." Additionally, in accordance with by Article 286, by becoming a party to UNCLOS states are consenting in advance to allow a party to a dispute to unilaterally refer it to adjudication or arbitration if a dispute cannot be resolved through negotiation. Furthermore, Article 287 specifies the available procedures for dispute resolution, including the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII, or a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

When considering the case law practice related to high seas matters, we can examine the decisions of such judicial bodies as ITLOS, PCA, ICJ, as well as other tribunals. These decisions may not always pertain directly to the specific ABMT concept at hand, but rather may address broader concepts regarding issues in the high seas or marine biodiversity protection.

Certain decisions are crucial to this study as they elucidate essential terms within the BBNJ framework. To start with, the Advisory Opinion issued by the Seabed Disputes Chamber of

ITLOS⁸⁰ is significant, as it characterizes obligations regarding high seas and Area preservation as *erga omnes*. The enforcement of *erga omnes* norms is referred to as the ‘public function’ of dispute settlement, in which the goal is to maintain and secure the values and objectives of the wider community of subjects of international law. In another case, *Whaling in the Antarctic*, the question of standing to sue was not directly addressed by the ICJ. Australia brought a case against Japan for violating the International Convention for the Regulation of Whaling. Although Australia was not directly affected by Japan's whaling activities, the Court did not question its right to bring the case and appeared to treat the application as an *erga omnes partes* issue.

Overview of recent ICJ practice suggests that the Court is willing to allow standing on the basis of "shared values" and a "common interest" in preventing a violation of the relevant environmental treaty. This aspect is crucial to our discussion since environmental concerns in the high seas do not harm specific parties. Establishing *erga omnes* status for the obligations laid down in Part XII of the Convention is important in terms of enabling any concerned state to raise issues before a court or tribunal under UNCLOS.⁸¹ However, it is worth noting that while the UNCLOS contains obligations related to state conduct in ABNJ that could be classified as *erga omnes*, very few disputes have been brought or raised under the dispute settlement procedures. This lack of examples arguably highlights the difficulties in using dispute settlement processes to enforce ABNJ obligations, particularly with regard to environmental duties.

Secondly, another issue clarified by case law is the interpretation of UNCLOS Article 194(5), which stresses that the measures taken in accordance with protection and preservation of the marine environment, shall include those necessary to protect and preserve rare or fragile ecosystems. Given subsequent developments in agreements, principles and the continual evolution of science and technology, UNCLOS, like all agreements, must be interpreted to align with its objectives and purposes. A notable example is the clarification provided by the Tribunal in the *Chagos Marine Protected Area* case regarding Article 194(5). This ruling emphasized that the scope of the article extends beyond the regulation of marine pollution,

⁸⁰ Responsibilities and Obligations of States with Respect to Activities in the Area, Request for Advisory Opinion submitted to the Seabed Disputes Chamber International Tribunal for the Law of the Sea, 1 February 2011, International Tribunal for the Law of the Sea [ITLOS] para 180

⁸¹ Climate Change and International Law, Request for an Advisory Opinion Submitted by the Commission of Small Island States, Case 31, 13 June 2023, International Tribunal for the Law of the Sea [ITLOS] para 121

recognizing the multifaceted nature of environmental concerns within Part XII of the Convention. This perspective was reiterated in the *South China Sea Arbitration*. Similarly, the *Southern Bluefin Tuna* case underscored the integral role of conserving marine living resources in safeguarding the marine environment.⁸² Although it is not explicitly delineated in Part XII, in all aforementioned cases judicial bodies recognized that the conservation of marine living resources forms an essential component of marine environmental protection.

Another crucial aspect, which needs to be addressed in this sub-chapter, relates to the extent of protection clauses in light of the PCA Award in the *Chagos Case*. The dispute arose between Mauritius and the UK under UNCLOS over the Chagos Archipelago, a chain of islands in the Indian Ocean. The UK established a MPA around the islands, which was argued by Mauritius to have infringed on its sovereignty claims to the territory. The Tribunal ruled in favor of Mauritius, finding that the UK's creation of the MPA did not comply with UNCLOS. The Tribunal declared that in establishing the MPA adjacent to the Chagos Archipelago, the UK breached its obligations under Arts 2(3), 56(2), and 194(4) UNCLOS. In particular, UK was obliged to, first, ensure that fishing rights in the Chagos Archipelago would remain available to Mauritius as far as practicable; second, to return the Chagos Archipelago to Mauritius when no longer needed for defense purposes; third, to preserve the benefit of any minerals or oil discovered in or near the Chagos Archipelago for Mauritius. Even though the Tribunal indicated the violation of obligations, it emphasized that its concern was with the manner in which the MPA was established, rather than its substantive quality or environmental importance. It further stated the issue is now open to the Parties, which need to enter into the negotiations with each other that the Tribunal would have expected prior to the proclamation of the MPA. Such negotiations shall be carried out with a view to achieving a mutually satisfactory arrangement for protecting the marine environment to the extent necessary under a "sovereignty umbrella."

The Chagos Archipelago is home to seven atolls and more than fifty small islands, and it is considered one of the richest marine ecosystems globally, with outstanding ecological values. According to the Chagos Conservation Trust, the archipelago is "the most pristine tropical

⁸² Examples of provisional measures include Provisional Measures (New Zealand v Japan; Australia v Japan) (27 August 1999) ITLOS Cases 3 and 4, para 70; Request for an Advisory Opinion by Sub-regional Fisheries Commission (2 April 2015) ITLOS Case 21, para 120; Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award, 18 March 2015) PCA Case No 2011–03, para 538.

marine environment surviving on the planet."⁸³ The Tribunal still recognized that the protection of biological diversity is compatible with UNCLOS and that MPAs are a measure within the meaning of Article 194(5) that obliges states to "protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened, or endangered species and other forms of marine life." From the wording of this article, it is evident that the protection of the ecosystems and habitats prescribed in Article 194(5) should be understood as comprising areas within and outside of national jurisdiction. However, it was recognized that the establishment of ABMTs cannot outweigh sovereignty claims.⁸⁴

In summary, despite the limited number of judicial precedents, landmark decisions from international tribunals shed light on the legal foundations required for effective protection of marine biodiversity. The provisions of UNCLOS, particularly Articles 283, 286, and 287, establish a framework for dispute resolution that, although underutilized, could empower states to enforce environmental obligations in ABNJ. Key rulings demonstrate a judicial readiness to recognize erga omnes obligations, enabling states to address shared environmental interests. The most closely related decision was still made in the Chagos Case, highlighting the need to balance environmental protection and state sovereignty when establishing ABMTs, emphasizing consideration for both ecological integrity and sovereign claims.

III. The BBNJ Agreement - Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction

BBNJ Agreement, also known as the "Treaty of the High Seas," was adopted on June 19, 2023, by the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction under the UNCLOS as the third implementing agreement to the UNCLOS.⁸⁵

The UNGA established an Ad hoc Open-Ended Informal Working Group in 2004 to explore the conservation and sustainable use of biodiversity on the high seas. Over the next decade, experts and governments deliberated on this issue, ultimately reaching a "package deal" in 2011

⁸³ Rambaree K, 'Environmental Justice in the Case of the Chagos Marine Protected Area: Implications for International Social Work' (2020) 12 Sustainability 8349 <MDPI> accessed 29 August 2024

⁸⁴ Westholm A and Argüello G, 'Dynamic Ocean Management in Areas beyond National Jurisdiction' (2023) 54 Ocean Development & International Law 448 <<https://www.tandfonline.com/doi/epdf/10.1080/00908320.2023.2296392?needAccess=true>> accessed 29 August 2024

⁸⁵ BBNJ (n 2)

that served as the foundation for future negotiations. The package deal focused on four key areas: (1) sharing the benefits of marine genetic resources, (2) implementing measures like area-based management of marine protected areas, (3) conducting environmental impact assessments, and (4) promoting capacity building and marine technology transfer. After nine years of discussions, the Working Group determined that a new convention was necessary to safeguard high-seas biodiversity.⁸⁶

In 2015, a groundbreaking resolution (69/292) was adopted by the UNGA, leading to the formation of a Preparatory Committee responsible for proposing recommendations for a new agreement. Following the report produced and presented to the UNGA by the Preparatory Committee, the UNGA decided to convene an intergovernmental conference to negotiate a legally binding agreement on the conservation and sustainable use of biodiversity in the high seas outside national jurisdiction in 2017, which was expected to last for two years. The first meeting of the Intergovernmental Conference (IGC) was held in 2018 at the UN in New York and addressed issues under the package adopted in 2011.

During the initial negotiation session, the opinions expressed at the Preparatory Committee meetings were reiterated. Achieving consensus among the participating states is crucial for the success of the new convention. However, the challenge becomes difficult when it comes to the high seas, which is a vast area that is not under the jurisdiction of any coastal state. In 2018, formal negotiations began with the IGC holding four sessions over five years. The extended duration of negotiation reflects the complexity of the issue, with nations striving to strike a balance between conservation needs and economic interests.

The agreement was opened for signature on the 20th of September 2023 and the closing date for signature is the 20th of September 2025. It will enter into force 120 days after the date of deposit of the 60th instrument of ratification, approval, acceptance or accession. After this deadline, countries cannot sign but can still accede to the Agreement, which has the same legal status as ratification. So far, 89 countries have signed the Agreement, but only four countries have ratified it, with Palau being the first.

⁸⁶ Oral N, 'Açık Denizler İçin Yeni Bir Uluslararası Anlaşma ve Deniz Koruma Alanları', Ulusal Yetki Alanları Dışında Kalan Açık Denizlerin Korunması Ve Yönetilmesi (Türk Deniz Arastirmalari Vakfi 2019) <https://tudav.org/wp-content/uploads/2019/04/TUDAV_Ulusal_Yetki_Alanlari_Disinda_Kalan_Acik_Denizlerin_Korunmasi_ve_Yonetilmesi_high.pdf> accessed 2024

A. Overview of the BBNJ Agreement

The adoption of the BBNJ Agreement is a significant moment for high seas governance. The high seas cover half of the Earth's surface, account to 64% of global ocean area and are open to the usage of humankind, with some exceptions mentioned above.⁸⁷ As per Article 2 of the BBNJ Agreement, "it applies to areas beyond national jurisdiction," presenting a unique opportunity to address specific concerns related to these vast areas, which fall outside of any specified marine area under the jurisdiction of states e.g. territorial seas, archipelagic waters, exclusive economic zones and historic waters.

The overarching objective of the Agreement is to ensure the conservation and sustainable use of marine biological diversity in ABNJ, both presently and in the long term. This is to be achieved through the effective implementation of relevant provisions of the UNCLOS, supplemented by enhanced international cooperation and coordination within the framework of established treaties, while safeguarding rights conferred by pre-existing agreements. Article 5 underscores the importance of upholding and implementing other pertinent legal instruments, while Article 6 reaffirms the Agreement's steadfast commitment to respecting the sovereignty of all nations.

Part I of the Agreement also clarifies the key terminology and brings definitions to related terms, lays out fundamental principles and approaches and stresses the importance of international collaboration in realizing its objectives, acknowledging the interconnectedness of marine ecosystems and the necessity of collective action.

The BBNJ Agreement is structured around four substantive elements: ABMTs, encompassing marine protected areas; environmental impact assessments; marine genetic resources, including the fair and equitable sharing of benefits; and capacity building and the transfer of marine technology. Through these elements and the attendant regulatory mechanisms, the Agreement aims to fulfill its objectives.

Moreover, the BBNJ Agreement addresses "cross-cutting issues" relevant to all substantive elements and establishes a funding mechanism and institutional arrangements, including a

⁸⁷ 'Protecting the High Seas " Marine Conservation Institute' (Marine Conservation Institute, 24 April 2023) <<https://marine-conservation.org/high-seas/#:~:text=The%20high%20seas%20%E2%80%93%20the%20vast,64%25%20of%20global%20ocean%20area>> accessed 31 August 2024.

Conference of the Parties, various subsidiary bodies, a clearing-house mechanism, and a secretariat.

