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Reflecting on the Role of the Arctic Council *vis-à-vis* a Future International Legally Binding Instrument on Biodiversity in Areas Beyond National Jurisdiction

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Abstract
Negotiations are ongoing to develop an international legally binding instrument (ILBI) under the United Nations Convention on the Law of the Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ). If adopted, the ILBI will likely apply to parts of the Arctic Ocean where the Arctic Council has played an important role for ocean governance. This begs the question of what role the Arctic Council will play *vis-à-vis* a future ILBI, which is envisioned to "not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies" (UN General Assembly Resolution 72/249). Against this backdrop, this article reflects on the future relationship between the Arctic Council and the ILBI. In so doing, the article initially discusses possible meanings of the notion of not undermining and, more broadly, how the ILBI will likely determine its institutional relationship with relevant bodies for BBNJ. Based on that, the article provides a short overview of the role of the Arctic Council in Arctic Ocean governance and explores whether the Arctic Council would qualify as a relevant regional body that shall not be undermined by the future ILBI.

Keywords: *Arctic Council, biodiversity, areas beyond national jurisdiction, Law of the Sea, BBNJ*

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1 Introduction

The question of the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ) has been under discussion for over 15 years. The existence of relevant legal gaps for the governance of areas beyond national jurisdiction (ABNJ),[1] and the related urgent need to develop norms and mechanisms aimed at protecting such vulnerable marine ecosystems was already recognised within the UN institutional setting during the 2003 meeting of the UN Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS).[2]

This was followed by the decision of the United Nations General Assembly (UNGA) in 2004 to establish an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of BBNJ.[3] This decision initiated what is now commonly referred to as the BBNJ process, which went through a preliminary[4] and a preparatory[5] phase before the UNGA launched a formal intergovernmental conference (IGC) on 24 December 2017.[6] The IGC has a mandate to address, "together and as a whole," four substantive topics: (i) marine genetic resources (MGRs), including questions concerning the sharing of benefits; (ii) measures such as area-based management tools (ABMTs), including marine protected areas (MPAs); (iii) environmental impact assessments (EIAs); and (iv) capacity-building and the transfer of marine technology.[7]

The aim of the IGC is to develop an "international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction" (ILBI).[8] While the BBNJ negotiations represent an important opportunity "to promote a dynamic, inclusive, and adaptive approach to oceans governance,"[9] it was also stressed that "a major concern in negotiating the ILBI is the avoidance of the potential for fragmentation of the law and decision-making procedures."[10] And indeed, one key problem is how to integrate the future ILBI within an already crowded global and regional normative landscape, where many instruments, frameworks and bodies operate with complementary, overlapping and sometimes competing mandates. In this respect, UNGA, in setting out the mandate of the IGC, reaffirmed that "the work and results" of the IGC "should be fully consistent" with the provisions of the United Nations Convention on the Law of the Sea (UNCLOS).[11] Additionally, and this is the central focus of this article, UNGA recognised that "this process and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies."[12]

The notion of not undermining, which appeared, in that particular formulation, rather late in the BBNJ process,[13] and the problem of its interpretation is in many ways an important point of disagreement between countries that support a global approach to BBNJ governance, and those which, by contrast, favour a regional model. Despite the introduction of a third alternative – referred to as the hybrid approach[14] – that should bridge these divergent points of view into a compromise

position, the concept of not undermining remains central to the negotiations. At the same time, however, its meaning remains affected by an "undeniably significant ambiguity."[15]

The geographical focus of this article will be the Arctic, as this region is particularly significant *vis-à-vis* the BBNJ negotiations for at least three reasons. First, the Arctic marine environment possesses a rich biodiversity; however, it is also extremely vulnerable to human activities and environmental change arising from both regional and global processes.[16] Second, the Arctic may be significantly affected by the future ILBI, because it is a region where key legal and governance gaps exist (for example, in relation to the topic of ABMTs, including MPAs).[17] Third, the Arctic coastal States – Russia, the United States, Norway, Canada and Denmark with respect to Greenland – as well as other regional coastal States, such as Iceland, have always considered that UNCLOS provides, in principle, a sufficient framework for marine environmental governance in the Arctic.[18] They have thus not been particularly in favour of a global approach to BBNJ governance throughout the BBNJ process.[19] The Arctic Ocean has thus far not been devoted specific attention at the BBNJ negotiations, though some scholars have started exploring the potential implications of the likely future applicability of the ILBI to some parts of the Arctic Ocean.[20] For instance, Koivurova and Caddell described the "ILBI as a potential milestone in Arctic governance,"[21] arguing that the Arctic Council, described as an intergovernmental "high level forum" tasked to facilitate cooperation on Arctic issues,[22] "may provide particularly fertile ground for achieving the objectives of the ILBI within this region."[23]

Against this backdrop, this article aims at further investigating the role of the Arctic Council *vis-à-vis* the future ILBI. One key question that arises in this regard is whether the Arctic Council qualifies as a relevant regional body that the future ILBI should not undermine.

The article will proceed as follows. Section 2 discusses the notion of *not undermining* and what it may mean when applied to relevant bodies, as well as, more broadly, how the ILBI will likely determine its institutional relationship with relevant bodies. Section 3 then provides a short overview of the role of the Arctic Council in Arctic Ocean governance. Section 4 reflects on the relationship between the ILBI and the Arctic Council, and, in so doing, discusses whether the Arctic Council can be considered as a relevant regional body that shall not be undermined. Section 5 offers some conclusions.

2 The notion of not undermining

UNGA Resolution 72/249 stipulates, as mentioned above, that the BBNJ "process and its results should not undermine existing relevant legal instruments and frameworks" as well as "relevant global, regional and sectoral bodies."[24] This normative criterion, first mentioned in the Report of the BBNJ Working Group (BBNJ WG) in

2014,[25] was arguably "a manoeuvre to break a deadlock" among the delegations in terms of how the ILBI should be integrated normatively and institutionally within the existing framework for BBNJ.[26] More specifically, the notion of not undermining is said to have emerged during the work of the BBNJ WG in relation to the perceived need, on the part of some delegations, to put in place a "safeguard" to ensure that the UN Fish Stocks Agreement (FSA),[27] and the broader framework of international fisheries law with its system of regional fisheries management bodies would not be negatively affected by a future treaty.[28]

The term *undermine*, which either means to "erode the base or foundation of (a rock formation)" or to "lessen the effectiveness, power, or ability of [something], especially gradually or insidiously,"[29] is, however, not a "term of art."[30] Its semantic scope is broad and, as has been noted, "highly ambiguous."[31] This ambiguity may have allowed the BBNJ process to move forward during its early stages by accommodating varying views on how to integrate the future ILBI within the existing landscape of instruments, frameworks and bodies with relevant competence for the conservation of marine biodiversity in ABNJ.[32] Yet, it has also prompted criticism in the literature,[33] and it poses some problems in terms of how to manage the institutional relationships between the ILBI and other instruments and bodies. While there have been a number of attempts at enucleating a precise meaning of the notion of not undermining,[34] uncertainties remain as to its scope and implications, and there are likely to be even more complex issues at the time of its implementation.[35]

There are, additionally, different views on the *role* of the notion. Scanlon, for example, stressed the importance of the notion of not undermining for "defining the scope and function" of a future ILBI.[36] By contrast, Oude Elferink suggested that "the role of the 'not undermining' requirement in the negotiations should not be over-estimated," arguing that the terminology *should not undermine* in UNGA Resolution 72/249 "was acceptable to the various interests involved and certainly is flexible enough to justify different approaches to the institutional framework of the ILBI."[37] Oude Elferink further argued that, in this respect, "the design of the institutional framework of the ILBI will not be based on a specific interpretation of the term 'not undermine',"[38] and predicted that the question of how to determine the relationship between the ILBI and other relevant instruments, frameworks and bodies will probably be addressed "in tandem" or after the BBNJ delegations have reached agreement on the institutional design of the ILBI.[39]

At the time of writing, neither the future institutional arrangements nor the question of how the ILBI would determine its relationship to relevant legal instruments, frameworks and bodies have been settled. We will thus proceed on the tentative basis of the revised draft of the ILBI,[40] which was circulated by the President of the Conference after the third session of the IGC. In terms of the future institutional arrangements of the ILBI, the revised draft text foresees the establishment of (1) a Conference of the Parties (COP); (2) a Scientific and Technical Body; (3) a Secretariat and (4) a Clearing-House Mechanism in Articles 48–51, respectively. The

precise competences which those different institutional elements of the ILBI would be entrusted with is, however, still an open question. The revised draft text also contains several indications regarding the question of how the ILBI and its eventual institutional components would relate to other relevant legal instruments, frameworks and bodies. A key provision in this regard is Article 4(3) of the revised draft text, which provides that:

> [t]his Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.

