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A Sheep in Wolf's Clothing? Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement

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ABSTRACT

This article seeks to elucidate the institutional nature of Part III of the BBNJ Agreement on area-based management tools (ABMTs), including marine protected areas (MPAs). While at first glance this new regime may appear to embody a “global” approach—that is, an institutional model wherein a strong conference of the parties (COP) plays a central role in establishing ABMTs—this article reveals that its true institutional nature is heavily decentralized. There is hence a risk of increased fragmentation of conservation efforts in areas beyond national jurisdiction. To address this challenge and promote coherence and uniformity in ABMT governance, this article advocates for the development of a robust recognition mechanism and offers reflections on how such a mechanism may be structured.

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Introduction

The vast expanses of the high seas, encompassing nearly half of the earth's surface area, have long fallen between the cracks of biodiversity conservation. Despite their immense ecological significance, hosting vital habitats and migratory routes for various marine species such as whales, sharks, sea turtles, and seabirds, and playing pivotal roles in climate regulation and carbon dioxide storage,¹ a mere 1.5 percent of this immense area of ocean space is protected through marine protected areas (MPAs).² This comparatively low level of protection is owed in part to the laissez-faire legal regime that governs it.

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¹ L. Karan and N. Clark, “A Path to Creating the First Generation of High Seas Protected Areas” (2020) *The Pew Charitable Trusts* at https://www.pewtrusts.org/-/media/assets/2024/04/highseas_mpa_report_2024.pdf (accessed 12 November 2024).

² UNEP-WCMC, IUN, NGAS, *Protected Planet Report 2020* (2021) at <https://livereport.protectedplanet.net> (accessed 27 February 2023). It should be noted, however, that these percentages indicate the *designation* of MPAs, which does not necessarily equal effective protection.

Indeed, the contemporary legal scheme governing the high seas centers around the high seas freedoms as outlined in article 87 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).³ This regime, which emanates from the age-old *mare liberum* doctrine, grants states significant leeway in deploying various activities on the high seas, including fishing and navigation. While one might anticipate these extensive freedoms to be counterbalanced by obligations to safeguard adequate protection and preservation of high seas biodiversity, the provisions dedicated thereto lack specificity and enforceability.⁴

Recognizing this lacuna,⁵ alongside other issues that have arisen in the implementation of the regime that governs areas beyond national jurisdiction (ABNJ)—which, in addition to the high seas, encompasses the Area⁶—international actors have recently taken decisive action with the adoption of the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement).⁷ The BBNJ Agreement, which marks the culmination of a nearly two-decade-long process, is a significant triumph in international diplomacy, especially considering the turbulent geopolitical context in which it was negotiated. Subsequent to its adoption, a surge of optimism emanated from governments,⁸ international organizations,⁹ the media,¹⁰ and environmental nongovernmental organizations (NGOs),¹¹

³ United Nations Convention on the Law of the Sea, adopted 10 December 1982, entered into force 16 November 1994, 1833 UNTS 396 [hereinafter: UNCLOS].

⁴ UNCLOS, Arts 117–119. These provisions contain very general obligations, inter alia to cooperate for the conservation and management of living resources on the high seas (Article 118) and to “take [...] such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas” (Article 117). Additionally, the general obligations outlined in Part XII apply, including to protect and preserve the marine environment (Article 192) and rare and fragile ecosystems (Article 194(5)); however, these provisions, too, lack specificity and enforceability.

⁵ See, in this regard, UNGA Resolution 59/122, Report on the work of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea at its fifth meeting (1 July 2004), noting “existing gaps in governance” [41] as well as a “[need] to address the gap in the conservation of high seas marine biodiversity and associated ecosystems” [86].

⁶ With regard to the Area, the primary issue is that UNCLOS is silent on the legal status of marine genetic resources (MGRs) in the Area.

⁷ 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 on 19 June 2023, not in force, C.N.203.2023.TREATIES-XXI.10 (Depository Notification).

⁸ Canada called the adoption of the ILBI a “big achievement” of which it is “very proud” (Global Affairs Canada, “Joint statement on successful conclusion of historic treaty to protect marine biodiversity beyond national jurisdiction” (2023), at <https://www.canada.ca/en/global-affairs/news/2023/03/joint-statement-on-successful-conclusion-of-historic-treaty-to-protect-marine-biodiversity-beyond-national-jurisdiction.html> (accessed 7 March 2024), and Singapore marks it as “a major step forward in contributing to the governance of the global commons” (Singapore Ministry of Foreign Affairs, “Successful Conclusion of Negotiations Under Singapore’s Presidency on a New United Nations Agreement on Marine Biological Diversity of Areas Beyond National Jurisdiction” (2023), at <https://www.mfa.gov.sg/Newsroom/Press-Statements-Transcripts-and-Photos/2023/03/BBNJ> (accessed 7 March 2024).

⁹ OSPAR, for one, “welcome[s] this historic moment and look forward to working with other international instruments, frameworks and bodies to deliver the objectives of the new Treaty” (OSPAR Commission, “OSPAR welcomes new global agreement to protect marine biodiversity in Areas Beyond National Jurisdiction,” 4 March 2023). António Guterres, Secretary-General of the UN, commented that the Agreement has “give[n] the ocean a fighting chance”; see United Nations, “Note to correspondents—press release on historic agreement adopted for conservation and sustainable use of biodiversity in over two-thirds of the ocean” (19 June 2023), at <https://www.un.org/sg/en/content/sg/note-correspondents/2023-06-19/note-correspondents-press-release-historic-agreement-adopted-for-conservation-and-sustainable-use-of-biodiversity-over-two-thirds-of-the-ocean> (accessed 25 July 2024).

¹⁰ See, e.g., C. Einhorn, “Nations Agree on Language for Historic Treaty to Protect Ocean Life,” 4 March 2023, *New York Times* at <https://www.nytimes.com/2023/03/04/climate/united-nations-treaty-oceans-biodiversity.html> (accessed 7 March 2024); K. McVeigh, “High Seas Treaty: Historic Deal to Protect International Waters Finally Reached at UN,” 5 March 2023, *The Guardian* at <https://www.theguardian.com/environment/2023/mar/05/high-seas-treaty-agreement-to-protect-international-waters-finally-reached-at-un#> (accessed 11 April 2024).