B. Comparison of ABMT Provisions of BBNJ Agreement with Relevant Existing Frameworks

For the purposes of the current study, Part II of the BBNJ Agreement, which focuses on measures such as ABMTs, including marine protected areas, is examined in detail under five sub-headings. It is important to understand which new regulations are introduced by the BBNJ Agreement and how it will contribute to the promotion of ABMTs. The BBNJ Agreement aims to bring a global, cross-cutting approach to these mechanisms, enabling a systematic process that can protect the biodiversity and ecosystem functions of the ocean at both spatial and temporal scales. It also aims to complement regional processes that may not be able to account for large-scale ecological or oceanographic processes, in particular connectivity generated by migratory species, ocean gyres, or the more than 25,000 transboundary species in the ocean. In this regard the Agreement focuses on bringing a global approach that can connect the dots between various regional organizations and initiatives already underway, while ensuring that key marine areas are not left behind. Through a critical review of relevant BBNJ articles and their comparison with existing international instruments, a deeper understanding of its potential impact will be sought.

a. Objectives

International treaties, such as the BBNJ Agreement, are rooted in scientific evidence, diplomatic negotiations and a shared understanding of the challenges facing the international community. The objectives of these treaties serve as guiding principles for their development and implementation, outlining the overarching goals that parties involved strive to achieve. These objectives are often found in the preamble or main body of the Agreement itself, and they provide a framework for negotiations and implementation.

For example, while UNCLOS does not have a specific article in its initial provisions, its preamble and later text outline its main functions: to promote the peaceful use of the seas, regulate the use of marine resources and promote the conservation of living resources and the preservation of the marine environment. In contrast, the CBD dedicates its Article 1 to clearly state its objectives as conservation of biological diversity, sustainable use of biological

diversity, and fair and equitable sharing of benefits from genetic resources.

In the case of the BBNJ Agreement, its structure is a combination of these both approaches. Article 2 establishes the overarching objective of the agreement: *"to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination."* However, the Agreement also outlines specific objectives for each chapter, including in Article 17, which defines five objectives of establishing measures such as ABMTs, including MPAs. By focusing on the objectives of this part of the Agreement, we can gain a better understanding of ABMTs' potential impact on the international community and the environment. Article 17 and its paragraph (a) reads as below:

"The objectives of Part III including are to: (a) Conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas"

Paragraph (a) focuses on the conservation and sustainable use of marine biodiversity, which is also emphasized in Article 1 of the CBD. Notably, the initial draft text⁸⁸ of the Agreement divided this sentence into two different paragraphs, outlining the establishment of two distinct system planning approaches. While the objective (c) mentioned a comprehensive system that included ABMTs and MPAs, the objective (d) was only dedicated to MPAs and creation of a system linking existing MPAs. There were two separate systems planned to be built according to the objectives (c) and (d). However, the current structure explicitly implies the creation of a single comprehensive system of ABMTs, encompassing ecologically representative and well-connected networks of MPAs, which is definitely more efficient in terms of streamlining all efforts.

"(b) Strengthen cooperation and coordination in the use of area-based management tools, including marine protected areas, among States, relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies"

⁸⁸Revised 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' (UNGA, 2019) <<https://documents.un.org/doc/undoc/gen/n19/372/88/pdf/n1937288.pdf>> accessed 31 August 2024

Paragraph (b) emphasizes strengthened cooperation, a concept found in most multilateral environmental agreements. However, it goes beyond a typical cooperation clause by specifying collaboration "among States, relevant legal instruments and frameworks, and relevant global, regional, subregional and sectoral bodies." This emphasis on inclusivity acknowledges the multifaceted nature of contemporary environmental challenges, recognizing that effective conservation efforts necessitate coordinated action across various levels and sectors.

The BBNJ Agreement is introduced into an already complex and competitive ocean governance framework, where it faces significant hurdles due to the presence of powerful stakeholders with often conflicting interests. These dynamics pose considerable challenges to the agreement's effectiveness in safeguarding marine biodiversity in ABNJ. A critical principle within the agreement is the commitment to respect the autonomy of existing bodies and legal frameworks, which continues to shape its implementation. Although the establishment of a Conference of Parties (COP) represents an institutional advancement, its capacity to make autonomous decisions is limited by the requirement to consult extensively with relevant stakeholders. Nevertheless, it should be accepted that its success is not dependent on asserting hierarchical control over existing frameworks, but rather on promoting systemic integration through orchestration. By fostering institutional polycentricity, the agreement aims to achieve its objectives by enhancing coordination and cooperation between existing and new coming. This strategy emphasizes the importance of orchestration as a key tool, setting a new precedent for how multilateral environmental agreements might operate moving forward.

"(c) Protect, preserve, restore and maintain biological diversity and ecosystems, including with a view to enhancing their productivity and health, and strengthen resilience to stressors, including those related to climate change, ocean acidification and marine pollution."

Paragraph (c) outlines a multifaceted approach to biodiversity and ecosystem conservation. It emphasizes the need to protect, preserve, restore and maintain biological diversity and ecosystems. This comprehensive strategy goes beyond the restoration focus found in many environmental treaties. By incorporating protection, preservation, and maintenance alongside restoration, the BBNJ Agreement acknowledges the importance of both proactive and reactive measures. Furthermore, it explicitly targets enhancing the productivity and health of ecosystems, which underscores the BBNJ's recognition of the intrinsic link between healthy ecosystems and the services they provide to humans. Additionally, the clause highlights the

need to strengthen resilience against stressors, including those associated with climate change, ocean acidification and marine pollution. This emphasis demonstrates the BBNJ Agreement's awareness of the complex threats facing marine biodiversity and ecosystems.

"(d) Support food security and other socioeconomic objectives, including the protection of cultural values."

Paragraph (d) expands the scope of the BBNJ Agreement beyond pure conservation by explicitly mentioning its role in supporting food security and other socioeconomic objectives. This broadened focus aligns with the UN Sustainable Development Goals (SDGs), it explicitly targets enhancing the productivity and health of ecosystems, which underscores the BBNJ's recognition of the intrinsic link between healthy ecosystems and the services they provide». I would mention it in one of the objectives. The inclusion of "cultural values" in paragraph (d) further demonstrates the agreement's holistic approach. It acknowledges the cultural significance of marine environments for various communities. By recognizing these diverse values, the BBNJ Agreement strives for a more inclusive and sustainable approach to marine biodiversity management.

"(e) Support developing States Parties, in particular the least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, taking into account the special circumstances of small island developing States, through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing area-based management tools, including marine protected areas"

Paragraph (e) addresses a crucial aspect often missing from initial environmental agreements, namely supporting developing States Parties. Here, the focus lies on capacity building and technology transfer, echoing similar principles enshrined in the UNCLOS, and acknowledges that developing countries may require additional assistance to effectively participate in international environmental agreements. While this objective was not reflected in the initial draft text,⁸⁹ its inclusion in the final version signifies an improvement. It demonstrates

⁸⁹Ibid.

the BBNJ's commitment to inclusivity and ensuring a level playing field for all parties. By providing capacity-building and facilitating the development and transfer of marine technology, paragraph (e) aims to bridge the gap and empower developing States Parties. This, in turn, fosters equitable participation in implementing, monitoring, managing and enforcing ABMTs.

When comparing the objectives of the BBNJ Agreement with the established and implemented ABMT systems, particularly here focusing on the general framework for the establishment of the CCAMLR MPAs⁹⁰, we can observe notable similarities. Both frameworks aim to protect biodiversity and ecosystems, including resilience to stressors like climate change, and are grounded in the best available scientific evidence. However, the BBNJ Agreement introduces some innovative elements and aims to cover broader scopes of regulation. While both agreements recognize the importance of establishing MPAs and protecting biodiversity, the BBNJ Agreement goes a step further and emphasizes international cooperation and coordination between different legal frameworks and organizations (BBNJ 17(b)). Additionally, the BBNJ explicitly addresses the needs of developing countries by promoting capacity building to support their effective participation in managing these areas (BBNJ 17(e)), which is not mentioned anywhere in the latter agreement. Therefore, we can assert that the BBNJ Agreement brings a much broader and collective approach to the issue, building upon the already established systems.

In conclusion, the BBNJ Agreement represents a significant advancement in the international framework for marine biodiversity conservation, integrating elements from existing treaties like UNCLOS and the CBD while introducing innovative measures to address contemporary challenges. The Agreement prioritizes the conservation and sustainable use of marine biological diversity, enhancing cooperation among diverse stakeholders and legal frameworks, while addresses critical problems of humanity such as climate resilience, food security and support for developing states, thus promoting a more inclusive and equitable strategy for marine resource management.

b. Area of application

Article 3 of the BBNJ Agreement states that the entire agreement applies to areas beyond

⁹⁰ 'General framework for the establishment of CCAMLR Marine Protected Areas - Conservation Measure 91-04' (CCAMLR, 2011) <<https://cm.ccamlr.org/measure-91-04-2011>> accessed 31 August 2024

national jurisdiction. According to Article 1, the areas beyond national jurisdiction refer to the high seas and the Area, as defined by the UNCLOS. The specific area of application for Part 3 is more precisely defined in Article 18 of the Agreement, which states:

“The establishment of area-based management tools, including marine protected areas, shall not include any areas within national jurisdiction and shall not be relied upon as a basis for asserting or denying any claims to sovereignty, sovereign rights, or jurisdiction, including in respect of any disputes relating thereto. The Conference of the Parties shall not consider for decision proposals for the establishment of such area-based management tools, including marine protected areas, and in no case shall such proposals be interpreted as recognition or non-recognition of any claims to sovereignty, sovereign rights, or jurisdiction.”

It is evident that critical aspects of the ABMT clauses of the BBNJ Agreement relate to its explicit clarification regarding sovereignty and jurisdiction. The establishment of ABMTs, including MPAs, in ABNJ is not intended to impact claims to sovereignty, sovereign rights or jurisdiction. Therefore, any areas under state jurisdiction, such as territorial seas, archipelagic waters, exclusive economic zones and historic waters, are outside of the scope of the Agreement. This provision is crucial in maintaining the balance between conservation efforts and the legal rights of states, ensuring that the creation of protected areas does not lead to disputes over maritime boundaries or resource entitlements. Additionally, the BBNJ Agreement introduces a transparent and inclusive decision-making process for the establishment of ABMTs, involving the COP and the scientific and technical body, which will be examined below. The BBNJ Agreement also emphasizes the need for capacity-building and technology transfer to support the implementation of ABMTs in ABNJ. This is particularly important for developing countries, which may lack the resources and expertise to effectively manage these areas. These processes ensure that all relevant stakeholders have a voice in the management of these areas which are beyond the any national jurisdiction.

While UNCLOS includes provisions for the protection and preservation of the marine environment in all ocean space, including high seas and the Area, the concept of ABMTs in ABNJ as elaborated in the BBNJ Agreement takes these protections a step further. UNCLOS outlines general obligations to protect and preserve the marine environment (Part XII) and establishes the legal basis for ABMTs. However, it lacks detailed mechanisms for the establishment and management of ABMTs, particularly in ABNJ. In contrast, the BBNJ Agreement specifically addresses this gap by providing a legal framework for the establishment

and management of ABMTs, including MPAs, in ABNJ. This involves detailed processes for the identification, designation and management of such areas, ensuring that conservation efforts are not confined to national jurisdictions but extend to the high seas and the deep seabed. Moreover, the BBNJ Agreement strengthens the enforcement and compliance mechanisms associated with ABMTs in ABNJ by promoting a more collaborative and science-based approach to managing these areas, involving a broad range of stakeholders, including scientists, policymakers and representatives of indigenous and local communities.

Regarding already existing ABMTs under other international frameworks, although existing ABMTs are primarily governed by their respective conventions, Article 22 of the BBNJ Agreement enables the COP to make recommendations to these bodies. The COP may even develop mechanisms to improve coherence between BBNJ measures and those of other legal instruments, as long as the competencies of existing instruments and frameworks are respected. The "not undermining" clause in Article 22(2) indicates that the BBNJ should not infringe upon the authority of these existing instruments, such as IMO. However, the COP can exert influence by promoting coordination and enhancing cross-sectoral approaches to marine conservation. For example, while the IMO leads in shipping regulations, the BBNJ can provide additional tools to address marine biodiversity threats from ship-source pollution, as long as these actions are compatible with the IMO's mandate. This coordination underscores the importance of taking the COP's recommendations seriously for effective marine protection, even though no legal obligation exists for existing bodies to adopt these rules. If successful, the BBNJ could play a significant role in bridging gaps between various ABMTs, enhancing marine conservation efforts in the high seas.