As a conflict clause,[41] Article 4(3) would determine the normative and institutional relationship between the ILBI and other relevant instruments, frameworks and bodies.[42] In its current form, Article 4(3) notably uses the term *undermine* and if the final conflict clause in the ILBI does so as well, the term *undermine* and its interpretation will be of continuing relevance.

Unlike UNGA Resolution 72/249, which used the wording "should not undermine," Article 4(3) uses the wording "shall" in connection with the criterion of not undermining relevant instruments, frameworks and bodies. Hence, Article 4(3) would not be of recommendatory character, but formulates a legal obligation instead. That said, BBNJ delegations voiced different understandings of the meaning of not undermining during IGC I, II and III,[43] which means that at the time of writing, it appears unlikely that the delegations will eventually agree on a specific meaning in the sense of Article 31(4) of the Vienna Convention on the Law of Treaties (VCLT). The meaning of the term *undermine* in Article 4(3) of the revised draft text would thus have to be determined by interpreting this term primarily in light of its ordinary meaning, context as well as object and purpose.[44] While the first meaning of undermining, as already mentioned, refers to rock erosion, it is its second meaning, namely "to lessen the effectiveness, power, or ability of' something,"[45] that is the appropriate starting point with respect to this article.[46]

Scanlon argued that this meaning offers only limited interpretative guidance, since the terms effectiveness, power and ability differ, which in turn begs the question of which term to rely on.[47] In addition, she suggested the meaning of *to undermine* could be different in the context of legal instruments and frameworks, as opposed to relevant bodies.[48] For instance, while not undermining a legal instrument could "suggest a requirement to not undermine the obliga-tions [sic] in that instrument," she argued that not undermining a relevant body could in contrast require "respecting its existing decisions, not creating an overlapping man-date [sic] or frustrating its ability to operate."[49] Here, Scanlon further suggested that, in the context of relevant bodies, the criterion of not undermining could either mean not to undermine "the *authority or mandate* of existing bodies" as well as the "measures" adopted under their auspices or instead merely not undermining "the *effectiveness or objectives* of existing frameworks and bodies."[50] These two divergent interpretations would in turn have

very different implications for the institutional relationship between the ILBI and any relevant global, regional or sectoral body. The first interpretation would protect the authority and mandate of relevant bodies *vis-à-vis* any future body under the ILBI, whereas the second interpretation's focus on the effectiveness of relevant bodies would not preclude future institutional elements/bodies under the ILBI to have an overlapping mandate or competence to adopt measures, so long as this would not undermine, i.e. lessen, the effectiveness of the relevant existing or future global, regional, subregional or sectoral body in question.[51] Given its ambiguous character, the ordinary meaning of the notion thus only offers limited interpretative guidance, especially in relation to the identification of relevant bodies.

That said, the meaning of not undermining in Article 4(3) could be informed by how the term is used elsewhere in the revised draft text.[52] For example, Article 15(4) of the revised draft text,[53] which deals with international cooperation and coordination in the context of ABMTs, uses the term not to undermine specifically in the context of effectiveness, by stipulating that "[m]easures adopted in accordance with this Part shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction." Interpreting not undermining in Article 4(3) to be directed at the effectiveness of relevant instruments, frameworks and bodies could also be supported by how the term to undermine is used in the FSA.[54] Here, the notion is mainly used in the context of the effectiveness of conservation and management measures,[55] which could suggest a similar interpretation in the context of the BBNJ process focussing on the effectiveness of relevant instruments, frameworks and bodies.[56] Yet, in Article 15 of the revised draft text as well as in the FSA, the notion of not undermining is generally directed at the effectiveness of conservation measures and not in the context of "institutional competence."[57] In contrast, in UNGA Resolution 72/249 as well as in Article 4(3) of the revised draft text, the notion of not undermining has a broader scope, especially as it is applied to relevant bodies for BBNJ.[58] This could militate against an interpretation that merely focuses on not undermining the effectiveness of relevant bodies for BBNJ.[59]

Additionally, Article 4(3) includes, albeit in brackets,[60] a requirement to apply and interpret the ILBI in a way that "respects the competence" of relevant global, regional, subregional and sectoral bodies. The inclusion of this additional requirement in a final conflict clause in the ILBI would evidently resolve the question of whether the notion of not undermining is directed at the *mandate, authority or competence* of relevant bodies, or instead at their *effectiveness*. Whether a future conflict clause in the ILBI will include the explicit requirement of respecting the competence of relevant bodies for BBNJ is, however, far from settled. For instance, the Core Latin American Group (CLAM) commented on Article 4 of the revised draft text by emphasising the need for "legislative harmonization and the participation of other international instruments and organi[s]ations to ensure that there is no over-regulation or interference in other jurisdictions or competences."[61] To that end, the CLAM pointed out "that the key for achieving the mandate of not undermining

[was] […] to fully observe the competencies of the relevant forums, organisms and instruments" and supported the requirement to respect the competence of relevant bodies for BBNJ in Article 4(3) of the revised draft text.[62] The United States also proposed, albeit without an explanation, to keep the requirement to respect the competence of relevant bodies for BBNJ in Article 4(3) of the revised draft text.[63] The International Chamber of Shipping went even further by suggesting that Article 4(3) should include the requirement to "fully" respect the competence of relevant bodies for BBNJ.[64] Monaco, in contrast, suggested deleting the reference to respecting the competence of relevant bodies for BBNJ and instead including a direct reference to the effectiveness of relevant legal instruments, frameworks and bodies that should not be undermined.[65] South Africa criticised Article 4 of the revised draft text more fundamentally,[66] and instead indicated support for Article 4 of the first draft text:[67]

> The current definition is not supported, as it has undergone deletion of previous text which was important. The text which was deleted was trying to achieve a very important aspect, namely that unless this treaty has priority when it comes to the conservation and sustainable use of biodiversity, other legal instruments and bodies can still pursue their own agendas potentially to the detriment of the implementation of this agreement. […] This treaty, to achieve its potential, needs to have priority when it comes to the conservation and sustainable use of biodiversity in ABNJ.[68]

Finally, the International Union for Conservation of Nature (IUCN) suggested to change the requirement to respect the competence of relevant bodies for BBNJ to a requirement that the future ILBI "shall be interpreted and applied in a manner that […] promotes coherence and cooperation and does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies."[69]

Given that the wording of a future conflict clause in the ILBI remains an open question, this matter will have to be further discussed by the delegations once the IGC resumes its work, possibly in 2021. Nonetheless, two comments appear noteworthy at this point. First, too strict an interpretation of the requirement of not undermining may work against the very purpose of adopting a new treaty. South Africa emphasised precisely this aspect in a way that resonates with the observation made by Gjerde, Clark and Harden-Davies, namely by saying that "[f]or the new agreement to achieve its stated goal of conserving and sustainably using marine biological diversity of areas beyond national jurisdiction, it must improve upon the status quo."[70] Additionally, institutional relationships built on the notion of not undermining may emphasise institutional conflicts and "turf wars," though it may be more useful to emphasise the positive elements of coherence and cooperation, as increasingly suggested by commentators.[71]

Even if the explicit requirement to respect the competence of relevant bodies is not be included in the final conflict clause, the following can be noted. So far, we have focused exclusively on how the notion of not undermining has been captured in Article 4(3) of the revised draft text as a tool to determine the normative and

institutional relationship between the ILBI and other relevant legal instruments, frameworks as well as relevant bodies for BBNJ. Yet, while Article 4(3) or a similar conflict clause in the ILBI would determine the relationship between the ILBI and relevant instruments, frameworks and bodies on a general level, the revised draft text also includes more specific provisions, which would be relevant for how the institutional components of the ILBI are envisioned to interact with other relevant bodies. For example, Article 48(4)(c) of the revised draft text would require a future COP to:

> [p]romote *cooperation and coordination* with and among relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, with a view to promoting *coherence among efforts* towards, and the *harmonization of relevant policies and measures* for, the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction [, including by establishing processes for cooperation and coordination with and among relevant global, regional, subregional and sectoral bodies] [, including by inviting other global, regional, subregional and sectoral bodies to establish processes for cooperation].[72]

Although Article 48(4)(c) still contains a lot of bracketed text, a similar provision in the final ILBI would determine more specifically, and in a more nuanced way, how the COP, as one of the potential institutional components of the ILBI, should interact with other relevant bodies. In this way, Article 48(4)(c) would arguably constitute *lex specialis vis-à-vis* a general conflict clause, such as Article 4(3). It thus appears that the question of whether the notion of not undermining should be interpreted so as to be directed at the effectiveness or competence of relevant bodies for BBNJ would be of secondary importance if the final text for the ILBI were to include more specific provisions that determine how its individual institutional components should interact with other relevant bodies for BBNJ. In addition, specific provisions, such as Article 48(4)(c), could also inform the interpretation of the term not to undermine in a general conflict clause, such as Article 4(3) of the revised draft text.