¹¹ According to the International Union for the Conservation of Nature (IUCN), the ILBI “opens the path for humankind to finally provide protection to marine life across vast swathes of the ocean”: IUCN, “IUCN Statement on the High

with Palau's symbolic ratification¹² of the treaty signaling the onset of an unprecedented wave of signatures in the first months following its adoption.¹³

The BBNJ Agreement sets forth a comprehensive regime for the conservation and sustainable use of ABNJ, addressing four elements: (i) marine genetic resources, including the fair and equitable sharing of benefits; (ii) environmental impact assessment; (iii) area-based management tools (ABMTs), including MPAs; and (iv) capacity-building and the transfer of marine technology. Its main objective, enshrined in Article 2, is to “ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction,”¹⁴ which it seeks to accomplish through, inter alia, the establishment of a “comprehensive system of area-based management tools, with ecologically representative and well-connected networks of marine protected areas.”¹⁵

In pursuit of this goal, Part III of the Agreement delineates a comprehensive regime for the identification, designation, and implementation of ABMTs and MPAs. This article critically examines these provisions, and does so primarily by clarifying the institutional nature of the Agreement, that is, how the BBNJ institutions—though focusing primarily on the conference of the parties (COP)—are embedded in the broader institutional constellation of ABNJ with regard to ABMT and MPA establishment. This may seem paradoxical; however, throughout the negotiating process, discussions on the substantive provisions in Part III were consistently underpinned by queries about the institutional “approach” that Part III would embody,¹⁶ and how it would relate to and “not undermine” relevant legal instruments and frameworks or relevant global, regional, subregional, or sectoral bodies (IFBs).¹⁷ Indeed, the institutional and normative dimensions of Part III are intricately linked and must be analyzed in tandem, rather than in isolation.

It should, however, be remarked that although the BBNJ Agreement has been adopted, the BBNJ process is by no means concluded, as many parts of the Agreement

Seas Treaty” (5 March 2023) at <https://iucn.org/iucn-statement/202303/iucn-statement-high-seas-treaty> (accessed 7 March 2024), and the World Wide Fund for Nature (WWF) “strongly welcomes” the new instrument, which “will provide the kind of oversight and integration we need” (WWF, “WWF: Landmark High Seas Treaty Agreed, Ushering in New Rules for Two-Thirds of the Ocean” (4 March 2023) at <https://wwf.panda.org/?7913966/landmark-high-seas-treaty-agreed> (accessed 7 March 2024).

¹² Pacific Island Developing States are among the main victims of the biodiversity and climate crises and have been among the main champions for a strong BBNJ Treaty. Its delegates were driven to despair when no agreement could be reached at the fifth intergovernmental conference, when “the representative of Samoa, speaking for Pacific Island Developing States, brought many in the room to tears when she told us that the \$260,000 spent on bringing the delegation to New York for the two week meeting was money that would not be available for schools or roads”; see C. Payne, “High Seas Biodiversity Will Have to Wait...” (2023) at <https://www.iucn.org/blog/202208/high-seas-biodiversity-will-have-wait> (accessed 19 March 2024).

¹³ As of 12 November 2024, 105 states have signed the Agreement and 14 have ratified it.

¹⁴ BBNJ Agreement, Art 2.

¹⁵ *Ibid*, Art 17(a).

¹⁶ See, for instance, UN, *Chair's overview of the third session of the Preparatory Committee* (9 September 2016) 12, comprehensively outlining the three institutional “approaches” that were tabled during the preparatory committee (PREPCOM) meetings. For a comprehensive introduction of these models, see N. Clark, “Institutional Arrangements for the New BBNJ Agreement: Moving beyond Global, Regional, and Hybrid” (2020) 122 *Marine Policy* 104143.

¹⁷ This relationship is aptly illustrated by New Zealand delegate Revell's report on the Informal working group on measures such as [ABMTs], including [MPAs], stating that “there are still divergent views on the central question of the roles in that process of the bodies established under the agreement and/or of relevant global, regional and sectoral bodies. This tension underlies the views of delegations on the specific steps of the process in relation to measures such as area-based management tools, including marine protected areas”; see UNGA, *Statement by the President of the Conference at the Closing of the Third Session*, UN Doc A/CONF.232/2019/10 (2019) 9. See, further, J. Tang, “Form Follows Function: An Initial Evaluation of the BBNJ Agreement's Achievements Regarding the “Not Undermining” Proviso” (2024) 159 *Marine Policy* 105952.

must be worked out in more detail.¹⁸ Therefore, the ensuing analysis inherently includes elements of speculation, as it cannot be said with certainty how the Agreement will be operationalized in practice. On the other hand, the treaty text and the *travaux préparatoires* offer a robust foundation that underpins the analysis conducted in this article.

To this end, the main corpus of this article is structured as follows. The ensuing section provides a concise examination of Part III of the Agreement, focusing on its normative content, that is, the process for identifying, establishing, and implementing ABMTs, including MPAs, in ABNJ. Section 3, then, brings the institutional dimension of the Agreement into sharper focus by analyzing in detail how the Agreement's institutions, and in particular its COP, relate to IFBs, seeking to answer the question of how the burden of fulfilling the objectives of Part III is distributed among the myriad bodies operating in ABNJ. Building thereupon, the fourth section concludes that there is a risk of increased fragmentation of conservation efforts, and presents a potential solution to this problem in the form of a "recognition" mechanism, offering reflections on the possible design of such a mechanism. The final section offers some concluding remarks.

ABMTs and MPAs under the BBNJ Agreement

The objectives of Part III are stipulated in Article 17, that is, to inter alia "conserve and sustainably use areas requiring protection, including through the establishment of a comprehensive system of [ABMTs], with ecologically representative and well-connected networks of [MPAs],"¹⁹ while also seeking to "strengthen cooperation and coordination in the use of [ABMTs], including [MPAs], among States [and IFBs]."²⁰

Part III then goes on to describe in great detail the process for establishing ABMTs and MPAs through the BBNJ Agreement, commencing with the procedure for submitting proposals, which are to be submitted to the secretariat by the Parties to the Agreement, either individually or collectively.²¹ The required contents of the proposal are described in some detail and can be elaborated further by the Scientific and Technical Body (STB). This new institution will play an important role throughout the process of establishing ABMTs, as it is moreover entrusted with the capacity to further develop the indicative identification criteria upon which ABMT proposals must be based, and to undertake a preliminary review of proposals.²²

Following the review by the STB, the secretariat convenes a consultation procedure, gathering inputs from a broad range of stakeholders including states, IFBs, civil society, the scientific community, and Indigenous peoples and local communities.²³ Following

¹⁸ As evinced by the recent commencement of the Preparatory Commission (PREPCOM), see UNGA, Preparatory Commission for the Entry into Force of the 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 and the Convening of the First Meeting of the Conference of the Parties to the Agreement Organizational meeting (1 July 2024) UN Doc A/AC.296/2024/4.

¹⁹ BBNJ Agreement, Art 17(a).

²⁰ *Ibid.*, Art 17(b).

²¹ *Ibid.*, Art 19.

²² *Ibid.*, Art 20.

²³ *Ibid.*, Art 21.

potential revisions based on contributions received during this consultation, as well as the STB's input,²⁴ the proposal undergoes further assessment by the STB before being forwarded to the COP.