The CBD and various sectoral and regional agreements also contribute to the establishment and management of ABMTs. However, despite the CBD's Aichi Biodiversity Targets include a target to conserve at least 10% of coastal and marine areas through effectively managed and ecologically representative systems of protected areas, the CBD does not have a specific mandate for ABNJ. Article 4 of the Convention sets the rules for the contracting parties for areas within the limits of its national jurisdiction or carried out under its jurisdiction or control.

Other international agreements, like MARPOL and Agreement Relating to the Implementation of Part XI of the UNCLOS which establishes the ISA, are sectoral in nature and thus limited in scope. MARPOL focuses specifically on preventing marine pollution from ships, addressing various forms of pollution such as oil, chemicals, and sewage. The ISA deals primarily with

issues related to the seabed beyond national jurisdiction, particularly in relation to mining and resource extraction. These sectoral agreements, while important, do not offer a comprehensive solution for the protection and sustainable management of specific marine areas. They address particular issues within their respective mandates but lack the integrated approach needed to tackle the multifaceted challenges of marine biodiversity conservation. The BBNJ Agreement, in contrast, provides a holistic framework that integrates various aspects of ocean governance, thereby offering a more effective solution for protecting marine biodiversity in ABMTs.

Regional frameworks, such as the OSPAR Convention and CCAMLR, have established MPAs in their respective regions. These frameworks demonstrate successful regional cooperation but are limited to specific geographic areas and do not provide a global approach to ABMTs in ABNJ. For instance, the OSPAR Convention has established several MPAs in the North-East Atlantic, focusing on habitats and species protection including some having mandates in ABNJ, but these efforts are region-specific and depend on the cooperation of the member states within that region. Similarly, CCAMLR has designated MPAs in the Southern Ocean, also some of them in ABNJ, with a focus on conserving marine living resources, but these protections are again geographically limited and dependent on the consensus of member states.

The BBNJ Agreement builds on these existing frameworks by offering a cohesive global mechanism for the establishment and management of ABMTs in ABNJ. It aims to fill the gaps left by UNCLOS and the CBD and to enhance cooperation and coordination among various regional and sectoral bodies. By creating a more unified and globally applicable framework, the BBNJ Agreement aims to address the need for a comprehensive approach to marine biodiversity conservation on the high seas. Nevertheless, it remains uncertain whether this will be entirely feasible, given the continued fragmentation of mandates and competencies among the various bodies and frameworks operating within the designated marine area.

c. Proposal mechanism

The proposal mechanism of the BBNJ Agreement is delineated between Articles 17 - 26, detailing the process from submission to establishment. Proposals under the BBNJ framework for designating areas of marine protection can only be submitted by the parties to the Agreement, either individually or collectively. Respectively, it excludes any BBNJ organ from independent proposal submissions. Article 19 also mandates that during the development of proposals the proposing parties shall collaborate and consult with relevant stakeholders,

including states, global, regional, subregional and sectoral bodies, as well as civil society, scientific community, private sector, indigenous peoples and local communities.

The article further stipulates that proposals must be based on the best available science and scientific information. Additionally, where available, the relevant traditional knowledge of indigenous peoples and local communities should also be utilized. It also integrates the precautionary approach and an ecosystem approach, reflecting the overarching ethos of the BBNJ Agreement. In environmental law, the concept of precaution serves as a reminder that scientific knowledge has its limitations when it comes to making decisions and warns the humanity to learn from past mistakes in order to prevent environmental damage in the future. Although the terms "precautionary principle" and "precautionary approach" may seem similar in theory, recent multilateral negotiations and interstate disputes have given these labels specific political meanings that reflect fundamentally different attitudes and regulatory approaches to health and environmental risks.⁹¹

The precautionary principle is now understood as a rigid and legally binding concept, requiring immediate preventive action when there is a potential for serious harm, even in the absence of full scientific certainty. This principle follows the "better safe than sorry" rationale, often resulting in regulatory measures such as restrictions or bans. On the other hand, the precautionary approach is considered more flexible and is typically used in non-binding policies or guidelines. It emphasizes careful evaluation and monitoring of risks but allows for more measured responses, adjusting actions based on emerging evidence rather than mandating immediate intervention.

In Article 7 "General Principles and Approaches" of the BBNJ Agreement, both the precautionary principle and approach are mentioned. Although both words are included in the Draft Text for future consideration⁹², the decision has been made to include precaution as an approach under Part III. This represents a departure from the "better safe than sorry" approach and mirrors the approach taken in other relevant treaties such as CBD, CCAMLR, and the Fish Stock Agreement, which diminishes the role of the principle in terms of ABMT establishment.

Article 19(4) specifies the elements required in any proposal for an ABMT. These elements

⁹¹ Peel J, 'Precaution — A Matter of Principle, Approach or Process?' (2004) 5 Melbourne Journal of International Law <https://law.unimelb.edu.au/__data/assets/pdf_file/0003/1681122/Peel.pdf> accessed 13 October 2024

⁹² Revised Draft Text of BBNJ (n 88)

include:

- (a) A geographic or spatial description of the area that is the subject of the proposal by reference to the indicative criteria specified in Annex I;*
- (b) Information on any of the criteria specified in Annex I, as well as any criteria that may be further developed and revised in accordance with paragraph 5 below applied in identifying the area;*
- (c) Human activities in the area, including uses by Indigenous Peoples and local communities, and their possible impact, if any;*
- (d) A description of the state of the marine environment and biological diversity in the identified area;*
- (e) A description of the conservation and, where appropriate, sustainable use objectives that are to be applied to the area;*
- (f) A draft management plan encompassing the proposed measures and outlining proposed monitoring, research and review activities to achieve the specified objectives;*
- (g) The duration of the proposed area and measures, if any;*
- (h) Information on any consultations undertaken with States, including adjacent coastal States and/or relevant global, regional, subregional and sectoral bodies, if any;*
- (i) Information on area-based management tools, including marine protected areas, implemented under relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies;*
- (j) Relevant scientific input and, where available, traditional knowledge of Indigenous Peoples and local communities.*

While some may view this level of detailed requirements as cumbersome, it serves several critical purposes. Precise geographical descriptions and scientific justifications for selecting specific areas ensure targeted conservation efforts. This promotes efficiency and avoids wasting resources on areas with less ecological significance. Understanding existing human

activities within the proposed ABMT area, such as fishing or shipping, allows for the development of management plans that minimize disruption to those activities. It fosters co-existence between conservation efforts and sustainable practices.

In addition, requirements for detailed and well-rounded proposals for ABMTs promote informed decision-making. Ultimately this comprehensive framework fosters effective marine conservation in international waters, safeguarding these vital ecosystems for generations to come. The detailed process outlined in Article 19(4) is not merely bureaucratic red tape, but rather the foundation for a future where a healthy and vibrant ocean thrives alongside sustainable human activities. As stated in the same Article's Paragraph 6, further requirements regarding the content of the proposal shall also be elaborated by the Scientific and Technical Body, as necessary, for consideration and adoption by the COP.

Also, detailed proposals ensure transparency throughout the process. Stakeholder consultations are crucial to foster a sense of ownership and increase the likelihood of successful implementation. A comprehensive understanding of the current environmental health of the area provides a baseline for measuring the success of conservation measures over time. Well-defined objectives, coupled with detailed draft management plans that include monitoring, research, and review processes, ensure that ABMTs are well-coordinated and effective.

Comparing BBNJ Agreement designation provisions to another relevant legal instruments, it is needed to examine in detail the Annex I of the CBD decision IX/20, elaborating on the indicative criteria list referred in Article 19(4a) of the BBNJ. It shares significant similarities with the criteria employed in conventions designating CBD EBSAs, as special areas in the ocean that play important roles in supporting the healthy functioning of oceans and the services they provide.⁹³ This list is a crucial indicator for establishing ABMTs. Comparing the two lists of criteria introduced by BBNJ Agreement and CBD, it can be stated that most criteria are almost identical, except for BBNJ criteria o, p, q, and v stated in BBNJ Annex I, which aim to address economic, social, and cultural factors, that were not mentioned in the CBD list. Other than these four criteria, even some criteria brought with BBNJ is not explicitly presented in the

⁹³ L'Institut du développement durable et des relations internationales (IDDRI), 'Ecologically or Biologically Significant Marine Areas (EBSAs): the identification process under the Convention on Biological Diversity (CBD) and possible ways forward' (Working Paper) BIODIVERSITY N°17/12 July 2012

CBD list, they are still incorporated within the descriptions or examples of the existing items⁹⁴ and this difference is understandable, as the CBD criteria focus solely on identifying significant marine areas based on ecological or biological significance, not on establishing any ABMTs.

Similarly, the IMO's Revised Guidelines for the Identification and Designation of PSSAs, which also includes a criteria list, exhibits a similar structure. The IMO list divides the criteria into three categories: ecological; social, cultural and economic; scientific and educational criteria.⁹⁵ Compared to the BBNJ Agreement, the ecological criteria of IMO are narrower in its scope and exclude factors like vulnerability, slow recovery and resilience. Nonetheless, the underlying rationale mirrors that of ABMTs, with no additional criteria having been introduced.

One notable criterion, absent from both CBD and IMO lists but introduced with BBNJ Agreement, is the transboundary impact of the designated area, which refers to the effects of the situations where multiple countries share a common resource, like a transboundary river or a shared ocean. Given that the primary aim of this Agreement is to provide global and comprehensive protection, this criterion holds significant importance and should undoubtedly be included in the lists of other marine regimes. The transboundary nature of many marine ecosystems necessitates a broader, more inclusive approach to conservation efforts. This inclusion would enhance the comprehensiveness and effectiveness of the criteria used to identify and manage these critical areas.

In addition, the list of criteria is not overly restrictive. Paragraph 5 stipulates that it may be further developed and revised as necessary by the Scientific and Technical Body for consideration and adoption by the Conference of the Parties. This flexibility allows for the incorporation of new scientific knowledge and emerging conservation priorities, ensuring that the criteria remain relevant and effective in identifying and protecting significant marine areas.

As for the further provision regulating proposals under the Agreement, Article 20 ensures the transparency as the secretariat makes the proposal publicly available after receiving. Simultaneously, the Scientific and Technical Body conducts a preliminary review to ensure

⁹⁴ 'Azores Scientific Criteria And Guidance For Identifying Ecologically Or Biologically Significant Marine Areas And Designing Representative Networks Of Marine Protected Areas In Open Ocean Waters And Deep Sea Habitats' (CBD, 2009) <<https://www.cbd.int/doc/meetings/mar/ebsaws-2014-01/other/ebsaws-2014-01-azores-brochure-en.pdf>> accessed 31 August 2024

⁹⁵ IMO Resolution (n 58)

that the proposal adheres to the information requirements stipulated in Article 19 and related annexes. The outcome of this review is then made public and communicated to the proponent for potential revisions.

A cornerstone of the ABMT establishment process in BBNJ Agreement is the emphasis on inclusive consultations, as outlined in Article 21. The secretariat actively facilitates open and transparent consultations to ensure that the voices of various stakeholders are heard and considered. States, especially those with coastlines adjacent to the proposed ABMT, are invited to contribute their expertise, providing feedback on the proposal's merits, the chosen geographic scope, relevant scientific data, potential implications of the ABMT and other crucial information. This inclusive approach ensures that the perspectives and concerns of neighboring states are integrated into the decision-making process, fostering cooperation and shared stewardship of marine resources.

In addition to states, relevant bodies such as international organizations and sectoral bodies with expertise are also invited to participate due to Article 21. These organizations contribute their assessments of the proposal's merits, highlight existing measures they have implemented, and explain how the proposed ABMT aligns with their frameworks. They are also welcomed to provide recommendations for strengthening the draft management plan and suggest additional measures within their competence. Furthermore, the process acknowledges the invaluable knowledge held by various other stakeholders, including indigenous peoples, local communities, scientific community, and civil society. These groups are encouraged to share their perspectives on the proposal's merits, provide relevant scientific data or research, offer traditional knowledge and contribute any other information they deem valuable.