Of course, all the preceding analysis remains tentative, given that the negotiating process is ongoing. It remains far from clear *when* a new agreement will be adopted and *whether* it will contain the current draft articles, and, if so, in what form, given all the remaining brackets and the underlying disagreements. As illustrated above in relation to the revised draft text, some delegations have been consistently pushing for a well-defined recognition of the obligation of the ILBI not to undermine existing instruments, framework and bodies. Others, by contrast, have more broadly emphasized the need for enhanced cooperation, coordination and coherence among existing instruments, frameworks and bodies of the ILBI. This latter focus is important as it would emphasise the *positive* and *collaborative* relationship of the ILBI to other bodies and highlight potential synergies.[73] Having offered a brief outline of the range of the meanings of and negotiating positions on the notion of not undermining, including the tensions between a negative and conflict-oriented and a positive and collaborative inflection of the notion, it is now time to turn our attention towards

the Arctic Council. The next section will discuss the role of the Arctic Council in Arctic governance, while the subsequent section will address a number of questions related to whether or not the Arctic Council is one of the bodies the ILBI should not undermine, as well as what role the Arctic Council may play in relation to Arctic governance once the ILBI is adopted.

3 The Arctic Council and Arctic Ocean Governance

The existing governance framework for the Arctic Ocean is complex, and consists of a web of global (e.g. UNCLOS and the Convention on Biological Diversity (CBD))[74] and regional instruments.[75] The Arctic Ocean is therefore far from being "an international law vacuum."[76] Yet, as it lacks a "comprehensive regional regime,"[77] regional cooperation in the Arctic has been, to a considerable degree, facilitated by the "soft power" of the Arctic Council.[78]

The Arctic Council was established in 1996 by the non-legally binding *1996 Ottawa Declaration* as "a high level forum" with the aim to facilitate "cooperation, coordination and interaction […] on common Arctic issues, in particular issues of sustainable development and environmental protection," while questions of "military security" are explicitly excluded from its mandate.[79] The Arctic Council has eight Member States, namely Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America.[80] In addition, up to seven Arctic Indigenous peoples organisations can be accorded the status of Permanent Participants,[81] as a means to ensure their "active participation and full consultation,"[82] whereas non-Arctic States, inter-governmental and inter-parliamentary organisations as well as non-governmental organisations may be granted the status of observer.[83]

The Arctic Council holds its ministerial meetings on a biennial basis, while the Senior Arctic Officials (SAOs), who are appointed by every member State of the Council, meet "at least twice a year."[84] Since 2013, the Arctic Council has appointed a permanent secretariat in Tromsø, Norway, which shall facilitate the activities of the Arctic Council, *inter alia,* by strengthening its "administrative capacity," as well as "by providing continuity, institutional memory, [and] operational efficiency."[85] The bulk of the work of the Arctic Council is, however, conducted within its six working groups (WGs):[86] (i) the Arctic Contaminants Action Program (ACAP); (ii) the Arctic Monitoring and Assessment Programme (AMAP); (iii) the Conservation of Arctic Flora and Fauna (CAFF); (iv) the Emergency Prevention, Preparedness and Response (EPPR); (v) the Protection of the Arctic Marine Environment (PAME) as well as (vi) the Sustainable Development Working Group (SDWG).[87] For example, the PAME WG adopted the non-binding *Framework for a Pan-Arctic Network Of Marine Protected Areas,*[88] and, more recently, issued the *Arctic Protected Areas: Indicator Report.*[89] Given its nature as an intergovernmental high-level forum, the Arctic Council lacks, however, the competence to adopt legally binding decisions

or instruments,[90] which is why the Council has, for the most part, functioned as "a forum for study and discussions"[91] of Arctic issues, and, in this regard, fulfilled a "monitoring and assess-ment [sic] role" through its WGs.[92] Yet, the Arctic Council has occasionally also fulfilled "a decision-shaping role or a limited regulatory role."[93]

Amidst concerns that the current governance framework for the Arctic Ocean was inadequate to respond to regulatory challenges, there has been much debate on whether a regional treaty for the Arctic Ocean, potentially modelled after the Antarctic Treaty System (ATS), was necessary.[94] Proposals were put forward to transform the Arctic Council from a high-level intergovernmental forum into an international organisation based on a legally binding treaty.[95] Responding to such suggestions, the Arctic coastal States (Canada, Denmark, Norway, the Russian Federation and the United States of America), which are commonly referred to as the Arctic 5, adopted the *2008 Ilulissat Declaration*.[96] In the latter declaration, the Arctic 5 stated that there was "no need to develop a new comprehensive international legal regime to govern the Arctic Ocean."[97] Instead, they pointed to "an extensive international legal framework […] [applicable] to the Arctic Ocean," specifically emphasising the law of the sea.[98] In addition, the Arctic 5 emphasised the role of the Arctic Council for Arctic Ocean governance and expressed their commitment "to continue to contribute actively to the work of the Arctic Council."[99]

While the Arctic 5 thus opposed any "new comprehensive international regime" for the Arctic Ocean in the 2008 Ilulissat Declaration,[100] they adopted, together with the other member States of the Arctic Council,[101] issue-specific agreements on various topics, such as scientific cooperation, search and rescue and oil spill preparedness.[102] These agreements were negotiated under the auspices of the Arctic Council,[103] and some commentators have underlined the role of the Council, through e.g. EPPR, in facilitating the implementation of some of these agreements.[104] This has prompted Molenaar to conceptualise the policy-shaping and treaty facilitation role of the Arctic Council in terms of the "Arctic Council System" (ASC).[105] The idea of an ACS, which offers a useful way of capturing the governance role of the Arctic Council, does not, however, capture developments that have been occurring outside of the sphere of influence of the Council.[106] One example of this is the 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (CAOF Agreement),[107] which was not negotiated under the auspices of the Arctic Council, but instead by the Arctic 5, together with China, Iceland, Japan, South Korea and the European Union (EU).[108]

In light of the above-mentioned concerns that the current governance framework for the Arctic Ocean was inadequate, the Arctic Council established two Task Forces on Arctic Marine Cooperation (TFAMC). The first was set up in 2015 in order "to assess future needs for a regional seas program or other mechanism, as appropriate, for increased cooperation in Arctic marine areas."[109] In its final report, TFAMC I identified various "functional needs" for Arctic marine cooperation,[110] noting the potential of "further exploring the establishment of a new Arctic Council subsidiary

body, in combination with complementary enhancements to existing Arctic Council mechanisms."[111] Interestingly, TFAMC I explicitly mentioned the BBNJ process in its final report by noting that TFAMC was "cognizant that the commitments our respective governments undertake in global fora […] represent the standards against which our marine cooperation outcomes will be measured."[112] In 2017, TFAMC II was mandated by the Arctic Council to develop the terms of reference […] for a possible new subsidiary body as well as "recommendations for complementary enhancements to existing Arctic Council mechanisms."[113] Yet, the SAOs decided in 2018 to limit the mandate of TFAMC II to recommendations only.[114] The process of developing a new subsidiary body under the Arctic Council has consequently stagnated. This notwithstanding, the recommendations for complementary enhancement of the Arctic Council's institutions included setting up "a SAO-based mechanism to guide the marine work of the Arctic Council and improve coordination on marine issues in the Arctic Council."[115] Thus, despite insistent questions on "whether the current institutional set-up of the Council will be sufficient to address future challenges and ambitions,"[116] there has been no political will to strengthen the institutional capacity of the Arctic Council so far. Nor has there been much enthusiasm among the Arctic States to adopt a comprehensive regional treaty for the Arctic Ocean. Against this backdrop, the next section reflects on the implications of the likely future applicability of the ILBI to some parts of the Arctic Ocean with a specific emphasis on the role of the Arctic Council *vis-à-vis* the ILBI.