Articles 22 and 23 of the Agreement delineate the procedure for decision-making by the COP with regard to the establishment of ABMTs, including MPAs and related measures (Figure 1). Article 22(1)(a) provides that the COP “shall take decisions on the establishment of area-based management tools, including marine protected areas, and related measures.”²⁵ These decisions are, in principle, adopted by consensus; however, proviso is made for a fallback voting mechanism of a three-quarter majority,²⁶ which cannot be viewed in isolation from the opt-out clause included in Article 23(3).²⁷ Indeed, COP decision-making was a contentious issue throughout much of the negotiation process,²⁸ and it appears that a compromise was found in opting for majority decision-making in combination with the opt-out clause.

In taking decisions pursuant to these provisions, the COP “shall respect the competences of, and not undermine [IFBs].”²⁹ In pursuit of the aforementioned objective to foster cooperation among states and IFBs, the COP is moreover granted the competence to “make arrangements for regular consultations to enhance cooperation and coordination with and among [IFBs].”³⁰

Once established, various mechanisms come into play that seek to ensure that states comply with the adopted ABMTs and associated measures. Parties are, first and foremost, under an obligation to “ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part.”³¹ In addition, Parties are under an obligation to report on the implementation of ABMTs and MPAs established under Part III.³² These reports feed into the periodic monitoring and review mechanisms executed

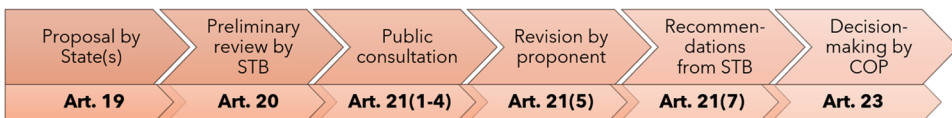


Figure 1. Simplified visualization of procedure for establishing ABMTs, including MPAs.

²⁴ Ibid, Arts 21(5) and 21(7).

²⁵ Ibid, Art 22(1)(a). Special rules apply in scenarios where competent IFBs are involved; this will be discussed below.

²⁶ Ibid; Arts 23(1) and 23(2) set out a two-step process by which, first, a two-thirds majority must decide that “all efforts to reach consensus have been exhausted” before a decision or recommendation may be adopted by a three-fourths majority.

²⁷ See, further, V. De Lucia, “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) *Ocean Development and International Law* 115.

²⁸ During IGC-4, for instance, a “regional group, supported by a number of delegations, proposed a voting system in the event that all efforts to reach consensus on the designation of ABMTs are exhausted. This was opposed by a number of delegations”; see T. Kantai and P. Bettelli, “Summary of the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 7–18 March 2022” (2022) 25 *Earth Negotiations Bulletin* 225, 7.

²⁹ BBNJ Agreement, Art 22(2).

³⁰ Ibid, Art 22(3).

³¹ Ibid, Art 25(1).

³² Ibid, Art 26(1).

through the STB, which seeks to “assess the effectiveness of [ABMTs], including [MPAs], established under this Part, including related measures and the progress made in achieving their objectives.”³³ Based on the outcomes thereof, the COP may decide or recommend to amend, extend, or revoke ABMTs and MPAs.³⁴

The Institutional Underpinnings of Part III of the BBNJ Agreement

The process for establishing ABMTs, including MPAs, through the BBNJ Agreement as discussed in the previous section is undeniably comprehensive and, at face value, appears robust. There is, however, an implicit contradiction in the treaty text that risks significantly reducing the effectiveness of the process. To fully grasp the paradoxical nature of Part III, we must take a step back and look at the broader institutional nuances that underpin the Agreement as a whole.

At the outset, it should be noted that the BBNJ Agreement establishes various institutions, that is, inter alia, the aforementioned COP and STB,³⁵ as well as a secretariat,³⁶ a clearing-house mechanism,³⁷ and, potentially, various subsidiary bodies.³⁸ This article is primarily concerned with the COP, as this body plays a central role in the process of establishing ABMTs, including MPAs, and exemplifies the broader institutional model embodied by the Agreement. The other institutions play a role of lesser importance but are mentioned and discussed insofar as they are relevant for the purposes of this article.

Throughout the negotiating process, among the most controversial and simultaneously critical issues were those relating to the institutional structure that the BBNJ Agreement would embody,³⁹ and how its institutions would be embedded within the wider institutional constellation governing ABNJ.⁴⁰ These discussions were long held in the form of “global approach vs. regional approach,”⁴¹ semantic containers denoting,

³³ Ibid, Art 26(3).

³⁴ Ibid, Art 26(4).

³⁵ Ibid, Arts 48 and 49.

³⁶ Ibid, Art 50.

³⁷ Ibid, Art 51. Additionally, a capacity-building and transfer of marine technology committee (Article 46), an implementation and compliance committee (Article 55), and an access and benefit-sharing committee (Article 15) will be established.

³⁸ Ibid, Art 47(6)(d).

³⁹ See, in this regard, A.G. Oude Elferink, “Exploring the Future of the Institutional Landscape of the Oceans beyond National Jurisdiction” (2019) 28:3 *Review of European, Comparative & International Environmental Law* 236, recognizing that the institutional arrangements are “a critical element and perhaps even the central battle ground for determining whether the ILBI has the potential to live up to the expectation of providing an effective regime for the sustainability of the oceans beyond national jurisdiction,” 243.

⁴⁰ During the second session of the Preparatory Committee, for instance, the Group of 77 and China called for “a global institutional mechanism to coordinate AMBTs” while, conversely, the Russian Federation stated that a “universal standard for MPA development is not possible” (E. Morgera, “Summary of the Second Session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 26 August–9 September 2016” (2016) 25 *Earth Negotiations Bulletin* 106, 9). This debate went on throughout the entirety of the negotiations. Prior to the fourth intergovernmental conference (IGC-4), for instance, the United States, in its textual proposal for Article 19, posited a provision which emphasizes the mandates of IFBs, with a COP that “may” take decisions on “matters related to” ABMTs and MPAs. On the other hand, the European Union proposal for Article 19 clearly mandated the COP to directly establish ABMTs and MPAs. See UNGA, *Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at [IGC-4], in Response to the Invitation by the President of the Conference in her Note of 18 November 2019, Article-by-Article Compilation* (20 February 2020) UN Doc A/CONF.232/2022/INF.1, 175, 183.

⁴¹ At IGC-1, for instance, the Russian Federation favored a “regional approach,” while, conversely, the IUCN, Singapore, and others advocated a “global approach”; see E. Morgera, “Summary of the First Session of the Intergovernmental

on the one hand, a model wherein COP is granted extensive powers to oversee the implementation of the BBNJ Agreement, thus creating a hierarchical relationship with existing instruments, frameworks, and bodies (IFBs), and on the other hand, an institutional approach that places the burden of carrying forward the work of the Agreement on existing legal instruments, frameworks, and bodies.⁴²

We can now try to answer the question of which approach prevailed in the end, focusing specifically on Part III of the Agreement. At first glance, this regime appears to embody a global approach, as the COP is assigned a seemingly expansive mandate to, *inter alia*, directly establish ABMTs, including MPAs, as well as “compatible” conservation measures.⁴³ In reality, however, the institutional model that was opted for is decentralized, a mere “global” system in disguise. This follows from two important characteristics of the Agreement: First, owing to the fact that for ABMTs and MPAs established thereunder to address the main activities taking place in ABNJ, that is, fisheries, shipping, and seabed mining,⁴⁴ the COP is largely dependent on the willingness of competent IFBs to cooperate. Second, Part III of the Agreement directs states toward pre-existing mechanisms by giving them precedence over its own MPA process. Both of these factors warrant closer examination.