Article 21 further delves into scenarios where the establishment of an ABMT might disproportionately affect a state, particularly if it is surrounded by its EEZ. Following the Principle 13 of Rio Declaration⁹⁶, in such cases, the article provides for a more focused don't have a definition of what is the "affected state" in international law. It is important to note that the consultation period has a defined timeframe, ensuring that the process moves forward efficiently. Once consultations are completed, a revised version of the proposal must be

⁹⁶ Rio Declaration (n 12) Principle 13: States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

submitted to the Scientific and Technical Body, which is responsible for assessing the proposal and making recommendations to the COP. The Scientific and Technical Body may also make recommendations for consideration and adoption by the COP regarding the consultation and assessment process, including the specific duration of the consultation period.

During the final stage of establishing an ABMT, Article 22 outlines the COP's decision-making process, which highlights information gathering, stakeholder input and adherence to existing legal frameworks. Before reaching a decision, the COP takes into account several factors, including the final proposal, draft management plan, input from consultations and scientific advice. The COP's decision-making process involves various layers. While it has the authority to directly establish ABMTs, in certain cases, they may take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies or only provide recommendations to other relevant bodies where proposed measures are within the competences of other global, regional, subregional or sectoral bodies.

Another crucial principle reflected in the article is the respect for existing frameworks. COP's decisions must not undermine pre-existing legal instruments or bodies. The term "undermine" was introduced into BBNJ Working Group discussions in 2014 to address concerns over how a new global instrument would interact with existing regional and sectoral frameworks, particularly regarding fisheries; and it has been included in the Final Text of the Agreement. However, the term still remains ambiguous despite various attempts to clarify its meaning. It is primarily mentioned in Article 5 of the Agreement mandates that it should be interpreted and applied in a way that does not undermine relevant institutions, a principle also reflected in Article 22(2). The obligations to "respect the competence" and "not undermine" other bodies are distinct, yet complementary, as "respect" pertains to competence, while "undermine" focuses on effectiveness, gradually weakening the authority of these institutions. Ultimately, since the functionality of these terms is not described in the Agreement, the interpretation of these terms will be shaped by the COP's and relevant bodies' practice.⁹⁷

Additionally, the COP must acknowledge national rights, ensuring that its decisions do not

⁹⁷ De Lucia V, 'After the Dust Settles: Selected Considerations about the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction with Respect to ABMTs and Mpas' (2024) 55 *Ocean Development & International Law* 115 <<https://www.tandfonline.com/doi/full/10.1080/00908320.2024.2333893#d1e529>> accessed 31 August 2024

diminish undertaken measures within national jurisdiction and that it consults with coastal states when their measures might affect coastal waters. The COP is also required to initiate regular consultations to promote collaboration. The article recognizes the potential need for a mechanism to ensure coherence with existing ABMTs established by other bodies, subject to specific conditions. Procedures are outlined for situations in which established ABMTs transition to national jurisdiction or fall under another legal body.

When analyzing what makes the proposals submission process different from other treaties while still sharing similarities, the first hallmark we can encounter is the actors, which are entitled to make a proposal. Under BBNJ Agreement, proposals can be made by the parties involved. While this submission process is similar to the mechanism under the IMO, which establishes PSSAs and restricts proposal submissions to treaty parties, it is different from the ISA REMP mechanism under the UNCLOS, which embodies a more autonomous and self-recognized authority. The ISA mandates that a REMP must be developed by the Authority for each region where activities occur within the Area. The Council is tasked with defining the strategy for developing these plans across all mineral provinces with ongoing exploration and identifying priority areas. Subsequently, the Council can request the Commission to undertake or initiate the development of these plans. In this scenario, the treaty-established authority holds the exclusive right to submit proposals, showcasing a higher level of self-governance and centralized control compared to the BBNJ Agreement and IMO frameworks. It also means to some extent that affected countries or communities cannot express their opinion in the decision-making process, which is in contrast encouraged under the Agreement.

When it comes to what the BBNJ proposal package includes, it is similar to the other ABMT proposal systems, with slight differences of being specifically tailored to address the impact of international shipping activities on vulnerable marine areas. However, BBNJ proposals adopt a broader scope by its nature, considering that it encompasses a wider range of human activities, biodiversity conservation and sustainable use objectives.

There is also a strong emphasis on inclusivity and transparency in the BBNJ Agreement, promoting broader stakeholder engagement compared to many existing management tools. The Agreement mandates inclusive processes at every stage, involving states, international organizations, industry and civil society. This framework ensures transparent decision-making with ample opportunities for public input and review, which is crucial as all states have equal rights and so many organizations have various mandates in ABNJ. By incorporating the

interests and knowledge of all relevant parties, the BBNJ Agreement aims to enhance the legitimacy and effectiveness of its management measures, fostering a more comprehensive and equitable approach to marine governance.

Furthermore, the proposal mechanism also includes stakeholder consultations, particularly with Indigenous Peoples and local communities, and the incorporation of both scientific input and traditional knowledge. This inclusive and adaptive framework is compatible with the object and purpose of the Agreement, considering its overall aim of promoting a holistic approach to marine conservation that goes beyond the specific threats and ultimate biodiversity and sustainable use.

Subsequently, the scientific basis is central to the BBNJ ABMT mechanisms, as it is in many other multilateral environmental agreements. The BBNJ Agreement features a STB that provides expert advice and ensures that decisions are grounded in the best available science, a topic that will be further examined below. It is important to note that during the proposal process, the STB conducts multiple reviews, including a preliminary review of the proposals. While existing tools also rely on scientific foundations for establishing ABMTs, they differ from one agreement to another. For instance, OSPAR⁹⁸ emphasizes the scientific value of the proposal, and the IMO⁹⁹ requires reports from technical groups. However, they do not have a scientific body as distinct and involved in the proposal process as seen in the BBNJ Agreement.¹⁰⁰

Finally, during the establishment phase of ABMTs under the BBNJ framework, we observe a strong focus on respecting the rights of Member States in their maritime areas and the mandates of existing organizations. The first reflects the fundamental principle of state sovereignty, which is a common aspect of international treaties. For the second, BBNJ Agreement has a unique approach compared to regional and sectoral treaties, as it involves a distinct delegation of authority. BBNJ Agreement does not necessarily insist on establishing the ABMTs itself. Instead, if more appropriate, it aims to fill in the gaps of the existing measures or to make recommendations to a body authorized by the COP to do so. Outlined strategy ensures that the efforts to protect and manage marine biodiversity are both inclusive and comprehensive,

⁹⁸ 'How OSPAR Works' (OSPAR Commission) <<https://www.ospar.org/about/how>> accessed 31 August 2024

⁹⁹ IMO Resolution (n 58)

¹⁰⁰ Environmental Management Plan for the Clarion Clipperton Zone (13 July 2011) ISBA/17/LTC/7 (International Seabed Authority Legal and Technical Commission) para 42; IMO Resolution (n 58) para 8.3

leading to more sustainable and resilient outcomes. This differs from regional treaties that never had a similar delegation of authority,¹⁰¹ and naturally from sectoral treaties, which clearly retained their own mandates.

While some may question whether the BBNJ approach is truly comprehensive, given the decentralized nature of the process that respects existing instruments, closer examination of Article 22 reveals a distinct level of intervention. Although the BBNJ Agreement does not supersede these instruments in the legal hierarchy, its approach is clearly differentiated. For instance, while Article 22(6) explicitly prohibits intervention in areas under national jurisdiction, the Agreement brings tailored cooperation with existing instruments for a real transboundary area management. This includes various levels of intervention, such as decision-making, proposing actions or developing a mechanism regarding existing area-based management tools.

d. Emergency measures

An emergency measure as described under Part III, Article 24, of the BBNJ Agreement, represents an innovative approach to managing marine resources in response to the growing frequency of abrupt and extreme events threatening marine ecosystems. Unlike formal ABMT process, which requires extensive time and efforts due to complex procedures and competing interests, emergency measures can be implemented rapidly on an interim basis. This flexibility makes emergency measures particularly valuable in addressing sudden environmental crises that traditional ABMTs are ill-suited to handle. The UNCLOS and other international agreements have proven inadequate in providing comprehensive responses to such unforeseen events, necessitating the development of more agile tools like emergency measures.¹⁰²

As such, emergency mechanism is crucial as it offers immediate action in the face of environmental emergencies, potentially mitigating significant damage to marine biodiversity. According to the Article 24 of the Agreement, emergency measures may be proposed by the Parties or recommended by the STB and adopted intersessionally after consultations with other international actors.¹⁰³ These measures are designed to be temporary, lasting up to two years,

¹⁰¹For example; Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995) UNTS 2102 (p.181) (UN Secretary)

¹⁰²Jiang X and Wang Z, 'Emergency Marine Protected Areas under the BBNJ Agreement: A Feasible Solution for Emergencies in ABNJ?' (2024) 55 Ocean Development & International Law 25 <<https://www.tandfonline.com/doi/full/10.1080/00908320.2024.2316675>> accessed 31 August 2024

¹⁰³ BBNJ (n 2) 24

but can be terminated earlier if necessary.¹⁰⁴

The concept of emergency measures is not entirely novel and has been reflected in national practices and international organizations. For example, Article 198 of UNCLOS imposes on states a duty to notify in cases of imminent or actual danger posed by pollution incidents affecting the marine environment. It entails, as provided in Article 199, an obligation to jointly develop and promote contingency plans for responding to pollution incidents. These two articles are important for the preparation and warning of pollution incidents in ABNJ. However, with increasing and varying sort of marine emergencies, they are insufficient to provide a solid legal base for taking effective action.¹⁰⁵

International fishery regimes, such as the FSA¹⁰⁶ and the 2009 Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFMO Convention),¹⁰⁷ include provisions for emergency measures in response to significant threats to fish stocks. These provisions reflect a precautionary approach, allowing for rapid conservation actions to prevent further harm. As another example, the CCAMLR has established a "two-stage" process for designating Special Areas for Scientific Study (SASSs) in the Southern Ocean following ice-shelf retreat or collapse. This proactive approach to environmental management underscores the growing recognition of the need for rapid response mechanisms in the face of environmental emergencies.¹⁰⁸

A critical aspect of implementing emergency measures is determining the "emergency threshold" — the specific conditions under which these measures should be enacted. This involves careful consideration of the factual situation and the proportionality of the response. In cases where an EMPA may impact the rights and interests of other states, consultation with those states is necessary to ensure that the measures are implemented with due regard for their rights. This approach was highlighted in the *Chagos Marine Protected Area* arbitration case, where the Tribunal emphasized the importance of consultation and the need to consider various factors, including the nature and importance of the rights involved and the availability of

¹⁰⁴ BBNJ (n 2) 24/4

¹⁰⁵ UNCLOS (n 1)

¹⁰⁶ Fish Stock Agreement (n 5)

¹⁰⁷ Convention On The Conservation And Management Of High Seas Fishery Resources In The South Pacific Ocean (adopted 14 November 2009, entered into force 24 September 2012) 2899 UntS 211 (SPRFMO)

¹⁰⁸ 'Conservation Measure 24-04 (2017) Establishing time-limited Special Areas for Scientific Study in newly exposed marine areas following ice-shelf retreat or collapse in Statistical Subareas 48.1, 48.5 and 88.3' (CAMLR, 2017) <<https://cm.ccamlr.org/en/measure-24-04-2017>> accessed 31 August 2024

alternative approaches.¹⁰⁹

The idea of emergency measures, which was not included in the first draft text of the Agreement, was later advocated by NGOs during the preparatory sessions for the BBNJ Agreement.¹¹⁰ This development reflects a growing recognition of the need for a rapid response mechanism to address marine environmental emergencies effectively.

e. Functioning and competencies of bodies

In Part VI of the BBNJ Agreement, five articles outline the institutional arrangements essential for the Agreement's implementation. Similar to other international agreements, the BBNJ Agreement has established specific bodies to facilitate the effective execution of its provisions. These include the Conference of the Parties, which serves as the main decision-making body; the Scientific and Technical Body, which provides expert advice on scientific and technical matters; and the Secretariat, which manages the administrative aspects of the Agreement.