4 The Arctic Council and the ILBI

The ILBI is envisioned to apply to "areas beyond national jurisdiction," i.e. the high seas and the Area.[117] Hence, the ILBI will apply to the considerable high seas portion of the Arctic Ocean and the Area, although the exact extent of the latter remains an open question,[118] since the Arctic coastal States are still in the process of delineating their respective outer continental shelf beyond 200 nautical miles pursuant to Article 76 UNCLOS.[119]

As mentioned in the introduction, Koivurova and Caddell characterised the "ILBI as a potential milestone in Arctic governance,"[120] and more specifically argued that the Arctic Council "may provide particularly fertile ground for achieving the objectives of the ILBI within this region."[121] Others, by contrast, have urged institutional developments to ensure effective Arctic conservation and the continuing relevance of the Arctic Council *vis-à-vis* the ILBI.[122] Since the BBNJ negotiations are ongoing, it is too early to assess whether and to what extent the Arctic Council will indeed play an active role in achieving the objectives of the ILBI, which will likely be "the long-term conservation and sustainable use of marine [BBNJ] […] through effective implementation of the relevant provisions of the [LOS] Convention and further international cooperation and coordination."[123] Yet, two intertwined points will likely have a bearing on the eventual role the Arctic Council will or can play: the

institutional structure of the ILBI and the way the ILBI will define its relation with other instruments, frameworks and bodies.

The first point targeting the institutional structure of the ILBI is, in fact, a question of whether the agreement will adopt a global, regional or – perhaps most likely – some form of hybrid approach.[124] As stressed above, Arctic coastal States have consistently resisted a global legal and governance framework for BBNJ, favouring by contrast a regional approach that shall not undermine existing regional and sectoral bodies.[125] A similar position is held by some of the other members of the Arctic Council (notably Iceland) and by States with an "active Arctic interest,"[126] such as China, Japan and South Korea.[127] The second point relates to how the ILBI will define its normative and institutional relationship with other instruments, frameworks and bodies. In this respect, a key question is whether the Arctic Council could be regarded as a "relevant regional body" which shall not be undermined by the future ILBI. It is to this question that we now turn.

In its current form, Article 4(3) of the revised draft text uses the wording *relevant global, regional, subregional and sectoral bodies*. This begs two questions: first, whether the Arctic Council can be subsumed under the term *bodies*. Second, if the Arctic Council can be considered a body for the purposes of the ILBI, a follow-up question is then whether the Arctic Council is a *relevant* body, and whether relevance is an all or nothing question or whether relevance may relate to certain functions only (as discussed in section 4.2).

While the question of whether the Arctic Council could be subsumed under the term *body* has not yet received much attention, it was observed that the Arctic Council lacks "legal personality or formal status as an international organi[s]ation," which could mean that "it is highly doubtful, at least *prima facie*, that it could be considered as one of the [relevant] bodies" the ILBI should not undermine.[128] Others have observed that "[g]iven that the ILBI will prefer to cooperate with (or at least not undermine) regional mechanisms, there appears to be particular scope to advance the four thematic priorities of the ILBI through the Arctic Council."[129] Though, on the basis of this observation, it is doubtful whether it is possible to derive any conclusive argument about whether the Arctic Council could qualify as a body in the sense of the UNGA Resolution 72/249. Additionally, neither the latter resolution, nor Article 4(3) of the revised draft text define the term "bodies." According to the Oxford Dictionary, the term body has various meanings.[130] The first meaning refers to "[t]he physical structure, […] of a person or an animal."[131] The more fitting meaning in the current context would, however, be "[a]n organized group of people with a common purpose or function."[132] Here, the Oxford Dictionary mentions as two examples "a regulatory body" as well as "international bodies of experts."[133]

Given the lack of a definition of a body in the revised draft text and the broadness of the ordinary meaning of the term, the Arctic Council, as a "high level forum," could perhaps be considered as a body. This conclusion can be supported by the fact that both UNGA Resolution 72/249 and Article 4(3) of the draft text refer to the

term body and not international organisation. Unlike the notion of body, international organisation is a term of art in international law.[134] For instance, Article 2(a) of the ILC Draft Articles on the Responsibility of International Organi[s]ations (Draft Articles) defines the term international organisation for the purpose of the Draft Articles as "an organi[s]ation established by a treaty or other instrument governed by international law and possessing its own international legal personality."[135] Since the Arctic Council was not established by *a treaty or other instrument governed by international law* and lacks legal personality, in principle it would not qualify as an international organisation.[136] The fact that Article 4(3) of the revised draft text does not use the term international organisation but the notion of body instead appears, however, to support the view that the Arctic Council could be subsumed under the notion of regional body in the sense of Article 4(3) of the revised draft text.

As mentioned in section 2, the notion of not undermining relevant instruments, frameworks and bodies presumably emerged during the work of the BBNJ WG in relation to the perceived need, on the part of some delegations, to "safeguard" the Fish Stocks Agreement and the broader framework of international fisheries law, including regional fisheries management bodies.[137] This could point to a more restricted meaning of the term body, in the sense of a regulatory body with legal personality under international law.[138] In that respect, while not conclusive, the history of the emergence of the term body may be of some interpretative relevance as part of the drafting history.[139]

Additionally, the notion of not undermining was at first one of a constellation of concepts that were discussed during the BBNJ WG sessions.[140] In fact, the Appendix to a 2014 letter from the Co-Chairs of the BBNJ WG to the President of the General Assembly indicates that the discussion focused on the broader notion that a potential new instrument "[s]hould not undermine, duplicate or change existing instruments."[141] Other terms and formulations capturing similar concerns were also included, such as the idea that a new treaty would need to "[r]espect and complement the existing mandates of relevant organi[s]ations and avoid duplications" or should not "subordinate existing instruments."[142] Some delegations further emphasised how "[d]ecision-making for regional and sectoral activities should remain with the relevant regional and sectoral organi[s]ations."[143] During the BBNJ WG, the focus thus seemed to have been related to avoid interfering with the decision-making of regional organisations or duplicating or changing existing instruments, and both terms seem to indicate a specific legal basis that may exclude informal arrangements or fora. However, as already mentioned, the terminology shifted during the BBNJ process from the original reference to organisations in the BBNJ WG to the subsequent term body. This raises a question of whether the terminological shift indicates that the later use of the term body captures the intention of deliberately broadening the scope of the concept of not undermining to bodies other than international organisations.

Unless the future ILBI specifically clarifies the meaning and definitional scope of the term body, it may seem reasonable to consider that the choice of the term body as opposed to international organisation, in light of the broad ordinary meaning of the former, may support the interpretation that the Arctic Council can be regarded as a body for the purposes of the not undermining clause.

Yet, even if the Arctic Council can be considered a body for the purposes of the ILBI, a follow-up question is whether the Council would also be a *relevant* body. There are two questions to address in this respect: first, the subject matter relevance; second, the regulatory relevance. As for the first question, the Arctic Council's mandate encompasses, as mentioned above, cooperation, coordination and interaction on common Arctic issues, particularly issues of sustainable development and environmental protection. As such, it overlaps with the overall objectives of the ILBI – the conservation and sustainable use of marine biodiversity – and with at least one of its substantive topics, that is, ABMTs, including MPAs. For example, as noted above, the PAME WG of the Arctic Council adopted the non-binding *Framework for a Pan-Arctic Network of Marine Protected Areas,*[144] and, more recently, issued the *Arctic Protected Areas: Indicator Report*.[145] We can thus say, with a degree of safety, that the Arctic Council is, from a subject matter perspective and with particular regard to the question of MPAs, a relevant body from the perspective of the subject matter.