The BBNJ Agreement vis-à-vis Sectoral IFBs

Among the most important characteristics of UNCLOS is its so-called “sectoral” nature, meaning that it effectively creates sub-regimes for several key activities taking place in the ocean, with each activity being equipped with its own institutional machinery: the International Maritime Organization (IMO) for shipping; the International Seabed Authority (ISA) for seabed mining; and regional fisheries organizations (RFMOs) in relation to fisheries. In ABNJ, these institutions and regimes are, in a sense, autonomous, as they are not subject to the direct jurisdiction of states.⁴⁵ The BBNJ Agreement largely maintains this regime, as it upholds and even reinforces the high seas freedoms

Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4–17 September 2018” (2018) 25 *Earth Negotiations Bulletin* 179.

⁴² K. Dalaker, “The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach” in M.H. Nordquist, J.N. Moore and R. Long (eds), *The Marine Environment and United Nations Sustainable Development Goal 14* (Brill Nijhoff, 2018) 137.

⁴³ BBNJ Agreement, Art 22; see the discussion above.

⁴⁴ Although not yet taking place on a commercial scale, it may become very important in the future and has been described as “the new extractive frontier.” See, e.g., A. Zalik, “Mining the Seabed, Enclosing the Area: Ocean Grabbing, Proprietary Knowledge and the Geopolitics of the Extractive Frontier beyond National Jurisdiction” (2018) 68 *International Social Science Journal* 243.

⁴⁵ UNCLOS endows the IMO and the ISA with extensive competences in relation to shipping and seabed mining respectively. See, e.g., Articles 22(3), 41(4), and 211 in relation to shipping, and Articles 208 and 209 and Article 137 *et seq* regarding seabed activities on the Area. RFMOs have less extensive mandates, as all states enjoy the freedom of fishing pursuant to Article 87 of UNCLOS. However, the 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 88 [hereinafter: FSA], limits access to stocks governed by an RFMO to those states participating therein or states “agreeing to apply the conservation and management measures established by such [RFMOs].” It should, however, be noted that states can influence decision-making of these institutions *indirectly* through their participation therein.

and protects the mandates of these organizations, which are not to be undermined.⁴⁶ The notion of “not undermining” was anchored into the mandate of the Intergovernmental Conference (IGC),⁴⁷ complicating—if not precluding—the establishment of an institutional system akin to a “global” approach.⁴⁸

Thus, the institutional scheme that ensued may be an inevitable consequence of the mandate underpinning the IGC, in which the BBNJ COP is not hierarchically superior to relevant IFBs.⁴⁹ It cannot *impose* ABMTs and conservation measures on these bodies, and hence, for an ABMT to address shipping, fishing, or seabed mining, the COP is dependent on the willingness of the aforementioned organizations to cooperate—most importantly RFMOs, the IMO, and potentially the ISA. There is hence a risk of continued fragmentation of activities and conservation efforts taking place in ABNJ. To establish a cohesive global system for the establishment of ABMTs and MPAs, delegations had to navigate the “not undermining” principle, and sought to do so by incorporating various mechanisms and obligations to foster cooperation and coordination with and among IFBs. For present purposes, two such mechanisms merit further examination.

First, for the Agreement in general, Article 8 sets forth the obligation for parties to “endeavour to promote, as appropriate the objectives of this Agreement when participating in decision-making under [IFBs].”⁵⁰ It is, however, questionable whether this provision will result in increased coherence and coordination, for two reasons. First, the obligation enshrined in Article 8 is a soft one; it is not only qualified (“endeavour to promote”) but also lacks specificity as it cannot be translated into specific, enforceable obligations. Second, it must be kept in mind that states are *already* under an obligation to cooperate by virtue of Article 197 UNCLOS, either directly or *through competent international organizations*, for the protection and preservation of the marine environment. It may thus reasonably be questioned whether Article 8 of the BBNJ Agreement adds something new and whether it will have any meaningful impact on the conduct of states, acting through IFBs.

The second mechanism through which the Agreement seeks to foster coherence and coordination of conservation efforts is found in Article 22(3), which stipulates that “the [COP] shall make arrangements for regular consultations to enhance

⁴⁶ BBNJ Agreement, Article 7 lists the “freedoms of the high seas” among the guiding principles for the achievement of the objectives of the BBNJ Agreement; Articles 5(2) and 22(2) reflect the “not to undermine” proviso for the Agreement in general, and in relation to ABMTs, respectively. For further discussion on the content and operationalization of the “not to undermine” clause, see V. De Lucia, note 27.

⁴⁷ UNGA Resolution 72/249. International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (19 January 2018) [7].

⁴⁸ The “not undermining” principle was, indeed, keenly leveraged by proponents of a more decentralized institutional model throughout the negotiations, e.g., during IGC-4 where one delegate “recalled General Assembly resolution 72/249 on not undermining existing instruments, calling on delegations to respect and fully implement UNCLOS” (IGC-4 Summary, note 27, 16). Similarly, during the Ad Hoc Open-ended Informal Working Group some delegations suggested ‘arrowing’ the scope of the Agreement as it may otherwise “overlap with existing instruments and mechanisms and undermine the work of current bodies” (UNGA, *Letter dated 5 May 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly* (5 May 2014) [73].

⁴⁹ This follows from the “not to undermine” clause, incorporated in various provisions throughout the BBNJ Agreement, as well as the absence of any provisions explicitly endowing the COP with competences that overrides those held by IFBs.

⁵⁰ BBNJ Agreement, Art 8(2).

cooperation and coordination with and among [IFBs].⁵¹ De Lucia noted that this provision “may carve a central role for the BBNJ Agreement for the coordination of all relevant IFBs in a particular region.”⁵² The underlying idea, indeed, seems to be that the COP could act as a linchpin in the new global regime for establishing a comprehensive network of MPAs. While undeniably appealing, it is questionable whether these mechanisms will have the desired effect. The notion of a consultation mechanism that brings together and coordinates efforts of various IFBs is not a novelty; it is reminiscent of the Collective Arrangement in the North-East Atlantic,⁵³ through which OSPAR sought to take on a similar role as now envisioned by the BBNJ COP.