Beyond these core institutions outlined in Part VI, the BBNJ Agreement also establishes several specialized committees to address specific aspects of the agreement. In particular, the Access and Benefit-Sharing Committee in Part II aims at establishing guidelines for benefit-sharing while providing transparency and ensuring a fair and equitable sharing of both monetary and non-monetary benefits. The Capacity-Building and Transfer of Marine Technology Committee under Part V focuses on enhancing the capabilities of Parties, particularly developing states. The Finance Committee under Part VII oversees financial resources. In its turn, the Implementation and Compliance Committee under Part VIII monitors adherence to the Agreement's provisions. Finally, Part IX of the Agreement provides detailed mechanisms for the peaceful settlement of disputes, reinforcing the commitment of Parties to uphold the Agreement's obligations, which will be outlined below.

In Part III, various processes involve the participation of COP and STB, therefore, we will take a closer look at both in this chapter. As stated in Article 47, the COP consists of the Parties to the Agreement and serves as the main decision-making body for all matters related to Part III. The COP has a broad responsibility, including the role of reviewing and evaluating the

¹⁰⁹ Chagos Marine Protected Area Arbitration, *Mauritius v United Kingdom*, Final Award, ICGJ 486 (PCA 2015), 18th March 2015, Permanent Court of Arbitration [PCA] paras 359, 571–572, [519].

¹¹⁰ Revised Draft Text of BBNJ (n 88)

implementation of the Agreement. Its tasks range from adopting decisions and recommendations related to the Agreement's implementation to establishing subsidiary bodies and adopting a budget deemed necessary for Agreement implementation. The first meeting will take place no later than one year after the Agreement enters into force, followed by regular meetings, including a review and assessment within five years. The COP may also hold extraordinary meetings in accordance with established rules of procedure.

The COP is obligated to make every effort to adopt decisions and recommendations by consensus. Nonetheless, there are voting procedures to ensure important decisions are not unduly blocked after all efforts to achieve consensus are exhausted. On questions of substance, decisions are made by a two-thirds majority of the Parties present and voting, with each Party having one vote. An exception is a regional economic integration organization Party to the BBNJ Agreement (e.g., European Union), which must exercise its right to vote with a number of votes equal to the number of its member countries that are Parties to the BBNJ Agreement. The regional economic integration organization Party must refrain from voting if any of its member countries exercise their right to vote, and vice versa.¹¹¹

Another notable feature of the Agreement is that the COP may request the ITLOS to provide an advisory opinion on a legal question regarding conformity with the Agreement, similar to Article 191 of UNCLOS, where the Seabed Disputes Chamber of ITLOS is empowered to give opinions at the request of the Assembly or the Council. However, the scope of such legal questions by BBNJ that the ITLOS can consider is narrow.

One of the key differences of the BBNJ Agreement from other treaties relates to its institutional framework operating within certain constraints typical of most multilateral environmental agreements. This includes aligning with existing international legal frameworks and institutions, as well as ensuring consistency with the UNCLOS. Of particular attention and scrutiny is the provision indicating that the BBNJ Agreement should be interpreted and applied in a manner that does not undermine relevant international bodies.

In the BBNJ context, the Agreement does not establish a hierarchy with decision-making

¹¹¹ 'BBNJ Institutional Arrangements' (Institutional Arrangements) <[https://bbnj-mgr.fas.harvard.edu/institutional-arrangements#:~:text=The%20Scientific%20and%20Technical%20Body,of%20the%20Parties%20\(COP\).>](https://bbnj-mgr.fas.harvard.edu/institutional-arrangements#:~:text=The%20Scientific%20and%20Technical%20Body,of%20the%20Parties%20(COP).>) accessed 31 August 2024

authority positioned clearly above or below others. The institutional landscape remains largely decentralized, with the COP's power appearing to be limited by the necessity to consult with relevant international bodies in key decision-making. However, the Agreement introduces a high-level policy goal, compelling existing international bodies to contribute to its work. The BBNJ Agreement relies on its normative authority to mobilize and coordinate international bodies, and its effectiveness will depend on the extent to which this goal is internalized by them.

Consider a hypothetical scenario where an ABMT is proposed under the BBNJ Agreement near potential mining sites. In this situation, the COP is required to engage in consultation with the ISA. However, it is unlikely that the ISA would agree to the ABMT as it could conflict with the mining plans of some parties. The only option available to the COP would be to encourage the adoption of similar measures by the ISA itself. If successful, the ISA would then either integrate the proposed area into one of its REMPs or develop a separate plan, which does not preclude potential mining activities. Therefore, ABMTs under the BBNJ Agreement may not be an effective means of preventing deep seabed mining activities if they are contrary to the interests of the ISA.¹¹² However, when we consider the comprehensive approach of the BBNJ Agreement in establishing a system that includes all relevant actors, this approach could be seen as a strength of the Agreement in the end, rather than a weakness.

Another body established by the Agreement under Article 49, the STB, is composed of members who serve in their expert capacity and act in the best interests of the Agreement. Its members are nominated by Parties and elected by the COP. The COP is also responsible for developing the modus operandi for the STB, which will include terms of reference, operational modalities, and institutional arrangements. The qualifications of the members consider the need for multidisciplinary expertise, including relevant scientific, technical, and traditional knowledge of indigenous peoples and local communities. The assessment of membership will also involve consideration of gender balance and equitable geographical representation.¹¹³

¹¹² Kim RE, 'The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance' (2024) 165 Marine Policy 106190 <<https://www.sciencedirect.com/science/article/pii/S0308597X2400188X>> accessed 13 October 2024

¹¹³ Gaebel C and others, 'Institutionalising Science and Knowledge under the Agreement for the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction (BBNJ): Stakeholder Perspectives on a Fit-for-Purpose Scientific and Technical Body' (2024) 161 Marine Policy 105998 <<https://www.sciencedirect.com/science/article/pii/S0308597X23005316#bbib21>> accessed 31 August 2024

Paragraph 3 of Article 49 states that the STB may draw on "appropriate advice emanating from relevant legal instruments and frameworks, relevant global, regional, subregional, and sectoral bodies, as well as from other scientists and experts," which strengthens the Agreement's scientific foundation.

The STB is a proactive organ in the BBNJ Agreement, reflecting the will of the parties involved and enjoying broad support since the early stages of the BBNJ process. There were debates about whether the STB's role should encompass decision-making and/or advisory functions. Nevertheless, despite these divergent perspectives, the importance of having an STB in the final institutional architecture of the agreement persisted, ultimately leading to its inclusion in the final text. As for the role of the STB, it shall provide scientific and technical advice to the COP, perform the functions assigned to it under the Agreement and such other functions as may be determined by the COP, and provide reports to the COP on its work. For example, with regards to ABMTs, additional functions include reviewing and assessing proposals, making recommendations to the COP, monitoring and reviewing ABMTs and providing guidance for adoption by the COP, among others.

The establishment of the STB aligns with the broader efforts to integrate scientific expertise into multilateral environmental treaties. While the structure and function of these groups may vary, their value within decision-making processes is widely recognized. In many similar treaties, scientific expertise typically has only a moderate influence on decisions and regime effectiveness, unless it interacts with other favorable factors associated with the specific issue. When deep political conflicts, including conflicts over value judgments, come into play, scientific expertise may have limited influence. Thus, the response is primarily shaped by politics rather than scientific expertise.

In conclusion, the institutional framework established under the BBNJ Agreement reflects a balanced and multi-faceted approach to governance, incorporating both decision-making and advisory bodies. The COP serves as the core decision-making entity, while the STB provides expert guidance, ensuring that science plays a critical role in policy decisions. Notably, the BBNJ Agreement does not establish an international organization nor does it grant the Agreement legal personality. Instead, all organs are Treaty bodies, ensuring the Agreement's provisions are upheld. Through the system established, we see the emphasis on the importance of transparency, coordination with other international bodies and the integration of scientific expertise. While the BBNJ Agreement operates within the constraints of broader international

frameworks, its reliance on a collaborative, multi-stakeholder approach strengthens its capacity to address complex marine biodiversity challenges.

f. Working methodology

In this subchapter, the structured processes that govern the decision-making, implementation and review mechanisms, essential for the successful application of the BBNJ Agreement's provisions, will be examined by highlighting both the strengths and challenges of these mechanisms in promoting marine conservation and sustainable use.

While consensus-based decision-making remains the general rule, Article 23(2) of the BBNJ Agreement provides a two-step procedure for adopting an ABMT or MPA proposal in cases where consensus is not reached. First, the COP must decide, by a two-thirds majority, that all efforts to reach consensus have been exhausted. Second, the COP may make decisions and recommendations related to ABMTs and MPAs by a three-fourths majority. This three-quarters majority threshold required to all decisions taken under Part III is higher than the threshold brought for substantial matters under other parts of the BBNJ Agreement, as stated in Article 47(5), where the COP only requires a two-thirds majority vote for decision-making on other substantial matters. Despite the higher threshold, it serves to prevent a scenario where an ABMT or MPA proposal is blocked by objections from a small number of States. For example, we see also a similar rule implied in the OSPAR Convention, while in the case of CCAMLR, reliance on consensus¹¹⁴ has led to the potential abolishment of an established ABMT if a party withdraws support,¹¹⁵ which undermines the ultimate goal of biodiversity protection. This procedure can be compared to the decision-making process under UNCLOS during the conference. It is also reminiscent of the more flexible Review Conference decision-making framework, where the Conference is required to make efforts to achieve consensus for five years after it begins, and if consensus is not possible within that time, decisions are made by a three-fourths majority of the State Parties over the following 12 months.

Introducing ABMT decisions to be made by a three-quarters vote rather than consensus opens doors for parties to opt out of decisions. However, since the purpose of the Agreement is to include all parties in decisions establishing ABMTs, opting out option is just valid for three-year periods, but it is renewable if the conditions remain the same for parties. The effect of an

¹¹⁴ CCAMLR (n 63) art XII

¹¹⁵ CCAMLR (n 63) art IX 6

objection is always significant, as it suspends the binding nature of the decision for the objecting party, which could have substantial implications if multiple crucial parties object. Three grounds for objection are presented in Article 23(5), unprecedented in their clarity compared to other agreements related to establishing ABMTs. While objection clauses exist in various agreements, none of them offer such explicit grounds for doing so.¹¹⁶

The first ground is inconsistency with the BBNJ Agreement itself, providing an internal control mechanism that allows parties to challenge decisions believed to conflict with the Agreement's provisions. The second ground for objection is broader and concerns decisions inconsistent with the objecting party's rights and obligations under UNCLOS. This includes potential conflicts with high seas freedoms, although these freedoms are subject to limitations, especially regarding the protection and preservation of the marine environment. The third ground for objection involves cases where a decision "unjustifiably discriminates" against the objecting party, either in form or in fact. Defining "unjustifiable discrimination" within the BBNJ context presents a challenge, but similar provisions in UNCLOS, Article 119, deal with discrimination in fisheries management. These precedents suggest that discrimination can be both direct and indirect, affecting parties' rights differently based on jurisdictional or economic interests. In the BBNJ context, discrimination objections might arise when measures disproportionately impact parties with adjacent jurisdictional areas or high seas rights.¹¹⁷

A further issue arises concerning how to protect the rights and interests of a State whose borders are adjacent to a high seas area designated as an ABMT or MPA, especially if that State objects to the designation. In addition to Article 23(5) requiring parties making an objection to explain the grounds for their objection, Article 23(6) obligates parties making an objection, 'to the extent practicable, adopt alternative measures or approaches that are equivalent in effect to the decision to which it has objected.'¹¹⁸ This implies that parties cannot simply ignore the decision to establish an ABMT or MPA — they must take alternative measures to achieve the equivalent effect. The phrase 'alternative measures or approaches that are equivalent in effect' suggests that parties to the BBNJ Agreement have limited discretion in choosing what alternative

¹¹⁶ Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (adopted 18 November 1980, entry into force 17 March 1982) TRE-000848 (NEAFC) art 12; International Convention for the Regulation of Whaling (adopted 2 December 1946, entry into force 10 November 1948) UNTS 2124 (IWC) art V

¹¹⁷ De Lucia V (n 98)

¹¹⁸ Bodansky D, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement' (2024) 118 *American Journal of International Law* 299 <<https://www.cambridge.org/core/journals/american-journal-of-international-law/article/four-treaties-in-one-the-biodiversity-beyond-national-jurisdiction-agreement/9AAFC1E5F60EF1ABF83AC8DB3829605>> accessed 31 August 2024

measures can be taken. The obligation to adopt alternative measures that are equivalent in effect is subject to the qualifier ‘to the extent practicable’. This wording indicates that the required action or measure must be feasible or possible, considering the economic, financial, personnel, and technical capacity of the State.