The second question targeting the regulatory relevance is more complex. Article 6(3) of the revised draft text envisages, albeit in bracketed text, that "States Parties shall cooperate to establish new global, regional and sectoral bodies, where necessary." More specifically in relation to the topic of ABMTs, the revised draft text also envisions, again in bracketed text, that "States Parties shall cooperate to establish […] an instrument, framework and body" with the capacity to establish ABMTs in case "there is no relevant legal instrument or framework or relevant global, regional, subregional or sectoral body" with such capacity.[146] It is thus fairly clear that the focus on regional bodies hinges on their regulatory capacity, i.e. on their competence to adopt specific conservation measures, such as, the designation of MPAs. In regions where a body with such competence does not exist, the ILBI envisions, albeit tentatively at this stage, the creation of such body. By contrast, the Arctic Council, as a high-level intergovernmental forum for cooperation, does not have competence to designate MPAs, adopt conservation measures or any legally binding decisions.[147] Thus, it seems to be excluded from the scope of these provisions, which in turn leads to the consideration that, even though it may be considered a body (or a framework, for that matter),[148] it may not be a *relevant* body for the purposes of the not undermining clause. In other words, even if the Arctic Council could, in abstract, be considered a body for the purposes of the ILBI, there would not be much to undermine in practice, given that it can neither adopt any regulatory measure, such as MPAs, nor impose legally binding obligations on its members. However, there may be more to consider. For example, if the ILBI requires or encourages the establishment of

bodies with regulatory competence in relation to the designation of MPAs in regions where no such bodies exist, this could re-start the stagnated process to develop a subsidiary body under the Arctic Council, given that Arctic States have historically favoured a regional approach, and have been consistently focused in their role as stewards of the Arctic. Additionally, the lack of regulatory competence does not necessarily entail the lack of relevance in other respects. In fact, a potential further question relates to the relevance of the Arctic Council with respect to the process of identification of MPAs, a role already fulfilled today. Relatedly, one could ask whether the Arctic Council could be undermined by the operation of one of the envisioned bodies to be adopted under the ILBI, namely a scientific and advisory body that may have a mandate that overlaps with that of the Arctic Council.

One such question has been raised in the context of the CAOF Agreement and, in particular, in terms of Article 14(3) of the CAOF Agreement, which stipulates that "[t]his Agreement shall not undermine nor conflict with the role and mandate of any existing international mechanism relating to fisheries management." Such international mechanisms relating to fisheries management would arguably include scientific advisory bodies, as confirmed by the Norwegian Government's proposal to Parliament to ratify the CAOF Agreement.[149] With respect to Article 14, this proposal observes that the CAOF Agreement shall not undermine[150] existing international fisheries management mechanisms,[151] and mentions specifically the International Council for the Exploration of the Sea (ICES).[152] The reference to the ICES is interesting for our purposes. While the ICES, unlike the Arctic Council, is an international organisation under international law, both, nonetheless, provide scientific knowledge that needs to be operationalised by competent international bodies. As the question of not undermining is thus in the context of the CAOF Agreeement also linked to scientific advisory bodies, the overlap or conflict of competence may be related to Article 4 of the CAOF Agreement, which sets out to establish a Joint Program of Scientific Research and Monitoring. It is then, perhaps, reasonable to raise the question also in relation to any overlap of mandate between the Arctic Council (as such or with more specific reference to one of its WGs) and a scientific body to be established under the ILBI, notwithstanding the fact that the Arctic Council is not an international organisation. In this context, it is, however, reasonable to consider that the question at stake is really one of duplication of functions (and thus also of efficiency), rather than one of undermining *stricto sensu*, though duplication is one of the elements of the notion of not undermining, at least according to some commentators.[153] This consideration may be also strengthened if one looks at the outcome document of the 2017 UN Ocean Conference, "Our Ocean, Our Future: Call for Action."[154] The document, in fact, affirms "the need to enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea." It further emphasises how "actions to implement [Sustainable Development] Goal 14 should be in accordance with, reinforce and not duplicate or undermine

existing legal instruments, arrangements, processes, mechanisms or entities" and reiterates how UNCLOS "provides the legal framework for the conservation and sustainable use of oceans and their resources."[155]

The ILBI may not only determine institutional relations and cooperation at a general level, but also more specifically. For example, Article 49 of the revised draft text, which establishes a Scientific and Technical Body, specifies in its current form that such a body "may also draw on appropriate advice from [existing arrangements, such as the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection], [relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies], as well as other scientists and experts, as may be required." The language used in this draft article points to operative words such as coordination and cooperation, rather than undermining. In this respect, Article 49 of the revised draft text serves as another example that the draft text appears to be moving away from a narrow focus/approach on not undermining and shifts rather towards focusing on coherence, cooperation and coordination between its different institutional components and other relevant (regional) bodies. This shift of focus has been, indeed, encouraged by the existing literature,[156] and also seems to be a more reasonable approach for achieving the overall objectives of the ILBI and UNCLOS, of which the ILBI shall be an implementing agreement. Indeed, a similar shift towards focusing on cooperation and coordination, instead of not undermining, has, in part, occurred in the context of the CAOF Agreement.[157]

5 Conclusion

This article has reflected on the role of the Arctic Council *vis-à-vis* a future ILBI and, in doing so, explored the question of whether the Arctic Council can be considered one of the bodies that the ILBI shall not undermine. This question captures the intersection of several important aspects of the negotiations. First, the question of not undermining, which remains central to the negotiations and is far from being settled. Second, and more broadly, the institutional arrangement of the ILBI, and relatedly the debate on whether the ILBI should have a prominently global or regional approach. Third, these aspects are concretised in relation to the Arctic, which is particularly significant *vis-à-vis* the BBNJ negotiations (i) given its ecological vulnerability; (ii) because important legal and governance gaps exist; and finally, (iii) because Arctic States have consistently preferred a regional approach to BBNJ governance throughout the BBNJ process.[158]

The Arctic Ocean has not been devoted specific attention at the BBNJ negotiations thus far, although some scholars have started exploring the potential implications of the likely future applicability of the ILBI to those parts of the Arctic Ocean that lie beyond national jurisdiction. Since the BBNJ negotiations are still ongoing, it is too early to precisely assess the role of the Arctic Council *vis-à-vis* the ILBI. Its role will, however, likely depend on several elements: (i) the institutional structure and design

of the ILBI; (ii) whether the Arctic Council could be regarded as a *relevant regional body*, and in relation to which function; and (iii) how the ILBI will determine its institutional relationship with relevant bodies. However, we have attempted to raise some of these questions and discuss possible ways to answer them in light of the available documents, such as the revised draft text. In this respect, the article has first explored the meaning of the concept of undermining, as well as the (limited) existing literature that has attempted to interpret the term. The article has subsequently discussed the Arctic Council, especially its structure and its mandate, in order to assess whether it can be considered as a body for the purposes of the not undermining clauses contained in the latest draft text of the ILBI, albeit partly still in tentative and bracketed form. The question, however, has several dimensions. Indeed, even if the Arctic Council can formally be considered as a body, it still needs to be a *relevant* one. While the answer to the first question may well be positive, the answer to the second is negative, to the extent that the Arctic Council has, for instance, neither the competence to designate MPAs nor to adopt any legally binding measures made applicable therein. A different answer may be given if one focuses on relevance with respect to a more limited function. A brief illustration was given in relation to the role of the Arctic Council and of its relevant WGs. This more limited role refers to the production of scientific knowledge that may be instrumental for identifying MPAs or to implement an ecosystem approach to the conservation of Arctic biodiversity. In this respect, the Arctic Council may function as a network of regional scientific bodies that feed into the ILBI and its overarching global bodies, thus contributing in a coherent, cooperative and coordinated manner to the overall achievement of the global goals of ocean governance. This integration would, moreover, build on the networks of collaboration that the different WGs of the Arctic Council already participate in.[159] Additionally, should the ILBI require the establishment of regional bodies able to designate MPAs in regions where there are no such bodies, this might re-start the stagnated process to develop a subsidiary body under the Arctic Council. In this sense, new life could be infused into the project of enhanced marine Arctic cooperation that fell short of its ambitions.

Ultimately, the very focus on the notion of not undermining may be counterproductive for the ILBI and for ocean governance more broadly insofar as it emphasises conflicts of competence rather than synergies. Indeed, too stringent an interpretation of the notion of not undermining, combined with a broad understanding of the term body, could stifle the capacity of the ILBI to effectively achieve its objectives and to implement UNCLOS at the outset, which hinges to a larger extent on its ability to "improve upon the status quo."[160]

Yet, the ILBI already contains some language that focuses on the positive dimensions of coherence, coordination and cooperation, and it would be useful if the future draft texts for the ILBI would further strengthen this shift in focus towards synergies to frame the relationship between the ILBI and other relevant instruments and bodies. Then, the key issue would be to address how to coordinate the activities

of instruments and bodies with overlapping or similar competences so as to achieve what are ultimately the overarching goals of biodiversity conservation and of protection and preservation of the marine environment enshrined in UNCLOS and the CBD.[161] Some commentators have begun indicating some ways to effectively shift the focus,[162] but much work remains to be done, especially in terms of how to integrate this shift coherently throughout the ILBI and how to ensure that this shift gathers consensus among negotiators. This task clearly exceeds the scope of this article, however, we hope this article is a contribution in that direction.