The OSPAR Commission,⁵⁴ in its efforts to establish a network of MPAs in ABNJ in the North-East Atlantic, was required to pursue cooperation with various sectoral organizations since, owing to the jurisdictional framework of UNCLOS discussed above, these MPAs do not regulate shipping, fishing, and mining. OSPAR sought to do so through the “Collective Arrangement,” a multilateral platform that should enable OSPAR to collaborate with all relevant entities responsible for managing human activities in the North-East Atlantic.⁵⁵ However, OSPAR encountered considerable challenges in attracting willing participants to engage in this endeavor, with particular notable absences being the IMO and the ISA.⁵⁶ Despite the improved coordination between NEAFC’s area closures and OSPAR’s MPAs in ABNJ, significant limitations persist owing to the exclusion of shipping and mining activities from the regulatory scope of these MPAs.⁵⁷ Indeed, OSPAR’s MPAs in ABNJ have been criticized for being little more than “paper parks,” as they fail to impose any substantive limitations on activities taking place within their confines.⁵⁸

The Collective Arrangement highlights the difficulties arising around cooperation with sectoral organizations for the establishment of MPAs. This, in turn, raises the question of whether the cooperative mechanisms envisioned by the BBNJ Agreement will have the desired effect of fostering cooperation and coordination in conservation efforts in ABNJ. On the other hand, the precise nature of the cooperative mechanism to be established under Article 22(4) of the Agreement remains uncertain, and it is yet to be determined whether it will mirror the Collective Arrangement. The potential involvement of the BBNJ COP in a coordinative role may enhance the efficacy of such mechanisms.

In any case, the issue that there is no strong obligation for IFBs to cooperate persists, and hence the success of the MPA-process outlined in Part III of the Agreement

⁵¹ Ibid, Art 22(3).

⁵² V. De Lucia, note 27.

⁵³ OSPAR Commission, “Collective Arrangement” at <https://www.ospar.org/about/international-cooperation/collective-arrangement> (accessed 26 March 2024).

⁵⁴ Convention for the Protection of the Marine Environment of the North-East Atlantic, adopted 22 September 1992, entered into force 25 March 1998, 2354 UNTS 67.

⁵⁵ OSPAR Agreement 2014–09 (Update 2018): Collective Arrangement between Competent International Organizations on Cooperation and Coordination Regarding Selected Areas in Areas beyond National Jurisdiction in the North-East Atlantic.

⁵⁶ See B.E. Klerk, “From Undermining to Strengthening: Implications of the Forthcoming Agreement on Biodiversity beyond National Jurisdiction for MPA Governance in the North-East Atlantic” (2023) 38 *International Journal of Marine and Coastal Law* 107, 139.

⁵⁷ Ibid.

⁵⁸ N. Matz-Lück and J. Fuchs, “The Impact of OSPAR on Protected Area Management beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?” (2014) 49 *Marine Policy* 155.

hinges, to some extent, on the cooperative spirit of IFBs. Should these bodies prove reluctant to cooperate with the COP and align their policies with the objectives of the BBNJ Agreement, the (rhetorical) question becomes: If not fishing, shipping, and seabed mining, what activities will ABMTs and MPAs established under Part III regulate?

IFBs as the Main Avenue for Designating ABMTs and MPAs

In addition to the limited competences of the COP with respect to Part III, the decentralized nature of the BBNJ Agreement follows from the prominent role it accords to IFBs for the establishment of ABMTs, including MPAs. It does so rather subtly, given that, at face value, Part III of the Agreement with its comprehensive process for directly establishing ABMTs and MPAs by the COP seems to have opted for an institutional scheme more akin to the notion of a “global approach.”

However, the opposite holds true, as, upon closer examination, it becomes clear that in instances where competent IFBs are present, this is the preferred avenue for designating ABMTs and MPAs. Indeed, Article 22 provides that “where proposed measures are within the competences of other [IFBs],” the COP “may” make recommendations to “this [IFB] to promote the adoption of relevant measures through such [IFBs].”⁵⁹ The word “may” could be interpreted in two ways: First, it could entail that the COP can decide whether it chooses to directly establish the MPA, notwithstanding the presence of a competent IFB; or, alternatively, that it lacks competence, and may decide to make recommendations to the relevant IFB, or instead refrain from taking action. The latter interpretation aligns with the requirement to “respect the competences of, and not undermine” relevant IFBs, as discussed in detail by De Lucia, who notes that this provision “effectively relinquish[es] competence to adopt measures” by the COP where IFBs exist. Consequently, the latter interpretation should take precedence, and hence ABMTs and MPAs can only be established by the COP in areas devoid of overlapping jurisdiction.

This conclusion has far-reaching implications, as it reinforces not only the limited competence *ratione materiae* of the BBNJ Agreement as discussed above by protecting the mandates of sectoral IFBs (i.e., RFMOs, the IMO and the ISA) but also that of *regional* IFBs. Consequently, it also circumscribes the COP’s competence to establish ABMTs in areas where a regional IFB is present with competence to establish ABMTs or MPAs. It is, in this context, noteworthy that some form of regional arrangement exists in all regional oceans (see [Figure 2](#)).⁶⁰ In some of the more institutionally dense regions, regional initiatives to establish MPAs have already taken place or are underway,⁶¹ while in other areas soft law arrangements such as action plans (e.g., the Action

⁵⁹ BBNJ Agreement, Art 22(1)(c).

⁶⁰ Figure source: UN Environment, *Regional Seas Follow Up and Review of the Sustainable Development Goals (SDGs), UN Environment Regional Seas Reports and Studies No. 208* (2018) available at https://wedocs.unep.org/bitstream/handle/20.500.11822/27295/ocean_SDG.pdf (accessed 11 April 2024).

⁶¹ In addition to the aforementioned OSPAR Commission, MPAs in ABNJ have been designated by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR Commission); see CCAMLR, “Marine Protected Areas (MPAs)” at <https://www.ccamlr.org/en/science/marine-protected-areas-mpas> (accessed 5 April 2024); and the Pelagos Sanctuary in the Mediterranean Sea under Intergovernmental Agreement related to the creation in the Mediterranean of a Sanctuary for Marine Mammals.

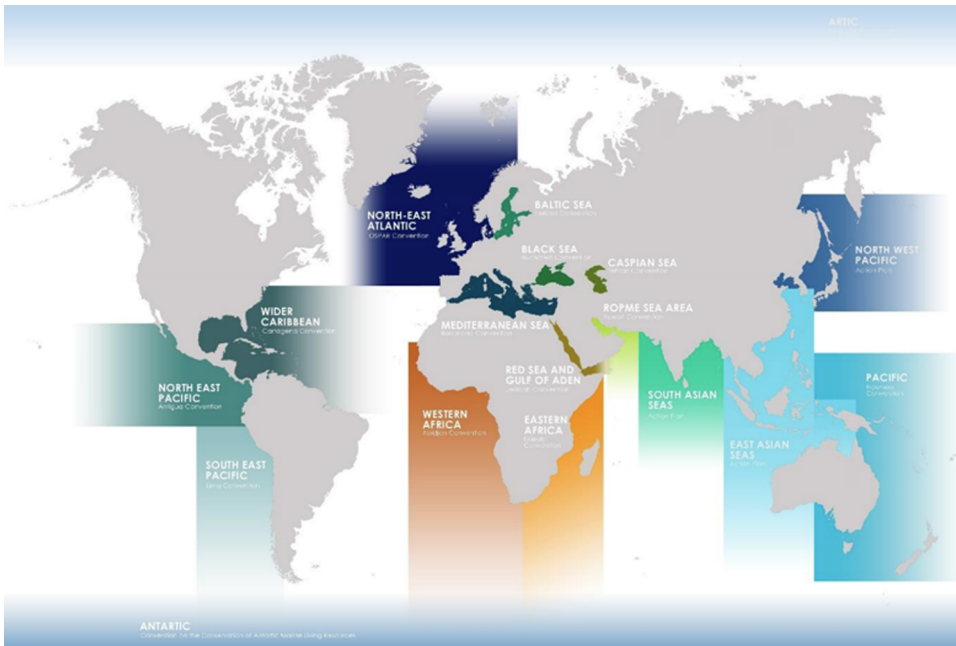


Figure 2. Map of regional seas.