A similar clause exists within the EU's Common Foreign and Security Policy (CFSP). While decision-making in the CFSP generally follows the principle of unanimity, Member States may exercise "constructive abstention,"¹¹⁹ meaning that while they abstain from a decision, they are not required to implement it, though the decision remains binding for the EU. However, unlike the BBNJ Agreement, there is no three-year period for reconsidering the decision in the CFSP framework. In the context of the BBNJ Agreement, since the ultimate goal is the protection of the marine environment – an objective that should not be compromised by national interests – the Agreement encourages parties to eventually vote in favor of such measures after necessary arrangements are made.

Article 25 outlines the necessary steps for implementing the ABMTs in ABNJ. The first paragraph asserts that parties must ensure that activities under their jurisdiction or control are carried out in a manner consistent with their responsibilities as flag states. This provision establishes a foundational principle that places the responsibility on states to regulate activities in ABNJ, thereby reinforcing their obligations under international law. Paragraph 2 builds on this by allowing parties to adopt more stringent measures than those required by the Agreement, offering flexibility for states to take stronger actions if they choose. This provision not only encourages states to go beyond the minimum standards but also fosters a proactive approach to marine conservation and sustainability.

In addition to promoting stringent measures, Article 25 also seeks to ensure equity among states. Paragraph 3 addresses the need to protect island states from bearing an unfair share of the burden, recognizing the unique vulnerabilities and challenges faced by these nations. By ensuring that obligations are distributed equitably, the Agreement acknowledges the disparities in capacity and resources among states, aiming for a fairer implementation process. Furthermore, Article 25(4) mandates that parties advocate for the adoption of supportive measures within other regimes they are part of, promoting a form of regime interaction. This interaction, driven by overlapping memberships, could enhance the coherence and consistency

¹¹⁹ Treaty on European Union (Maastricht Treaty) art 31

of international legal regimes related to ABMTs. Such measures aim to create synergies between different international frameworks, ensuring that the goals of the BBNJ Agreement are supported and reinforced across various platforms.

The importance of broad international cooperation is further emphasized in the subsequent paragraph, which stresses the need to promote these measures to non-parties. By encouraging wider adoption of the Agreement's provisions, the BBNJ Agreement aims to foster a more comprehensive approach to marine conservation that transcends individual national jurisdictions. However, for parties that are not members of relevant regimes, Article 25(6) underscores their obligation to cooperate under both the UNCLOS and the BBNJ Agreement, ensuring they contribute to the conservation and sustainable use of BBNJ, although the legal application of this requirement remains debatable.

Overall, Article 25 is well-crafted, aiming for inclusivity and cooperation among states. It recognizes the diverse capacities and needs of different nations while promoting a unified approach to marine conservation. However, despite these strengths, the BBNJ Agreement's implementation mechanism is not as robust as it could be. While it represents an improvement over UNCLOS, it falls short when compared to some regional regimes like NEAFC and CCAMLR, which have established more rigorous frameworks for managing areas beyond national jurisdiction. The BBNJ negotiations did not prioritize creating a strong compliance and implementation mechanism, resulting in a framework that relies heavily on the goodwill and initiative of individual states. Under Article 25(1), the enforcement of ABMTs still largely depends on the individual parties. Although Article 55 establishes an Implementation and Compliance Committee, its role is mainly advisory, with the power to make only non-binding recommendations. The responsibility to enforce ABMTs ultimately lies with the parties themselves, which could lead to inconsistencies in enforcement and compliance. This reliance on voluntary enforcement raises concerns about the effectiveness of the Agreement in achieving its conservation goals.

A crucial issue arises when considering the enforcement of these obligations. If a party violates an ABMT established under the Agreement and disregards the implementation and compliance mechanisms, the BBNJ Agreement offers a dispute settlement process. Article 60 incorporates the dispute settlement procedures from Part XV of UNCLOS, including binding decisions. If a dispute arises over a party's failure to implement and comply with an ABMT, any party can invoke these procedures, potentially leading to a binding decision by an international judicial

or arbitral body. Such a decision would determine whether the party in question has breached its obligations, and it could result in the party being held accountable for internationally wrongful acts. While this dispute settlement mechanism provides a means of recourse, its effectiveness will ultimately depend on the willingness of states to engage in the process and adhere to its outcomes.¹²⁰

Part IX of the BBNJ Agreement on the settlement of disputes represents a compromise reflecting differing state views on compulsory dispute settlement through one of the following: ITLOS, ICJ, an UNCLOS Annex VII arbitral tribunal, an UNCLOS Annex VIII special arbitral tribunal for one or more of the categories of disputes specified. By incorporating elements of UNCLOS Part XV through Article 60, paragraphs (1) and (2), the Agreement extends the dispute settlement system to both UNCLOS parties and non-parties, but also introduces additional provisions. Article 56 which calls for cooperation to prevent disputes, mirrors the Fish Stocks Agreement yet lacks clarity on the specifics of this duty, raising questions about when the obligation to cooperate begins and ends, and its broader implications. This vagueness may either delay compulsory proceedings or expedite the crystallization of disputes, depending on how it is interpreted. Article 60 further addresses the relationship between the BBNJ Agreement and other legal frameworks. Paragraph 8 maintains that external dispute mechanisms remain unaffected by BBNJ procedures, while Paragraph 9 excludes disputes over sovereignty and national jurisdiction from the Agreement's dispute resolution mechanisms. This exclusion responds to past ambiguities in UNCLOS tribunals, particularly concerning sovereignty claims, ensuring that such matters are explicitly outside the scope of the BBNJ Agreement. However, the interpretation of "legal status" remains limited by existing UNCLOS provisions, particularly Article 297, which restricts jurisdiction over a coastal state's exercise of sovereign rights.¹²¹

The monitoring of ABMTs, as outlined in Article 26 (the final article of Part III), is crucial for ensuring their effectiveness. This process can involve either individual or collective reporting from the parties on the implementation of ABMTs. Additionally, international frameworks and bodies are invited to provide information. This collaborative approach ensures a

¹²⁰ Duan W, 'Area-based Management Tools under the BBNJ: Ambition or Illusion?' (2024) 33 *Review of European, Comparative & International Environmental Law* 70 <<https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12531>> accessed 31 August 2024

¹²¹ Nguyen W by LN and others, 'Dispute Settlement under the BBNJ Agreement: Accepting Part XV of the UNCLOS with a Twist' (EJIL, 14 May 2023) <<https://www.ejiltalk.org/dispute-settlement-under-the-bbnj-agreement-accepting-part-xv-of-the-unclos-with-a-twist/>> accessed 15 October 2024

comprehensive understanding of the progress and challenges associated with ABMTs. To systematically oversee the implementation and effectiveness of ABMTs, the STB tasked with periodic reviews and assessments. The STB examines the measures taken, assesses their effectiveness, and prepares detailed reports. These reports are then analyzed by the COP, which makes final decisions regarding any necessary adjustments or improvements to the measures.

One significant challenge is ensuring that the reports prepared by individual countries are reliable and accurate. For instance, in the case of the CCAMLR, the STB plays a substantial role in the monitoring process, which has proven to be effective.¹²² The STB, being a group of scientific experts dedicated solely to this task, brings a level of rigor and impartiality that individual country reports may lack. This model could serve as a valuable example for other ABMT monitoring systems.

The established monitoring and reviewing system involve both the COP and the STB as the primary decision-makers and examiners. The STB conducts thorough examinations of the measures taken, prepares comprehensive reports, and submits these reports to the COP. The COP then analyzes the findings and makes decisions regarding the continuation, modification, or termination of the measures based on the STB's recommendations. This dual-level oversight ensures that both scientific and policy perspectives are considered in the decision-making process.

Monitoring and reviewing extend beyond ABMTs to related conservation measures as well. Relevant legal instruments, frameworks, and global, regional, subregional, and sectoral bodies can be called upon to provide reports. This inclusive approach ensures that a wide range of expertise and perspectives are considered, enhancing the robustness of the monitoring system. Developing a comprehensive monitoring plan is essential. As suggested by the Deep-Ocean Stewardship Initiative (DOSI), incorporating a daily monitoring system alongside periodic reviews could provide more immediate insights and allow for quicker responses to emerging issues. The IUCN also supports this idea, emphasizing the importance of continuous monitoring to complement the broader review process.

In conclusion, the effectiveness of ABMTs relies heavily on a well-structured monitoring and reviewing system. By involving both individual and collective reporting, leveraging the

¹²² CCAMLR (n 63) Article 15

expertise of the STB and incorporating continuous monitoring mechanisms, the system can ensure that ABMTs fulfill their conservation objectives. The role of the COP in making informed decisions based on the STB's scientific assessments further strengthens this process, providing a balanced approach to the management and conservation of marine areas.¹²³ A key consideration, however, is that this monitoring and review system does not apply to ABMTs established by other international bodies or legal frameworks. Nonetheless, if gaps in marine biodiversity protection arise from tools by other international actors, the BBNJ Parties can propose additional ABMTs to address them. In such cases, the BBNJ COP can request relevant authorities to broaden existing measures or establish new tools to enhance protection.

C. Key Questions

Before reaching a conclusion on the impact and effectiveness of the ABMT system in the context of the BBNJ Agreement, it is also important to address 3 critical questions in the context of this paper. The BBNJ Agreement introduces a new framework for the protection of marine biodiversity in the ABNJ, which has historically been under-regulated despite the existence of the UNCLOS framework. First, we need to consider the concept of freedom of the high seas in international law. Do these areas remain free under the new regime, or were they ever truly free? Secondly, relevant question refers to the impact of the Agreement on non-party third states. How will these states be affected, and what strategies can be used to encourage their participation, given that comprehensive biodiversity protection requires global action? Thirdly, the relationship between the BBNJ and existing regional and sectoral bodies, including the established ABMTs, is crucial. Will the new agreement support or undermine the efforts of these existing systems that have historically worked for marine conservation? Addressing these questions is essential to understanding the BBNJ Agreement's potential to reshape ocean governance and its effectiveness in advancing global marine biodiversity conservation.

a. Are the seas still free?

¹²³ Tekin Aydin FB, 'Area-Based Management Tools In 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' (thesis, 2020) <https://www.un.org/oceancapacity/sites/www.un.org.oceancapacity/files/2020unnf_tekin.pdf> accessed 31 August 2024

The concept of freedom of the seas has long been a cornerstone of international maritime law, deeply rooted in the doctrine of *mare liberum* articulated by Hugo Grotius in the early 17th century. However, the evolving legal, environmental and geopolitical landscapes have significantly modified this traditional understanding, as discussed by many scholars.¹²⁴

While, the UNCLOS confirms the century-old freedoms of the high seas as part of international law, yet these freedoms have not been static. High seas freedoms have adapted to evolving social conditions and new scientific knowledge, challenging the notion of inexhaustibility and raising the question: *Are the seas still free?*

UNCLOS, the most comprehensive legal framework governing the seas, explicitly states that ABNJs are open to all states, granting freedoms such as navigation, laying submarine cables and pipelines, constructing artificial islands, fishing, and scientific research (Art. 87 UNCLOS). Part VII of the Agreement further reinforces these freedoms, stipulating that every state, whether coastal or landlocked, has the right to sail ships flying its flag on the high seas (Art. 90 UNCLOS). However, the Convention brings also other concepts, such as the introduction of the 200-nautical-mile EEZ marked a significant departure from Grotius' general *mare liberum* approach.¹²⁵ The EEZ reduces the area of high seas open to all states, imposing certain restrictions on the freedom of third states.

Another constraint to the full freedom of the seas was introduced by UNCLOS itself. It arises from coastal states' exclusive rights to exploit the seabed and subsoil of their continental shelf, potentially extending even beyond the EEZ. Moreover, the mandate of the ISA further complicates the notion of freedom, as the ISA is tasked with organizing, regulating, and controlling all mineral-resource-related activities in the Area (the seabed and ocean floor and the subsoil thereof, beyond the limits of national jurisdiction) for the benefit of humankind as a whole. Consequently, today states are only truly free to use the seabed within their own jurisdiction, with the ISA exercising considerable control over activities in international waters.

¹²⁴ Hafner G, 'Does the Freedom of the Seas Still Exist?' [2017] The International Legal Order: Current Needs and Possible Responses 346 <https://brill.com/display/book/edcoll/9789004314375/B9789004314375_024.xml> accessed 31 August 2024

¹²⁵ Fisheries Jurisdiction, United Kingdom v Iceland, Judgment, Jurisdiction, [1973] ICJ Rep 3, ICGJ 141 (ICJ 1973), 2nd February 1973, United Nations [UN]; International Court of Justice [ICJ]: the International Court noted that the "... laissez-faire treatment of the living resources of the sea in the high seas" had ended and had been "... replaced by a recognition of a duty to have due regard of other states and the needs of conservation for the benefit of all.

In addition, numerous international and regional agreements regulate the six freedoms of the high seas. For example, the Fish Stocks Agreement pertains to fishing rights, and MARPOL regulates freedom of navigation. The emergence of environmental protection agreements has also posed challenges to the traditional concept of freedom of the high seas outlined by UNCLOS Article 87. For example, the equitable sharing of benefits, as outlined in the CBD and the Nagoya Protocol, challenges the previous practice where individual states or entities had the autonomy to carry out activities without the obligation to share benefits. Furthermore, the new BBNJ framework has imposed additional restrictions on freedoms in ABNJs through the establishment of MPAs and the implementation of area-based management tools, environmental impact assessments (EIAs), capacity-building and transfer of marine technology, all of which have tangible effects on the freedom of the seas.

It is evident that the traditional concept of "freedom of the seas," as proposed by Hugo Grotius in his work *Mare Liberum*,¹²⁶ is increasingly challenged by contemporary developments in ocean governance. Grotius's theory was rooted in the notion of the ocean's inexhaustibility, a belief that has been fundamentally undermined by technological advancements and humanity's growing environmental footprint. Today, the idea that the seas are boundless and immune to exploitation no longer holds. Yet this shift also does not fully align with John Selden's opposing view in *Mare Clausum*,¹²⁷ which argued for the seas' potential to be owned or closed off by nations based on Roman law. Instead, what we observe today is a more nuanced approach where ABMTs play a critical role in ocean governance, recognizing the ocean as a shared resource that belongs to all of humanity. These ABMTs and many other governance tools do not aim to divide or restrict access to the seas, but rather tend to ensure their sustainable use through careful regulation and international cooperation, reflecting a collective responsibility for the stewardship of this global common.

In this context, ocean governance tools represent a significant evolution in the governance of the oceans, such as embodying a shift from the classical notions of absolute freedom or ownership toward a more balanced and inclusive management framework. These tools are designed to protect marine biodiversity while allowing for sustainable use of marine resources. They are governed by international agreements and organizations, which emphasize the importance of monitoring, regulation and global cooperation. This approach underscores the

¹²⁶ Grotius H, *Mare Liberum* (Lodewijk Elzevir 1609)

¹²⁷ Selden J, *Mare Clausum* (Will Stanesbeius pro Richardo Meighen 1635)

idea that the seas, while not owned by any single nation, are a heritage of humankind that must be preserved for future generations. The challenge today lies not in asserting ownership or unrestricted freedom anymore but in finding effective ways to manage and protect this shared resource in an increasingly interconnected and environmentally conscious world.

b. How does it affect the third states?

While the BBNJ Agreement is a significant step towards addressing the conservation and sustainable use of marine biodiversity in ABNJ, a major concern remains regarding its effectiveness on third-party states that have not ratified, acceded to or succeeded to the treaty. The relationship between third parties and international treaties is guided by the principle of *pacta tertiis nec nocent nec prosunt*, as outlined in Article 34 of the Vienna Convention on the Law of Treaties, which states that a state is not bound by a treaty it has not consented to. Given that all states have rights in ABNJ, the absence of all states as parties to the treaty can present challenges. The Agreement acknowledges this issue by including Part X, which addresses non-parties. It states that "*Parties shall encourage non-parties to this Agreement to become Parties thereto and to adopt laws and regulations consistent with its provisions.*" Additionally, Article 25 of the BBNJ Agreement stipulates that non-parties entitled to become Parties will be encouraged by contracting parties to adopt measures supporting the decisions and recommendations of the COP on ABMTs. However, the Preamble of the Agreement also stresses that "the legal status of non-parties to the Convention or any other related agreements is governed by the rules of the law of treaties," indicating the Agreement's incentive-based approach towards third-party states. This chapter will explore the potential effects of the BBNJ Agreement on third-party countries that have not ratified it.

The principle of sovereign equality and consent underpins international law but also creates potential loopholes in the enforcement of international treaties, especially those related to environmental protection. In the case of marine biodiversity, the issue is of such magnitude that measures need to be taken globally. A significant concern is whether non-signatory states will be free to exploit marine biodiversity in ABNJ with few or no obligations, leading to an asymmetry in rights and responsibilities. This situation creates a risk of over-exploitation of marine resources by third parties, invoking a typical "tragedy of the commons"¹²⁸ scenario. Without a mechanism to enforce compliance on non-parties, the ecological goals of the BBNJ

¹²⁸ Hardin G, 'The Tragedy of the Commons' (1968) 162 Science 1243

Agreement may be undermined. Article 17 of the Fish Stock Agreement extends certain responsibilities to non-members of organizations and non-participants in arrangements. However, since these non-members are signatories to the Agreement, they can still be held legally accountable. Another provision, Article 33, addresses non-parties to the Agreement, stating that “*states parties shall take measures consistent with UNFSA and international law to deter the activities of vessels flying the flag of non-parties which undermine the effective implementation of the Agreement.*” The implementation of this provision, however, remains debatable.

Starting with the basics of international law, one potential avenue for extending the reach of the BBNJ Agreement to third parties is the development of its provisions into customary international law. Customary international law binds all states, regardless of whether they are party to a specific treaty. However, the transformation of treaty provisions into customary international law is a complex and lengthy process. For a rule to become customary international law, it must meet two essential criteria: general practice and *opinio juris* (the belief that such practice is legally obligatory). Achieving the necessary level of general practice for the BBNJ Agreement is highly challenging. Given the diverse interests of states in the high seas, non-parties may continue their activities without adhering to the treaty's provisions or some states can stay as persistent objector to the clauses. Furthermore, the concept of *opinio juris* remains one of the challenging aspects of international law. Even when states adopt domestic measures that reflect international conservation goals, it may not indicate that they view these measures as legally obligatory under international law. Instead, these actions may stem from public opinion or international pressure rather than a genuine belief in the legal necessity of such rules.¹²⁹ In its Advisory Opinion¹³⁰, in respect of Article 206, the ITLOS emphasized that “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law,” which was repeated by other international legal entities later again¹³¹. However, although the international law has already accepted that conducting transboundary EIA is a requirement

¹²⁹ Ma D and Zhou J, ‘The Binding Force of the BBNJ Agreement on Third Parties’ (2021) 212 Ocean & Coastal Management 105818 <<https://www.sciencedirect.com/science/article/abs/pii/S096456912100301X>> accessed 31 August 2024

¹³⁰ Responsibilities and Obligations of States with Respect to Activities in the Area, Request for Advisory Opinion submitted to the Seabed Disputes Chamber International Tribunal for the Law of the Sea, 1 February 2011, International Tribunal for the Law of the Sea [ITLOS] para 145

¹³¹ The South China Sea Arbitration, the Republic of the Philippines and the People’s Republic of China, Award, 12 July 2016, Permanent Court of Arbitration [PCA] para 947

under customary or general international law, no equally definitive decision has been made regarding the status of ABMTs as customary international law. Yet, since both Article 206, which concerns EIAs, and Article 192, which establishes the general obligation to protect and preserve the marine environment, are part of the same section of the UNCLOS, it is conceivable that one day respecting ABMTs, which aim to protect and preserve the marine environment, may also be recognized as customary law.

Given the difficulty in transforming the BBNJ Agreement into customary international law, a more pragmatic solution might lie in the realm of accepting BBNJ as a soft law material. Soft law refers to non-legally binding agreements, principles and declarations that guide state behavior without the force of hard law. While soft law offers flexibility, allowing states to commit to environmental standards without being legally bound, it also presents significant challenges, particularly for third-party states. Without the binding force of hard law, soft law lacks enforceability, which may hinder its effectiveness in regulating actions beyond national jurisdictions. This could lead to uneven implementation, with third-party states selectively applying or even disregarding the principles of the BBNJ Agreement. While soft law can be a precursor to hard law and may provide a foundation for future binding agreements, it has some current limitations. For instance, difficulty in ensuring compliance and the potential erosion of existing legal obligations suggest that soft law is insufficient on its own to guarantee the protection and sustainable use of marine biodiversity in international waters. Without a legal framework that holds all states accountable, the normative impact of soft law may be too weak to address the pressing environmental challenges the BBNJ seeks to tackle.¹³² As for another argument, the BBNJ Agreement, being an implementation agreement under the UNCLOS, could benefit from the broader legal framework established by UNCLOS. UNCLOS has achieved near-universal acceptance, and many of its provisions, including those related to the conservation and management of marine resources, are recognized as customary international law.¹³³ The integrity of UNCLOS and its principles of cooperation and good faith may provide a pathway for extending the influence of the BBNJ Agreement to non-parties. UNCLOS emphasizes the interdependence of marine issues and encourages states to collaborate on the

¹³² von Engelhardt, Marie. "Opportunities and Challenges of a Soft Law Track to Economic and Social Rights - The Case of the Voluntary Guidelines on the Right to Food." *Verfassung Und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*, vol. 42, no. 4, 2009, pp. 502–26. JSTOR, <http://www.jstor.org/stable/43239538>. Accessed 25 Aug. 2024.

¹³³ 'UNCLOS: the law of the sea in the 21st century' (House Of Lords International Relations and Defence Committee, 2nd Report of Session 2021–22) <<https://committees.parliament.uk/publications/9005/documents/159002/default/>> accessed 31 August 2024

management and protection of ocean resources. This holistic approach could strengthen the legitimacy of the BBNJ Agreement, even for non-parties, by framing its provisions within the established legal norms of UNCLOS.

An additional perspective drawn from scholarly debate suggests that one promising scenario would involve framing marine biodiversity in ABNJ as a "common concern" of humanity, rather than merely a "common heritage." The current language of the treaty refers to "common heritage," which traditionally emphasizes the equitable sharing of benefits. However, "common concern" regimes could shift the focus towards the equitable sharing of the burdens associated with cooperation and problem-solving. Such a shift could align more closely with the spirit of global environmental responsibility and could potentially facilitate broader participation in the Agreement's implementation, including by non-parties, since it is a general concept which does not connote specific rules and obligations, but establishes the general basis for the concerned community to act, although there is still no ICJ ruling referring to this.

¹³⁴ Including the "common concern" concept to the Agreement could greatly benefit the international community to hold third states responsible for their acts together with accepting BBNJ under the frameworks of UNCLOS customary rules.

To conclude, while the BBNJ Agreement represents a crucial step toward safeguarding marine biodiversity in ABNJ, its ultimate success depends on addressing the participation gap posed by non-signatory states. The challenge lies in finding enforceable mechanisms to extend the treaty's principles beyond its parties, whether through gradual incorporation into customary international law by leveraging the established framework of UNCLOS to ensure broader compliance. Additionally, rethinking the concept of marine biodiversity as a "common concern of humanity" could foster a more inclusive approach, placing the shared responsibility for global environmental stewardship at the forefront. At the same time, the path forward requires not only legal innovation but also sustained diplomatic efforts and a collective commitment to preventing the deterioration of our oceans, as suggested in the Article 62 of the Agreement.

c. How does the new BBNJ regime relate to the existing ABMTs?

One of the critical issues surrounding the BBNJ Agreement concerns its interaction with and

¹³⁴ Brunnée J, 'Common Areas, Common Heritage, and Common Concern' [2012] The Oxford Handbook of International Environmental Law 550 <<https://academic.oup.com/edited-volume/42625/chapter-abstract/358047876?redirectedFrom=fulltext>> accessed 31 August 2024

impact on existing mechanisms and ABMTs. These tools, established by various regional and sectoral bodies, are designed to manage human activities and protect marine environments in specific regions. For example, high seas fishing is governed by a patchwork of regional fisheries management organizations, which vary significantly in terms of the species they manage, their ability to incorporate broader ecosystem considerations, and their overall effectiveness. In contrast, other activities in ABNJ, such as shipping and mining, are regulated at a global level, often without clear obligations or mechanisms for cooperation with other sectoral governance bodies. The varying effectiveness and scope of these existing mechanisms create a complex landscape of ocean governance that the BBNJ Agreement must navigate.

During the preparatory phase of the BBNJ discussions, three terms were used to describe models for institutional arrangements: global, regional, and hybrid. The term "regional" referred to establishing a framework agreement similar to the UNCLOS Implementing Agreement on Fish Stocks, wherein there are guidelines for managing the situation but no bodies for implementation. On the other hand, "global" meant giving a strong mandate to BBNJ Agreement and its established organs to have exclusive power over all systems in order to achieve the goals of the Agreement.¹³⁵ Both approaches had their advantages and disadvantages. While the regional approach would lack the power to address crucial issues, the global approach would be so powerful as to undermine the mandates of existing international organizations. While, the negotiators wanted to have an effective mechanism, none of them expressed a desire to undermine existing organizations, as they are recommended by the UNGA to avoid doing so. As a result, a hybrid option was pursued, aiming to strike a balance between the two approaches. This hybrid model seeks to avoid undermining the roles of existing bodies while establishing powerful governing bodies that are not regulated by other organizations, effectively cooperating with existing international bodies on their mandates.¹³⁶

Scholars have also shown that the effectiveness of governance depends on the structure of institutional collaboration networks, which take into account power imbalances among stakeholders. A regime complex can improve governance when international organizations work together cooperatively. This collaboration helps to share information, spread best

135 Clark NA, 'Institutional Arrangements for the New BBNJ Agreement: Moving beyond Global, Regional, and Hybrid' (2020) 122 Marine Policy 104143
<<https://www.sciencedirect.com/science/article/abs/pii/S0308597X19308796>> accessed 31 August 2024

¹³⁶ Ibid.

practices and management structures, and build resilience during crises.¹³⁷

The results of a data collection show that 52 international organizations are involved to some extent in different aspects of the new BBNJ Agreement. These organizations form a marine biodiversity regime complex and will likely work together in the ABNJ to protect marine biodiversity. Key organizations mentioned in relation to the identification of areas in Part III of the Agreement include FAO, IMO, and CBD. Furthermore, several other organizations, such as NAFO, South-East Atlantic Fisheries Organization (SEAFO), NEAFC, CCAMLR, and OSPAR, are highlighted to underscore the need for coordination and cooperation with and among them for the effective implementation of ABMTs in ABNJ.

In the final text of the BBNJ Agreement, there is a strong emphasis on establishing a complementary relationship with existing ABMTs, aimed at enhancing cooperation and coordination among different stakeholders and governance bodies but unfortunately it stays in a collaboration level, which can mean different things and also be very weak. Articles 5 and 8 underscore the importance of cooperation with relevant international organizations, while Article 22 outlines the role of cooperation while establishing ABMTs. These provisions are intended to promote closer collaboration between the new BBNJ regime and existing ABMTs, indicating that the BBNJ Agreement aims to strengthen and build upon existing mechanisms rather than replace them.

However, tension still exists between these two aspects in the hybrid system. Article 22 of the BBNJ Agreement, as a whole, arguably creates a comprehensive framework for ABMTs.¹³⁸ The COPs of the BBNJ Agreement are mandated to establish arrangements for regular consultations aimed at enhancing cooperation and coordination with relevant IFBs, as outlined in Article 22(3). Additionally, Article 22(4) stipulates that the COPs may, as appropriate, develop mechanisms regarding existing ABMTs adopted by relevant IFBs. The term "not undermining" is likely to emphasize the effectiveness of relevant measures.¹³⁹ This implies that "not undermining" does not equate to "not interacting" or "not affecting." The COPs could

137 Langlet A and Vadrot ABM, 'Not "Undermining" Who? Unpacking the Emerging BBNJ Regime Complex' (2023) 147 Marine Policy 105372 <<https://www.sciencedirect.com/science/article/abs/pii/S0308597X19308796>> accessed 31 August 2024

¹³⁸ Wang J and Zhang Y, 'The Area-Based Management Tools Coordination between IMO and BBNJ Agreement Regimes and Its Implications on Vessel Pollution Control' (2024) 11 Frontiers in Marine Science <<https://www.frontiersin.org/journals/marine-science/articles/10.3389/fmars.2024.1341222/full>> accessed 31 August 2024

¹³⁹ Langlet (n 141)

exert influence over relevant bodies either directly or indirectly. Consequently, the BBNJ Agreement should not undermine the authority of these bodies in managing the respective activities but rather provide cross-sectoral and ecosystem-based ABMTs to enhance control measures for ship pollution.

Harmonization between the BBNJ Agreement and existing frameworks can be achieved through ‘compatibility clauses.’ Many international treaties include such clauses to manage the relationship between them and related treaties, as seen in Article 301 of UNCLOS. These clauses are designed to build bridges and ensure coordination between international treaties. The final legal text of the BBNJ Agreement includes compatibility clauses that explicitly call for coordination and cooperation with other international instruments and legal institutions. There is no doubt that existing bodies can effectively supervise activities under their mandates in ABMTs, given their expertise and experience, such as the IMO's in shipping activities and the ISA's in seabed activities.¹⁴⁰

To ensure effective coordination of ABMTs between the other international frameworks and BBNJ Agreement regimes, emphasis should be placed on the coordinating role of the COPs. Effective information exchange between international bodies and the BBNJ Agreement are crucial for the design and implementation of ABMTs. Long-term interactions foster sustained relationships, where participants consider their future together while inadequate access to information increases the uncertainty of collective action, making international cooperation challenging. Information exchange is facilitated through communication and interaction between Secretariat authorized by the COP of the BBNJ Agreement.

Finally, states' actions can significantly promote cooperation between regimes or treaties. States with overlapping memberships can spread new knowledge or ideas from one regime to influence decision-making in another. Cooperation among international organizations under different treaties primarily depends on the actions of individual states.¹⁴¹ The BBNJ Agreement also stipulates that parties shall, as appropriate, promote the adoption of measures within relevant IFBs of which they are members to support the implementation of decisions and recommendations made by the COPs regarding the ABMTs.

¹⁴⁰ Wang (n 142)

¹⁴¹ Stoll PT, ‘A New Law of Cooperation: Collective Action, International Organizations, and Fragmentation’, Oxford University Press (2021) <<https://global.oup.com/academic/product/the-protection-of-general-interests-in-contemporary-international-law-9780192846501?cc=pl&lang=en>> accessed 31 August 2024

In conclusion, the interaction between the BBNJ Agreement and existing mechanisms for ABMTs presents both opportunities and challenges. Key takeaways emphasize the need for a balanced, hybrid approach that promotes cooperation without undermining the mandates of existing organizations. The BBNJ Agreement prioritizes collaboration, as outlined in Articles 5, 8, and 22, which stress the importance of working with relevant international bodies to strengthen and enhance marine biodiversity protection. This is a new critical approach since the Agreement suggests a complementary, rather than competitive, relationship by putting the emphasis on "not undermining" the authority of other bodies. This will allow a holistic approach to marine biodiversity protection in ABNJ. The role of the Conference of the Parties (COP) in facilitating coordination and information exchange will be vital in ensuring the successful implementation of ABMTs across sectors and regions.

IV. Conclusion

This thesis aimed to examine whether the BBNJ Agreement is legally effective in its application of area-based management tools, an essential aspect of global marine governance aimed at protecting marine biodiversity in areas beyond national jurisdiction. After an in-depth analysis of the Agreement's provisions, as well as its relation to existing frameworks such as UNCLOS and various regional agreements, several conclusions can be drawn.

The BBNJ Treaty, as a landmark agreement under the UNCLOS, signifies a transformative step in the regulation of marine resources beyond national boundaries. By introducing a formalized structure for ABMTs, it provides a legal mechanism that seeks to enhance the conservation and sustainable use of marine biological diversity. This is particularly important as traditional governance frameworks, like UNCLOS, were not fully equipped to address the growing challenges posed by environmental degradation, climate change and over-exploitation of marine resources in these vast and often vulnerable areas.

One of the key strengths of the BBNJ Treaty is its clear and structured approach to ABMTs, covering vital aspects such as proposal mechanisms, areas of application and the powers vested in international bodies to enforce these tools. The inclusion of emergency measures is a notable innovation, providing states and international bodies with the ability to take swift action to address urgent threats to marine ecosystems. Furthermore, the treaty enhances coordination between existing regional and global frameworks, offering a more coherent legal framework for ABMTs that transcends fragmented regional and efforts. It encourages cooperative

governance. While questions remain about its relationship with established regional and sectoral agreements and bodies that have their own management regimes¹⁴², the writer of this paper believes that BBNJ introduces important legal and practical mechanisms how these different regimes will interact. In particular, BBNJ could be a mitigator for all regimes, especially in regions where ABMTs already exist.

However, the BBNJ Treaty also presents challenges, particularly in its relationship with the rights of third states, and related to that, how this regime would work together with on the long-standing principle of the freedom of the seas. The inclusion of third states, those not party to the treaty, creates potential legal complications. While the treaty establishes obligations for states parties, how it applies to non-participating states and how compliance will be enforced across the global community remains to be seen. This raises broader issues of fairness and equitable governance on the high seas. Historically, areas beyond national jurisdiction have been governed by the concept of "freedom of the high seas," allowing states considerable latitude in navigation, fishing and resource exploitation. However, it is still a question how the BBNJ regime can impose new conservation-oriented obligations that could be seen as constraining some of these freedoms. The extent to which the treaty balances environmental protection with the continued freedom of states to use marine resources will be a key factor in determining its overall effectiveness and acceptance by the global community. In this sense, the treaty can be viewed as a significant departure from past norms, potentially shifting the balance toward conservation rather than exploitation.

Looking ahead, the BBNJ Treaty's success in practice will hinge on its implementation, particularly the cooperation and commitment of states to enforce its provisions. The treaty relies heavily on the political will of its parties, as well as their capacity to monitor and regulate activities in vast and remote areas. The first COP meeting will be important in terms of future power of the Agreement, since it will be the session where the roles of several BBNJ bodies will be decided on. Establishment of effective enforcement mechanisms will be crucial, and further clarification will be needed on how compliance will be monitored and what sanctions will be imposed on violators.

In terms of future research, scholars should focus on the implementation phase of the BBNJ Agreement, tracking how it interacts with existing legal frameworks and regional agreements

¹⁴² Kim RE (n 114)

in practice. Comparative studies will be vital in understanding the effectiveness of various ABMTs under the treaty and assessing how well these tools achieve their conservation objectives. Additionally, there is a need to explore the practical implications of the Agreement's provisions on ABMTs, especially in the context of rapidly evolving environmental threats such as climate change and biodiversity loss. From a policy perspective, policymakers will also need to pay close attention to the development of monitoring and enforcement mechanisms that ensure compliance without overburdening states, especially those with limited resources.

The BBNJ Treaty represents a significant legal advancement in the governance of marine areas beyond national jurisdiction. While it offers a promising framework for the application of ABMTs, its effectiveness will depend on strong empowered bodies and their robust implementation, as well as the resolution of legal ambiguities and sustained international cooperation. The treaty signals a shift toward more responsible stewardship of the high seas, but its success will be measured by how well it balances the protection of marine biodiversity with the diverse and sometimes conflicting interests of the international community. As this new legal regime takes shape, it will be essential to continuously assess its impact and refine its provisions to ensure that it meets the evolving challenges of marine conservation in the 21st century.

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