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NOTES

1. In the context of the law of the sea, the term areas beyond national jurisdiction (ABNJ) refers to the high seas and the Area. Pursuant to Article 86 of the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), the high seas encompass "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State". The Area, on the other hand, is defined in Article 1(1)(1) UNCLOS as "the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".
2. UNGA, "Report of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea," (26 June 2003), UN Doc A/58/95, para 98 ff.
3. UNGA, "Oceans and the Law of the Sea," (4 February 2005) UN Doc A/RES/59/24, (17 November 2004) para 73. Retrieved from https://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/477/64/PDF/N0447764.pdf?OpenElement
4. Ibid.
5. UNGA, "Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction," (19 June 2015) UN Doc A/69/292.
6. UNGA, "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," (24 December 2017) UN Doc A/RES/72/249.
7. Ibid., para 2.
8. As already decided in 2015 (UNGA Res A/69/292, para 1) and reiterated in 2017 (UNGA Res A/RES/72/249, para 1).
9. Margaret A. Young and Andrew Friedman, "Biodiversity Beyond National Jurisdiction: Regimes and Their Interaction," *American Journal for International Law* Unbound 112 (2018): 128.

10. Alex G. Oude Elferink, "Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction," *Review of European, Comparative and International Environmental Law* 28 (2019): 237.
11. UNGA Res A/RES/72/249, para 6.
12. Ibid., para 7.
13. Vito De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2," NCLOS Blog (formerly JCLOS Blog), https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/ (accessed 24 June 2020).
14. On the hybrid approach, see, e.g., Kristine Dalaker Kraabel. "The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach," in *The Marine Environment and United Nations Sustainable Development Goal 14: Life Below Water,* eds. Myron H. Nordquist et al. (Leiden: Brill Nijhoff, 2019).
15. Zoe Scanlon, "The Art of 'Not Undermining': Possibilities within Existing Architecture to Improve Environmental Protections in Areas Beyond National Jurisdiction," *ICES Journal of Marine Science* 75 (2017): 405-406.
16. See IPCC, "Special Report on the Ocean and Cryosphere in a Changing Climate," (IPCC 2019), https://www.ipcc.ch/srocc/ (accessed 24 June 2020); AMAP, "Snow, Water, Ice and Permafrost in the Arctic. Summary for Policymakers," (SWIPA Report) (AMAP 2017), https://www.amap.no/documents/doc/snow-water-ice-and-permafrost.-summary-for-policy-makers/1532 (accessed 24 June 2020); Paul Wassmann, "Arctic Marine Ecosystems in an Era of Rapid Climate Change," *Progress in Oceanography* 90 (2011): 1; Maria Fossheim et al., "Recent Warming Leads to a Rapid Borealization of Fish Communities in the Western Arctic," *Nature Climate Chang*e 5 (2015): 673.
17. See generally, Ingvild Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Leiden: Brill Nijhoff, 2016).
18. The Arctic coastal States have indeed articulated this view, for example, in the "Ilulissat Declaration," (27–29 May 2008), (Ilulissat Declaration), https://cil.nus.edu.sg/wp-content/uploads/2017/07/2008-Ilulissat-Declaration.pdf (accessed 24 June 2020).
19. See, e.g., Vito De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," *Marine Policy* (2019), https://www.sciencedirect.com/science/article/pii/S0308597X19306025 (accessed 24 July 2020); Christian Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction," *Marine Policy* (2019), https://www.sciencedirect.com/science/article/pii/S0308597X19304762 (accessed 24 June 2020).
20. See, e.g., Kamrul Hossain, "A New Legal Regime for the Protection of Arctic Marine Biodiversity in the ABNJ?," *ArCticles* 2/2016 (2016), https://lauda.ulapland.fi/bitstream/handle/10024/62369/ArCticles-2-2016-Kamrul-Hossain.pdf (accessed 7 July 2020); Vito De Lucia, "The Arctic Environment and the BBNJ Negotiations. Special Rules for Special Circumstances?," *Marine Policy* 86 (2017); Timo Koivurova and Richard Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," *American Society of International Law Unbound* 112 (2018); De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic"; Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction".
21. Koivurova and Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," 134.
22. Arctic Council, "Declaration on the Establishment of the Arctic Council," (Ottawa, 1996), (Ottawa Declaration), https://oaarchive.arctic-council.org/bitstream/handle/11374/85/EDOCS-1752-v2-ACMMCA00_Ottawa_1996_Founding_Declaration.PDF?sequence=5&isAllowed=y (accessed 24 June 2020).

23. Koivurova and Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," 135.
24. UNGA Res 72/249, para 7.
25. De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2," 2.
26. Ibid.
27. 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 (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 88 (FSA).
28. A number of States, including Norway, felt that there was a need to put in place a "safeguard" to ensure the FSA, and more broadly the regional fisheres management framework would not be negatively affected by a future treaty; Kjell K. Egge, Special Legal Adviser, Ministry of Foreign Affairs, Norway, and Head of the BBNJ Delegation of Norway, "Presentation at the Conference 'Rule of Law for Ocean'," (Oslo, 5 October 2019), Personal Annotation; see also De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2," 2.
29. Oxford Dictionary, "undermine," https://en.oxforddictionaries.com/definition/undermine (accessed 24 June 2020).
30. Richard A. Barnes. "Fisheries and ABNJ: Advancing and Enhancing Cooperation," (Draft) in *New Knowledge and Changing Circumstances in the Law of the Sea*, ed. Tomas Heidar (Forthcoming), 9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421529 (accessed 24 June 2020).
31. Scanlon, "The Art of 'Not Undermining'," 406.
32. Andrew Friedman, "Beyond 'Not Undermining': Possibilities for Global Cooperation to Improve Environmental Protection in Areas Beyond National Jurisdiction," *ICES Journal of Marine Science* 76(2) (2019): 452.
33. Scanlon, "The Art of 'Not Undermining'," 406; Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (Cambridge: Cambridge University Press, 2018), 246; De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2"; Friedman, "Beyond 'Not Undermining'," 452.
34. See, e.g., Scanlon, "The Art of 'Not Undermining'"; Glen Wright et al., "High Seas Fisheries: What Role for a New International Instrument," *IDDRI* 3 (2016), https://www.iddri.org/sites/default/files/import/publications/st0316_gw-et-al._fisheries-bbnj.pdf (accessed 24 June 2020); De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2"; Dupuy and Viñuales, *International Environmental Law*; Friedman, "Beyond 'Not Undermining'".
35. Dupuy and Viñuales, *International Environmental Law,* 246.
36. Scanlon, "The Art of 'Not Undermining'," 406.
37. Oude Elferink, "Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction," 4; see also Friedman, "Beyond 'Not Undermining'," 452.
38. Ibid.
39. Ibid.
40. 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" (18 November 2019) (Revised Draft for an ILBI) UN Doc A/CONF.232/2020/, https://undocs.org/en/a/conf.232/2020/3 (accessed 21 July 2020).
41. See generally, Nele Matz-Lück, "Treaties, Conflict Clauses," in *The Max Planck Encyclopaedia of Public International Law*, ed. Rüdiger Wolfrum, (online edn, 2006), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1466?rskey=xS8Jst&result=1&prd=MPIL (accessed 24 June 2020).