Plan for the South Asian Seas Programme (SASP))⁶² have been put in place. It is not unlikely that, following the adoption of the BBNJ Agreement, we will witness a rapid institutionalization and strengthening of these “soft” regional governance structures, akin to the proliferation of RFMOs following the adoption of the 1995 Fish Stock Agreement, opening a new frontier for MPA establishment on the high seas.⁶³

In conclusion, there is an apparent disjunction between the substantive regime for designating MPAs in ABNJ and its institutional underpinnings. The former outlines a comprehensive procedure for establishing MPAs by the COP, which, to be effective, would have to be embedded within an institutional structure wherein the COP is granted extensive competences and placed in a hierarchically superior position vis-à-vis IFBs—as envisioned by proponents of the traditional “global” approach. However, despite its appearance as a global system, the implemented institutional model reveals itself to be decentralized at its core, akin to a sheep dressed in wolf’s clothing. This is owing to the fact that the main activities taking place in ABNJ are, in a way, beyond the institutional ambit of the Agreement, and hence the effectiveness of the process for designating ABMTs ultimately hinges upon the willingness of competent IFBs to cooperate. Moreover, by virtue of the “not undermining” clause, ABMT establishment through regional and sectoral avenues is given precedence over the BBNJ route, thereby

⁶² South Asia Co-operative Environment Programme (SACEP) Decision 11/7, “Action Plan for the Protection and Management of the Marine and Coastal Environment of the South Asian Seas Region,” 24 May 1983.

⁶³ Given the limited competence of the COP to establish ABMTs, the majority of the burden to fulfill the objectives of Part III rests with regional and sectoral IFBs. While sectoral IFBs already have competences in ABNJ and, in some cases, have designated ABMTs therein, most regional IFBs would need to broaden both their substantive and geographic mandates to designate ABMTs in ABNJ. A strong incentive for such a development, at least for some states—i.e., those favoring a decentralized model—is that it would effectively circumscribe the competence of the COP in that region. Needless to say, it remains to be seen whether such developments will actually unfold.

further diminishing the relevance of the substantive regime set out in Part III of the Agreement.

Combatting Fragmentation: Why Recognition Is Key

The previous section showed that sectoral mechanisms, such as the establishment of closed areas for fisheries through RFMOs,⁶⁴ particularly sensitive sea areas (PSSAs) by the IMO,⁶⁵ and areas of particular environmental interest (APEIs) under the ISA,⁶⁶ will persist and may even proliferate following the adoption of the BBNJ Agreement. Indeed, as we have seen, it gives precedence to such mechanisms over the global ABMT process and mandates the COP to promote the establishment of such sectoral ABMTs by making recommendations to this end.⁶⁷ Moreover, the undermining principle is linked to the mandates of relevant international frameworks and bodies (IFBs)⁶⁸; that is, the COP's capacity to establish ABMTs and MPAs is contingent upon the presence and competences of existing IFBs. Consequently, sectoral organizations might seek to reinforce and solidify their mandates with a view to limiting the potential space in which the BBNJ COP could operate. The same applies to regional seas conventions, which, as alluded to above, may undergo significant transformations in the future, potentially leading to a proliferation of regional MPA initiatives.

In light of these considerations, the prospect of continued fragmentation of conservation efforts in ABNJ looms large. While not explicitly stated among its objectives, combatting fragmentation is among the main rationales for the establishment of this new regime. This can be inferred from the preambular recitals stressing the need to address biodiversity loss in a “coherent and cooperative manner” and the establishment of a “comprehensive global regime,”⁶⁹ as well as repeated mentions of coordination, coherence, and cooperation throughout the Agreement and its negotiating history.⁷⁰ The above discussion, however, suggests the Agreement may have the opposite effect—that is, it may lead to *increased* fragmentation of conservation efforts in ABNJ.

While, as we have seen, the aforementioned mechanisms that seek to foster cooperation and coordination with and among IFBs may not have the desired effect, a

⁶⁴ See, e.g., CCAMLR Conservation Measure 32-01 (2001).

⁶⁵ IMO, Particularly Sensitive Sea Areas, at <https://www.imo.org/en/ourwork/environment/pages/pssas.aspx> (accessed 5 April 2024). See, for instance, IMO Marine Environmental Protection Committee (MEPC) Resolution MEPC.268(68), “Designation of the South-West Coral Sea as an Extension of the Great Barrier Reef and Torres Strait Particularly Sensitive Area,” 15 May 2015.

⁶⁶ See, in this regard, International Seabed Authority, Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22) 26 July 2012, which includes the designation of 9 APEIs. An additional four APEIs were established in 2021: Decision of the Council of the International Seabed Authority relating to the review of the environmental management plan for the Clarion-Clipperton Zone (ISBA/26/C/58) 10 December 2021.

⁶⁷ BBNJ Agreement, Art 22(1)(c).

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, preamble.

⁷⁰ *Ibid.*, see, e.g., Articles 2, 8, and 17(b). Calls for coherence are found throughout negotiating reports of the IGCs. For instance, a EU delegate “underscored the role of the ILBI in improving coherence” in the aftermath of IGC-1 (see IGC-1 Summary, note 41, 14), and, similarly, New Zealand reporting convergence on “the need to promote coherence, complementarity, and synergies with [IFBs]” following informal discussion on ABMTs at IGC-2 (T. Kantai, “Summary of the Second Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March–5 April 2019” (2019) 25 *Earth Negotiations Bulletin* 195, 8.

potential solution lies in the possibility of establishing a *recognition* mechanism: that is, a process through which ABMTs and MPAs established by regional and sectoral bodies would effectively be brought under the “umbrella” of the BBNJ Agreement, rendering them binding on all member states and potentially broadening their scope of application.⁷¹ The legal basis for the establishment of such a mechanism is enshrined, albeit rather cryptically, in Article 22(4) of the Agreement:

Where the achievement of the objectives and the implementation of this Part so requires, to further international cooperation and coordination with respect to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, the Conference of the Parties may consider and, subject to paragraphs 1 and 2 above, may decide, as appropriate, to develop a mechanism regarding existing area-based management tools, including marine protected areas, adopted by relevant legal instruments and frameworks or relevant global, regional, subregional or sectoral bodies.

This provision is among those that are purposely left ambiguous and open-ended to be worked out further by the COP, presumably to break a deadlock in the negotiations.⁷² On face value, it appears insignificant and lacking in legal force and substance, owing to its various qualifications and ambiguities—it is, for instance, not specified what such a mechanism may entail. However, closer examination of this provision, especially in light of its negotiating history, reveals that the “mechanism” in question is, at least potentially, a recognition mechanism.⁷³ Nevertheless, given the open-ended language of Article 22(4) and the absence of explicit mention of recognition, the COP may opt for a different, less formal mechanism.⁷⁴ It is argued here, however, that establishing a recognition mechanism could be of pivotal importance, for two main reasons.

First is because it has great potential to foster *uniformity and coherence* in MPA governance, which is key for the fulfilment of the objective of establishing a “comprehensive system of area-based management tools” in ABNJ.⁷⁵ Different IFBs may use different criteria for identifying areas requiring protection, have varying conservation objectives, and uphold different standards and regulations, resulting in a patchy, complex web of regulations and management tools. Moreover, an increasingly fragmented legal landscape for biodiversity conservation on the high seas could negatively impact legal certainty, as obligations would be scattered across various regions and activities. Bringing those obligations together under one global framework will foster structure and coherence, which may, in turn, have a positive effect on compliance.

Second, recognition of existing ABMTs could expand the normative reach of measures designated by IFBs. This is particularly relevant in relation to regional conventions

⁷¹ That is, if the BBNJ Agreement attracts global participation.

⁷² Throughout the BBNJ Agreement, many issues are left open-ended to be considered by the COP, e.g., *inter alia*, the modalities of a benefit-sharing mechanism (Article 14(2)(h) and 14(7)); the terms of reference and modalities for the operation of the access and benefit-sharing committee (Article 15(2)); and standards or guidelines for environmental impact assessments (Article 38).

⁷³ This can be inferred primarily from the reference to *existing* ABMTs, including MPAs, in Article 22(4), which has, throughout the negotiating process, been used exclusively in relation to a recognition mechanism. This wording stems from the European Union’s textual submission prior to IGC-4, where it proposed “the recognition of *existing* [ABMTs], including [MPAs]” (emphasis added); see IGC-4 Textual Proposals, note 40, 145.

⁷⁴ See V. De Lucia, note 27, who suggests that “it does not necessarily entail a process of recognition, [and] may take the form of a mere acknowledgement map or yet other forms the COP may devise” [insert pin point ref].

⁷⁵ BBNJ Agreement, Article 17(a).

such as OSPAR, which could benefit significantly from recognition of its high seas MPAs under the BBNJ Agreement as they are only binding *inter partes*, under the principle of *pacta tertiis nec nocent nec prosunt*.⁷⁶ Thus, third states are not bound by these MPAs, and can freely exercise their high seas freedoms in these areas. However, following their recognition through the BBNJ Agreement, their scope of application could be broadened significantly, depending on the degree of participation it attracts. The same would apply to sectoral organizations, particularly to RFMOs, which also have regional participation.⁷⁷

The concept of “recognizing” tools and measures established through regional or sectoral organizations under an overarching global regime is a creative legal fiction that has no precedent in international environmental law. Perhaps the novelty of the idea was among the reasons why no agreement could be reached on a strong formulation thereof. Indeed, initial formulations of this mechanism that surfaced during the early stages of the IGC process were far more detailed. As the negotiations unfolded, the mechanism underwent significant changes and, for a while, even disappeared from the draft text.⁷⁸ However, the final version of the text that was released prior to the resumed fifth IGC included a fairly detailed description of the recognition process:

The Conference of the Parties may recognize, in accordance with the objectives, criteria and decision-making process laid down in this Part, area-based management tools, including marine protected areas, established under [IFBs] at the request of that body or of a Party authorized to act on its behalf, or Parties authorized to act on its behalf. The following articles apply to area-based management tools, including marine protected areas, recognized under this paragraph, as if they were established under this Part.⁷⁹

This provision stands in stark contrast to the bare-bone clause included in Article 22(4) of the BBNJ Agreement. While the process for recognition is not described in great detail, this draft provision outlines the basic procedure and requirements for recognizing ABMTs, including MPAs, notably that the COP is competent to decide on the recognition of ABMTs and MPAs through its normal decision-making process on the request of a Party or Parties. It, moreover, provided that to be recognized, ABMTs and MPAs must conform to the objectives and criteria of the BBNJ Agreement.

The current phrasing of Article 22(4) is, in effect, a step backward insofar as negotiations on whether to establish a recognition mechanism and in what way—which have already taken place throughout the IGCs⁸⁰—will have to be held once more at

⁷⁶ See, in this regard, B.E. Klerk, note 56.

⁷⁷ While the FSA applies *extra partes* pursuant to Article 17, which provides that non-member states to RFMOs “shall not authorize vessels flying its flag to engage in fishing” in the relevant area, it should be kept in mind that the FSA, with its 92 member states, does not have universal participation. Hence, the BBNJ Agreement may, depending on its success in terms of participation, extend the application of measures adopted through RFMOs.

⁷⁸ The Drafts released prior to IGC-3 and IGC-4 contain no reference to recognition; see UNGA, 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, UN Doc A/CONF.232/2019/6 (2019); and UNGA, Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UN Doc A/CONF.232/2020/3 (2019).

⁷⁹ UNGA, Further refreshed 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, UN Doc A/CONF.232/2022/CRP.13 (2022) article 19(2).

⁸⁰ At IGC-2, for instance, Australia and the Russian Federation opposed the formal notion of “recognition,” while, on the other hand, New Zealand, Canada, Singapore, and the Philippines “favored a global overarching framework

the COP. Given the potential significance of such a mechanism, it is useful to reflect briefly on how it may be shaped in due course.

Shaping the Recognition Process under the BBNJ Agreement

When structuring a recognition process, three key questions need to be addressed. First, which ABMTs and MPAs are eligible for recognition, and what are the relevant criteria for that purpose? Second, what is the *process* for recognizing ABMTs? And third, once recognized, does this have any consequences for how and by whom these ABMTs are governed? The ensuing discussion offers reflections on each of these three questions.

The question of how a recognition process may be shaped has already been subjected to extensive deliberation during the negotiation of the BBNJ Agreement. The most comprehensive debates took place at IGC-1, where there was broad support for establishing a recognition mechanism.⁸¹ Various proposals for how such a process could be structured were brought to the negotiating table, with Norway proposing “automatic recognition of ABMTs established according to certain procedures and requirements.”⁸² The High Seas Alliance, on the other hand, called for “global recognition of existing MPAs that meet [BBNJ] criteria.”⁸³

These various proposals were subsequently included in the ‘President’s Aid’ to the negotiations that was released prior to IGC-2, which presented delegations with three variations of a recognition mechanism.⁸⁴ Under option A, ABMTs and MPAs established by IFBs “shall go through a process of recognition by the [COP],”⁸⁵ meaning that recognition would be subject to the COP’s normal decision-making procedures. Option B stipulates that such tools “shall be recognized under this instrument, provided that such measures are established in accordance with the requirements set out in this Part,”⁸⁶ leaving the COP significantly less room to maneuver as this implies that once it is established that an ABMT meets the identification criteria, it *shall* be recognized. And finally, option C closely resembles Norway’s suggestion to automatically recognize ABMTs and MPAs, “provided that such measures are established in accordance with the requirements set out in this Part.”⁸⁷ It is unclear what such requirements entail, but this option seems to imply that these ABMTs would go through a simplified procedure that does not require COP decision-making but can instead be assessed by the Secretariat or the STB.

All three options offer viable alternatives and should be carefully considered. None emerges as inherently superior to the others; however, some concerns related to state consent may arise around the second and third options. States are reluctant to be subjected to ABMTs and MPAs to which they have not explicitly given their consent,

for the recognition and establishment of ABMTs” (IGC-2 summary, note 70, 5). See also note 81 below.

⁸¹ Many delegations supported including some type of recognition mechanism, including the Group of 77/China, Norway and the High Seas Alliance; see IGC-1 Summary, note 41, 6–8.

⁸² *Ibid.*, 7.

⁸³ *Ibid.*, 8.

⁸⁴ UNGA, *President’s Aid to negotiations*, UN Doc A/CONF.232/2019/1 (2018) [4.2] Option I (4).

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

and it may be questioned whether (quasi)automatic recognition is consistent with the principle of *pacta tertiis nec nocent nec prosunt*. Moreover, concerns regarding transparency and legitimacy may be raised with respect to the automatic recognition of ABMTs and MPAs established by regional bodies, effectively imposing restrictions on states that did not participate in their establishment. Taking this into account, it appears that the first alternative is most legally sound and politically realistic.

The question of which ABMTs would be eligible for recognition aligns, to some degree, with the preceding discussion. Essentially, it revolves around whether these tools are evaluated based on the criteria outlined in Annex I of the Agreement and other standards, such as those outlined in Article 17. Given the broad nature of the indicative criteria listed in Annex I, strict scrutiny is not possible insofar as there is quite possibly no MPA that meets all 22 criteria—especially in the case of sectoral ABMTs that will generally have a more limited scope. They could, however, be used alongside the objectives of Part III to guide the COP in making decisions on recognizing ABMTs. However, bearing in mind the aforementioned objectives of combatting fragmentation and fostering uniformity and coherence, it could be argued that imposing overly stringent requirements on ABMTs would be counterproductive.

Another crucial consideration in establishing a recognition process is precisely determining the implications of the recognition of ABMTs. Most fundamentally, the legal consequences of a decision to that effect need to be clarified: notably, whether the IFB by whom it was designated retains full authority of the ABMT. If so, the question arises of whether it can be subjected to monitoring and review by the STB. Notably, Article 26 of the BBNJ Agreement provides that the STB “shall assess the effectiveness of [ABMTs and MPAs] *established under this Part*” (emphasis added), which excludes recognized ABMTs from the scope of this provision. However, this provision does not exhaustively list the STB’s competences, and it is explicitly provided in Article 49(4) that the COP may assign additional functions to the STB. It is thus entirely possible to subject recognized ABMTs to monitoring and review by the STB if the COP so decides. This is arguably desirable, as it would allow the STB to monitor the implementation of all ABMTs and assess them against the Agreement’s objectives and criteria. Based on the outcomes thereof, the STB could make recommendations to this end to the competent IFBs. Such a process could not only foster uniformity but may also have a positive impact on effectiveness.⁸⁸

A related question that may arise is whether changes made by the IFB to, for instance, the management framework or geographical delineation of the ABMT are automatically recognized or whether these need to go through a (simplified) recognition procedure. It is, evidently, important that recognized ABMTs stay up-to-date. However, automatic recognition of alterations may not be feasible owing to the same transparency and legitimacy issues highlighted above. A potential solution lies in the consultation mechanism found in Article 22(3), as already discussed above, which seeks to “enhance coordination and coordination with and among [IFBs]” by the COP. This

⁸⁸ BBNJ Agreement, Article 26 outlines the monitoring and review procedure as to be conducted by the STB, which could be made applicable to recognized ABMTs *mutatis mutandis*. Reports are made publicly available (article 26(1)), thereby potentially subjecting such ABMTs to scrutiny by, e.g., the general public and environmental NGOs, holding IFBs accountable for any potential deficiencies in their ABMT governance such as poor implementation or continued activities in the relevant area.

could offer a platform where IFBs present updates on their recognized ABMTs, which may then be adopted by the COP.

Concluding Remarks

This article has sought to elucidate the institutional nature of Part III of the BBNJ Agreement. At first glance it may appear to embody a “global” approach—that is, an institutional model wherein a strong COP plays a central role in establishing ABMTs. However, the analysis carried out has showed that it is, in reality, more towards the decentralized part of the institutional spectrum, and, in that sense, a sheep in wolf’s clothing. This paradoxical nature of Part III is an embodiment of the compromise struck between the proponents of the “global” and “regional” approaches, which was a dividing line throughout much, if not all, of the negotiating process.⁸⁹ The substantive provisions in Part III on establishing ABMTs are, it seems, a result of the negotiating efforts of those supporting a global system, while maintaining and reinforcing sectoralism can be attributed to those favoring a more decentralized approach. The result is an ABMT regime that seems to be torn between two directions.

This need not necessarily be problematic, however. This article is not a critique of Part III of the Agreement; rather, it is a plea to be realistic about the institutional creature that it really is—namely, one that, albeit somewhat ambiguously, vests the main burden of carrying out the objectives of Part III into regional and sectoral IFBs, rather than the BBNJ COP itself. This may very well lead to a proliferation of ABMTs in ABNJ. Indeed, the BBNJ Agreement reflects, at the very least, a global consensus that there is a need to better preserve high seas biodiversity through, *inter alia*, designating ABMTs and MPAs. If this occurs primarily through IFBs, which may well be the case, it is important to be cognizant of the risk of continued or increased fragmentation. In this vein, this article has underscored the importance of designing a robust recognition mechanism, and offered reflections on how such a mechanism may be shaped.

In conclusion, given the dire state of marine biodiversity, the question of *how* to establish a network of ABMTs and MPAs on the high seas is ultimately of minor importance. Rather, it is imperative that states and other stakeholders seize the momentum and opportunities created by the conclusion of the BBNJ Agreement, fully leveraging the tools it offers, as they may provide a lifeline that the ocean desperately needs.

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⁸⁹ See notes 40 and 41 above.