42. See Philipp Nickels, "Revisiting Bioprospecting in the Southern Ocean in the Context of the BBNJ Negotiations," *Ocean Development & International Law* (2020), https://www.tandfonline.com/doi/pdf/10.1080/00908320.2020.1736773?needAccess=true.b (accessed 24 June 2020).
43. See, e.g., De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2".
44. Vienna Convention on the Law of Treaties (adopted 23 June 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).
45. Oxford Dictionary, "undermine".
46. Scanlon, "The Art of 'Not Undermining'," 406; De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2".
47. Scanlon, "The Art of 'Not Undermining'," 406.
48. Ibid.
49. Ibid.
50. Ibid., 407 [emphasis in original].
51. Ibid.
52. VCLT, Article 31(1).
53. Other examples are Articles 12(1) and 34(5) of the Revised Draft text, which use the term undermine.
54. Ibid., Article 31(3)(c); Wright et al., "High Seas Fisheries".
55. See Wright et al., "High Seas Fisheries," 10; De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2," 3.
56. The fact that Article 4(3) of the revised draft text lacks any reference to effectiveness, while Article 15(4) of the revised draft text explicitly refers to this term, could, however, also support the opposite interpretation, i.e. that Article 4(3) of the revised draft text is not directed at the effectiveness of existing legal instruments, frameworks and bodies that are relevant for BBNJ.
57. Barnes, "Fisheries and ABNJ," 9; see also Scanlon, "The Art of 'Not Undermining'".
58. Barnes, "Fisheries and ABNJ," 9; Scanlon, "The Art of 'Not Undermining'," 407.
59. Scanlon, "The Art of 'Not Undermining'," 407.
60. As explained in the introduction to the Revised Draft text, "[s]quare brackets have been used […] (a) where there are two or more alternative options within a provision; and (b) where support has been expressed for a 'no text' option, either within a provision or in relation to a provision as a whole. However, the absence of square brackets does not imply agreement on the ideas or specific language reflected in a provision"; Revised Draft Text for the ILBI.
61. UN, "Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (the Conference), in Response to the Invitation by the President of the Conference in her Note of 18 November 2019" (Textual Proposals Submitted by Delegations by 20 February 2020) UN Doc A/CONF.232/2020/3, 38, https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf (accessed 24 June 2020).
62. Ibid., 38.
63. Ibid., 41.
64. Ibid., 42.
65. Ibid., 40.
66. Ibid., 41.
67. Article 4 of the first draft text reads: "[t]his Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine [existing] relevant

legal instruments and frameworks and relevant global, regional and sectoral bodies, and that promotes coherence and coordination with those instruments, frameworks and bodies, provided that they are supportive of and do not run counter to the objectives of the Convention and this Agreement"; 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," (17 May 2019) UN Doc A/CONF.232/2019/6, Article 4(3).

68. "Textual Proposals Submitted by Delegations by 20 February 2020," 41.
69. Ibid., 42.
70. Kristina M. Gjerde et al., "Building a Platform for the Future: The Relationship of the Expected New Agreement for Marine Biodiversity in Areas Beyond National Jurisdiction and the UN Convention on the Law of the Sea," *Ocean Yearbook Online* 33(1) (2019): 39.
71. IUCN, "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, IUCN Comments," (20 February 2020), 6, https://www.iucn.org/sites/dev/files/iucn_comments_on_bbnj_draft_text_-_august_2019.pdf (accessed 24 June 2020); Friedman "Beyond 'Not Undermining'," 453.
72. Emphasis added.
73. See, e.g., Friedman, "Beyond 'Not Undermining'," 453; Vito De Lucia "Rethinking the Conservation of Marine Biodiversity Beyond National Jurisdiction – From 'Not Undermine' to Ecosystem-Based Governance," *ESIL Reflection European Society of International Law* 8(4) (2019).
74. Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD).
75. See, e.g., 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 (OSPAR Convention); Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (adopted 3 October 2018, not yet in force) (CAOF Agreement), https://eur-lex.europa.eu/resource.html?uri=cellar:2554f475-6e25-11e8-9483-01aa75ed71a1.0001.02/DOC_2&format=PDF (accessed 24 June 2020); see also, Erik J. Molenaar. "The Arctic, the Arctic Council, and the Law of the Sea" in *Governance of Arctic Shipping, Balancing Rights and Interests of Arctic States and User States,* eds. Robert C. Beckmann et al. (Boston: Brill Nijhoff, 2017), 24-67, 33.
76. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 24.
77. Alexander Proelss and Till Müller, "The Legal Regime of the Arctic Ocean," *ZaöRV* 68 (2008): 654.
78. Karen N. Scott and David L. VanderZwaag. "Polar Oceans and Law of the Sea," in *The Oxford Handbook of the Law of the Sea,* eds. Donald R. Rothwell et al. (Oxford: Oxford University Press, 2015), 738-746, 725.
79. Ottawa Declaration; for a thorough discussion of the Arctic Council and its role within the broader context of Arctic governance, see Erik J. Molenaar, "Current and Prospective Roles of the Arctic Council System within the Context of the Law of the Sea," *The International Journal of Marine and Coastal Law* 27 (2012): 553-595; Yoshinobu Takei, "The Role of the Arctic Council from an International Law Perspective: Past, Present and Future," *The Yearbook of Polar Law* 6 (2015): 349-374.
80. Ottawa Declaration.
81. The Permanent Participants are the Aleut International Association (AIA), the Arctic Athabaskan Council (AAC), the Gwich'in Council International (GCI), the Inuit Circumpolar Council (ICC), the Russian Association of Indigenous Peoples of the North (RAIPON)

and the Saami Council (SC), see Arctic Council, "Permanent Participants," https://arctic-council.org/index.php/en/about-us/permanent-participants (accessed 24 June 2020).

82. Ottawa Declaration.
83. Ibid.
84. Arctic Council, "Arctic Council: Rules of Procedure," (adopted 17-18 September 1998, revised 15 May 2013) (Kiruna, 2013), https://oaarchive.arctic-council.org/bitstream/handle/11374/940/2015-09-01_Rules_of_Procedure_website_version.pdf?sequence=7&isAllowed=y (accessed 24 June 2020).
85. Arctic Council Secretariat, "Terms of Reference of the Arctic Council Secretariat," (Oulu SAO Meeting, 2017), https://oaarchive.arctic-council.org/bitstream/handle/11374/1568/ACS_Terms_of_Reference_11352_v5a.pdf?sequence=14&isAllowed=y (accessed 24 June 2020).
86. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 48.
87. See further Arctic Council, "The Arctic Council: A Backgrounder," https://arctic-council.org/index.php/en/about-us (accessed 24 June 2020).
88. PAME, "Framework for a Pan-Arctic Network of Marine Protected Areas," (2015), https://pame.is/images/03_Projects/MPA/MPA_Report.pdf (accessed 24 June 2020).
89. CAFF and PAME, "Arctic Protected Areas: Indicator Report," (2017), https://pame.is/images/03_Projects/MPA/Indicator/Indicator_Report_on_Protected_Areas_.pdf (accessed 24 June 2020).
90. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 47.
91. Scott and VanderZwaag, "Polar Oceans and Law of the Sea," 736.
92. Molenaar, "Current and Prospective Roles of the Arctic Council System," 593.
93. Ibid.
94. See, e.g., Timo Koivurova, "Alternatives for an Arctic Treaty – Evaluation and a New Proposal," *Review of European Community & International Environmental Law* 17(1) (2008).
95. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 62 with further references.
96. Ilulissat Declaration.
97. Ibid.
98. Ibid.
99. Ibid.
100. Ibid.
101. Sweden, Iceland and Finland.
102. See, Agreement on Cooperation in Aeronautical and Maritime Search and Rescue in the Arctic (adopted 12 May 2011, entered into force 19 January 2013) (Arctic SAR Agreement), https://oaarchive.arctic-council.org/bitstream/handle/11374/531/EDOCS-3661-v1-ACMMDK07_Nuuk_2011_SAR_Search_and_Rescue_Agreement_signed_EN_FR_RU.PDF?sequence=5&isAllowed=y (accessed 24 June 2020); Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic Oil Preparedness (adopted 15 May 2013, entered into force 25 March 2016) (Arctic MOPPR Agreement), https://oaarchive.arctic-council.org/bitstream/handle/11374/529/EDOCS-2067-v1-ACMMSE08_KIRUNA_2013_agreement_on_oil_pollution_preparedness_and_response__in_the_arctic_formatted.PDF?sequence=5&isAllowed=y (accessed 24 June 2020); Agreement on Enhancing International Arctic Scientific Cooperation (adopted 11 May 2017, not yet into force) (Arctic Science Agreement), https://oaarchive.arctic-council.org/handle/11374/1916 (accessed 24 June 2020).
103. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 55.
104. Ibid.

105. According to Molenaar, the Arctic Council System (ATS) has two main components: (1) "the Council's constitutive instrument (i.e., the Ottawa Declaration), other Ministerial Declarations, other instruments adopted by the Arctic Council […] and the Council's institutional structure" and (2) the "instruments negotiated under the Council's auspices – but not adopted by it – and their institutional dimension", Molenaar, "Current and Prospective Roles of the Arctic Council System," 572; see also, Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 55 et seq.
106. This is unsurprising, as the main idea of the Arctic Council System (ACS) is, as explained by Molenaar, "to clarify that legally binding instruments such as the Arctic SAR Agreement and the MOSPA – and their institutional components – can be part of the Council's output even though they are not formally adopted by it due to the fact that the Council is a high-level intergovernmental forum"; Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 55.
107. CAOF Agreement.
108. David Balton, "What Will the BBNJ Agreement Mean for the Arctic Fisheries Agreement?," *Marine Policy* (2019), https://www.sciencedirect.com/science/article/pii/S0308597X1930449X (accessed 24 June 2020).
109. Arctic Council, "Iqaluit Declaration," (24 April 2015), 43, https://oaarchive.arctic-council.org/bitstream/handle/11374/662/EDOCS-2547-v1-ACMMCA09_Iqaluit_2015_Iqaluit_Declaration_formatted_brochure_low-res.PDF?sequence=6&isAllowed=y (accessed 24 June 2020).
110. Arctic Council, "Report to Ministers of the Task Force on Arctic Marine Cooperation," (2017), 4, https://oaarchive.arctic-council.org/bitstream/handle/11374/1923/2017-04-30-Edocs-4079-v3-TFAMC-report-to-ministers-with-cover-and-colophon.pdf?sequence=1&isAllowed=y (accessed 24 June 2020).
111. Ibid., 8.
112. Ibid., 4.
113. Arctic Council, "Fairbanks Declaration," (2017), para 12, https://oaarchive.arctic-council.org/bitstream/handle/11374/1910/EDOCS-4339-v1-ACMMUS10_FAIRBANKS_2017_Fairbanks_Declaration_Brochure_Version_w_Layout.PDF?sequence=8&isAllowed=y (accessed 24 June 2020).
114. Arctic Council, "Co-Chairś Report on the Work of the Task Force on Arctic Marine Cooperation II in 2017-2019," (2019), https://oaarchive.arctic-council.org/bitstream/handle/11374/2344/SAOFI204_2019_RUKA_08-02_TFAMC-II-Draft-Report.pdf?sequence=1&isAllowed=y (accessed 24 June 2020).
115. Arctic Council SAO Plenary Meeting, "Recommendations by the Task Force on Arctic Marine Cooperation II for Complementary Enhancements of the Arctic Council Institutions Including the SAO Based Mechanism to Coordinate Marine Issues in the Arctic Council," (2018), https://oaarchive.arctic-council.org/bitstream/handle/11374/2231/SAOFI203_2018_ROVANIEMI_07C_TFAMC-Recommendations.pdf?sequence=1&isAllowed=y (accessed 24 June 2020).
116. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 62.
117. Revised Draft for an ILBI, Article 3(1).
118. For an overview, see Scott and VanderZwaag, "Polar Oceans and Law of the Sea".
119. It has been suggested that once the process of delineation is completed, there might remain only "two small areas" in the Arctic Ocean lying beyond the outer continental shelves of the Arctic coastal States; Michael Byers, *International Law and the Arctic* (Cambridge: University Press Cambridge 2013), 126-127.
120. Koivurova and Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," 134.

121. Ibid.,135.
122. Vito De Lucia et al., "Arctic Protection Can't Wait for Global Treaty" *Nature* 565 (2019): 161; Vito De Lucia et al., "Arctic Marine Biodiversity in the High Seas between Regional and Global Governance," *Arctic Review on Law and Politics* 9 (2018): 264-266.
123. Revised Draft for an ILBI, Article 2.
124. Dalaker Kraabel, "The BBNJ PrepCom and Institutional Arrangements".
125. See, e.g., De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2".
126. De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," 9.
127. Which are observers in the Arctic Council, and original signatories of the Central Arctic Ocean Fisheries Agreement; on the latter, see Balton, "What Will the BBNJ Agreement Mean for the Arctic Fisheries Agreement?".
128. De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," 6 [emphasis addded].
129. Koivurova and Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," 136.
130. Oxford Dictionary, "body," https://www.lexico.com/en/definition/body (accessed 24 June 2020).
131. Ibid.
132. Ibid.
133. Ibid.
134. See generally Malcolm Shaw, *International Law* (Cambridge: Cambridge University Press, 2018), 989 et seq.
135. ILC, "Draft Articles on the Responsibility of International Organizations," *Yearbook of the International Law Commission* Vol 2 Part 2 (2011*)*: 40.
136. De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," 6; for a discussion, see Takei, "The Role of the Arctic Council from an International Law Perspective," 353.
137. Egge, "Presentation at the Conference 'Rule of Law for Ocean'".
138. Further consideration is necessary in the context of Regional Fisheries Management Arrangements (RFMAs), as opposed to Regional Fisheries Management Organisations (RFMOs). Pursuant to Article 1(1)(d) of the FSA, the term RFMA refers to "a cooperative mechanism established in accordance with [UNCLOS] […] and this Agreement by two or more States for the purpose, inter alia, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks." Importantly, as pointed out by Molenaar, "unlike an RFMO, an RFMA is not an intergovernmental organization and also does not establish one," which "means that an RFMA does not necessarily have to be established pursuant to a legally binding instrument;" Erik J. Molenaar. "Regional Fisheries Management Organizations" in *Global Challenges and the Law of the Sea,* eds. Marta C. Ribeiro et al. (Cham: Springer Nature, 2020) 81 – 109, 85.
139. VCLT, Article 32.
140. This paragraph draws on De Lucia, "Reflecting on the Meaning of 'Not Undermining' ahead of IGC-2".
141. UNGA, "Letter Dated 25 July 2014 From the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly," (23 July 2014) UN Doc A/69/177, Appendix, Section A, 24.
142. Ibid.
143. Ibid.
144. PAME, "Framework for a Pan-Arctic Network of Marine Protected Areas".
145. CAFF and PAME, "Arctic Protected Areas: Indicator Report".
146. Revised Draft for an ILBI, Article 15(2) Alt. to para. 1. (b) (ii).

147. Molenaar, "The Arctic, the Arctic Council, and the Law of the Sea," 47.
148. This article does not address the question of whether the Arctic Council could be considered a framework. The reason for this is that it is arguably not necessary to address it, as the Arctic Council (i) may be considered a body; and (ii) the question of its relevance (or lack thereof) would be equally central in relation to the question of whether it may be considered a framework. This is, however, a question that may be further and separately explored in a subsequent article.
149. Prop. 29S (2019-2020), Proposisjon til Stortinget (forslag til stortingsvedtak), "Samtykke til Ratifikasjon av Avtale for å Hiundre Uregulert Fiske i den Internasjonale Delen av Polhavet av 3. oktober 2018".
150. In Norwegian: "skal ikke undergrave"; ibid., 3.
151. "Mechanisms" is the term expressly used in the proposal, "mekanismer", ibid., 3.
152. Ibid.
153. Barnes, "Fisheries and ABNJ".
154. UNGA, "Our Ocean, Our Future: Call for Action," (6 July 2017) UN Doc A/Res/71/312, https://undocs.org/pdf?symbol=en/a/res/71/312 (accessed 7 July 2020).
155. Ibid., Annex, para 11.
156. Friedman, "Beyond 'Not Undermining'"; De Lucia, "Rethinking the Conservation of Marine Biodiversity Beyond National Jurisdiction".
157. As observed by Molenaar, the preamble of the CAOF Agreement originally included the wording that the CAOF Agreement should not undermine the North-East Atlantic Fisheries Commission (NEAFC). Yet, as the negotiations progressed, the language shifted from not to undermine to pointing to the "importance of ensuring cooperation and coordination." And while in the operative parts of the CAOF Agreement there are still references to not undermining (e.g. in Article 14, discussed above), the shift in language in the preamble indicates at least an attempt to frame the relation between the CAOF Agreement and the NEAFC in a more positive and collaborative manner; Erik J. Molenaar. "The CAOF Agreement: Key Issues of International Fisheries Law," in *New Knowledge and Changing Circumstances in the Law of the Sea*, ed. Tomas Heidar (Leiden: Brill Nijhoff, 2020) 446 – 476, 457.
158. See, e.g., De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic"; Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction".
159. For example, CAFF WG has established numerous resolutions of cooperation, including with the Convention on Biological Diversity, with the Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 19 ILM 15 (Bonn Convention) and with the Convention on Wetlands of International Importance Especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 (Ramsar Convention); for an overview see CAFF, "Resolutions of Cooperation," https://www.caff.is/resolutions-of-cooperation (accessed 21 July 2020).
160. Gjerde et al., "Building a Platform for the Future," 39.
161. While the ILBI is envisioned as an implementing agreement of UNCLOS, it also fulfils the obligations of States under Article 5 of the CBD in relation to the conservation of biodiversity in ABNJ, which State parties should pursue through international cooperation.
162. Gjerde et al., "Building a Platform for the Future"; De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic".