UNIVERSITÀ DEGLI STUDI DI NAPOLI FEDERICO II
DIPARTIMENTO DI GIURISPRUDENZA

DOTTORATO DI RICERCA IN DIRITTO DELL'ECONOMIA
XXXVII CICLO

IMPLICAZIONI DELL'ACCORDO BBNJ SULLA NAVIGAZIONE IN ALTO MARE

IMPLICATIONS OF THE BBNJ AGREEMENT ON HIGH SEAS NAVIGATION

Tutor:
Prof. Loris Marotti

Candidato:
Dott. Julio Alberto Tilloy

A.A. 2023-2024

JULIO ALBERTO TILLOY

IMPLICAZIONI DELL'ACCORDO BBNJ SULLA NAVIGAZIONE IN ALTO MARE

IMPLICATIONS OF THE BBNJ AGREEMENT ON HIGH SEAS NAVIGATION

UNIVERSITÀ DEGLI STUDI DI NAPOLI FEDERICO II
DIPARTIMENTO DI GIURISPRUDENZA

DOTTORATO DI RICERCA IN DIRITTO DELL’ECONOMIA
XXXVII CICLO

IMPLICAZIONI DELL'ACCORDO BBNJ SULLA NAVIGAZIONE IN ALTO MARE

IMPLICATIONS OF THE BBNJ AGREEMENT ON HIGH SEAS NAVIGATION

Tutor:
Prof. Loris Marotti

Candidato:
Dott. Julio Alberto Tilloy

A.A. 2023-2024

TABLE OF CONTENTS

CHAPTER 2

THE COOPERATION REQUIRED BY THE BBNJ AGREEMENT

CHAPTER 3

LESSONS LEARNED FROM THE UNFSA

CHAPTER 4

IMPLEMENTATION OF THE BBNJ AGREEMENT

CHAPTER 5

POTENTIAL CHALLENGES FOR THE RESOLUTION OF LEGAL CONFLICTS AFTER THE OVERLAP OF THE BBNJ AGREEMENT AND THE LOSC

LIST OF ABBREVIATIONS

ABMT Area-Based Management Tool

BBNJ Agreement Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction

CBD Convention on Biological Diversity

CHM Clearing House Mechanism (BBNJ Agreement)

COP Conference of the Parties (BBNJ Agreement)

DOALOS UN Division for the Ocean Affairs and the Law of the Sea

EC European Union Council

EEZ Exclusive Economic Zone

EIA Environmental Impact Assessment

EU European Union

FAO Food and Agriculture Organization of the United Nations

FAO Code of Conduct Code of Conduct for Responsible Fisheries

GAIRS Generally Accepted International Rules and Standards

ICCAT International Commission for the Conservation of Atlantic Tunas

ICG 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 Biodiversity of Areas Beyond National Jurisdiction

IFBs Relevant Legal Instruments or Frameworks, or Relevant Global, Regional, Subregional, or Sectoral Bodies

ILC International Law Commission

IMO International Maritime Organization

IPAO International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing

ITLOS International Tribunal for the Law of the Sea

IUCN International Union for Conservation of Nature

IUU fishing Illegal Unreported and Unregulated fishing

LOSC United Nations Convention on the Law of the Sea of 10 December 1982

MPA Marine Protected Area

NAFO Northwest Atlantic Fisheries Organization

NEAFC North-East Atlantic Fisheries Commission

NGO Nongovernmental organization

OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic

Part XI Implementation Agreement Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982

PrepCom Preparatory Committee (UNGA)

PSSA Particularly Sensitive Sea Areas (IMO)

PSMA Agreement on port State measures to prevent, deter, and eliminate illegal, unreported, and unregulated fishing

RFMA Regional Fisheries Management Arrangement

RFMO Regional Fisheries Management Organization

STB Scientific and Technical Body (BBNJ Agreement)

Relevant IFB Measures Measures adopted by Relevant Legal Instruments or Frameworks, or Relevant Global, Regional, Subregional, or Sectoral Bodies (BBNJ Agreement)

UN United Nations

UNCLOS III Third United Nations Conference on the Law of the Sea

UNFSA 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 of 4 December 1995

UNGA United Nations General Assembly

UNTS United Nations Treaty Series

VCLT Vienna Convention on the Law of Treaties

WCPFC Western and Central Pacific Fisheries Commission

WG Ad Hoc Open-ended Informal Working Group (UNGA)

PRELIMINARY CONSIDERATIONS

There are two contrasting paradigms for regulating activities in areas beyond national jurisdiction, particularly regarding the protection of the marine environment: *mare liberum* and *mare clausum*. The thesis is oriented towards progressively demonstrating how 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 (BBNJ Agreement)[1], adopted on 19 June 2023, contributes to the consolidation of the latter paradigm and can lead to a legal fragmentation over the high seas.

Fragmentation would result from the parallel coexistence of instruments built upon the paradigm of *mare clausum* and instruments based on the paradigm of *mare liberum*. Universal treaties like the BBNJ Agreement and, before it, 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 of 4 December 1995 (UNFSA)[2] are exemplary of the *mare clausum* paradigm. The United Nations Convention on the Law of the Sea of 10 December 1982 (LOSC)[3], preceding both of these treaties, is representative of the *mare liberum* paradigm. High seas activities like commercial navigation would be regulated differently, depending on the context of the treaty under which they are exercised.

The *mare liberum* paradigm is reflected in the traditional law of the sea, as enshrined in the LOSC, which was negotiated during the late 1970s and early 1980s and concluded in 1982. Under the LOSC, all States cooperate in regulating their rights to exercise high-seas freedoms and agree upon subsequent obligations (*mare liberum*). In the functional-zonal approach set up by the LOSC, the allocation of jurisdiction is reflected in the functions assigned to the States following the spatial division of the maritime geography into regulated zones.[4] The cooperation for the protection of the whole marine environment, for which all States have functions, is subject to this legal-spatial approach (for instance, under the status of 'flag State' and subsequent functions). Consistent with this scheme, the LOSC places international environmental law within the context of the law of the sea and not *vice versa*. As a result, marine environmental protection relies on the willingness of States to cooperate.

Environmental matters are addressed in Part XII LOSC, which provides rules for the protection and preservation of the marine environment. Following Part XII, States have the

[1] 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 New York, 19 June 2023)

[2] 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) UNTS 37924

[3] United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 10 December 1982. entered into force 16 November 1994) UNTS 31363.

[4] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007) 33.

general obligation to cooperate in the protection and preservation of the marine environment.[5] More particularly, States are obligated to cooperate in the prevention, reduction, and control of marine pollution and may do so by acting through the competent international organization, i.e., the International Maritime Organization (IMO).[6] In this context, Part XII complements other parts of the treaty, including Part VII concerning the high seas regime, and, in doing so, does not challenge the equal status of States nor their rights to exercise their freedoms within that vast maritime zone. According to Part VII LOSC, international cooperation mandated by Part XII must be carried out taking into consideration that "the high seas are open to all States" and that "freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas".[7] The equality of all States is fundamental and, on that basis, every State "has the right to sail ships flying its flag on the high seas"[8] The *right* of each and all States to the high seas freedoms is crucial for preventing the factual inequalities between (developing and developed) States from eroding their status and equality on the legal plane, no matter whether a State actually exercises the given activity. In addition, in the LOSC, becoming a member or conferring powers to bodies like regional fisheries management organizations (RFMOs), which are circumscribed to high seas fisheries, is discretionary, and applying their measures is not the only way by which State parties can cooperate to meet environmental duties.[9]

In contrast, the paradigm prevailing in recent times, developed from the 1990s onwards, suggests that conferring powers to international (regional) bodies like RFMOs and applying their measures is the only way to cooperate to protect the marine environment in areas beyond national jurisdiction. The idea of *mare clausum* characterizing this prevailing paradigm stems from the core role given to RFMOs, in conjunction with the fact that these bodies are sometimes considered to represent a *de facto* monopoly of a group of States that exercise exclusive harvesting rights and support the virtual occupation of regions of the high seas by denying the freedom of fisheries to non-members.[10] This paradigm underpins the legal framework of the UNFSA and echoes in the BBNJ Agreement, i.e., treaties openly endorsing RFMOs. Because of the complementarity with RFMOs, the implementation of the BBNJ Agreement is likely to evolve in harmony with the UNFSA. Given that the UNFSA challenges the openness of the high seas and the freedom of all States to fish, discovering similarities allows for reflecting on how the BBNJ Agreement may be applied in practice once entered into force.

In the functional-regional approach established by the UNFSA and the BBNJ Agreement, the allocation of jurisdiction is reflected in the functions assigned to the States following the spatial division of marine geography into regulated regions and areas thereof. Jurisdiction may be allocated by RFMOs or other regional tools through these treaties. Cooperation for the protection of the entire marine environment is subject to this legal-spatial scheme. Unlike the LOSC, elements of classic law of the sea are placed within the context of contemporary international environmental law and may face restrictions under the latter (and not *vice versa*). RFMOs with jurisdiction over environmental matters concerning the protection of 'biological diversity' may play a key role in implementing these universal treaties. Achieving

[5] LOSC art 192.
[6] BBNJ Agreement arts 210, 211(1) and 212.
[7] LOSC art 87.
[8] ibid 90.
[9] ibid 118.
[10] SM Garcia and M Hayashi, 'Division of the Oceans and Ecosystem Management: A Contrastive Spatial Evolution of Marine Fisheries Governance' (2000) 43 Ocean & Coastal Management 445, 456.

marine environmental goals would heavily depend on the willingness of States participating in RFMOs. The willingness of non-members to consent to apply RFMO measures and other related tools is essential for enhancing the protection of the marine environment under this functional-regional approach and for the subsequent area-based management. The consent granted by non-members entails the obligation to apply measures as agreed upon by RFMO members.

The prevailing paradigm favoring *mare clausum* should be elucidated for discussing the BBNJ Agreement, because the rules of the sea change in favor of a few, impacting the sovereign equality of all States and contributing to the factual occupation of the high seas. Two main statuses are allowed and promoted by this paradigm: States acting through RFMOs remain the rule-makers over a certain high seas region, while non-members, excluded from rulemaking, are obligated to comply with those rules under threat of being considered non-cooperating and subsequently sanctioned. The vertical relationship among these two different groups of States, not conceivable under the LOSC, may be inferred from provisions on treaty-based cooperation between State parties and limited-access bodies.[11]

The aim and main contribution of the thesis consists of clarifying the nature of the BBNJ Agreement through the analysis of some of the legal mechanisms it provides to regulate high seas navigation and to protect the 'marine biological diversity'. Ultimately, this work questions whether the BBNJ Agreement and the normative shift it promotes from classic international law of the sea is justified or whether States may engage in a better implementation of the existing international law for achieving the same goal without jeopardizing their equality and the freedoms of all of them in the high seas.

[11] UNFSA, art 8(3); BBNJ Agreement art 25(6).

INTRODUCTION

1. Introduction

The conservation of the oceans is under serious threat. The environmental decline in marine spaces has heightened the international community's desire to safeguard environmental processes and mitigate anthropogenic impacts worldwide. Accelerating species extinction rates drive global changes in the marine environment, threatening the biological diversity thereof and the ecosystems and the services provided.[12] Among other factors, the declining condition of the oceans is due to increased overfishing, acidification, ocean warming, and plastic pollution.[13] As a response to this scenario, world leaders, policymakers, and academics have been calling for action to reverse declines in biological diversity.[14] By means of a variety of political and legal tools, the management of the oceans through regulatory areas (area-based management) has fostered the undefined notion of 'marine protected areas' and the subsequent implementation of regional mechanisms for improving biological diversity in the marine environment.[15]

Against this background, on 19 June 2023, 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 (BBNJ Agreement) was

[12] TF Johnson and others, 'Revealing Uncertainty in the Status of Biodiversity Change' [2024] Nature 1, 1.
[13] UN Department for Economic and Social Affairs, *The Sustainable Development Goals Report 2023: Special Edition* (United Nations 2023) 40–41 <https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf>.
[14] Johnson and others (n 12) 1.
[15] Sarah Wolf and Jan Asmus Bischoff, 'Marine Protected Areas', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2013) para 4 <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022.

concluded.[16] The treaty treats the notion of 'marine biological diversity' as an element comprised in the notion of 'marine environment'. Under it, legal mechanisms such as 'area-based management tools' (ABMTs) and 'marine protected areas' (MPAs) are presented as measures necessary for the protection of the 'marine environment'. At the same time, relevant legal instruments or frameworks, or relevant global, regional, subregional, or sectoral bodies (IFBs) and the measures they adopt (Relevant IFB Measures) such as environmental impact assessments (EIAs) and regulations, and standards are considered mechanisms important to that end. All these measures are meant to regulate activities carried out in a variety of regions beyond national jurisdiction, including high seas navigation.

2. The BBNJ Agreement

2.1. An Overview of the Negotiations and Preceding Works

Works preceding the adoption of the treaty, including the negotiation of its text, unfolded over practically twenty years. The drafting of the conventional text was achieved in a short time.[17] Towards the end of negotiations, the efforts were directed at overcoming obstacles submitted by the many brackets present in the earlier drafts and the non-convergent views they reflected.[18] It is worth noting some of the salient moments that led to this landmark treaty.

According to Resolution 59/24, in 2004 the United Nations General Assembly (UNGA) decided "to establish an Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction: (a) To survey the past and present activities of the United Nations and other

[16] 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 New York, 19 June 2023).

[17] Representatives of the 'civil society' played a role in this respect. For instance, among NGOs, Greenpeace called "for a strong implementing agreement negotiated in a time-bound manner", IISD, 'Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015' (2015) 25 Earth Negotiations Bulletin 1, 4.

[18] Bodansky opines on the negotiation skills displayed during the negotiation process by saying "[c]ombine and conquer. That was the strategy of those seeking to develop an international regime to address marine biological diversity found in areas beyond national jurisdiction areas that constitute half of the world's surface and a much greater proportion of its habitable volume. States had quite different visions for the regime. On the one hand, the European Union and other developed countries such as Australia and New Zealand wanted a conservation-oriented regime providing for the establishment of marine protected areas and setting rules for environmental impact assessments; on the other hand, developing countries wanted a resource-oriented regime that would allow them to get what they consider their fair share of the benefits of marine genetic resources and would assist them with capacity building and technology transfer. Only by combining these disparate topics in a single package was agreement possible.", Daniel Bodansky, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement' (2024) 118 American Journal of International Law 299, 299.

relevant international organizations with regard to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction; (b) To examine the scientific, technical, economic, legal, environmental, socio-economic and other aspects of these issues; (c) To identify key issues and questions where more detailed background studies would facilitate consideration by States of these issues; (d) To indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction;"[19] At the same time, also through Resolution 59/24, the UNGA called upon States "to implement strategies and programmes for an *integrated ecosystem-based approach to management*, developed by the Conference of the Parties to the [Convention on Biological Diversity (CBD)[20]], the [Food and Agriculture Organization of the United Nations (FAO)], and other relevant global and regional organizations, and urges those organizations to cooperate in the development of practical guidance to assist States in this regard".[21] The Ad Hoc Open-ended Informal Working Group (WG) developed its many tasks in nine meetings, between 2006 and 2015 (WG-1 to WG-9 meetings).[22]

In 2015, after the WG fulfilled its mandate, the UNGA adopted Resolution 69/292 and decided "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"[23]. Subsequently, the UNGA established a Preparatory Committee (PrepCom) and mandated it "to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument *under the Convention*"[24]. Four sessions of a Preparatory Committee (PrepCom) followed between 2016 and 2017 (PrepCom-1 to PrepCom-4).[25] The PrepCom ended up recommending the UNGA to "take a decision, *as soon as possible*, on the convening of an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text of an international legally binding instrument"[26].

---

[19] UNGA, Oceans and the law of the sea 2005 [A/RES/59/24] para 73.

[20] Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) UNTS 1760 UNTS 79.

[21] UNGA A/RES/59/24 (n 19) para 66.

[22] 'Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction' <https://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm> accessed 30 March 2024.

[23] 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 2015 [A/RES/69/292] para 1 emphasis added.

[24] ibid 1(a) emphasis added.

[25] 'Preparatory Committee Established by General Assembly Resolution 69/292: Development of an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (*UN DOALOS*) <https://www.un.org/depts/los/biodiversity/prepcom.htm> accessed 30 March 2024.

[26] UNGA, Preparatory Committee established by General Assembly resolution 69/292: Development of an international legally binding instrument under the United Nations Convention on the Law of the

In 2017, through Resolution 72/249, the UNGA decided "to convene an intergovernmental conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee on the elements and to elaborate the text 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, with a view to developing the instrument *as soon as possible*".[27] 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 Biodiversity of Areas Beyond National Jurisdiction" (ICG) commenced its sessions in 2018 and concluded its work in 2023 after the adoption of the BBNJ Agreement on 19 June 2023 (ICG-1 to 5.3).[28]

2.2. The Divergent Views after the Conclusion of the Treaty

The adoption of the BBNJ Agreement in 2023 has not been exempt from the turbulent times through which the world is going nowadays. World politics and geopolitics, as always, have conditioned and shaped international law and, especially, legal developments relating to activities in the ocean. This relates to the noticeable contrasting standpoints among the great players in world geopolitics after the conclusion of the treaty. Highlighting this and making a brief comment on the titanic efforts to adopt the treaty adds nuances that may be deemed of some importance to later address the topic discussed in this thesis.

Different views shown by the United States, China, and, more notoriously, the Russian Federation, reveal what might become the preamble of a conflicting international scenario. The United States "stressed that the Ocean is key to the health of our planet for future generations, and that the Agreement offers a once-in-a-lifetime opportunity to make good on our commitment to the high seas, addressing threats including [illegal unreported and unregulated fishing (IUU fishing)], climate change, and pollution."[29] China sustained that "the Agreement should be interpreted in good faith, seeking consensus in practice and not as a procedural

Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction 2017 [A/AC.287/2017/PC.4/2] para 38(b).

[27] 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 2018 [A/RES/72/249] para 1.

[28] 'Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction' (*United Nations*) <https://www.un.org/bbnj/> accessed 30 March 2024; 'United Nations Convention on the Law of the Sea 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 DOALOS*, 4 April 2024) <https://www.un.org/Depts/los/bbnj.htm> accessed 4 April 2024.

[29] IISD, 'Summary of the Further Resumed Fifth Session of the Intergovernmental Conference to Adopt 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: 19-20 June 2023' (2023) 25 Earth Negotiations Bulletin 1, 7.

requirement, and 'focusing on conservation and sustainable use and not spilling over into sensitive issues under dispute.'"[30] The Russian Federation noted that "his country distances itself from the consensus, but is not demanding a vote out of respect for the position of many developing countries, which are convinced that the agreement will promote their rights and interests."[31] The Russian Federation acknowledged that "the Agreement does not achieve a balance between conservation and sustainable use, with conservation being the priority to the detriment of legitimate uses of marine biodiversity."[32] Additionally, he "lamented (…) how the creation of a hierarchical structure will not place existing, relevant, international organizations in a subordinate position."[33]

Tensions among their maritime interests are easy to perceive and difficult to disregard for *inter alia* legal scholars. It is uncertain, though, to what point these tensions may represent a true difficulty for operationalizing the BBNJ Agreement on a global scale.[34] The BBNJ Agreement constitutes a game-changing legal framework "in times of geopolitical tensions and open conflicts."[35]

2.3. Uncertainty about the Future Universal Support

It has not gone unnoticed that "[p]olitical will, competing interests and availability of resources determine the extent to which different aspects of the conservation and sustainable use of biodiversity become the subject of specific regulation at the global level"[36]. This is an aspect that brings concerns about *inter alia* the political support necessary for the treaty to enter into force, and for the treaty to achieve the universal participation to which it aspires. It may be expected that the implementation of the BBNJ Agreement and its environmental objectives would be challenged by those who, simultaneously, feel challenged by it.

The conclusion of the BBNJ Agreement represents an outstanding example of the efforts of a group of committed States that played an efficient and persuasive role in encouraging others to give their consent in the final stages of the negotiations. Presumably,

---

[30] ibid.
[31] ibid 4.
[32] ibid.
[33] ibid 3–4.
[34] Contrasting views during the initial exchange of views might said to have persisted and echo in the statements delivered after the conclusion of the treaty: "China recommended that the Working Group reach consensus on recommendations to the UNGA, underscoring that *the few countries with reservations are prominent global actors in oceans affairs* and that a new agreement could not reach universality if the views of all countries are not considered from the beginning.", IISD, 'Summary of the Eighth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 16-19 June 2014' [2014] Briefing Note on the WG on Marine Biodiversity 1, 7 (emphasis added).
[35] Vito 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 & International Law 1, 22.
[36] Philippe Sands and others, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 388.

these States were more eager to achieve a legal framework for the conservation and sustainable use of 'marine biological diversity' than others. Indeed, results suggest that alliances such as the "The BBNJ High Ambition Coalition"[37] and "The Blue Leaders" proved to be successful in their goals.[38] It would be expected that those committed States and alliances collaborate to make the treaty enter into force.

This political support does not rule out that some views may persist and that, in one way or another, the BBNJ Agreement might not reach its desired universality if it enters into force. Claims that there is no gap in the existing legal framework have been raised after recalling the history of the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the United Nations Convention on the Law of the Sea of 10 December 1982 (LOSC)[39] adopted after it. It has been sustained that there is no legal gap in the LOSC but rather a deficit in its implementation, which could be addressed through coordination and cooperation, drawing on inputs from the existing international law on 'biological diversity' and the law of the sea, with a focus on capacity building and technology transfer.[40] All in all, a new era of international law governing the oceans seems to be about to start.

3. Issues concerning the Treaty under Study

---

[37] "The High Ambition Coalition on Biodiversity Beyond National Jurisdiction (BBNJ) was launched at the One Ocean Summit in Brest on February 11, 2022. The coalition brings together 52 parties who have committed, at the highest political level, to achieving an ambitious outcome from the negotiations on a high seas treaty" ('The High Ambition Coalition on Biodiversity Beyond National Jurisdiction (BBNJ)' (*One Planet Summit*) <https://oneplanetsummit.fr/en/coalitions-82/high-ambition-coalition-biodiversity-beyond-national-jurisdiction-bbnj-259#:~:text=The%20coalition%20brings%20together%2052,at%20COP%2015%20in%20December> accessed 30 March 2024.). According to the website, "The European Commission is committed to speeding up the process and helping developing countries prepare for ratification and implementation of the treaty." (ibid.).

[38] "The Blue Leaders are an ambitious group of countries calling for urgent action to save the global ocean in the face of the climate crisis, overfishing, pollution, and other threats. The Blue Leaders are committed to two major goals: [a] Securing a new international target to protect at least 30% of the global ocean through a network of highly and fully protected marine areas by 2030. [b] The rapid and successful conclusion of a new High Seas Treaty that provides for establishment of fully and highly protected marine areas in the high seas and strengthens management of human activities outside protected areas. These two actions will give the ocean a fighting chance as we face unprecedented climate and biodiversity crises." ('The Blue Leaders' <https://www.theblueleaders.org/> accessed 30 March 2024.). See also IISD, 'Summary of the Blue Leaders High-Level Event: 7 March 2024' [2024] Blue Leaders Bulletin 1.

[39] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1883 UNTS 3.

[40] IISD, 'Summary of the Second Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 28 April - 2 May 2008' (2008) 25 Earth Negotiations Bulletin 1, 9.

3.1. The Non-Legal Subordination to the LOSC

The interpretation that the BBNJ Agreement is a treaty under the LOSC or subordinate to it is based on the idea of what the LOSC *ought to be* and not as *it is*. The characterization of implementation or implementing agreement seems to be fostered by the assumption that a *legal gap* exists in the LOSC, on the one hand, and the assumption that that gap needs to be *closed* or *filled* with the BBNJ Agreement, on the other. The BBNJ Agreement has often been regarded as the third 'implementation agreement' of the LOSC, which, in appearance, would aim to be a treaty that comprehends a set of provisions for a more precise or effective application of the LOSC. This view is strengthened, for instance, by the words chosen to entitle the BBNJ Agreement, which highlight that it consists of an agreement *under the LOSC*, therefore, suggesting a relationship based on the terms of Article 31(3.a) Vienna Convention on the Law of Treaties (VCLT)[41], i.e., as if it were an agreement after the LOSC. However, recognizing this legal characterization seems difficult when the text of the BBNJ Agreement is read against the plain text of the LOSC.

The subject matter and subsequent nature of the BBNJ Agreement, on 'marine biological diversity', make its classification under the law of the sea or its complementarity to the LOSC something hard to assert (scope *ratione materiae*). This observation is strengthened by the status the treaty gives to international bodies that, labelled as 'stakeholders', are grouped with other uncertain actors falling under that label (scope *ratione personae*).

This raises questions about whether the new agreement is supposed to fill a *legal gap* in the LOSC, and whether expressions like *under the LOSC* or *implementing agreement of the LOSC* have legal foundations. Works and standpoints of States preceding the conclusion of the treaty suggest that such expressions lack legal rigor.[42] In more practical terms, it is undeniable that, before 19 June 2023, no international universal instruments on the 'conservation' and 'sustainable use' of 'marine biological diversity' applicable to all marine spaces beyond national jurisdiction existed.

[41] 1969 Vienna Convention on the Law of Treaties (adopted on 23 May 1969, entered into force on 27 January 1980), UNTS 1155, 331.

[42] The labelling of the BBNJ Agreement as a treaty under the LOSC or implementing appears to reflect political motivations rather than strictly legal reasons. This may be inferred from the discussions carried out shortly before the decision to negotiate a treaty under the format of an *implementing agreement under the LOSC*, at the 2015 WG 9th session. For instance, in 2013, at the WG 6th meeting, Iceland and Norway "*reiterated* the need to entertain a substantive discussion of BBNJ issues before taking a decision on the need to negotiate an implementing agreement." IISD, 'Summary of the Sixth Meeting of Teh Working Group on Marine Biodiversity beyond Areas of National Jurisdiction: 13-23 August 2013' [2013] Earth Negotiations Bulletin 1, 3. In 2014, at the WG 7th meeting "The Russian Federation emphasized that an implementing agreement was only one of the options considered at Rio+20, noting the need to better understand the subject matter of a new instrument. He cautioned against threatening the balance of interests protected by existing agreements, such as UNCLOS(…)", IISD, 'Summary of the Seventh Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 1-4 April 2014' [2014] Earth Negotiations Bulletin 1, 3. The reading of these documents, among others, reveals great uncertainty about what it would mean to adopt an instrument under the LOSC, as well as evidence of contrasting views on the direction to take. This is striking given the advanced stage of the discussions and the short time it would take to resolve to adopt an agreement in the fashion in which it was made.

Views on the *non liquet* problem in international law could be useful for understanding what a legal gap consists of and clarifying the status of the BBNJ Agreement. [43] In this respect, "international law is sometimes criticized for lacking rules that adequately address new problems such as terrorism or global warming. But such normative deficiencies in international law are not equivalent to a *non liquet*, which signifies a gap not in the law as it *ought* to be but in the law as it *is*."[44] The gap in the law as it *ought to be* and its characterization as shortcomings relies on "moral or political deficiencies" or, in other words, non-legal deficiencies.[45] The interpretation of the BBNJ Agreement as a treaty implementing the LOSC appears to rely on moral or political deficiencies in the LOSC. The legal status of the treaty can be studied as the outcome of what negotiators thought the LOSC *ought to be,* meaning that the treaty is not legally subordinate to the LOSC, nor can it be regarded as an amendment to it.

It is recognized that relevant provisions in the LOSC make its amendment something difficult to accomplish.[46] Considering the need to combat existing ongoing threats to biological diversity in the oceans, it may be stressed that a treaty on the conservation and sustainable use of 'marine biological diversity' legally subject or subordinate to the framework given by the LOSC remains a pending task of States. The classification and ranking of the BBNJ Agreement with respect to the LOSC is to be made following these considerations. The drafters' decision to omit references to the LOSC in Article 8(1) BBNJ Agreement appears to allow a more accurate description of the relationship with the earlier treaty. The provision refers to the treaty as "this Agreement for the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction".

To further support this premise, some considerations can be made about the Ad Hoc Open-ended Informal Working Group (WG) 9th meeting, which meant the conclusion of the mandate of the WG and the beginning of a new phase towards BBNJ negotiations. The decision to adopt a new international instrument *under the LOSC* was the significant outcome of the WG 9th meeting.[47] Discussions were undertaken from 20 to 23 January 2015, and their result represented an instrumental step toward the work of the PreCom and later the IGC that resulted in the adoption of the conventional text. Reports on the work of the WG 9th meeting shed scarce light on whether the States found the existence of a *legal gap* in the LOSC that justified the consensus for developing *a new agreement under the LOSC,* like the BBNJ Agreement. Indeed, after years of discussions that commenced in the WG 1st meeting of 2006, the question of the legal gap in the LOSC seemed not to have been ascertained. Divergent viewpoints relating to the inclusion of the expression "legal gap" in the text of recommendations to the UNGA appear

---

[43] Daniel Bodansky, 'Non Liquet', *Max Planck Encyclopedia of Public International* (on line, Oxford University Press 2006) para 2 <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024.
[44] ibid.
[45] ibid.
[46] Chris Whomersley, 'How to Amend UNCLOS and Why It Has Never Been Done' (2021) 9 The Korean Journal of International and Comparative Law 72; Sean D Murphy, 'Durability, Flexibility and Plasticity in the UN Convention on the Law of the Sea' [2024] The International Journal of Marine and Coastal Law 1, 230.
[47] Annex to UNGA, Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly 2015 [A/69/780] para 1(e); IISD, 'Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015' (n 17) 9.

to show that the issue was problematic and not solved, with some favouring moving forward on "an international instrument" and some highlighting that "there have been no discussions in the Working Group on legal gaps in the current regime".[48] However, notwithstanding observations made here, after receiving the WG recommendations, the UNGA established a PrepCom with a mandate to develop an instrument *under the LOSC*.[49] Contrary to what might be assumed, the decision to adopt an international instrument *under the LOSC* appears to have been based on discussions that, from a strictly legal perspective, did not reach a point of full

[48] The information published in the *Earth Negotiations Bulletin* might be illustrative of this conclusion. According to it, on the second of four days, on 21 January 2015 afternoon, delegates discussed the Co-Facilitators' draft intended to provide the basis for negotiations. The draft consisted of a text that included requesting the UNGA that "the current absence of a comprehensive global regime to address *the legal gap* relating to the conservation and sustainable use of BBNJ be addressed *[the LOSC]*; basing negotiations on the 2011 package; (…) and deciding to convene in either 2017 or 2018 an intergovernmental conference on BBNJ to elaborate a legally binding instrument under *[the LOSC]* with a predetermined deadline and preceded by a PrepCom.", IISD, 'Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015' (n 17) 5. The United States questioned the text and, in doing so, noted that the 2011 package was a "bare skeleton", ibid 6. In relation to the issue of the legal gap, the European Union proposed "deleting text on addressing the legal gap" and emphasized that "a new agreement should become *a third implementing agreement under [the LOSC]*", ibid. The United States, Iceland, the Russian Federation, Japan, and Canada did not show support for the paragraph, ibid. The United States sustained that there are existing tools to address the conservation and sustainable use of biodiversity in areas beyond national jurisdiction while the Russian Federation opined that "there have been no discussions in the Working Group on legal gaps in the current regime", ibid 5–6. Iceland considered the paragraph "too political", ibid 6.

On the third of four days of the IWG-09 meeting, on 22 and 23 January 2015, an informal group discussed the drafting of the recommendations that were meant to be addressed to the UNGA, ibid 7. On 22 January evening, delegates addressed, among other things, the feasibility of an international instrument under the LOSC. The G-77/China insisted on retaining reference to "the legal gap" as "the reason" for a new implementing agreement of the LOSC, ibid. The G-77/China was opposed by Canada, Iceland, Japan, and the United States, ibid. Norway suggested alternative text on the need to address "any legal gaps" and for a "new implementing agreement", ibid. The Russian Federation noted that there was not a "common understanding" of the gaps, ibid. The Russian Federation and the United States favored moving forward on "an international instrument", which arguably suggests that they favored the adoption of a free-standing agreement not under the LOSC, ibid. The EU, instead, emphasized its position on the need for a "legally binding" instrument "under [the LOSC]", ibid. Against this background, on 23 January, the informal group "discussed a new proposal by a large coordinating group, which conceded to exclude all references to legal gaps and the inability to maintain the status quo" but that, simultaneously, "stressed the need for a comprehensive global regime relating to the conservation and sustainable use of BBNJ under [the LOSC]." , ibid. Some expressed reservations about "including the text at all.", , ibid. Finally, "[a]fter consultations late into the night" delegates agreed on the wording without including references to *the legal gap*.

Subsequently, on 24 January, the WG decided to recommend the UNGA *inter alia* to "stress the need for the comprehensive global regime to better address the conservation and sustainable use of BBNJ, having considered the feasibility of developing an international instrument under [the LOSC]", ibid 9. Following this, the UNGA established the PrepCom "to make substantive recommendations to the General Assembly on the elements of a draft text of an international legally binding instrument under [the LOSC]", UNGA A/RES/69/292 (n 23) para 1(a).

[49] UNGA A/RES/69/292 (n 23) para 1(a).

maturity.[50] In this sense, the conclusion of the new treaty would appear to have been driven by moral or political (non-legal) motivations rather than properly legal ones.

3.2. The Conferral of Powers to Regulate High Seas Activities

The autonomy of the BBNJ Agreement from the LOSC is also reflected in the conferral of powers to regulate activities taking place in areas beyond national jurisdiction or on how high seas freedoms, such as navigation, may be exercised. The BBNJ Agreement allows and encourages States to confer powers to IFBs and enables those falling under the label 'stakeholders' to support such conferral to achieve the objectives of the treaty.[51] IFBs conferred with such powers may become competent to determine to what extent State parties can exercise freedoms when they jeopardize achieving the goals set out by the treaty.

After the entry into force of the BBNJ Agreement, if some States (not all), directly or through international bodies or regional mechanisms, were to agree to adopt and implement measures through the designation of multi-sectoral tools meeting the description of 'ABMTs' or 'MPAs' the resulting restrictions may become binding on States that were not parties to the agreement.[52] In doing so, the former States would be free to stipulate, for example, that 'biological diversity' or the 'marine biological diversity' is an element of the 'marine environment' in areas beyond national jurisdiction and to subsequently regulate activities of all States parties to the treaty. The BBNJ Agreement would enable States that negotiated and concluded the agreement to restrict or deprive non-parties from exercising their freedoms in the high seas.[53] In so doing, they would be protecting 'the marine environment', containing the element 'marine biological diversity', so conceived under the treaty.[54] A similar mechanism, aiming at circumventing the consent of State parties and confer powers to regional bodies and mechanisms, has already been employed in the earlier universal 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

---

[50] The urgency might have affected how the discussions were developed in the WG. It is worth recalling that the Heads of State and Government and high-level representatives had committed "to address, *on an urgent basis*, the issue of the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, including by taking a decision on the development of an international instrument under the Convention on the Law of the Sea.", Annex to UNGA, Resolution adopted by the General Assembly on 27 July 2012: "The future we want " 2012 [A/RES/66/288] para 162 emphasis added.

[51] BBNJ Agreement art 19(2) and 48(1).

[52] ibid 17(a); Ingvild Ulrikke Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill Nijhoff 2016) 53. See measures described in Article 26(2) BBNJ Agreement, which allow States acting through IFBs to achieve the objectives of the treaty without consulting State parties as long as these meet the requirements and environmental thresholds for 'ABMTs' and 'MPAs' given by the treaty.

[53] Jakobsen (n 52) 53.

[54] BBNJ Agreement art 2.

and Highly Migratory Fish Stocks of 4 December 1995 (UNFSA).[55] In this respect, the BBNJ Agreement innovates by providing for regulations in the form of 'recommendations' made and 'decisions' taken by State parties. How measures may be embodied in 'recommendations' and 'decisions', and how they may be useful for the conferral of powers to IFBs relevant for the treaty, needs to be clarified.

By making a (generic) reference to 'regional fisheries management organizations' (RFMOs), the treaty gives specificity to the bodies that may implement the treaty.[56] The BBNJ Agreement allows regional mechanisms such as RFMOs to achieve the objectives of the treaty directly and without the need to consult State parties.[57] The treaty ranks the measures RFMOs may adopt and implement above the decisions that may be taken through formal proceedings under it. By consequence, 'ABMTs' and 'MPAs' established by formal consultations with State parties may hardly challenge RFMO measures and the *status quo* of State members acting as rule makers through those bodies. When consulted, 'ABMTs' and 'MPAs' that may be decided by State parties should comply with, *inter alia*, the compatibility threshold in respect of measures of IFBs, including those of RFMOs.[58] It is worth noting that the legitimacy of RFMOs in conservation matters is questioned.[59] In contrast, developed States endorse the protagonism of RFMOs and presumably see it as strategic for developing a new area-based management system for areas beyond national jurisdiction.[60]

The treaty allows and shows preference for measures adopted through RFMOs, after the agreement of their State members, to be combined with measures of its own and of other bodies over areas requiring protection.[61] The collaboration and combination of EIAs and regulations, and standards would become key measures for the constitution of multi-sectoral regulatory areas or 'MPAs' consistent with the conservation objectives of the treaty.[62] Consultation with State parties is not mandatory for this collaboration, including meeting the desired thresholds; they may endorse the 'MPA' by later contributions.[63]

In this respect, the BBNJ Agreement also identifies the International Maritime Organization (IMO) as a relevant body and subsequently ranks measures adopted and

[55] 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) UNTS 37924. See Simone Vezzani, *Jurisdiction in International Fisheries Law: Evolving Trends and New Challenges* (Wolters Kluwer 2020) 234–237.
[56] BBNJ Agreement art 19(4.i) and Annex II (d.ix).
[57] ibid 26(2).
[58] ibid 22(1.b).
[59] With a critical view, is has been commented that "[t]his continuing decline in the status of high seas fisheries resources rather begs the question as to the efficacy of the measures adopted by RFMOs to ensure the long-term conservation and sustainable use of the fish stocks under their management. This in turns raises the question as to the legitimacy of RFMOs as stewards for the international community of the world's high seas fisheries resources.", Rosemary Rayfuse, 'Regional Fisheries Management Organizations' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 440.
[60] See Chapter 1.
[61] BBNJ Agreement art 29(4).
[62] ibid 1(9) and 29(4).
[63] ibid.

implemented by it for the development of the area-based management system it pursues.[64] Measures agreed through RFMOs and combined with those of the IMO may become crucial to the designation of measures and regulation of navigational activities of State parties or others.[65] In this context, State parties are obligated to cooperate with IFBs and, when having access, through them.[66] In case State parties cannot access RFMOs, they shall not be discharged from their obligation to cooperate and apply the measures these bodies adopt to achieve the objectives of the treaty.[67] This obligation may comprise the duty to apply RFMO measures on fisheries considered relevant for the area-based management provided by the treaty.[68]

The cooperation of State parties for applying RFMO measures is likely to become of fundamental importance when making measures through IMO over a given region, given that the plurality of State parties acting as IMO members would have to collaborate with the competent RFMO, and, indirectly, with States that are members of a such regional mechanism.[69] Even though RFMO members may decide not to ratify the BBNJ Agreement, cooperation with them may become mandatory when they act as 'stakeholders'.[70]

3.3. The Complementarity with Post-LOSC Universal Treaties

The BBNJ Agreement relates to two universal treaties regarding biological diversity adopted during the 1990s, after UNCLOS III, complemented by later developments to date. First, because they both concern activities in the high seas, the BBNJ Agreement shows great connectivity with the UNFSA. The UNFSA is often referred to as the 'second implementing agreement' of the LOSC. Assessing the latter treaty results in valuable guidance to schematize the main structural characteristics of the BBNJ Agreement. The notion of 'biodiversity' is at the core of the BBNJ Agreement, and, at the same time, it is at the foundation of the UNFSA. This is evident considering, for instance, the overarching general principles the UNFSA establishes to achieve its objectives. It sets out that the principle to protect biodiversity in the marine environment is essential to conserve and manage straddling and highly migratory fish stocks.[71]

The UNFSA amplifies the reach of the regional competences of RFMOs by giving precise content to the international cooperation it mandates, constraining its parties to "apply the conservation and management measures established by such organization"[72]. The UNFSA and RFMOs have further developed their mandates by way of the concept of 'unregulated'

---

64 ibid 51(4).
65 ibid 29(4).
66 ibid 25(6).
67 ibid.
68 ibid 10(2) and 25(6).
69 ibid 25(6).
70 States non-parties to the BBNJ Agreement are included among the 'stakeholders', ibid 48(4).
71 UNFSA, art 5(g).
72 ibid 8(3).

fishing, included in the *global* concept of IUU fishing.[73] Notwithstanding the different scope *ratione materiae* of the BBNJ Agreement, the UNFSA also concerns a conferral of powers from State parties to RFMOs and, indirectly, to States members of these bodies. The conferral of powers does not erode the *status quo* of States that are RFMO members but rather enhances it. Like in the BBNJ Agreement, RFMO members do not need to be parties to the UNFSA to have a pivotal role in the legal developments after the universal treaty. Though the UNFSA and, more recently, the BBNJ Agreement regard the conferral of powers from State parties to the relevant bodies, the evolution of the latter would take place under a scope *ratione materiae* much wider, affecting freedoms like that of navigation in the high seas, including changes on how State parties may exercise jurisdiction over vessels flying their flag.

Second, the BBNJ Agreement, like the UNFSA, relates to the CBD of 5 June 1992. The CBD constitutes the first global treaty to have 'biological diversity' at its core. Its objectives are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[74] The CBD clarifies that its scope *ratione materiae* concerns a subject matter different from the law of the sea and therefore separate from the LOSC.[75] It has been acknowledged that the relationship between the CBD and the LOSC is not clear and that it cannot be solved by focusing on the treaty norms that provide for the resolution of conflicts.[76]

The UNFSA has been treated differently from treaties following the classic law of the sea, like the LOSC. It has been stressed that "[t]o a significant extent [the UNFSA] gives effect to some of the general objectives of the CBD"[77] and that it constitutes "the missing link between the international law of the sea and international environmental law."[78] However difficult it has been to classify the UNFSA as a classic law of the sea treaty, it has been recognized that the "[t]he range of matters covered by [the UNFSA] simply could not have been addressed with the same freedom or priority as an addendum to the CBD."[79] Because of its material scope, these considerations may apply *mutatis mutandis* to the BBNJ Agreement.[80]

The BBNJ Agreement shows openness to references to the UNFSA to be included in the development of a proposal for a recommendation or a decision.[81] This makes it possible for non-parties to the UNFSA and non-members of RFMOs to confer powers to RFMOs on the performance of fishing activities after being consulted as State parties to the BBNJ Agreement. Given that the UNFSA and the conferral of powers to RFMOs under it challenge the openness

---

[73] FAO Committee on Fisheries, International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing 2001 para 3(1-4).

[74] CBD art 1.

[75] "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea", ibid 22(2).

[76] Rüdiger Wolfrum and Nele Matz-Lück, *Conflicts in International Environmental Law* (Springer 2003) 125.

[77] Alan Boyle, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea* (Oxford University Press 2006) 58 emphasis added.

[78] Alexander Proelss, 'Fisheries', *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing 2016) 190.

[79] Boyle (n 77) 58 (emphasis added).

[80] ibid (emphasis added).

[81] See Chapter 3.

of the high seas and the freedom of all States to fish, discovering similarities between these two treaties allows for reflecting on how the BBNJ Agreement may evolve over other freedoms, such as commercial navigation.[82] In this respect, the BBNJ Agreement echoes the UNFSA in seeing the *mare liberum* paradigm and the high seas freedoms as an obstacle to achieving its goals and, subsequently, endorses the *mare clausum* paradigm.[83]

3.4. Geographical Overlap with the LOSC

Given that the LOSC and the BBNJ Agreement apply to areas beyond national jurisdiction, a spatial overlap between the two treaties is predictable. The high seas are meant to be covered by both treaties. Even though it is well-established that the freedom of navigation does not consist of absolute freedom, the possibility of it or the equality of all States at its foundations being restricted may attract interest, and even international concern.[84]

In the context of consultations, State parties to both the BBNJ Agreement and the LOSC might express discomfort with navigation-restrictive measures resulting from the agreement concluded without their participation in a specific high-sea area and advocate for requesting legal clarification to determine the balance between the freedom of navigation and the environmental aims of the treaty.[85] In addition, differences in participation (scope *ratione personae*) may lead to the rise of legal conflicts between two treaties that, while aspiring to universal participation, aim at regulating activities in areas beyond national jurisdiction under different parameters. Difference in participation may provide for situations in which vessels flying the flag of State parties to the BBNJ Agreement, on the one side, and State parties to the LOSC reluctant to ratify the BBNJ Agreement, navigate following treaties of a diverse nature and subject matters (scope *ratione materiae*). The possibility of the BBNJ Agreement conflicting with the LOSC appears likely to happen.

The LOSC *as a whole* is sustained in the package deal achieved during UNCLOS III, and it is because of it that it enjoys great acceptance on the part of the States and has gained a prominent role in international law to the point of holding a *constitutional* status in the law of the sea. It is understood that "[o]ne 'constitutional law' feature which particularly distinguishes the LOSC from most treaties is that on its own terms it enjoys a strong degree of pre-eminence over other treaties by virtue of its integral status. [N]ot only are states parties not free to derogate unilaterally from its provisions, their freedom to do so multilaterally is also constrained in certain circumstances. *In part these constraints reflect the need to protect the consensus package-deal on which the Convention is based. Without them it could not long*

---

[82] See Chapter 3.
[83] See Chapter 3.
[84] Elaine B Weinstein, 'The Impact of Regulation of Transport of Hazardous Waste on Freedom of Navigation' (1994) 9 International Journal of Marine and Coastal Law 135, 169.
[85] BBNJ Agreement art 47(7).

remain an integrated whole. But equally importantly they help sustain the Convention's character as a global regime for the oceans."[86]

The equality of all States is enshrined in the LOSC. According to its preamble, the LOSC was adopted with the desire to constitute a legal order for the seas and oceans "with due regard for the sovereignty of all States". The freedom of navigation and the freedom to fish are very much based on the legal equality among States, thus effects on the former can affect the latter and *vice versa*. It is relevant to recall that statehood constitutes "a constitutive legal fiction of the international legal system"[87] as it happens with sovereignty.[88] The principle that all States are considered equal "is an essential constitutive fiction of international law"[89]. It has been observed that this "fiction is fundamental. Despite the inequalities between states in fact, in law they are equal (…). A system of law designed by states, for states, and with any aspiration to guide state behaviour, must ensure that no hierarchy can exist between states."[90]

Freedom of navigation is among the most important freedoms because of what it represents to international law. It is worth recalling that the freedom to fish is of the utmost importance for States in general and fishing States in particular. Furthermore, "[t]he most fundamental high seas freedom after navigation is the freedom to fish."[91] For States, the importance of the high seas freedoms, including fishing, results from the fact that high seas freedoms, like navigation and fishing, reflect an inherent principle of international law, such as the (Westphalian) equality of States.[92]

The LOSC is based on the *mare liberum* paradigm.[93] The protection of the marine environment mandated by it is aimed at being achieved by international cooperation that does not jeopardize the equality of States nor their right to exercise freedoms in the high seas. In this respect, the LOSC does not obligate State parties to confer powers to international bodies over their freedoms, notwithstanding the discretion they have. A State party to the LOSC can confer powers and subordinate its jurisdiction to international mechanisms concerning activities in the high seas; however, such conferral cannot challenge the freedom of other State parties not recognizing those mechanisms or applying measures adopted under them.[94] For instance, in the context of high seas fisheries, the LOSC gives States the liberty to constitute RFMOs and apply their measures, and does not restrict high seas fishing activities to those allowed through the regional mechanisms.[95] Consistently, under the law of the sea, cooperation to designate an 'MPA' and to adopt protective measures would be binding on States that agreed to do so, i.e., States that are parties to that agreement.[96]

---

[86] Boyle (n 77) 43–44 emphasis added.
[87] Reece Lewis, *Legal Fictions in International Law* (Edward Elgar publishing 2021) 39.
[88] ibid.
[89] ibid 36.
[90] ibid 37.
[91] Douglas Guilfoyle, 'Article 87 . Freedom of the High Seas' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 682.
[92] Rayfuse (n 59) 444.
[93]LOSC art 87. See Mikki Stelder, 'A Sinking Empire' (2023) 28 Angelaki 53, 55–58.
[94] LOSC art 87(2).
[95] ibid 118.
[96] Jakobsen (n 52) 53.

If some (not all) States, directly or through international bodies or regional mechanisms, "were to agree to take measures to conserve an ecosystem in the high seas through the establishment of MPAs, the resulting restrictions would not apply and be binding on states that were not parties to the agreement."[97] In doing so, those States are free to stipulate, for example, that 'biological diversity' or the 'marine biological diversity' is an element of the 'marine environment' in areas beyond national jurisdiction. The LOSC allows such agreements, permits non-parties to the agreements to *inter alia* navigate areas of the high seas falling under the agreement, while not discharging the latter from the general obligation to protect the marine environment.[98] States parties to the agreement cannot restrict or deprive non-parties from exercising their freedoms in the high seas.[99]

3.5. The New Mandates of the IMO and the ITLOS

The IMO and the International Tribunal for the Law of the Sea (ITLOS) are institutions important for both the BBNJ Agreement and the LOSC. After the entry into force of the BBNJ Agreement, these international bodies would have to adjust their functions in accordance with different treaties simultaneously. The ITLOS has been established by the LOSC.[100] Its jurisdiction concerns the interpretation or application of the LOSC.[101] In parallel, the BBNJ Agreement grants the ITLOS consultative functions together with jurisdiction on dispute settlement.[102]

The mandate of the IMO is established by the IMO Convention.[103] It is regarded as "the competent international organization" in the LOSC.[104] In this context, multilateral agreements have been adopted.[105] Most importantly, IMO aims to enable cooperation between States 'in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade', and 'to encourage and facilitate the general adoption of the highest practicable standards in matters concerning the maritime safety, efficiency of navigation and prevention and control of marine pollution from ships.'[106] In addition, the IMO addresses 'any matters concerning shipping and the effect of shipping on the marine environment that may be referred to it by any organ or specialised agency of the United

---

[97] ibid.
[98] LOSC art 192; Jakobsen (n 52) 53.
[99] Jakobsen (n 52) 53.
[100] LOSC app Annex VI.
[101] ibid 288(1).
[102] BBNJ Agreement art 47(7) and 60(5.a).
[103] Convention on the Intergovernmental Maritime Consultative Organization (hereinafter the IMO Convention), Geneva, 6 March 1948, in force 17 March 1958, 289 UNTS 3.
[104] LOSC art 211(1).
[105] Aldo Chircop, 'The International Maritime Organization' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens (eds),The Oxford Handbook of the Law of the Sea (Oxford: Oxford University Press 2015), 421.
[106] IMO Convention, Article 1(a).

Nations.'[107] It is known that "[n]inety per cent of global trade is conducted by shipping, which is considered to be the most environmentally friendly form of transport, taking into account its productive value. Shipping contributes to a limited extent to marine pollution from human activities, in particular when compared to pollution from land-based sources (or even dumping)".[108] The great participation of States in conventions adopted under the mandate of the IMO has allowed the regulation of activities of almost all the tonnage of the world's merchant fleet.[109] However important to protect the marine environment, the making and implementation of IMO regulations and standards addressed to States is not limited to the combination that may be achieved by cooperation with regional mechanisms such as RFMOs or their members.[110]

In the LOSC, States are required to conform to 'generally accepted international regulations' applicable to vessels flying their flags and to adopt laws and regulations that have *general acceptance* ('generally accepted international rules and standards' or 'GAIRs').[111] After States acknowledge that this and the other thresholds provided by the LOSC are met, parties to the LOSC that have not formally and directly consented to those regulations are indirectly obligated to comply with them through the LOSC.[112] Differently, in the BBNJ Agreement, after *some* States acting through limited access mechanisms determine that environmental thresholds given by the treaty have been met, a regional body, such as an RFMO, may become entitled to agree to regulations and standards on commercial navigation and subsequently bind all State parties.[113]

4. Key Aspects of this Research

4.1. Main Question, Purpose, and Scope

The *main research question* is: How may the area-based management measures under the BBNJ Agreement affect the freedom of navigation of commercial vessels in areas beyond national jurisdiction?

The work submits *the hypothesis* that the BBNJ Agreement constitutes a freestanding environmental legal framework with the potential to, first, fragment the international law of

[107] IMO Convention, Article 1(d).
[108] Fitzmaurice, Malgosia, "The International Convention for the Prevention of Pollution from Ships (MARPOL" in IMLI Manual Vol. III, Attard (ed), Oxford University Press, p. 33.
[109] Jakobsen (n 52) 56.
[110] ibid 53; Bastiaan Ewoud 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 The International Journal of Marine and Coastal Law 107, 112.
[111] LOSC art 94(5) and 211(2). Literature indicates that the term 'GAIRs' is not clear and need to be further defined, Jakobsen (n 52) 57.
[112] LOSC arts 197 and 237.
[113] BBNJ Agreement art 8(1), 25(6) and 29(4.b.ii).

the high seas into different legally binding regulatory areas under 'MPAs' and 'ABMTs' comprised in regions of that vast maritime zone and, subsequently, reconfigure the freedom of navigation in a manner different from that envisaged in the LOSC. The hypothesis builds on the finding that the BBNJ Agreement, embedded in contemporary international environmental law, is not dependent on the LOSC and that it has to be understood separately and as representing a shift of paradigm on ocean affairs towards a binding regionalization of the high seas. Subsequently, because of being two different treaty contexts regarding different aims, the work considers that, in conventional terms, the freedom of navigation as understood in the LOSC must not be equated with the freedom of navigation implied in the BBNJ Agreement. Based on a procedural legal mindset, the process for contributions carried out through the procedural rules in Parts III and IV may allow visualizing how the BBNJ Agreement provides positive connotations to legal fragmentation while providing a subsequent mechanism for later harmonization, potentially establishing a parallelism with the LOSC.

Therefore, *the purpose* of this work is to identify the upcoming challenges for the equality of States and, therefore for the freedom of navigation by providing a *different approach* to the BBNJ Agreement thus not envisaged in current international legal literature. The academic contribution, thus, consists in giving new elements for legal reasoning and future policy. The widespread view is that the BBNJ Agreement would mainly provide a unifying framework for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction, including the high seas.[114] In contrast with that expectation, this work focuses on how provisions in Part III and IV might interplay in a *practical* manner, according to which achieving the goals of the treaty may prevail over the freedom of navigation in a way that does not necessarily imply maintaining the equality among States. The work gives special attention to 'Measures such as' those that the BBNJ COP may take, i.e., 'ABMTs' or 'MPAs' and also to others made by the relevant IFBs, including RFMOs and the IMO, by which these IFBs may collaborate and *directly* achieve the objectives of the treaty (i.e., not through the BBNJ COP). In this view, the work seeks to demonstrate that the BBNJ Agreement, particularly Parts III and IV, may constitute the *procedural* legal basis for an international institutional vertical scheme that benefits some States and not others.

As to *the scope* of this research, this work mainly focuses on the BBNJ Agreement and its Part III BBNJ Agreement framework in connection with the high-seas freedom of navigation. This work does not provide an in-depth assessment of the LOSC, considered here as corresponding to an earlier, different regime. Illustrative occasional references may be made to other activities on the high seas, like fishing, or other maritime zones and their respective rules, like the Area or zones under the jurisdiction of States. References to the CBD are also occasional and illustrative. These activities and zones, however, are not the main subject matter under analysis and, therefore, are outside the scope of this inquiry. In addition, this research does not discuss every aspect of the arrangements for ABMTs or MPAs under the BBNJ Agreement. It focuses on the selected aspects that are relevant to answering the main research question and developing the scope of each chapter.

[114] Bodansky (n 18) 301.

4.2. Relevance

This research is *relevant* to understanding the importance of the area-based management network provided mainly by Parts III and IV and the nature of the BBNJ Agreement. A comparison of this treaty with the UNFSA allows precision to be given to the content of the obligation to cooperate as enshrined through treaty provisions. This work assesses the classical freedom of navigation on the high seas before the trends and legal developments that put the 'conservation' and 'sustainable use' of 'marine biological diversity' at the core of a global comprehensive international instrument such as the BBNJ Agreement, which sets out the legal basis to make recommendations and take decisions to establish binding 'MPAs' and other 'ABMTs' in areas beyond national jurisdiction including the high seas. The significance, thence, consists of recognizing whether and to what extent the equality of States and navigation of commercial vessels may be affected by the forthcoming global framework on 'marine biological diversity'. In this manner and through legal reasoning, the research attempts to understand how the right of the flag State to freely navigate the high seas and the jurisdiction it has over its vessel may be understood when facing regimes comprised within the tools adopted for the overarching objective of conservation and sustainable use of marine biological diversity. The objectives and the effectiveness of an 'MPA' and other 'ABMTs' might be conditioned by the need to restrict the freedom of navigation in part, or the totality of the geographical scope covered by them.

Clarifying the nature of the BBNJ Agreement and the potential of the *contributions* that may be achieved through it may be important for, for instance, *stakeholders* in the shipping sector. During negotiations, some concerns about the arrival of new international environmental law and the restrictions it may entail were perceivable. The International Chamber of Shipping, for instance, proposed explicitly reducing the activities that would fall within the scope of the BBNJ Agreement.[115] Some skepticism may remain on the part of some of the 'stakeholders'. The explanations and the views shown here will function as a deterrent to that skepticism and possibly as *some* optimism for those working in the sector.

In strictly legal terms, it may be possible that the BBNJ Agreement constitutes a whole new system based on presumptions following a paradigm that shifts away from the one that

[115] The proposal read "It shall not apply to activities: (a) Undertaken or permitted by States to occur within their national jurisdiction [unless those activities pose a risk of substantial negative impacts to biodiversity or significant and harmful changes to the marine environment in areas beyond national jurisdiction]; (b) Enumerated in Article 87(1) Freedom of the High Seas, [subject to certain further limitations and requirements] [set forth herin as may be necessary from time to time] to protect and conserve biodiversity, marine resources and the environment; (c) Related to mining in the Area as governed by the provisions of Part XI and the Agreement relating thereto; (d) Related to fishing, as governed by Part VII and the United Nations Fish Stocks Agreement; (f) Subject to the regulation or supervision by, or under the jurisdiction of, recognised global, regional, sub-regional or sectoral bodies, agreements, treaties or other binding agreements among States.", 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 (A/CONF.232/2020/3) 34–35.

has traditionally characterized international law and, particularly, the law of the sea and the LOSC. Traditional assumptions, then, may give way to new ones. Any incisive analysis of the precise and specific consequences of the BBNJ Agreement on the rights and obligations of States in the high seas might seem bold at the moment. It is. The reader must not expect accurate details in this regard, mostly because the treaty has not entered into force. In this mindset, the research undertaken explores the provisions of the BBNJ Agreement and their interplay from a broad perspective, looking at it as a whole new legal context that the treaty represents for areas beyond national jurisdiction.

4.3. Discussion and Structure of the Thesis

The present work discusses the BBNJ Agreement by approaching it as a universal legal platform with the potential of causing the fragmentation of the international law governing the high seas. Fragmentation may be considered the legal consequence of the diversity of international substantive and procedural rules.[116] On the one side, a variety of regimes (areas with a defined material scope) and a diversity of geographical or regional lines set the basis for the substantive fragmentation of international law (fragmentation in substance).[117] The combination of, first, regime fragmentation and, second, geographical fragmentation may give rise to, third, parallel or conflicting norms or obligations applying to the same subjects of international law.[118] On the other side, the variety of procedural or secondary rules involved in this type of fragmentation might relate to the creation, interpretation, change, and enforcement of treaty rules.[119] This aspect of fragmentation concerning procedural or secondary rules arises mostly in the context of multiple international courts and tribunals.[120] The regulatory areas constituted under 'ABMTs' and 'MPAs', based on 'Relevant IFB Measures' and established under Part III, would have to be read in light of this complex international phenomenon.

The BBNJ Agreement has not entered into force, and therefore it is not possible to predict the definitive impact on navigation on the high seas. However, the current conventional text provides some grounds that suggest that it might be affected by it. In the context of the BBNJ Agreement, this work sustains that the effects on the right to freely navigate the high seas find a cause on three main factors: the unclear relationship between the new treaty and the LOSC; the unique normative-making process encouraged by the BBNJ Agreement and the openness to "stakeholders" under Part III. Simultaneously, the BBNJ Agreement involves transformative legal mechanisms that could change the current role of influential institutions on maritime legal affairs, such as the IMO. Eventually, this might also impact the judicial functions of the ITLOS.

---

[116] Joost Pauwelyn, 'Fragmentation of International Law', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2006) para 1.
[117] ibid 2–3.
[118] ibid 4.
[119] ibid 5.
[120] ibid.

Following this introduction, the thesis is structured in five chapters and a conclusion. Chapter 1 provides an assessment of some of the salient features of the BBNJ Agreement, focusing on Part III and Part IV. It commences by assessing the structure and nature of the treaty. Later, it considers the geographical and material scope of the treaty. After this, it refers to the scope *ratione personae* of the treaty. The chapter continues by assessing some of the relevant institutional arrangements established. It then deals with the judicial function of the ITLOS under the treaty. Following this, it provides insight into the making of the legal system following the BBNJ Agreement, highlighting the importance of the notions 'collaboration' and 'contribution'. The consultation procedures regulated by the treaty, or non-regular and time-bound consultations, are addressed. Finally, the chapter engages in an examination of the modalities restricting the competencies of States parties acting through the Conference of the Parties (COP).

Chapter 2 provides a preliminary assessment of the content of the obligation to cooperate in terms of the BBNJ Agreement. With that aim, it commences by referring to the cooperation required by Part I and Part VI to later address the cooperation mandated by Part III and Part IV. In doing so, such assessment, relevant provisions of the UNFSA are pointed out. The chapter then refers to the potential role RFMOs may have under the BBNJ Agreement while reflecting on how they are referred to in the LOSC and the UNFSA. In light of this, the presumptions underlying the duty to cooperate are highlighted together with their impact on the institutional and legal dimensions of the BBNJ Agreement. After clarifying the cooperation needed by the treaty, the chapter points out the possible consequences it may have on the status of some of the relevant institutional arrangements and access to information. In this context, it provides reflections about the COP, the Scientific and Technical Body (STB), and the Clearing House Mechanism (CHM). Against this background, the chapter concludes, strengthening the presumption that the equality of States may be affected by the BBNJ Agreement.

Chapter 3 addresses some of the general features of the UNFSA that are now reflected in the BBNJ Agreement. Focusing on this issue clarifies the ties between these treaties and thereby recognizes the UNFSA's relevance as a key precedent and model treaty for the drafting of the BBNJ Agreement. Given that both treaties underpin a functional-regional approach that departs from the functional-zonal approach enshrined in the LOSC, a study of the UNFSA model would contribute to realizing some of the possible consequences of the BBNJ Agreement. More particularly, this would set the basis to consider the extent to which the freedom of navigation might potentially be affected by the BBNJ Agreement. This chapter offers a review of the UNFSA by focusing on three of its features, schematized: its freestanding status with respect to the LOSC; its dependence on RFMOs mainly; and the decentralization characterizing its normative making. The examination in this schematic form illustrates how salient aspects of the UNFSA, in conjunction with later legal developments supported by it, have affected the freedom of fishing and, together with it, the freedom of navigation that fishing vessels. In this way, the chapter aims at strengthening the presumption that the BBNJ Agreement may affect the freedom of navigation by somehow mirroring the features of the early treaty.

Chapter 4 addresses substantive elements of the main research question about how the BBNJ Agreement might affect the regulation of commercial navigation, together with the freedom of navigation of State parties in the high seas. In so doing, the chapter assesses relevant aspects of the relationship between Part III on MPAs and other ABMTs and Part IV on EIAs. The arguments in this chapter unfold above the idea that the framework for area-based management embodied in Part III BBNJ Agreement represents a shift away from the law of the sea and the LOSC. At the same time, the chapter builds upon the existing awareness about the solidification of relevant international instruments and frameworks and relevant IFBs allowed by Part III and, in this view, sustains that the 'stakeholders' would play a key role as to the authorization of activities such as navigation in areas beyond national jurisdiction. Special attention is devoted to the role of the RFMOs and the IMO. Endorsing the view that the BBNJ Agreement reflects the main characteristics of the UNFSA and is arguably going to have the same status with respect to the LOSC, the chapter builds upon the scheme utilized to study the UNFSA in the previous chapter. The chapter starts by highlighting the legal presumptions at the foundations of the treaty. Next, it examines the freestanding status of the BBNJ Agreement to the LOSC, appraising Part III as an instrumental sign of this feature; the international cooperation and the dependence on external regional bodies and instruments; and, lastly, the decentralization of normative making. The chapter concludes with some insights into the possible consequences of Part III on commercial navigation on the high seas.

Chapter 5 provides suggestions for harmonizing the BBNJ Agreement and the LOSC. To this end, the chapter focuses on two possible scenarios. First, it considers how a systemic interpretation of the relevant provisions of the LOSC under the BBNJ Agreement might be undertaken, taking into account the situation of States that may become parties to both treaties. Noting that harmonization may be possible through judicial reasoning, the chapter focuses on the role that ITLOS may play in this regard. Later, the chapter assesses the situation of States that might be reluctant to ratify the BBNJ and suggests possible ways in which these States might be persuaded to contribute to harmonization. In doing so, the chapter highlights the potential position of States that support the treaty.

CHAPTER 1

AN ASSESSMENT OF THE TEXT OF THE BBNJ AGREEMENT

1. Introduction

This chapter provides an assessment of some of the salient features of the BBNJ Agreement, focusing on Part III and Part IV. It commences by assessing the structure and nature of the treaty. Later, it considers the geographical and material scope of the treaty. After this, it refers to the scope *ratione personae* of the treaty. The chapter continues by assessing some of the relevant institutional arrangements established. It then deals with the judicial function of the ITLOS under the treaty. Following this, it provides insight into the making of the legal system following the BBNJ Agreement, highlighting the importance of the notions 'collaboration' and 'contribution'. The consultation procedures regulated by the treaty, or non-regular and time-bound consultations, are addressed. Finally, the chapter engages in an examination of the modalities restricting the competencies of States parties acting through the COP.

The chapter constitutes a first step towards defining whether this new treaty might or might not affect the freedom to navigate and, if so, whether it might affect that freedom in a manner not provided by the LOSC. In this respect, acknowledging the differences between the

BBNJ Agreement and the LOSC allows approaching the study of the freedom to navigate separately from its earlier conception in Article 87(1.a) LOSC. Enhancing the legal importance of the BBNJ Agreement clarifies the importance of the potential overlap with the LOSC.

2. Structure and Nature of the Treaty

The BBNJ Agreement consists of a main text of 76 Articles, divided into 12 parts, and two annexes. The BBNJ Agreement provides regulations on the components negotiated under the 2011 "package deal": marine genetic resources (MGR) (Part II), area-based management tools ('BBNJ ABMTs' or simply 'ABMTs'), including 'MPAs' ('BBNJ MPAs' or simply 'MPAs') (Part III), environmental impact assessments ('EIAs') (Part IV), and capacity-building and the transfer of marine technology (Part V).[121] The Agreement establishes different bodies, including the COP, the STB, a Secretariat (BBNJ Secretariat or simply Secretariat), a CHM, and other subsidiary bodies (Access and Benefit Shearing Committee, Implementation and Compliance Committee, Capacity Building and Transfer of Marine Technology Committee, Finance Committee). The Agreement also addresses other cross-cutting issues such as implementation, compliance, funding, and dispute settlement. Such cross-cutting issues are relevant for implementing the BBNJ Agreement and subsequent measures *as a whole*. Unless expressly provided, the treaty does not permit reservations or exceptions to it.[122] However, it gives a set of rules for its amendment.[123]

The characteristics of the BBNJ Agreement are promising for establishing the legal basis for a comprehensive global regime and, therefore, for progressive legal development of a variety of issues. The BBNJ Agreement makes explicit references to the 'relevant provisions' of the LOSC.[124] Furthermore, it aims at having an impact on customary law, beyond treaty law.[125] While some of the substantive provisions give only a few indications of their scope and

[121] Fernanda Millicay, 'Marine Biodiversity of Areas Beyond National Jurisdiction: Securing a Sound Law of the Sea Instrument' in David Joseph Attard, David M Ong and Dino Kritsiotis (eds), *UN and Global Ocean Governance* (Oxford University Press 2018) 167–178.
[122] BBNJ Agreement art 70. Declarations and statements are permitted, ibid 71.
[123] BBNJ Agreement art 72.
[124] ibid 4 of the Preamble.
[125] "The denunciation shall not in any way affect the duty of any Party to fulfil any obligation embodied in this Agreement to which it would be subject *under international law independently of this Agreement*.", ibid 73(2) (emphasis added). This provisions may become relevant since it relates to the making of a potential *customary* obligation to establish MPAs and other ABMTs. Duan explains that "the conservation/management measures associated with MPAs in [areas beyond national jurisdiction] adopted under a treaty regime may also have legal effects on third States through those general obligations under customary international law, which is also subject to the necessity of those measures and the economic/technical capacity of the third States (…). As to whether there is a direct customary obligation to establish MPAs in ABNJ, due to insufficient State practice of the establishment and management of MPAs in [areas beyond national jurisdiction], such an obligation has not emerged as yet.", Wen Duan, *The International Legal Regime Relating to Marine Protected Areas in Areas beyond*

content, future normative-making and subsequent normative (decisions and recommendations) would certainly "add precision and specificity" to the obligations the BBNJ Agreement establishes as it applies in the context of the high seas and the Area.[126]

2.1. Objectives of the Treaty

According to Part I, the general objective of the BBNJ Agreement is "to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction".[127] In terms of the treaty, the objectives and *measures* under Parts III and IV should be understood as mechanisms for international cooperation to achieve the general objectives in Part I through *collaboration* and *contribution*.

Part III, in Article 17, gives a lists of objectives.[128] Part III has the objective to *inter alia* "[c]onserve and sustainably use areas requiring protection".[129] The phrase establishing this objective continues with the expression "including through" and then adds "the establishment of a *comprehensive* system of [ABMTs], with ecologically representative and *well-connected* networks of [MPAs]".[130] In addition, Part III aims to "[p]rotect, preserve, restore and maintain biological diversity and ecosystems".[131] Part IV also provides for a list of objectives in Article 27. Part IV has the purpose of *inter alia* "[a]chieve *a coherent* [EIA] *framework* for activities in areas beyond national jurisdiction"[132] and "establishing processes, thresholds and other requirements for conducting and reporting assessments by Parties"[133].

Part IV, in Article 28(1), establishes that State parties "shall ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control that take place in areas beyond national jurisdiction are assessed as set out in this Part IV *before*

National Jurisdiction: Identifying and Addressing Gaps (Brill | Nijhoff 2022) 341 <https://brill.com/view/title/62423> accessed 21 August 2023.

126 *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion* (2011) 2011 ITLOS 10 (ITLOS Seabed Disputes Chamber) [149].

127 BBNJ Agreement art 2. The BBNJ Agreement does not define "conservation", "biological diversity" or "marine biological diversity". However, it does provide a concept of "sustainable use": "the use of components of biological diversity in a way and at a rate that does not lead to a long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.", ibid 1(13).

128 BBNJ Agreement art 17(a-e). These objectives include supporting "food security and other socioeconomic objectives, including the protection of cultural values" and "developing State Parties (…) through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing" ABMTs including MPAs, ibid 17(d)(e).

129 BBNJ Agreement art 17(a).

130 ibid (emphasis added).

131 ibid 17(c).

132 ibid 27(e) (emphasis added).

133 ibid 27(a).

they are authorized."[134] Forward, it mandates that State parties "under whose jurisdiction or control a planned activity falls shall be responsible for determining if it may proceed".[135]

Additionally, Part IV sets out "Thresholds and Factors for conducting [EIAs]" under Article 30 and a "Process for [EIAs]" in Article 31. According to Article 31, State parties "shall ensure that the process for conducting an [EIA] pursuant to [Part IV] includes the following steps:" (a) 'screening', (b) 'scoping', (c) 'impact assessment and evaluation', (d) 'prevention, mitigation, and management of potential adverse effects'.[136] Part IV establishes environmental thresholds and indicates that "[w]hen a planned activity may have more than a *minor or transitory effect on the marine environment*, or the effects of the activity are *unknown or poorly understood*, the Party with jurisdiction or control of the activity shall conduct a screening of the activity under article 31"[137] It also provides non-exhaustive factors to be considered when determining whether planned activities meet the environmental thresholds.[138] In this context, Article 29 on the relationship between the BBNJ Agreement and the EIA processes under IFBs provides a set of rules that allow the prevalence of external EIAs and subsequent measures over the EIA and measures under the COP.[139]

2.2. A Framework Agreement

This new treaty certainly relates to the notion of a framework treaty, defined by Matz-Lück as "a legally binding treaty of international law that establishes broad commitments for its parties and a general system of governance, while leaving more detailed rules and the setting of

[134] ibid 28(1) (emphasis added).
[135] ibid 34(1). These obligations set out in Part IV emphasize the obligations of States. Interestingly, they do not provide obligations or responsibilities of IFBs generically indicated in Article 29 nor for other 'stakeholders'. In this respect, obligations and responsibilities would be a subject matter that the given IFB would have to decide within its context, i.e., the issue would be entirely dependent on the States participating within those IFBs. This might turn out in a difficulty for accountability for those who do not participate in them or who do not have enough political power within them.
[136] Article 31(3) establishes that "[a] roster of experts shall be created under the [STB] (…). The experts cannot be appointed to another part of the environmental impact assessment process of the same activity." It also indicates that "Parties with capacity constraints may request advice and assistance from those experts to conduct and evaluate screenings and [EIAs] for a planned activity under their jurisdiction or control (…). The Party that requested the advice and assistance shall ensure that such [EIAs] *are submitted to it for review and decision-making.*" (emphasis added). This would be important for IFBs in which 'States parties with capacity constraints' participate. In Part VI, Article 49(3) provides that the STB "may draw on appropriate advice emanating from [relevant IFBs], as well as from other scientists and experts, as may be required." The wording of these provisions might give the impression that the EIAs pointed out in Article 31(3), i.e., those requested by the 'States parties with capacity constraints', somehow ends up falling under the control of an IFB different from the COP.
[137] BBNJ Agreement art 30(1) (emphasis added).
[138] ibid 30(2).
[139] ibid 29(4).

specific targets either to subsequent agreements between the parties, usually referred to as protocols, or to national legislation."[140]

Indeed, the lack of precision of the substantial rules and the provision of an institutional framework are typical aspects of framework agreements.[141] The BBNJ Agreement contains a great number of procedural rules but lacks clear, substantial rules concerning, for instance, the impact on activities like navigation undertaken under the 'MPAs' or other 'ABMTs' established after taking decisions under Part III.

Broad commitments in the BBNJ Agreement include the general objective in Article 2 in Part I and the special objectives in Article 17 in Part III. Article 7 in Part I, which establishes general principles and approaches, can also be included among the broad commitments. The lack of precision in the current provisions serves to illustrate that, to date, it is not possible to know how these commitments are going to definitely and specifically condition and shape the rights and obligations of States on the high seas when the latter find themselves balanced with the objectives of the BBNJ Agreement. Simultaneously, the fact that the drafters have decided to establish broad commitments reflects the obvious need for complementary later instruments providing precision to those broad commitments under the BBNJ Agreement.

Certainly, the normative-making process and the application of the resulting rules will be of conclusive importance in operationalizing the BBNJ Agreement and recognizing the specific consequences of the area-based management framework it aims to constitute over the freedoms of the high seas, such as the freedom to navigate. Moreover, some authors suggest that the BBNJ Agreement might be considered *a framework of frameworks* or *four treaties in one*.[142] Indeed, the special objectives and some terminology employed in Part III entail a certain degree of specialty with respect to the general provisions in Part I. In addition, Part IV complements and adds precision to Part III. In short, the area-based management framework constituted by the BBNJ Agreement should be understood as comprising these two closely complementary parts as if they were one. Navigation in the high seas and other activities taking place in those vast spaces would be affected by measures of IFBs under that scheme.

2.3. A Treaty of International Environmental Law Hardly Classifiable under the Law of the Sea

The notion of 'marine biological diversity' is, without a doubt, essential to the legal scheme under the BBNJ Agreement. The BBNJ Agreement, however, does not define 'marine

---

[140] Nele Matz-Lück, 'Framework Agreements', *Max Planck Encyclopedia of Public International Law* (On line, Oxford University Press 2011) para 1 <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022.

[141] Rüdiger Wolfrum, 'Solidarity and Community Interests: Driving Forces For the Interpretation and Development of International Law', *Recueil des cours*, vol 416 (Koninklijke Brill NV 2021) 254.

[142] Bodansky (n 18) 299; Gian Maria Farnelli, 'Introduzione: Il Traguardo Dell'Accordo BBNJ' in Gian Maria Farnelli and Silvia Catalano (eds), *Biodiversità e mare: il traguardo dell'Accordo BBNJ* (Dipartimento di Scienze giuridiche della Università di Bologna 2024) 1–7.

biological diversity'. Considering 'marine biological diversity' as a component of the 'marine environment' in areas beyond national jurisdiction emerges as a fundamental premise to sustain that the BBNJ Agreement is meant to *implement* the LOSC and, therefore, to suggest a hypothetical succession or subordination of the new treaty in respect of the earlier one in respect of areas beyond national jurisdiction. It would be right to ascertain that 'marine biological diversity' is a component of the 'marine environment' in the context of the BBNJ Agreement. However, the term 'marine biological diversity' does not stem from the text of the LOSC.

Reading the text of the LOSC provisions makes it difficult to ascertain that 'biodiversity', 'biological diversity' or 'marine biological diversity', is a concept included in the conventional context. In contrast, terms such as 'substantial pollution', 'significant and harmful changes' and 'marine environment' in the LOSC are spelled in the same manner as it is written in the BBNJ Agreement. Similar semantics, however, do not overrule legal reasoning.

The LOSC, *as it is,* deals with the notion of the 'marine environment' without defining it. It recognizes some of its components, such as the habitat, ecology, species, and other forms of marine life, and qualifies some of them as 'marine living resources' because of their commercial or economic value.[143] The latter results in, for instance, how conservation is understood under the LOSC, which focuses mainly on the need to conserve and manage commercial fish stocks.[144] In this reasoning, it should be acknowledged that the word 'environment' in the term 'marine environment' evidences the relation between the LOSC and the receptiveness to international environmental law present at the time of its drafting.[145] The Stockholm Declaration, a milestone of international environmental law, had already set out several principles regarding the environment before the adoption of the LOSC.[146] Part XII LOSC on marine environmental protection was built upon the foundation articulated in the Stockholm Declaration and in accordance with the environmental awareness of that time.[147] "Part XII needs to be interpreted in that context."[148] Accordingly, the LOSC and international instruments consequent to environmental normative developments later to the Stockholm epoque must be assessed with a differentiated legal sensitivity.[149]

The concept of 'biodiversity' can be located within contemporary international environmental law, meaning normative developments in the field *after* the 1972 Stockholm Declaration on the Human Environment.[150] Distancing from the Stockholm epoque,

143 LOSC art 1(1)(4), 116–120, 194(5).
144 Patricia W Birnie, Alan E Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed, Oxford University Press 2009) 702.
145 Jakobsen (n 52) 65–67.
146 'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972' (United Nations 1973) A/CONF.48/14/Rev.1 3–6 <https://digitallibrary.un.org/record/523249?v=pdf> accessed 30 March 2024.
147 Weinstein (n 84) 168.
148 ibid 169.
149 Sands and others (n 36) 21–51.
150 'Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972' (n 146) 3–6. De Sadeleer observes that "[p]rinciples are far more widely in evidence in environmental law than in any other field of law. International environmental law provides a particularly propitious breeding ground for principles, for while it is difficult to agree on fixed and precise rules at the international level, it is far easier to come to a public understanding about indefinite principles that can

contemporary international environmental law is reflected in instruments such as the 1992 Rio Declaration,[151] Agenda 21,[152] 2002 Johannesburg Declaration on Sustainable Development and the Plan of Implementation,[153] 2012 "The Future We Want",[154] and Agenda 2030,[155] all of which provided meaningful inputs and principles in this legal field. Contemporary international environmental law gives new approaches, principles, and concepts, like the 'MPA' tool for the conservation of 'biological diversity', which mainly emerged in the international plane during the 1990s, i.e., after the adoption of the LOSC.[156] Because of this, the BBNJ Agreement can be considered to be embedded in contemporary international environmental law according to global circumstances and views very different from those present during the UNCLOS III.

Article 1 does not give a concept or a notion of 'conservation' or 'marine biological diversity', terms broadly spread all over the text of the BBNJ Agreement. Biodiversity is a rather "new concept in nature conservation."[157] It gained global legal importance because of normative developments outside the LOSC, such as the 1992 CBD, a significant outcome of the UN Conference on Environment and Development.[158] Different from the BBNJ Agreement, Article 2 CBD provides an explicit definition of "biological diversity." According to it, 'biodiversity means "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems."[159]. The CBD differs and detaches from the categories and terminology, like "fauna and flora," "habitats," or "species," often used in earlier instruments on nature conservation thus having a *broader* material scope.[160] Curiously, in contrast to the idea of establishing an instrument *under the LOSC*, the CBD had been considered as an appropriate context for an instrument aimed at the establishment of 'MPAs' on the high seas.[161]

---

progressively be given more concrete form. The 1972 Stockholm Declaration on the Human Environment, the 1982 World Charter for Nature, and the 1992 Rio Declaration on Environment and Development -as well as Agenda 21, intended to clarify the scope of the 1992 UN Declaration, are replete with principles. These have been taken up, and often refined, by scores of international conventions adopted in their wake.", Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002) 1.

[151] 'Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions Adopted by the Conference' (United Nations 1993) A/CONF.151/26/Rev.1 <https://digitallibrary.un.org/record/160453?v=pdf> Annex I.

[152] ibid Annex II.

[153] 'Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002' (United Nations 2002) A/CONF.199/20 <https://digitallibrary.un.org/record/478154?v=pdf>.

[154] UNGA A/RES/66/288 (n 50).

[155] Transforming our world: the 2030 Agenda for Sustainable Development 2015 [A/RES/70/1].

[156] Jakobsen (n 52) 65–66.

[157] ibid 86. "The terms 'biological diversity' and 'ecosystem' were introduced as new *legal* terms through the adoption of the CBD", ibid 107 (emphasis added).

[158] 'Rio 1992' (*UN Conferences | Environment and sustainable development*) <https://www.un.org/en/conferences/environment/rio1992>.

[159] CBD art 2.

[160] Jakobsen (n 52) 86–87.

[161] In 2003, Young observed that "[t]he international climate currently appears to discourage the adoption of new international agreements. Hence, the development of an international [high seas MPA] framework would appear to stand a better chance if it is closely linked to one of the key international

Literature indicates that the introduction of the notion of 'biodiversity' was instrumental in protecting non-commercial species.[162] In this respect, Jakobsen has observed that the concept was designed by scientists, after the UNCLOS III, "to group ecological, species and genetic diversity."[163] The notion of biological diversity is not easy to define; some have explained that biological diversity does not refer to *the sum of all life* but to the variability of life at the genetic, species, and ecosystem levels.[164] Due to its comprehensive nature, the notion of biological diversity has entailed normative complexities and difficulties, and, subsequently, conserving it presents *enormous regulatory challenges to international law*.[165] Albeit some of the wording utilized for drafting the LOSC (such as 'habitat', 'ecology', 'species', and other forms of 'marine life'), 'biological diversity' or 'marine biological diversity' is not expressly included among those mentioned. Literature has discussed this concept and others revolving around it.[166]

Interestingly, Takacs has offered some clarity to this issue by making it understandable that 'biological diversity' or 'biodiversity' is destined to remain undefined. It would appear that the strength of the notion lies in its indefiniteness. After the CBD was adopted and the definition in Article 2 was drafted, Takacs went through an in-depth examination of the *invention* of *the idea of biodiversity*, including the impressive emergence of this complex *idea* and the *creation* of the *biodiversity crisis* in the United States in the mid-1980s.[167] Notwithstanding that a

---

frameworks – [LOSC] or the CBD (…). The CBD offers the possibility of establishing an HSMPA Protocol, or adopting a new "Annex" to the convention.", Tomme R Young, 'Developing a Legal Strategy for High Seas Marine Protected Areas' in Kristina M Gjerde and Charlotte Breide (eds), *Towards a strategy for high seas marine protected areas: proceedings of the IUCN, WCPA and WWF experts workshop on high seas marine protected areas, 15 - 17 January 2003, Malaga, Spain* (IUCN 2003) 21–22.

[162] Jakobsen (n 52) 87.

[163] ibid 86 footnote 6.

[164] ibid 87.

[165] Sands and others (n 36) 449. Fisher states that "[b]iodiversity is one of those concepts that does not fit comfortably within the legal system. If it is assumed that biodiversity is in certain contexts a value, then the function described as the conservation of biodiversity seeks to protect a value that is as elusive as other values that are said to underlie the legal system such as freedom, liberty, democracy, or property.", DE Fisher, 'Legal and Paralegal Rules for Biodiversity Conservation: A Sequence of Conceptual, Linguistic, and Legal Challenges' in Michael I Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity Conservation, Law + Livelihoods: Bridging the North–South Divide* (Cambridge University Press 2008) 95 <https://www.cambridge.org/core/product/identifier/9780511551161/type/book> accessed 27 June 2024.

[166] Jakobsen (n 52) 87–88. Jakobsen points out that "[t]he concept of biological diversity is a dynamic term that is difficult to apply in a legal sense. We do not have knowledge about all species and of all interactions between species and within and between ecosystems. Furthermore, the term biological diversity does not make any distinctions concerning the value or significance of the different elements of biological diversity. The definition does not distinguish between wild and cultivated species, or new species and alien species; do these species have the same legal status and protection? Is it equally important to protect all biological diversity? The concept of biodiversity is also difficult to legally apply due to its broad and comprehensive nature.", ibid 87. The author observes that "[i]t is also difficult to determine when the biological diversity is conserved or when the goal of sustainable use is achieved. The concept of biological diversity thus raises many questions and leaves room for *subjective interpretation* by the Contracting Parties", ibid 88 (emphasis added).

[167] David Takacs, *The Idea of Biodiversity: Philosophies of Paradise* (Johns Hopkins University Press 1996) arts 34–40.

definition was already included in the universal CBD, his work concluded with the assertion, "[d]on't know what biodiversity is? You can't."[168] After pointing this out, he immediately added, "[p]erhaps biodiversity is an appropriate term. The confusion it conveys reveals our pathetic weakness in thinking we can define, know, and control a nature that will always dance just beyond our grasp."[169] Without going deeper into this, at present, the reflection of Takacs translates into a challenge to understanding the aims of the BBNJ Agreement. This allows acknowledging the *emptiness* and also the *vastness* that the core notion of the whole global system possesses.

Notwithstanding their relationship with marine environmental issues, international environmental law and the law of the sea are acknowledged as two different branches of international law.[170] This becomes evident within the LOSC. Part XII LOSC shows how the law of the sea deals with environmental issues (and not *vice-versa*) by including them in a legal context posed upon the fragile balance of interests safeguarded at UNCLOS III.[171] The term 'marine environment' is used within this specific legal context of the LOSC thus under its functional-zonal approach.[172] Just for illustrative purposes, under the LOSC, it might be legitimate to interpret that there *are as many marine environments as maritime zones*.[173] The protection and preservation of the marine environment in general requires the engagement and cooperation of States parties when performing statuses such as 'flag State' or 'coastal State' in the different maritime zones.[174] Contrastingly, this may not be the case in contemporary

[168] ibid 341.
[169] ibid.
[170] Pascale Ricard, 'Les Aires Marines Protégées En Haute Mer et La Difficile Conciliation Entre Droit de La Mer et Droit de l'environnement' in Patrick Chaumette (ed), *Transforming the ocean law by requirement of the marine environment conservation* (Université de Nantes - Marcial Pons 2019) 250. Ricard stresses that "[l]e droit de l'environnement a néanmoins entraîné de profonds changements en droit international, de par ses caractéristiques. Par exemple, les acteurs non étatiques 'jouent un rôle bien plus important que celui qui leur est habituellement dévolu': les opérateurs privés sont à la fois les principaux auteurs de pollutions et les détenteurs de technologies permettant la protection de l'environnement. Les ONG jouent également un rôle très important, notamment dans le processus de production de normes. Cette caractéristique s'oppose au droit de la mer qui est, traditionnellement, un droit exclusivement interétatique, accordant peu de place aux personnes privées ou autres entités non étatiques comme cela se reflète à travers la CNUDM. Malgré la réticence de certains états, cette dimension du droit international de l'environnement influence le droit de la mer. Par exemple, le processus actuel de discussions en vue de l'adoption d'un accord de mise en œuvre de la CNUDM tente d'associer des parties prenantes de la société civile aux discussions et prévoit potentiellement la mise en place d'une conférence des parties spécifique au futur accord, caractéristique institutionnelle des accords environnementaux", ibid 251–252. Sands explains that "[i]nternational environmental law comprises those substantive, procedural and institutional rules of international law that have as their primary objective the protection of the environment. These rules form a set of related legal developments and treaties rather than a coherent 'regime' (…). Moreover, international environmental law is increasingly seen to encompass environmental rules of regional or supranational scope that exist 'beyond the state'.", Sands and others (n 36) 14.
[171] Ricard (n 170) 250.
[172] Although the LOSC does not define the term "marine environment" it might be inferred from the conventional text, see LOSC para 1(1)(4), 194(5).
[173] Some papers published little after the LOSC was adopted include the term "marine environments" denoting the zonal criteria of the LOSC, see Weinstein (n 84) 169. Recent literature does not tend to use this type of terminology when dealing with marine environment issues.
[174] Gavouneli (n 4) 33.

international environmental treaties following an integrated or holistic approach to the ocean.[175] Different from the LOSC, the BBNJ Agreement can be located among these more *ecocentric* developments. Including "ecological connectivity" as one of the Annex I indicative criteria supports that characterization.[176] Ecological connectivity is an element considered in the designation of 'MPAs' and other 'ABMTs' and in the concept of EIA under the treaty.[177] In sum, the BBNJ Agreement has prominent features of a multilateral environmental agreement (MEA) and is relatable to other treaties of this category, such as the CBD, under which marine protected areas may also be implemented.[178]

In this connection, "[l]ike most [multilateral environmental agreements (MEA)], the BBNJ Agreement is intended to be a dynamic treaty that will evolve in response to new information and changing politics."[179] MEAs "establish regimes designed to develop incrementally but dynamically, and to engage large number of states and other actors in this dynamism."[180] This type of treaty owes its design to a character very much connected with dynamism, which is *adaptability*.[181] This calls into question the qualification of the BBNJ Agreement as a *law of the sea treaty*, as is the case with the LOSC. As a consequence, if the BBNJ Agreement is qualified as an instrument not appertaining to the law of the sea and detached from the LOSC, the right of States to freely navigate the high seas under this treaty would have to be envisaged *separately* from the freedom of navigation under the LOSC.[182]

It is worth noting that the objectives of the CBD consist of the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.[183] Following Fitzmaurice and Elias' reasoning, it is acknowledged that even though the LOSC and the CBD overlap in certain areas connected with marine environmental issues, it must be clear that they have *essentially different aims* and they cannot be considered as having the same scope *ratione materiae* nor they can be seen as successive treaties.[184] Matz's view endorses this stance by stating that "differences between the two agreements primarily have their basis in the different approaches

[175] In contrast with how the LOSC deals with environmental issues, recent developments show that international environmental law tends toward ecocentrism, and, in so doing, pushes against the Anthropocentrism that characterized it in its origins and that was paradigmatic to the drafters of the LOSC. See discussion in Vito De Lucia, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (Routledge 2019) 1–13; see also Katie Pavid, 'What Is the Anthropocene and Why Does It Matter?' (*Natural History Museum*) <https://www.nhm.ac.uk/discover/what-is-the-anthropocene.html> accessed 14 August 2024.
[176] Annex to BBNJ Agreement para (m).
[177] Ina Tessnow-von Wysocki and Alice BM Vadrot, 'Governing a Divided Ocean: The Transformative Power of Ecological Connectivity in the BBNJ Negotiations' (2022) 10 Politics and Governance 19.
[178] Bodansky (n 18) 300.
[179] ibid 323.
[180] Jutta Brunnée, 'International Environmental Law: Of Sovereignty, Complexity, and Grotian Moments' (2022) 43 Grotiana 3, 23.
[181] ibid.
[182] *MOX Plant (Irelandv United Kingdom), Provisional Measures* [2001] ITLOS Case No. 10, ITLOS 95 [50].
[183] CBD art 1.
[184] Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005) 333; see also Wolfrum and Matz-Lück (n 76) 150–151.

each adopts"[185] and thus underpins that "priorities concerning legal concepts or principles established by the [LOSC], e.g. the freedom of shipping, innocent passage, and transit passage, can collide with the approaches the [CBD] takes towards the protection of marine biodiversity."[186] Given that the BBNJ Agreement explicitly deals with activities in the high seas, such a collision would be, *mutatis mutandis*, likely to happen. Furthermore, the CBD has been discussed under the subject matter of the problematic relationship between the LOSC and international agreements concerning global environmental problems.[187]

Mainly because its objectives are very similar to those of the CBD, the relationship between the BBNJ Agreement and the LOSC would also have to be encompassed within the greater subject matter of the problematic relationship between the LOSC and international agreements concerning global environmental problems.[188] Like the CBD, the BBNJ Agreement should also be considered as having an aim *essentially different* from that of the LOSC and as having a diverse scope *ratione materiae*. Thus, as with the CBD, the BBNJ Agreement could not be seen as a successive treaty to the LOSC nor properly *under it*. [189] Enhancing the legal importance of the BBNJ Agreement suggests a potential overlap with the LOSC and strengthens the hypothesis of a future fragmentation of the international law governing the high seas through the establishment of diverse and legally binding special regimes under MPAs and other 'ABMTS' on the high seas. This different reasoning and the respective context can certainly be considered as a factor affecting the freedom of navigation.

This clarifies the lack of legal subordination to the LOSC and allows inferring that the title, the preamble, and Article 5(1) of the BBNJ Agreement are aspects not conclusive in the characterization of the nature of this new treaty or its relationship with the LOSC, and become somewhat misleading.[190] Reversing the logic underlying Part XII LOSC, Part III BBNJ Agreement arguably evidences how international environmental law could set the legal basis to deal with issues traditionally assessed within the realm of the law of the sea or given the status of the LOSC in that matter. In this connection, Articles 2 and 4 UNFSA are now mirrored in Article 2 and Article 5(1) BBNJ Agreement. The wording in these relevant provisions in these treaties and their misleading appearance of conflict clauses can contribute to a mistaken understanding about the relation of these treaties and the LOSC. [191] Remarks made here on the BBNJ Agreement are useful to assess *mutatis mutandis* the UNFSA and question the legal weight of some of their eye-catching features of both these treaties, from their titles to their difficult description as *implementing agreements* of the LOSC. Wolfrum has observed that "[t]he term 'implementation agreement' is in fact misleading. In reality they significantly modified the convention, at least one of them progressively." [192] Further, alluding to the BBNJ Agreement (not yet adopted at the time), he goes on to add "[a] *further agreement of this type on biological resources beyond national jurisdiction is in preparation*."[193] Not without some

[185] Wolfrum and Matz-Lück (n 76) 16.
[186] ibid.
[187] ibid 15.
[188] ibid.
[189] Fitzmaurice and Elias (n 184) 333.
[190] Matz-Lück (n 140) para 2.
[191] Wolfrum (n 141) 107.
[192] ibid.
[193] ibid emphasis added.

reservations, it has been argued that it would stand to reason to interpret key provisions under the UNFSA and the BBNJ Agreement "in a manner that is *consistent* with one another."[194] In this respect, strengthening this view, Article 5(3) clarifies the autonomy of the BBNJ Agreement from the LOSC by establishing that "[t]he legal status of non-parties to the Convention or any other related agreements concerning those instruments is not affected by this Agreement." This provision should be read in conjunction with Article 5(1).

Specific references to the LOSC provisions by number or by Parts are generally absent in the BBNJ Agreement. The drafters preferred using the vague term "relevant provisions" and or "Convention". The BBNJ Agreement establishes that decisions and recommendations adopted by the BBNJ COP *inter alia* "shall be made with *due regard* for the rights and duties of all States, in accordance with the [LOSC]."[195] The preamble and the rest of the text of the BBNJ Agreement, in general, except for Part IX regarding dispute settlement, follow this criterion.[196] The term "relevant provisions" is used often in the BBNJ Agreement text. This aspect raises questions about which provisions of the LOSC the BBNJ Agreement aims to implement. For instance, the lack of precision regarding the relevant provisions affects the understanding of the objective in Article 2 of the treaty. Besides this, it is noticeable that the

---

194 De Lucia (n 35) 12 (emphasis added).

195 BBNJ Agreement art 22(5).

196 The Preamble is constituted of 17 paragraphs. Notwithstanding the relevance of the whole preamble in the context of the BBNJ Agreement, three issues deserve to be noted. First, paragraph 4 recalls the consciousness of the need for "the comprehensive global regime under the [LOSC] *to better address* the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction." (emphasis added). The expression "to better address" might be misleading in the sense that its inclusion might contribute to the misconception that the LOSC already regulated the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction. While LOSC provisions on marine environmental protection or conservation of marine living resources may contribute to the conservation of 'marine biological diversity', the latter is not included in the material scope of the LOSC. Indeed, the scope *ratione materiae* of the BBNJ Agreement cannot be found within the overarching text of the LOSC. The term "to better address" used to highlight normative complementarity might be better used when assessing the relationship between the CBD and the BBNJ Agreement. The second observation concerns paragraph 11 and refers to the desire to act as "stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations". To accomplish this desire, the treaty points out two venues. On the one side, by protecting, caring for, and ensuring responsible use of the 'marine environment'. This should regard the commitment to achieve 'sustainable development' in paragraph 16. On the other, by maintaining *the integrity of ocean ecosystems* and conserving the inherent value of biological diversity of areas beyond national jurisdiction. As to the integrity of the oceans, from a legal perspective, the notion relates to the holistic approach, which has been seen as contrasted to the zonal approach established in the LOSC.[196] The paragraph does not mention the zonal approach or offer any explicit counterbalance to the desired integrity. Third, the drafters of the BBNJ Agreement devoted an entire paragraph to reflect the aspiration to achieve universal participation. The importance of this paragraph, put in context, might outweigh the relevance of the first, which recalls the relevant provisions of the LOSC. This point is connected with the openness of the treaty to non-parties to the LOSC and its subsequent *freestanding* status. As will be discussed forward, this could serve to question the apparent relevance of the title and provisions of the treaty that support the idea that it is an instrument *under the LOSC* and, consequently, to shed light on the nature of the treaty with respect to the LOSC.

majority of the terminology is absent in the text of the LOSC. Moreover, the terms correspond to the vocabulary closer to that in Article 2 CBD.

The legal structure built upon these provisions seems to lack fundamental ceilings. Notwithstanding this, conservation measures, MPAs, or others related are the ones that could restrict or limit one or several sectors or activities.[197] The degree to which an activity might be regulated or affected will surely depend on how rigorous the conservation standard is fixed.[198] Additional environmental regulations and the manner in which these are elaborated and implemented, like those to ensure the conservation of marine biodiversity, will certainly impact the responsibilities of the flag States and how navigation is to be exercised by the vessel flying its flag.[199]

Notwithstanding the aforementioned, what is meant by 'marine biological diversity' or by conservation (or conservation objectives) is likely to be clarified or specified on a case-by-case basis in the future, based on the measures of IFBs. After their inclusion in the proposals submitted by a party or parties to the treaty, IFB measures incorporated in recommendations and decisions of the State parties would also clarify the notion of 'marine biological diversity'.[200] Following this reasoning, the sustainability in the usage of components of biological diversity would also be established or defined on a case-by-case basis, considering the specific level of conservation and the sustainable use objectives within the proposal and included in the decision establishing the particular regimes for each BBNJ 'MPA' or other 'ABMT'.[201]

2.4. Principles and Approaches

The content of the principles and approaches and how they are implemented for achieving the objectives of the treaty may not be predictable at the moment. The submission of proposals and their content would be instrumental for this. Article 7 BBNJ Agreement sets out principles and approaches "[i]n order to achieve the objectives", general and specific.[202] The principles are (a) the polluter-pays principle; (b) the principle of the common heritage of humankind "which is set out in the [LOSC]"; (c) the freedom of marine scientific research, "together with other freedoms of the high seas"; and (d) the principle of equity and the fair and equitable sharing of benefits.[203] In connection with this, the freedom of navigation is not explicitly mentioned nor

[197] Wolf and Asmus Bischoff (n 15) paras 2, 6.
[198] ibid.
[199] ibid.
[200] BBNJ Agreement arts 19–22.
[201] ibid 19(3)(e), 20–23. In contrast with other provisions that use the term "Parties", this provision uses the term "States". This relates to Article 62: "Parties shall encourage non-parties to this Agreement to become Parties thereto and to adopt laws and regulations consistent with its provisions."
[202] ibid 7(a-d).
[203] ibid 7(a-n).

is Article 87 LOSC or the other freedoms listed thereof.[204] However, these freedoms would appear to be implied in the expression "other freedoms of the high seas". [205]

The provision introduces the "precautionary principle or precautionary approach, as appropriate" as one of the principles/approaches to achieve the conventional objectives. The technique used here by the drafters is, at least, questionable because of the uncertainty introduced in what aims to be a rule for the interpretation and application of the BBNJ Agreement.[206]

Article 7 continues by detailing the approaches: (f) an ecosystem approach; (g) an integrated approach to ocean management; (h) "[a]n approach that builds ecosystem resilience, including to adverse effects of climate change and ocean acidification, and also maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role of the ocean in climate"; (i) the use of the best available science and scientific information; (j) the use of relevant traditional knowledge of Indigenous Peoples and local communities, "where available"; (k) the respect, promotion and consideration of their respective obligations, "as applicable", relating to the rights of Indigenous Peoples or of, "as appropriate", local communities when taking action to address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction; (l) the non-transfer, directly or indirectly, of damage or hazards from one area to another and the non-transformation of one type of pollution into another in taking measures to prevent, reduce and control pollution of the marine environment; (m) full recognition of the special circumstances of small island developing States and of least developed countries; (n) acknowledgement of the special interests and needs of landlocked developing countries.[207]

3. Geographical Scope and Activities Regulated under the Treaty

Article 3 in Part I indicates the geographical "Scope of application". According to it, the treaty would apply to areas beyond national jurisdiction, that is, the high seas and the Area.[208] However, following Tanaka, it may be argued that the geographical scope in Article 3 is inaccurate. When analyzing Article 28(2) in Part IV, Tanaka reflects "[w]hile this obligation does not explicitly relate to an EIA of a planned activity that may have adverse impacts on the environment of another state, it is not unreasonable to categorize an EIA under Article 28(2) as *a form of transboundary EIA*"[209]. The lack of clarity as to its geographical scope may have

[204] LOSC art 87(1)(a-e).
[205] BBNJ Agreement art 7(c).
[206] ibid 7(e).
[207] ibid 7(f-n).
[208] ibid 1(2), 3.
[209] Yoshifumi Tanaka, 'Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic beyond National Jurisdiction' (2024) 55 Ocean Development & International Law 85, 95 (emphasis added).

consequences during time-bound consultations and allow unexpected inputs by way of procedural *contributions*. This indicates that, when read against the treaty as a whole, some provisions of the BBNJ Agreement are weakened while others are strengthened.

To further illustrate the relativization of the weight of its provisions it is worth noting that Article 6 BBNJ Agreement establishes that the BBNJ Agreement normative and activities following it "shall be without prejudice to (…) any claims to, sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto" and "and shall not be relied upon as a basis for asserting or denying" those claims.[210] Article 6 may have interesting procedural ramifications in the establishment of 'ABMTs', including 'MPAs', mostly during the time-bound consultation process.[211]

Article 18, entitled "Area of application", states that "[t]he establishment of [ABMTs], including [MPAs], shall not include any areas within national jurisdiction". This part of the provision appears to be endorsing the rule in Article 3 concerning the geographical scope. However, the provision continues. Afterward, Article 18 establishes that "[t]he *establishment* of [ABMTs], including [MPAs] (…) shall not be relied upon as a basis for asserting or denying any claims to sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto. The [COP] shall not consider for decision *proposals* for the establishment of such [ABMTs], including [MPAs], and in no case shall such *proposals* be interpreted as recognition or non-recognition of any claims to sovereignty, sovereign rights or jurisdiction."[212] This second part of the provision relates to Article 6 of the general provisions in Part I. However, different from the first part, the wording employed in the second part of Article 18 does not seem to reflect with total exactitude what Article 6 establishes. Indeed, it is not certain whether Article 18 emphasizes certain aspects without altering the norm in Article 6 at all, or whether it is selective of *special* aspects of the general norm in Article 6 while it excludes others. While reference to the "proposals" and the "establishment" of ABMTs is included in Article 18, an important term such as "consultations" is not mentioned. Subsequently, it does not seem clear whether the consultations have consequences on, for instance, the recognition of other States' sovereignty in the context of a dispute. This issue would most certainly be dealt with after the BBNJ Agreement enters into force, and the time-bound consultation process regulated by Part III is initiated through the contributions of the 'stakeholders'.[213]

---

[210] BBNJ Agreement art 6.
[211] ibid 21(5).
[212] ibid 18 (emphasis added).
[213] Legal literature is already considering Part III BBNJ as a "framework" among others in the BBNJ Agreement. "[I]n essence, [the BBNJ Agreement] constitutes four treaties in one, all addressing marine biological diversity in areas beyond national jurisdiction (ABNJ), but each with its own objectives, principles, obligations, and—in some cases—institutions.", Bodansky (n 18) 299. If this view is taken as certain, there might be a reason to consider provisions in Part III BBNJ as special (*lex specialis*) to the general provisions in Part I, which include Article 6, Dorota Marianna Banaszewska, 'Lex Specialis', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2015) para 6 <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024. While reference to the proposals and the establishment of ABMTs are included in Article 18, a term such as "consultations" is not explicitly included. If there is a relationship based on *lex specialis* between Part III and Part I BBNJ Agreement, and if Article 18 alleged specialty translates into the exclusion of other aspects of the general norm in Article 6, it might be worth questioning whether, on the one side, the process of *consultations* concerning MPAs and other AMBTs might be relied upon as a basis for asserting or

Against this background, though not explicitly established, the treaty would apply to *practically* all activities taking place in areas beyond national jurisdiction. This includes commercial activities such as commercial navigation or shipping. Other activities, like "(a) Fishing regulated under relevant international law and fishing-related activities; or (b) Fish or other living marine resources known to have been taken in fishing and fishing-related activities from areas beyond national jurisdiction, except where such fish or other living marine resources are regulated as utilization under [Part I]."[214] do not fall within the scope of Part I. These high-seas fishing activities may fall within the scope of bodies such as RFMOs. Highlighting this allows sustaining that State parties, when acting through the COP, i.e., during time-bound consultations, would not have the competence to discuss RFMO measures regulating fishing activities that were agreed upon without their participation, and were nonetheless included in the proposals. Adding to these limitations of the COP, sectoral measures such as those of the IMO may not fall within the scope of competencies of the COP when they are considered to arise from RFMO measures.[215]

4. Scope Ratione Personae

4.1. The 'Stakeholders'

The label of 'stakeholders' is included in many provisions of the BBNJ Agreement. The term 'Transparency' entitling Article 48, is practically defined as openness to them. The label 'stakeholders' encompasses a variety of entities labeled but not defined. In broad terms, the treaty differentiates between 'stakeholders' and State parties. The former would arguably find their most representative institutional structure in existing regional IFBs and sectoral IFBs. All State parties would interact with the 'stakeholders' through the COP when that body is consulted. Paragraph 4 of Article 48 demonstrates that the term 'stakeholders' shows great

---

denying any claims to sovereignty, sovereign rights or jurisdiction, including in respect of any disputes relating thereto. Also in light of Article 18, on the other side, it might be questioned whether the COP has the competencies to consider for decision *consultations* for the establishment of such MPAs and other ABMTs and whether such *consultations* might be interpreted as recognition or non-recognition of any claims to sovereignty, sovereign rights, or jurisdiction. The relevance of highlighting this uncertainty about the relationship between Article 6 and Article 18 can be explained by the need for universal participation in the conservation and sustainable use of marine biodiversity. The needed universal participation would certainly include, for example, States having disputes of sovereignty. Given this, these States might show reluctance to ratify the treaty, see Pablo Bonuccelli, 'El Acuerdo BBNJ y La Afectación de Los Intereses Argentinos' *Radar Austral* (19 August 2024) <https://www.radaraustral.com/articulos/el-acuerdo-bbnj-y-la-afectacion-de-los-intereses-argentinos/> accessed 11 November 2024.

[214] BBNJ Agreement art 10(2).

[215] ibid 29(4.b.ii).

elasticity to the point of including representatives of “States not party to this Agreement”, *ergo* not legally bound by it.[216]

Thus, *transparency* is arguably translated into *openness* to entities that are non-conclusively identified. Quite possibly, the entities falling within these categories under the label ‘stakeholders’ would eventually be identified in the meetings of the COP, in the medium or long term, after the treaty enters into force. In this relation, the transparency in the implementation of the BBNJ Agreement would include “the public dissemination of information and the facilitation of the participation of, and *consultation* with” entities such as “relevant global, regional, subregional and sectoral bodies, Indigenous Peoples and local communities with relevant traditional knowledge, the scientific community, civil society and *other relevant stakeholders*, as *appropriate* and in accordance with the provisions of this Agreement”.[217] The expression ‘other relevant stakeholders’ suggests that all these categories mentioned would fall into the more general category of *stakeholders,* to which participation would be facilitated and consultations would be addressed to meet the general objectives of the treaty.[218] Stakeholders may also participate as observers in the COP and subsidiary bodies, following the rules of procedure decided by the COP.[219]

IFBs, of all ‘stakeholders’, would have the possibility to define how the COP may perform its powers and act accordingly with the *modalities* set up by Part III. When taking decisions compatible with the ‘Relevant IFB Measures’ applying in an area requiring protection, for example, the COP would act “in cooperation and coordination with those instruments, frameworks and bodies.”[220] Importantly, Article 5(2) establishes a general obligation following which the BBNJ Agreement “shall be interpreted and applied in a manner that does *not undermine* [IFBs] and that promotes coherence and coordination with those instruments, frameworks and bodies.” (emphasis added). In this connection, Article 22(2) provides that “[i]*n taking decisions* under this article, the [COP] *shall respect the competences of, and not undermine*, [IFBs]” (emphasis added).[221] Article 22(2) would be a major factor defining the relationship between the COP and the IFBs.

It is noteworthy that the ‘not undermine’ clause in Article 5(2) would apply to *collaborations* necessary for the cooperation required by the treaty, before and after the non-regular and time-bound consultation period. This clause would also apply to IFBs, in general,

---

216 ibid 48(4).
217 ibid 48(3) (emphasis added).
218 The term “stakeholders” is amplified with other examples throughout other provisions of the BBNJ Agreement. Some are contained in Part III on ABMTs and MPAs and treated below. In this respect, it might be wondered how the inclusion of this *elastic* term might contribute to promoting the universal participation of States or, especially, the participation of those States that are majorly responsible for the harm to marine biodiversity. This becomes a reasonable (and concerning) question considering, for instance, that representatives of “States not party to this Agreement” would be allowed to *influence* discussions in the BBNJ COP and subsidiary bodies and, most likely, the normative-making processes under the BBNJ Agreement, ibid 48(4). Moreover, the participation of these representatives (and of other stakeholders) would be *facilitated* by the BBNJ COP, ibid 48(3).
219 BBNJ Agreement art 48(2)(4).
220 ibid 22(1.b).
221 ‘Panel on Cooperation with Relevant Instruments, Frameworks and Bodies (IFBs) under the BBNJ Agreement’ (BBNJ Symposium 2025, Singapore, 19 February 2025) pt min. 6 <https://cil.nus.edu.sg/event/bbnj-symposium-2025/>. See also, De Lucia (n 35) 8.

when making contributions during time-bound consultations. In this reasoning, the implementation of the 'not undermine' clause in Article 5(2) is likely to be *interpreted* and *applied* through collaboration and the subsequent design of 'Relevant IFB Measures'. These measures may serve as a legal basis for developing a proposal and later decisions and recommendations. Instead, the clause in Article 22(2) would mostly apply when 'stakeholders' and State parties provide input by *contributions,* during the time-bound consultation period. This other clause is particularly aimed at the COP, placing it in a different position to the other IFBs. It has been explained that the 'not undermine' clause in Article 5(2) would require an interpretation separate from that of Article 22(2), notwithstanding that the former clause may eventually clarify the application of the latter.[222]

RFMOs, including those with limited access, are recognized among the IFBs considered by the BBNJ Agreement, in its Annex II.[223] Under Part III, RFMOs and RFMO members may be deemed as necessary collaborators for the development of proposals. Article 19(2) mandates that State parties "shall collaborate and consult, *as appropriate*, with relevant stakeholders, including *States* and global, regional, subregional and sectoral *bodies*, as well as civil society, the scientific community, the private sector, Indigenous Peoples and local communities, for the development of proposals, as set out in this Part." (emphasis added). Interpreting the term 'as appropriate' under Article 19(2) as a qualifier of performance (and not as implying discretion on the part of State parties) appears consistent with the goal-oriented cooperation required by a treaty of this nature (in Articles 8 in Part I, 25(4) in Part III, 29(1) in Part IV, etc.). Interestingly, RFMOs and other IFBs, following the willingness of States acting through them, can arrange regular consultations with the COP.[224]

Under the commitment to achieve the objectives, subject to the conditions mentioned herein, the COP "may *decide*, *as appropriate*, to develop a *mechanism* regarding existing [ABMTs], including [MPAs], adopted by [relevant instruments and bodies]."[225] Decisions

---

[222] De Lucia (n 35) 5–14. In De Lucia's view, "we can outline a distinction between the two by way of emphasizing how 'respecting the competence' indicates an obligation to not directly encroach on the competence of relevant IFBs, by, for example, establishing an ABMT or MPA in an area and for a sector subject to the regulatory competence of one such IFB. The meaning of not undermining, on the other hand, remains ambiguous", ibid 8. In explaining the clause under Article 22(2), De Lucia has observed "[r]espect for the competence of an IFB therefore needs to be understood with regard to the limited competence of the IFB. To take one example, respecting the competence of the International Maritime Organization (IMO) means that shipping shall be regulated by the IMO at a global level, while respecting the competence of [an RFMO such as] the North-East Atlantic Fisheries Commission means respecting its competence to regulate fisheries in the North-East Atlantic. Additionally, the competence of each IFB is relevant only for parties to that individual IFB. In fact, precisely in cases with delimited competence *ratione materiae* and *ratione personae*, the BBNJ Agreement could actually complement and strengthen, rather than undermine, relevant IFBs, while also respecting the competence of relevant IFBs.", ibid 9.

[223] BBNJ Agreement para (d.ix).

[224] Article 22(3) provides that "[t]he [COP] shall make arrangements for *regular consultations* to enhance cooperation and coordination *with and among* [relevant IFBs] with regard to [ABMTs, including MPAs] as well as coordination with regard to related measures adopted under such instruments and frameworks and by such bodies." (emphasis added).

[225] BBNJ Agreement art 22(4) emphasis added. This provision seems to allude to the idea of *integrating* measures originated in other regimes by way of qualification as "ABMTs" under the comprehensive legal platform given by the BBNJ Agreement. Niels Krabbe, 'High Seas Marine Protected Areas:

establishing these mechanisms might be useful in the relationship between the COP and a body such as an RFMO or the IMO, and, apparently, in preventing the overlapping and the duplication of competencies with respect to the COP. The IMO is also acknowledged as a relevant sectoral body and thus as a 'stakeholder'.[226]

'Relevant IFB Measures' adopted by these 'stakeholders' would be instrumental during collaborations and also during the contributions requested by Part III and for the implementation of the BBNJ Agreement.[227] The applicability of principles and approaches considered by the treaty may be clarified when a proposal, based on the 'Relevant IFB Measures' agreed upon, is submitted.

4.2. The State Parties: Unique Contributors During the Consultation Period

The State parties would have a crucial role in collaboration and, when acting through the BBNJ COP, would be essential contributors. It is important to clarify that the COP would not incarnate a new subject in international law or a legal entity different from State parties to the treaty; the term 'COP' constitutes a way to allude to State parties when acting in the context of formal non-regular and time-bound consultations.[228] Among all IFBs participating in the time-bound consultation period, the COP is the only one with the capacity to adopt *decisions* binding all State parties. Decisions adopted after the *contributions*, according to Article 22(1), would serve to establish the 'ABMTs' and 'MPAs'. Following the contributions, 'Relevant IFB Measures' previously designed and used as the legal basis for taking decisions may become binding on all State parties. The same might be stressed in the case of recommendations, when the existing legal sources referred to in a proposal, upon which the making of new 'Relevant IFB Measures' is pursued, are recognized as mandatory by States acting through the COP.[229]

Article 47 provides norms for the COP. The COP has been vested with a set of competencies, including promoting cooperation and coordination with and among relevant instruments and bodies and establishing appropriate processes.[230] Parties have one vote each, except in the circumstances stated in Article 64(2) regarding regional economic integration organizations.[231] The COP shall hold ordinary meetings or extraordinary meetings.[232] Ordinary meetings shall be held regularly to be determined by the COP. Extraordinary meetings may be

Impact on Shipping and the IMO' in Abhinayan Basu Bal and others (eds), *Regulation of Risk* (Brill | Nijhoff 2022) 404–406.

[226] BBNJ Agreement art 51(4); Bastiaan E Klerk, 'A Sheep in Wolf's Clothing? Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement' [2024] Ocean Development & International Law 1, 12.

[227] BBNJ Agreement art 19(2) and 21.

[228] See comments made by David Freestone in 'Panel on Cooperation with Relevant Instruments, Frameworks and Bodies (IFBs) under the BBNJ Agreement' (n 221) (min. 6 onwards).

[229] BBNJ Agreement art 19(4.a).

[230] ibid 47(6)(c).

[231] ibid 64(1).

[232] ibid 47(2).

held at other times, following the rules of procedure.[233] Article 47 also provides that the COP shall undertake a "review and evaluation" of the BBNJ Agreement implementation.[234] The COP is vested with powers to establish subsidiary bodies "as deemed necessary" for implementing the BBNJ Agreement.[235] The list of competencies to review and evaluate implementation is not exhaustive since the COP may "[u]ndertake other functions identified in this Agreement or as may be required for its implementation."[236] Furthermore, upon reviewing the "adequacy and effectiveness" of the treaty provisions and considering the necessity, the COP may propose "means of strengthening the implementation of those provisions in order to better address" the general objective.[237] The competences of the COP concerning the making of recommendations and the taking of decisions, along with the modalities that limit its powers, will be assessed below.

4.3. The Key Role of RFMOs

Certain aspects of the works preceding the adoption of the BBNJ Agreement may be enlightening when considering how it may develop after it enters into force. Though conferring the area-based management system to limited access bodies such as RFMOs was contested time before the conclusion of the treaty, several States were enthusiastic about conferring the 'conservation' and 'sustainable use' of 'marine biological diversity' to RFMOs in the belief that these had to be pivotal to the area-based management system, together with IMO.[238]

[233] ibid. Rules of procedure for the COP and its subsidiary bodies would have to be adopted at the COP 1st meeting. However, till the rules of procedure have been adopted, the procedural rules of the IGC would apply, ibid.
[234] BBNJ Agreement art 47(6).
[235] ibid 47(6)(d).
[236] ibid 47(6)(f).
[237] ibid 47(8).
[238] RFMOs were highly regarded through the Working Group (WG) meetings, the Preparatory Committee (PrepCom), and the Intergovernmental Conference (IGC) and were acknowledged by several as having a main role in biodiversity conservation. Notice that years before the conclusion of the treaty text, during the exchange of views in the WG, some delegates already had suggested the possibility of granting RFMOs the mandate necessary to conserve and sustainably use marine biodiversity, notwithstanding others were not compelled by that initiative or even by considering RFMOs an exemplary reference for the making of an international treaty. For illustration, the United States "supported existing mechanisms to create MPAs, such as RFMOs and the IMO", IISD, 'Summary of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 13 February 2006' (2006) 25 Earth Negotiations Bulletin 1, 5. In that same context, it was "cautioned against giving RFMOs the mandate to establish MPAs in the high seas, giving their limited membership.", ibid. "China noted a reluctance by RFMO members to expand RFMO functions.", IISD, 'WG 2nd Meeting' (n 40) 6. In that context, it was argued "that RFMOs, given their exclusionary mandates, could not represent the interests of the international community; and that conservation of biodiversity is a state mandate and, therefore, the exclusion of states when using conservation tools was inconsistent with UNCLOS.", ibid 9. IUCN "urged expansion and strengthening of RFMOs", ibid. "Japan suggested that MPAs should be established by RFMOs(…)", IISD, 'WG 7th Meeting' (n 42) 4. Making a clarifying distinction, Australia noted that "*only MPAs established by RFMOs for biodiversity conservation purposes* would

Several delegations considered that the inclusion of RFMOs in the discussions would favor the pursuit of coherent governance and highlighted the importance of their expertise in fisheries.[239] During the preparatory works, "the structure and functioning of a majority of RFMOs [were described], *noting their role in marine biodiversity conservation*, including by identifying vulnerable marine ecosystems."[240]

The fact that the *modernization* of the law of RFMOs to protect biological diversity has been noted and connected with the conclusion of the BBNJ Agreement seems to reveal how quintessential those bodies may become.[241] RFMOs, like the North Pacific Fisheries Commission (NPFC), underscored that they contribute to biological diversity conservation and could do the same under the forthcoming BBNJ Agreement by enhancing their capabilities.[242] Part III shows great openness to RFMOs and, presumably, to their modernization process and interaction with the treaty.[243] This may allow RFMOs to acquire a pivotal role in orchestrating a constellation of IFBs and avoiding legal collisions by the resolution of conflicts between different regimes, all with the support of the myriad entities covered by the 'stakeholders' category. As to shipping, IMO would be the most authoritative sectoral IFB to cooperate with such orchestration. The United States "supported existing mechanisms to create MPAs, such as RFMOs and the IMO".[244]

In this regard, after the BBNJ Agreement enters into force, IMO regulations and standards might develop according to the recommendations that RFMO members can promote through a proposal to the COP over the regions they govern. The High Seas Alliance has

---

be considered under a future agreement, whereas areas established by RFMOs for the recovery of fish stocks would not fit into a global MPA network.", IISD, 'Summary of the Eighth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 16-19 June 2014' (n 34) 4 emphasis added. "Chile called for more and better MPAs including through regional fisheries management organizations (RFMOs), or by creating new, small and effective institutions.", IISD, 'Summary of the First Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 28 March - 8 April 2016' (2016) 25 Earth Negotiations Bulletin 1, 3.

[239] IISD, 'Summary of the First Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 28 March - 8 April 2016' (n 238) 4–5, 9–11.

[240] IISD, '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 1, 6 emphasis added.

[241] Zoe Scanlon, 'The Art of "Not Undermining": Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction' (2018) 75 ICES Journal of Marine Science 405, 409–412.

[242] "The North Pacific Fisheries Commission highlighted existing expertise and cost-effectiveness, noting that RFMOs are evolving, and suggested filling gaps in capacities, capabilities and current mandates rather than adding another bureaucratic layer", IISD, 'Summary of the Second Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 26 August – 9 September 2016' (2016) 25 Earth Negotiations Bulletin 1, 17.

[243] BBNJ Agreement art 22(7).

[244] IISD, 'Summary of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 13 February 2006' (n 238) 5.

recognized that "[o]ther than the general obligations under UNCLOS, IMO has no specific EIA requirements".[245]

More recently, it has been sustained that "[t]he implementation of [EIAs] for deep-sea fisheries sets precedents for the conduct of EIAs for other activities in the deep sea and high seas. Recently, the adoption by the [BBNJ Agreement] presents an opportunity to enhance and modernise the process of assessing environmental impacts in areas of the ocean beyond national jurisdiction. Although the BBNJ Agreement will not directly enforce EIA procedures on established entities like RFMOs, *these requirements will be applicable to States that have voluntarily accepted the provisions of the BBNJ Agreement by becoming Parties to it*."[246]

Notice that the context pictured here might pretty much determine the subsequent law-making capacity that RFMO non-members that are parties to the BBNJ Agreement would be deprived of developing, mostly during collaborations.[247] RFMO members, who can also act and participate through other 'relevant' global IFBs like IMO, would be in the best position to define the notion of "marine biological diversity"[248] in geographically defined areas or regions, obtain "the best available science and scientific"[249] "information"[250], collaborate in the adoption and implementation of 'Relevant IFB Measures', including "the regulations and standards (…) designed to prevent, mitigate or manage potential impacts"[251], all to "conserve and sustainably use areas requiring protection"[252] and, in general, "with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement."[253] RFMOs in the Pacific and the Atlantic Oceans, particularly in the North Atlantic, are indicative of the efforts and commitment of these bodies to accommodate their legal structure to better protect and manage biological diversity, showing the potential those have for having a key role under a framework like the one enshrined in the BBNJ Agreement.[254] Additionally, RFMOs of

---

[245] High Seas Alliance, 'How Could the EIA Provisions of the BBNJ Agreement Apply to Activities and Existing Bodies?' 5 <https://www.highseasalliance.org/wp-content/uploads/2021/07/FINAL-How-would-the-EIA-provisions-of-the-BBNJ-Treaty-apply-in-practice-7.8.21.pdf>.

[246] Laura Kaikkonen and others, 'Improving Impact Assessments to Reduce Impacts of Deep-Sea Fisheries on Vulnerable Marine Ecosystems' (2024) 167 Marine Policy 106281, 11 (emphasis added)."For any new fishing activities, in an area where there is no RFMO with jurisdiction over a proposed fishing activity in a specific area, the BBNJ provisions directly apply. Therefore, to ensure that high seas activities are managed effectively under the new treaty, States must first ensure that the existing criteria for IAs for all high seas activities are respected.", ibid.

[247] Before the treaty was concluded, some had foreseen that "RFMOs have a difficult task even with limited membership numbers; however, reaching agreement on any binding measures would be even more difficult at the global level when a larger number of parties—potentially including *those without a direct interest*—are involved (…). [I]t appears that effective implementation of measures at the regional level rather than global is more likely, as regional Parties are more likely to have a strong interest in the preservation of the marine environment of that region (…). RFMOs' diversity has been seen as an opportunity for tailored approaches to regional conditions", Scanlon (n 241) 414 (emphasis added).

[248] BBNJ Agreement art 2.

[249] ibid 35.

[250] ibid 26(2).

[251] ibid 29(4.b.ii).

[252] ibid 17(a).

[253] ibid 1(1).

[254] Scanlon (n 241) 410–411. In this respect, some highlight the work undertaken by RFMOs such as the Northwest Atlantic Fisheries Organization (NAFO), the International Commission for the

a more recent constituency, in the North and South Pacific Ocean and the Southern Indian Ocean, are also considered in the literature of utmost importance in this respect.[255]

5. Relevant Institutional Arrangements

Provisions in Part VI of the BBNJ Agreement regulate the competencies of the STB, the Secretariat, and the CHM managed by the Secretariat. Some of the functions of other institutional arrangements, such as the COP, are also regulated under that Part.[256] Provisions thereof define the general competencies of the arrangements established by the new treaty. However, these provisions do not seem exhaustive and, therefore, will most probably be complemented by provisions in other Parts of the treaty and future legal developments.

5.1. The Scientific and Technical Body

The STB is given many competencies in the BBNJ Agreement. Under Article 49, the STB is constituted.[257] The STB shall be composed of "members serving in their expert capacity and in the best interest of the Agreement", nominated by Parties and elected by the COP with suitable qualifications.[258] The provision points out that "terms of reference and modalities for the operation of the [STB], including its selection process and the terms of members' mandates, shall be determined by the [COP] at its first meeting".[259]

The STB shall provide scientific and technical advice to the COP, perform the functions assigned to it under the treaty, and "such other functions as may be determined by the [COP]" and provide reports to the COP on its work.[260] Interestingly, the STB is provided with competencies to "draw on appropriate advice emanating from [relevant IFBs], as well as from other scientists and experts, *as may be required*."[261]

Its relationship with the State parties or the COP is not clear, nor is the reach of the competences it may have in connection with them. Article 21(6) under Part III indicates that

Conservation of Atlantic Tunas (ICCAT), and the Western and Central Pacific Fisheries Commission (WCPFC), ibid.

[255] Scanlon (n 241) 410. In this respect, some highlight the work undertaken by RFMOs such as the North Pacific Fisheries Commission (NPFC), the South Pacific Regional Fisheries Management Organisation (SPRFMO), and the Southern Indian Ocean Fisheries Agreement (SIOFA), ibid.

[256] LOSC arts 47–51.

[257] BBNJ Agreement art 49(1).

[258] ibid 49(2).

[259] ibid 47(4), 49(2).

[260] ibid 49(4).

[261] ibid 49(3).

"*modalities* for the consultation and assessment process, including *duration*, shall be further elaborated by the [STB], as necessary, at its first meeting, for consideration and adoption by the [COP]" (emphasis added). The term 'modalities' has been used to describe the treaty-based competences of the COP, and States parties acting through it would have in the adoption of measures.[262] If the STB were to have those competencies, its material scope would not be as apparent as the words 'scientific' and 'technical' suggest. The modalities elaborated by the STB and referred to in Article 21(6) would have to be considered and consulted with the IFBs and other 'stakeholders'.[263] In discussing the *institutionalization* of the EIAs, Tanaka has commented, "the BBNJ Agreement seems to reflect a *vertical relationship between the STB and contracting parties with respect to EIAs*. If this is the case, it would appear that in the particular context of an EIA in the marine Arctic, the BBNJ Agreement may introduce a *vertical* element into the horizontal legal system governing the Arctic."[264]

Besides this, the STB appears to have distinctive powers to develop the BBNJ Agreement as such. According to Article 38(1) in Part IV, the STB "shall develop *standards* or guidelines for consideration and adoption by the [COP]" (emphasis added). Article 38(3) indicates that "[a]ny *standard* shall be set out in an *annex to this Agreement*, in accordance with article 74"(emphasis added). Simultaneously, Article 74(1) provides that "annexes form an integral part of this Agreement". Consultations with 'stakeholders' appear to be mandatory for these developments.[265]

Lastly, it is worth noting that divergences evolving into a technical dispute are left aside from the general system provided by the BBNJ Agreement.[266] Parties concerned may refer the technical dispute to an ad hoc expert panel established by them. The panel "shall endeavour to resolve the dispute *expeditiously*" and "*without recourse* to binding procedures for the settlement of disputes under article 60 of this Agreement." [267]

5.2. The Secretariat

Article 50 establishes the Secretariat.[268] At its 1st meeting, the COP should make arrangements for the functioning and seating of this organ.[269] However, until the actual commencement of the Secretariat's functioning, the functions of the organ would be performed by the UN Secretary-General, through the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations (DOALOS) Secretariat. [270] The BBNJ Secretariat is vested with a non-exhaustive number of functions, including administrative tasks. [271] It is

[262] De Lucia (n 35) 13.
[263] BBNJ Agreement art 48(3).
[264] Tanaka (n 209) 111 (emphasis added).
[265] BBNJ Agreement art 48(1) and 48(3).
[266] ibid 59, 60.
[267] ibid 60.
[268] ibid 50(1).
[269] ibid.
[270] ibid 50(2).
[271] ibid 50(4)(a-f).

worth noting that, among these functions, the Secretariat shall circulate information relating to the implementation of the BBNJ Agreement as well as to relevant instruments and bodies.[272] Moreover, the Secretariat has the assignment to facilitate cooperation and coordination "as appropriate" with secretariats of other "relevant international bodies".[273]

5.3. The Clearing House Mechanism

The CHM would consist primarily of an open-access platform vested with several functions that can be increased by the COP or assigned under the BBNJ Agreement.[274] The functions comprise *inter alia* serving as a centralized platform to enable Parties to access, provide, and disseminate information concerning activities taking place under the BBNJ Agreement, including information relating to the establishment and implementation of 'ABMTs' and 'MPAs'.[275] The BBNJ Agreement establishes a CHM to be managed by the Secretariat.[276] The specific modalities for the operation of the CHM are to be defined by the COP, which shall promote *transparency* in the relevant decision-making.[277]

6. The Consultative Function of the ITLOS and the Settlement of Disputes

The BBNJ Agreement vests the COP with the powers necessary to adopt a decision to request an advisory opinion from the ITLOS.[278] According to Article 47(7) the COP may request an advisory opinion "on a legal question on the conformity with this Agreement of a proposal before the [COP] on *any matter within its competence*."[279]

---

[272] ibid 50(4)(c).
[273] ibid 50(4)(d).
[274] ibid 51(2) and 51(3.a-g).
[275] ibid 51(3.a). Other functions explicitly mentioned in the BBNJ Agreement comprise, providing links to relevant global, regional, subregional, national, and sectoral CHMs and other gene banks, repositories, and databases, and promoting, *where possible*, links with publicly available private and nongovernmental platforms for the exchange of information; building on global, regional and subregional clearing-house institutions, *where applicable*, when establishing regional and subregional mechanisms under the *global mechanism*; and fostering enhanced *transparency*, by facilitating the sharing of environmental baseline data and information relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction between Parties and *other relevant stakeholders*, ibid 51(3)(c-e).
[276] BBNJ Agreement art 51(1)(4).
[277] ibid 48(1) and 51(2).
[278] ibid 47(7).
[279] ibid.

This competence of the COP, however, comes with limitations explicitly included in the text of the provision.[280] Limitations consist of: first, the COP request "shall not be sought on a matter within the competences of *other global, regional, subregional or sectoral bodies*", or, second, "on a matter that necessarily involves the concurrent consideration of any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto, or the legal status of an area as within national jurisdiction."[281] Moreover, the provision emphasizes that "[t]he request shall indicate *the scope* of the legal question on which the advisory opinion is sought" and the COP "may request that such opinion be given as a matter of *urgency*."[282] Although the decision of State parties acting through the COP formally defines which issues fall within or beyond its competence, the required transparency suggests that stakeholders' role in deciding to request an advisory opinion should not be overlooked.[283] In this sense, stakeholders may be able to give their input, for example, to indicate the scope of the legal question, and benefit from cooperating with the COP when they are directly affected by legal uncertainty.

Part IX of the BBNJ Agreement was entitled "Settlement of Disputes".[284] According to this part, State parties shall cooperate to prevent disputes or, if that is not feasible, they shall settle their disputes concerning the interpretation or application *of the BBNJ Agreement* by peaceful means.[285] Article 60 establishes that "[d]isputes concerning the interpretation or application of this Agreement shall be settled in accordance with the provisions for the settlement of disputes provided for in Part XV of the [LOSC]."[286] Parties "shall be free to choose, by means of a written declaration"[287] one or more of the means for the settlement of disputes concerning the interpretation or application of the treaty. Such means comprise the ITLOS, together with the International Court of Justice, an 'Annex VII arbitral tribunal' and an 'Annex VIII special arbitral tribunal'.[288]

Interestingly, limitations on requesting an advisory opinion appear to echo in the context of dispute settlement. Article 60(8) establishes that the "provisions of this article shall be *without prejudice* to the procedures on the settlement of disputes to which Parties have agreed as participants in a relevant legal instrument or framework, or as members of a relevant global, regional, subregional or sectoral body concerning the interpretation or application of such instruments and frameworks."[289] Article 60(9) states that "[n]othing in this Agreement shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement, provided

[280] ibid.
[281] ibid.
[282] ibid.
[283] ibid 47(7) and 48(1).
[284] ibid 56–61.
[285] ibid 56–58.
[286] ibid 60(1).
[287] ibid 60(5).
[288] ibid.
[289] ibid 60(8).

that nothing in this paragraph shall be interpreted as limiting the jurisdiction of a court or tribunal under Part XV, section 2, of the [LOSC]."[290]

Article 60(2) establishes that "provisions of Part XV of and Annexes V, VI, VII and VIII to the [LOSC] shall be deemed to be *replicated* for the purpose of the settlement of disputes involving *a Party to this Agreement that is not a Party to the [LOSC].*"[291] Leaving aside the unclear resort to *replication* used lightly in this case, this provision grants non-parties to the LOSC access to the dispute settlement institutional mechanisms constituted by the LOSC, such as the ITLOS. It seems that universal participation in the BBNJ Agreement is prioritized over the effective implementation of the LOSC as a whole.[292] Because of its openness to non-parties to the LOSC, the BBNJ Agreement, like the UNFSA, can be regarded as a freestanding agreement *not dependent* on the LOSC. [293] This feature certainly adds to the characterization of the BBNJ Agreement as a *sui generis* international environmental framework. Indeed, Part IX BBNJ Agreement shows that commitment to the LOSC is not of instrumental relevance for ensuring the conservation and sustainable use of biological diversity.[294] This is consistent with the fact that the BBNJ Agreement aims to have the same status as the LOSC, rather than a lower one. In other words, from a legal perspective, it seems almost impossible to sustain that the BBNJ Agreement can be interpreted and applied *in the context* of the LOSC and in a manner *consistent* with it.[295]

In its next paragraphs, Article 60 continues by regulating the settlement of disputes for Parties to both the LOSC and the BBNJ Agreement and Parties *to the latter treaty only*.[296] From

[290] ibid 60(9).
[291] ibid 60(2).
[292] This may clarify the meaning of the general provisions in Part I of the BBNJ Agreement; the general objective of the treaty is to be achievable through "the effective implementation of the relevant provisions of the [LOSC]", ibid 2. In light of this, it is reasonable to question why promoting the inclusion of participants who have refused to formally consent to the LOSC for over 40 years after its adoption is regarded as a priority in the context of an instrument presumably intended to implement LOSC rules.
[293] Boyle (n 77) 42. In distinguishing the UNFSA from the Part XI Implementation Agreement, Harrison stresses that the UNFSA consists of a *freestanding* treaty and explains this is justified by the fact that "the [UNFSA] does not go as far as saying that [it] and the [LOSC] should be considered as a single instrument. Indeed, the [UNFSA] does not even require states to be a State Party to the [LOSC] before they become a party to [it].", James Harrison, 'Implementing Agreements', *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011) 103.
[294] This connects to how important universal participation is to the BBNJ Agreement. As referred to above, the drafters of the BBNJ Agreement devoted an entire paragraph of the preamble to reflect the aspiration to achieve universal participation. This is an aspect that must not be overshadowed mainly because of how it is strengthened by some of the provisions in the dispositive part of the treaty, mainly found in Part IX. By providing non-parties to the LOSC with access to the dispute settlement mechanisms given by the LOSC, as in Article 60, paragraph 2, the BBNJ Agreement arguably prioritizes universal participation in the pursuit of its overarching objectives while minimizing the manner in which those objectives are to be (presumably) achieved, i.e. through the implementation of the LOSC provisions. The latter seems to be further strengthened because of the unclear reference to "the relevant provisions" of the LOSC scattered throughout the BBNJ Agreement.
[295] BBNJ Agreement art 5(1).
[296] It can be observed that a shift in the drafting of the BBNJ Agreement is particularly reflected in this provision. Paragraphs of Article 60 opening the system of dispute settlements in Part XV LOSC contrasts with the logic once poured into the Part XI Implementation Agreement. A good example to illustrate this is art. 4(2) of the Part XI Implementation Agreement which establishes that "[n]o State or

one difficult-to-conceive perspective, a provision such as Article 60 might contribute to interpretative divergences in the jurisprudence of the relevant international tribunals depending on the status of States, that is, Parties to the LOSC, Parties to both the LOSC and BBNJ Agreement, and Parties to the BBNJ Agreement only.[297] This seems unrealistic. Over time, from a more realistic perspective, an international tribunal's authoritative interpretation involving relevant provisions of the LOSC *in conjunction with* the normative under the BBNJ Agreement might produce gradual changes in how the former treaty is interpreted and lastly applied.[298]

This might have consequences beyond the particular case submitted to the occasional tribunal. Indeed, it would be difficult to argue that the resulting jurisprudence covering issues of the BBNJ Agreement would have *no effect at all* on the interpretation and application of the LOSC for those who are Parties to the LOSC and not to the BBNJ Agreement. All States, even those who may not be willing to become parties to the BBNJ Agreement, might be *persuaded* to behave according to the authoritative findings relating to this treaty and, subsequently, apply the LOSC rules following the interpretative criteria in those judicial findings.[299] The contrary, meaning the difficult-to-conceive perspective, would mean favoring the generation of a *fragmented* jurisprudence.[300]

---

entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the [LOSC].", Part XI Agreement art 4(2). In that manner, the Part XI Implementation Agreement secured the adherence to the LOSC provisions and simultaneously prevented fragmentation. Of course, the latter was achieved on the basis of a substantial modification of the Part XI LOSC provisions.

[297] BBNJ Agreement art 60(5).

[298] This reasoning alludes to the parameter of *coherence* that an international tribunal should follow in the different cases submitted to it. In this connection, Charney emphasizes that "it is clear that the continuing specialized international tribunals tend to follow the reasoning of their prior decisions", Jonathan Charney, 'Is International Law Threatened by Multiple International Tribunals?', *Recueil des cours*, vol 271 (1998) 347.

[299] As Lanzoni points out, persuasiveness or persuasive authority "depends on the degree to which the judicial decision is able to convince the widest possible number of international actors of the correctness of what it establishes.", Niccolò Lanzoni, 'The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case' [2022] The Italian Review of International and Comparative Law 296, 302.

[300] In its recent advisory opinion on climate change, the ITLOS has anticipated its awareness of the BBNJ Agreement even though it has not entered into force. The ITLOS has even used the vocabulary employed in the text of the BBNJ Agreement, mostly strange to the LOSC wording (i.e., the category "Area-based management tools"), *Request for an Advisory Opinion submitted by the Commission of Small Island States on climate change and international law, Advisory Opinion* [2024] ITLOS Case No. 31, ITLOS 1 437–440. In light of this, it is submitted that the BBNJ Agreement may influence the future interpretation of the LOSC provisions and their subsequent application. See discussion in Roberto Virzo, 'Fondamento Ed Esercizio Della Competenza Consultiva Del Tribunale Internazionale Del Diritto Del Mare: Considerazioni a Margine Del Parere Del 21 Maggio 2024' (2024) 79 La comunità internazionale 603, 603–620.

7. The Making of an Area-Based Legal System through Collaboration and Its Strengthening through Later Contributions

The BBNJ Agreement sets the legal foundations to transition toward a regime based on a functional-regional approach for the area-based management pursued by Part III.[301] The focus should not be hastily put on, for instance, Article 23, which rules the decision-making in Part III, but rather, more prudently, on the more comprehensive view that includes the norm-making within IFBs, different from that of the COP, i.e., with full participation of all State parties to the treaty. The development of measures would exceed the explicit procedural rules on time-bound consultations given by Part III, especially those concerning the mandate of the COP.

The regime sought by Part III, which covers Part IV, would develop in two key stages for international cooperation: the first regards *collaborations* and the second, *contributions*. Collaborations are quite autonomous from formal procedures regulated by Part III and come before contributions during the time-bound consultation period. Collaboration refers to cooperation *through and with* IFBs, namely those explicitly acknowledged in the treaty, without the necessary inclusion of the COP. Contribution refers to cooperation through and with IFBs, necessarily with the COP, and regards the making of recommendations and taking of decisions. At the same time, collaboration and contribution are encompassed in the broader *consultation stage*. In practical terms, the expression 'consultations' may be understood as the undertaking of negotiations with the aim of reaching agreements. The modalities or limitations imposed on the COP will undoubtedly have an impact on the performance of States acting through it.

The (decentralized) normative making would first comprise a substantial law-making step that precedes the submission of the proposal referred to in Article 19(2) regarding *collaborations* and *collaborators*. The *collaborations* would not be constrained by procedural formalities under the scope of Part III and, more informally, may unfold regularly. Interestingly, both the feasibility and success of the arrangements that the COP should make "for regular consultations" and, subsequently, its participation and subsequent status as a *collaborator* would be largely reliant on the willingness of IFBs and other 'stakeholders' collaborating with or through them.[302] RFMOs and, through them, their members may be considered relevant *collaborators*.

Next, after the proposal had been submitted, the normative making would extend to the more formal procedural phase concerning *contributions* and *contributors*, framed mainly in Article 21 of Part III. It stems from the text that, by default, the COP participates in non-regular consultations, meaning those meant to establish 'ABMTs' and 'MPAs' or to make

[301] BBNJ Agreement art 17(a).
[302] ibid 22(3). The term 'consultation' inserted in this provision makes it clear that the COP is another one of the IFBs to be consulted. Though the text in general does not make explicit the rank of the COP in relation to other IFBs, an overall view of Part III, and particularly of provisions like Article 22(1), arguably clarifies its status. In discussing the mechanism in Article 22(3), it has been opined that "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, through which OSPAR sought to take on a similar role as now envisioned by the BBNJ COP.", Klerk (n 226) 9.

recommendations and that, of course, require the prior triggering of proceedings under Part III.[303] Therefore, it may be advisable to appreciate the content of Articles 22 (establishment of 'ABMTs' and 'MPAs'), 23 (decision-making), and 24 (emergency measures) under the scope of Article 21 (time-bound and non-regular consultations). Article 21(5) mandates that the consultation period regulated by proceedings under Part III, i.e., that in which the COP is consulted, shall be time-bound.

Though not as explicitly as may have been desired, in practical terms, Part III treats the COP as a *contributor* and, at the same time, qualifies it and gives it a key role that differentiates it from the 'stakeholders'. Article 22(1) makes it clear that the COP would be the last to be consulted under the proceedings of Part III. This arguably gives clarity to the terminology in Article 22(1); after 'stakeholders' *make* law, the COP would indeed *take* decisions and *make* recommendations. By the end of the consultation period, after 'contributions' among the 'stakeholders', the "final proposal and the draft management plan"[304] would be addressed to the COP for it to deliberate in accordance with Article 23 and contribute to Part III by taking decisions and recommendations following Article 22, restrictions (or modalities) included.

Broadly speaking, the time-bound consultation period would represent the determinant normative-making phase in which designated 'Relevant IFB Measures' previously agreed, selected, and later accommodated in a proposal would be embodied in the final proposal and the draft management plan and constitute the main legal basis for the COP to adopt subsequent measures.[305] In pursuing the objectives of Part III, after the regime evolves, established 'ABMTs' and 'MPAs' might also be accommodated similarly by their inclusion in ulterior proposals.

Under treaty law in Part III, State parties to the BBNJ Agreement are granted the procedural opportunity to provide inputs through the COP during the period described in Article 21, following limitations specially imposed by inter alia Article 22(1) and 22(2).[306] Because provisions expressly refer to the 'COP', these limitations do not apply when State parties have to *collaborate* through other IFBs, including sectoral bodies such as the IMO, or

[303] BBNJ Agreement art 22(3).
[304] ibid 22(1).
[305] ibid.
[306] Article 21 consultations may be interpreted as a formal continuation of collaborations referred to in Article 19(2), undertaken before submitting the proposal. The label of *contributors* is wider than that of 'stakeholders' and adds practicality to achieve the objectives of the treaty. Without any apparent discrimination between *inter alia* States, non-state actors, IFBs, and the COP, the label *contributor* or the term *contribution* groups or refers to an indeterminate range of entities solely on by following objective-oriented criteria. It must be clear that *contributions* made under Article 21 would be made to the BBNJ Agreement, particularly to the procedures under Part III, to achieve the objectives set out therein. "Contributions" are not addressed to subjects like the proponent and the rest of the State parties acting through the COP, nor "received" by them, ibid 21(3) and 21(5). In this context, though State parties, including the proponent, and the COP may all be described as *contributors* to the phase of the *consultation stage* covered by Article 21, they appear to be treated differently from 'stakeholders' like the 'relevant' IFBs and all the sub-categories subsumed in the latter. *Contributions* of 'stakeholders' are all given the same legal importance and would therefore equally pressing on the proponent and, lastly, on the COP, ibid 21(5) and 22(1).

to *collaborate* with them, like RFMOs or other regional mechanisms of limited access.[307] It is noteworthy that, notwithstanding that Articles 22(1) and 22(2) already provides *modalities* limiting the competencies of the COP (and, by logic, restricting the inputs of State parties), Article 22(8) gives the STB the competence to "further" elaborate "modalities for the consultation and assessment process, including duration" "as necessary, at its first meeting, for consideration and adoption by" the COP.[308]

In this respect, in addition to the comments about the STB made above, Article 29(3) establishes that the STB "shall, as appropriate, *collaborate* with [relevant IFBs]" (emphasis added) "when developing or updating standards or guidelines for the conduct of [EIAs] of activities in areas beyond national jurisdiction" under Article 38. Simultaneously, Article 29(2) indicates that the COP (presumably, during its meetings) "shall develop mechanisms under [Part IV] for the [STB] to *collaborate* with [relevant IFBs] *that regulate* activities in areas beyond national jurisdiction or protect the marine environment." (emphasis added). Such mechanisms might have consequences for the capacity of the COP. Indeed, collaboration appears to favor 'relevant IFBs' with competencies over areas requiring protection by granting them considerable discretion instead of obligating them to collaborate with or be subject to the COP. Bearing the aforementioned in mind is essential to analyzing the construction of the legal system under the BBNJ Agreement through collaboration and contribution. At the same time, this may shed light on the unclear relationship between the STB and COP, among other things.

7.1. Measures for Achieving The Objectives of the Treaty

7.1.1. Measures Circumventing the Formal Consent

Many things about the reading of the BBNJ Agreement rely on perspectives and appearances, and clarification seems necessary. This regards the measures designed during the collaboration stage, which may provide for a more *practical* evolution of the BBNJ Agreement in areas or regions requiring protection. Echoing the UNFSA, such measures represent a mechanism for conferring powers to RFMOs and States acting through them.[309] Within Part III, Article 26(2) provides that the "[relevant IFBs] shall be invited to provide information to the [COP] on *the implementation of measures that they have adopted to achieve the objectives of* [ABMTs,

[307] Neither they nor the COP, through which they may act, are given automatic or direct access to the IFBs or granted recognition or participation concerning matters of substance within their latter's context. Access to external IFBs falls beyond the scope of the BBNJ Agreement.

[308] The term 'modality' has been used in literature to characterize the COP limitations under Article 22(1), De Lucia (n 35) 12.

[309] Vezzani (n 55) 234–237; Haoyu Tian and Jianping Guo, 'The Potential Interactions Between the BBNJ Agreement and RFMOs in the Establishment of ABMTs: Implications for RFMOs' (2025) 171 Marine Policy 106477, 6–8.

including MPAs], *established under this Part*."[310] The category of measures described and referred to in Article 26(2) is, first, autonomous from those that can be elaborated with participation of all State parties through the COP, and, subsequently, different from 'ABMTs' and 'MPAs'. Such measures would have the same objectives of 'ABMTs' and 'MPAs' under the BBNJ Agreement to "conserve and sustainably use areas requiring protection"[311]. They are here referred to as 'Relevant IFB Measures'.

These measures enable IFBs and States acting through them to *directly* engage in achieving the objectives of the BBNJ Agreement without the need to initiate non-regular and time-bound *consultations*.[312] States acting through IFBs may include those parties to the BBNJ Agreement. Once adopted and implemented, 'Relevant IFB Measures' may be utilized as political or legal sources for collaborating with the 'stakeholders' in the development of a proposal.[313]

The *status quo* that Part III proposes to State parties does not necessarily reflect equality with respect to other States. Under Part III, 'Relevant IFB Measures' may be designed *through* IFBs constituted and developed by a group of (say, *relevant*) States operating worldwide through the different marine regions. This group of States would be more influential than those that lack such a capacity, whose status would be lowered below that of the more exclusive group. As a result, with respect to this group of States, parties to the BBNJ Agreement may end up being mainly recipients of norms but not equal norm-makers. This would be the case, for instance, for those who do not have access or who, having access, cannot significantly influence decision-making within RFMOs, among other IFBs. In this reasoning, it may be argued that Part III, in connection with Part IV, would serve as the legal platform for the indirect and virtual conferral of powers to that privileged group of States.[314] Because of this, the conferral of powers made by State parties through the BBNJ Agreement may result in the indirect maximization of regional area-based management powers of some (*relevant*) States with global binding effects (all through relevant IFBs within which they participate). State parties not included in that exclusive group would have to interpret, apply and implement the BBNJ Agreement in the manner decided by the privileged States.[315]

On the basis that IFBs can achieve the objectives of the treaty directly, it may be asserted that the treaty allows IFBs to manage several sectors or activities through 'Relevant IFB Measures' designated to achieve specific long-term biological diversity conservation objectives it establishes.[316] In this view, activities undertaken under the scope of 'Relevant IFB Measures' in a specific area would have to be carried out in a manner "*consistent* with the

---

310 BBNJ Agreement art 26(2) (emphasis added).
311 ibid 17(a).
312 ibid 21(5).
313 ibid 19(2) and (19(4).
314 It has been highlighted that "not all conferrals of powers are the same, and there are important differences that flow from the types of conferrals for the legal relationship that is thereby established between States conferring powers and organizations.", Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005) 28. The type of conferral could be definitively asserted after the BBNJ Agreement starts functioning and the role of those falling under the 'stakeholder' in lawmaking is clarified.
315 BBNJ Agreement art 25(6).
316 ibid 1(1) and 1(9).

conservation objectives"[317]. Since activities beyond national jurisdiction would have to be exercised by State parties *consistently* with the conservation objectives of the treaty, it may be argued that 'Relevant IFB Measures' regulating those activities would have to be *consistent* with the BBNJ Agreement and measures under it. In this reasoning, the harmonization of a variety of EIAs and mitigation or management measures *through*, for instance, RFMOs would have to follow the threshold of consistency. The same modality would apply when RFMOs agree on measures *with* the IMO. Importantly, 'consistency' is considered a threshold below 'compatibility' and, therefore, more flexible.[318] This contrasts with the modalities under which the COP would have to exercise its powers.

'Relevant IFB Measures', generically referred to in Part III and described in Article 26(2), may comprise external *mitigation and management* measures *consistent* with EIAs and more stringent measures referred to in Article 25(2), including those described in Article 29(4.b.ii) in Part IV. The fact that 'Relevant IFB Measures' may allow "*where appropriate*, sustainable use provided it is consistent with the conservation objectives"[319] opens the possibility for situations in which the use of a geographical area is considered not sustainable and not appropriate. Determining such situations would depend on the view of States acting through IFBs different from the COP. In this context, where the exercise of a certain type of high seas commercial navigation does not show consistency with 'Relevant IFB Measures' that type of navigation may be restricted or even banned, and, therefore, the exercise of the right of a State party to navigate in that high seas area might be subsequently affected.

Against this background, it is important to note Article 25(6) under Part III. It applies in the context of collaborations and also during contributions relevant to the implementation of the treaty. Article 25(6) provides that a State party "that is not a party to or a participant in a relevant legal instrument or framework, or a member of a relevant global, regional, subregional or sectoral body, and that does not otherwise agree to apply the measures established under such instruments and frameworks and by such bodies *shall not be discharged from the obligation to cooperate*" (emphasis added). Among all IFBs, this key provision arguably implies the empowerment of RFMOs and State members acting through them. Article 25(6) has been drafted following the wording in Article 17(1) UNFSA, through which RFMOs have amplified their competencies over straddling and highly migratory fish stocks.[320] The text in Article 25(6) further confirms that 'Relevant IFB Measures' may be adopted without the full participation of State parties and their solemn, more formal consent.

RFMO measures or measures adopted and combined *consistently* with those of RFMOs after a collaboration and a subsequent agreement within such bodies would become automatically mandatory for State parties when meeting the environmental thresholds

---

[317] ibid 1(9) (emphasis added).
[318] Jakobsen (n 52) 275–278.
[319] BBNJ Agreement art 1(9) (emphasis added).
[320] "A *State* which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.", UNFSA, art 17(1) (emphasis added).

established by the treaty, including those of more stringent measures in Part IV.[321] Through the BBNJ Agreement, following the VCLT, subsequent legal practice through RFMOs, with the involvement of their members, and obligations *arising* from agreements concluded with RFMOs would become key legal sources for providing content to the vast undefined terminology of the treaty with binding consequences for State parties.[322] Such legal materials may give precision and specificity to *inter alia* the notions of 'ABMTs' and 'MPAs' in an area requiring protection. In these terms, when agreements or 'Relevant IFB Measures' are concluded with the collaboration of the IMO, the regulation of activities of commercial vessels within a protected high seas region may impact the right of all States to navigate in that area.

Against this background, it may be reflected that the development of a proposal according to Article 19(2), may consist of the embodiment of a package of 'Relevant IFB Measures' that would have to be examined considering the requirement indicated in Article 29(4.a). Article 29(4.a) points out how the combination and harmonization of 'Relevant IFB Measures' of more stringent standards would have to be embodied in a proposal. In this respect, the conjunction 'or' in the provision allows wide combinations that may presumably reach a high complexity in the legal and scientific technical terms of the treaty. Presumably, the proposal submitted (containing legal and scientific, and technical language) would not make the *political arrangements* between the regional and sectoral relevant IFBs and other 'stakeholders' explicit. In the context of the procedures, after the *ascertainment* of the STB under Article 20, the COP may have to *take* a decision or *make* a recommendation. It may be argued that the time-bound factor, among others, would be a pressing one for the COP and State parties. In this connection, after the adoption of the treaty, it was "underscored the risk of politicizing ocean conservation"[323].

All the aforementioned may impact the capacity of State parties to make contributions during the time-bound consultation period. The promotion and preference for external EIAs that Part IV itself establishes appear to weaken the possibility of activities adjusting their conduct to the process for EIA under the competences of the COP.[324] In this respect, it is worth considering provisions on decision-making in Article 34 under Part IV. As Article 34(2) is not specifically addressed to the COP, it can be presumed that it would also apply to other IFBs aiming to achieve the treaty's objectives directly.

Considering the obligation of the COP under Article 34(2) to take full account of those external EIAs conducted in accordance with Part IV "[w]hen determining whether the planned activity may proceed", the preference of the BBNJ Agreement for external EIAs would lead to the restriction of the decision-making power of the COP. Furthermore, this may have consequences on the decision to authorize the planned activity under the jurisdiction or control

[321] BBNJ Agreement art 1(9) and 29(4).
[322] 'VCLT' art 31(3.b) and 35. A State party to the BBNJ Agreement would expressly accept obligations agreed by other States when consenting to the BBNJ Agreement. An obligation would arise for the State party (third State) from a provision of an agreement if the States acting through a competent RFMO that are parties to the agreement intend the provision to be the means of establishing the obligation, ibid 35. The agreements for adopting measures referred to in Article 29(4.b) could comprise those concluded among RFMO members themselves or those concluded between RFMO members, acting through such body, with the IMO or other sectoral bodies, among others.
[323] See statement of Russia in IISD, 'IGC 5(3) Session' (n 29) 4.
[324] BBNJ Agreement art 29(4.b.i) and 31.

of a Party, considering such a decision shall be made "taking into account mitigation and management measures"[325] that IFBs (different from the COP) would have implemented after collaborations. Interestingly, depending on the area under protection, the subsequent legal practice by IFBs concerning 'mitigation and management measures' may define the notions of "the prevention of significant adverse impacts on the marine environment" or "all reasonable efforts" referred to in Article 34(2). In this respect, a decision of the COP to authorize a (planned) activity "shall only be made when (…) the Party has determined that it has made *all reasonable efforts* to ensure that the activity can be conducted in a manner consistent with *the prevention of significant adverse impacts on the marine environment*."[326]. Recognizing that the empty notions and terminology in Article 34(2) and other provisions may be predetermined by the collaboration and legal practices carried out through and with IFBs that differ from the COP, provides an understanding of the limited margin with which state parties acting through it may contribute when consulted.[327]

7.1.2. Measures Adopted with the Consent of All State Parties

Measures with the formal consent of State parties regard those recognized or adopted through decisions and recommendations of the COP by the non-regular and time-bound consultation period governed by the procedural rules of the treaty. Besides 'ABMTs' and 'MPAs', Part III and Part IV include a variety of measures to "[c]onserve and sustainably use areas requiring protection".[328] The BBNJ Agreement defines *some of the characteristics* of 'ABMTs' and 'MPAs'. An 'ABMT' consists of "a tool, including a marine protected area, for a geographically defined area through which one or *several sectors or activities* are managed with the aim of achieving particular conservation and sustainable use objectives in accordance with this Agreement."[329] Following this, a BBNJ MPA is defined as "a geographically defined marine area that is designated and managed to achieve specific long-term biological diversity conservation objectives and may allow, where appropriate, sustainable use provided it is *consistent* with the conservation objectives."[330]

The treaty makes emphasis on the *effectiveness* of measures and objectives, as opposed to the relevance of the authorities and mandates of IFBs or the rights of States.[331] Accordingly,

[325] ibid 34(2).
[326] ibid (emphasis added).
[327] ibid 21(2).
[328] ibid 17(a).
[329] ibid 1(1) (emphasis added).
[330] ibid 1(9) (emphasis added).
[331] ibid 23(6) and 22(5). Observations of De Lucia in discussing the obligation not to undermine are enlightening in this respect: "effectiveness may refer to particular measures, rather than to the operation of an IFB as such. This interpretation is reasonable in light of two considerations: first, the fact that the reference to the competence of IFBs is covered by the obligation to "respect the competence," and thus the obligation to not undermine cannot reasonably refer to competence without duplication of functions of two expressions that, we have seen, must be treated as entailing distinct obligations; and second, the existence of similar provisions included in the [UNFSA]", De Lucia (n 35) 10.

State parties would have an obligation of cooperation and coordination in the use of 'ABMTs' and 'MPAs' with 'stakeholders', more precisely, with 'States' and the relevant IFBs.[332]In light of this, 'ABMTs' and 'MPAs' would have to follow the threshold of *consistency* with the BBNJ Agreement, that is, the same that applies to 'Relevant IFB Measures'. The thresholds applicable under the BBNJ Agreement fixed for *measures* adopted by IFBs differ from the thresholds or modalities imposed on State parties when acting under the COP.[333]

Part III indicates that 'ABMTs' and 'MPAs' would be adopted by decisions taken by the COP.[334] 'ABMTs' and 'MPAs' established by the COP would ultimately be implemented by IFBs.[335] Given that the establishment of 'MPAs' would require IMO measures to be consistent with those of an RFMO, it may be argued that decisions of the COP may have the effect of levelling the mandate of that global sectoral body with that of the RFMO in the high seas region where the latter body could have competencies. Inconsistency with RFMO measures would not satisfy the threshold of *consistency* required for establishing 'MPAs' and is arguably discouraged by the treaty. Accordingly, the agreement necessary to design IMO measures consistent with RFMO measures aimed at establishing 'ABMTs' and 'MPAs' may presumably result in the empowerment of the group of States acting through the RFMO. Thanks to the consistency requirements, measures agreed by RFMO members may influence how navigation is regulated in a geographically defined area covered by that body.

In turn, Part IV, in Article 29, establishes an important provision containing a stimulus for the relevant IFBs to adopt *inter alia* more stringent measures.[336] More stringent measures comprise those described in Article 29(4.b.ii), i.e., regulations and standards that may fall within the generic reference to 'mitigation and management measures' made in Article 34(2).

The impetus for IFBs is provided by the possibility of activating the clause in Article 29(4), and its subsequent legal ramifications under the BBNJ Agreement. Consequences of activating the clause under Article 29(4) may favor decentralization and the development of a legal system based on the paradigm of *mare clausum*.[337] To date, the IMO "has the monopoly to establish the rules and standards applicable for navigation."[338] but that might not stay the same under the BBNJ Agreement. In practical terms, after the adoption of more stringent measures by the COP, IFBs such as RFMOs and their members could be virtually conferred with powers over the freedoms exercised in a high seas area and the jurisdiction of State parties over vessels flying their flag.[339] Article 29(4) reads:

[332] BBNJ Agreement art 17(b).
[333] ibid 22 and 34(2).
[334] ibid 22(1).
[335] ibid 19(4.i).
[336] ibid 25(2).
[337] See considerations made about the origins of the *mare clausum* paradigm in Martine Julia Van Ittersum, 'Debating the Free Sea in London, Paris, The Hague and Venice: The Publication of John Selden's Mare Clausum (1635) and Its Diplomatic Repercussions in Western Europe' (2021) 47 History of European Ideas 1193, 1193–1195.
[338] Wolfrum (n 141) art 210.
[339] BBNJ Agreement art 25(2).

> "It is not necessary to conduct a screening or an [EIA] in areas beyond national jurisdiction, provided that the Party with jurisdiction or control over the planned activity determines:
>
> (a) That the potential impacts of the planned activity or category of activity have been assessed in accordance with the requirements of other relevant legal instruments *or* frameworks *or* by relevant global, regional, subregional *or* sectoral bodies;
>
> (b) That: (i) the assessment already undertaken for the planned activity is *equivalent* to the one required under this Part, and the results of the assessment are taken into account; or (ii) the regulations or standards of the relevant legal instruments *or* frameworks *or* relevant global, regional, subregional *or* sectoral bodies *arising from* the assessment were designed to prevent, mitigate or manage potential impacts below the threshold for [EIAs] under this Part, and they have been complied with." (emphasis added).

The text in this provision further confirms that EIAs are not something that can be dealt with separately from Part III and assessed by only focusing on Part IV. The content of Article 29(4) may be deemed a close-up over a precise subject matter following the measures and proceedings regulated under Part III. Interestingly, the conjunction 'or' is widespread throughout its text, an aspect that should not be overlooked. The explicit specification of such a mechanism under Article 29(4) suggests that it and the subsequent decentralization are preferred for achieving the objectives of the BBNJ Agreement.

In its *chapeau*, Article 29(4) provides that if "the Party" with jurisdiction or control over a "planned activity" "determines" that they have complied with certain requirements listed in the provision, "[i]t is not necessary to conduct a screening or an [EIA] of a planned activity". The provision, taken as a whole, demonstrates how procedures can be used to recognize the prevalence and *authoritativeness* of external legal schemes, meaning relevant IFBs. Such recognition could simultaneously include the recognition of 'Relevant IFB Measures' related to regional and sectoral external EIAs adopted in a manner consistent with Article 29(4.b.i).

Measures referred in Article 29(4.b) fall within the scope of 'Relevant IFB Measures' described in Article 26(2) and that may be used as a legal basis for decisions and referred to in recommendations of the COP. Part IV gives preference to external EIAs consistent with the BBNJ Agreement. This may be inferred from the fact that Article 29(1) in Part IV establishes that State parties "shall promote *the use* of [EIAs] and the adoption and implementation of the standards and/or guidelines developed under article 38 in relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral *bodies* of which they are members." (emphasis added). It is worth highlighting that this provision entails a stronger obligation than Article 25(4) in Part III, which, more lightly, mandates that State parties "shall promote, as appropriate, the adoption of measures within relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral *bodies* of which they are members, to support the implementation of the decisions and recommendations made by the [COP] under this Part." (emphasis added). EIAs may be regulated under 'ABMTs' or 'MPAs'. In this respect, it is noticeable that State parties complying with the mandate in Article 29(1) in Part IV would also be complying with the objectives in Part III, oriented towards "[s]trengthen cooperation and coordination in *the use* of [ABMTs, including MPAs] among States, [and relevant IFBs]"[340]. The obligations to promote EIAs and strengthen cooperation and coordination in their use would be of the utmost importance during collaboration and contributions with IFBs and through them. Given the weight measures for circumventing consent may have for developing the BBNJ Agreement, the 'equivalence' of an EIA adopted under an IFB would most likely be defined during collaborations.[341] This may be interpreted as an advantage for competent RFMOs, among other IFBs, with respect to State parties acting under the COP.

Besides the relevant EIA equivalency, Article 29(4.b.i) establishes that "the results of the assessment are *taken into account*" (emphasis added). The expression 'taken into account' is not clear about the extent to which those results would have to be regarded. What may be assumed, though, is that the IFB that had established an external EIA would be the one with competence to *determine* or *ascertain* whether the EIA was 'taken into account'. The text suggests that, in geographical areas under the mandate of regional bodies such as RFMOs, they would be the ones with competence to determine whether the EIA is consistent with Article 29(4.b.i) and whether it was 'taken into account'. Following this reasoning, IMO would be the one entitled to ascertain whether an EIA adopted under it meets the requirements set out in the said provision.

Concerning the relevant 'regulations or standards' under Part IV, the vague vocabulary employed and the expression 'arising from' in Article 29(4.b.ii) allow flexibility for the combination of 'Relevant IFB Measures' of different relevant IFBs. The great adaptability of Article 29(4.b) allows some degree of political discretion to IFBs when *collaborating* and harmonizing 'Relevant IFB Measures' of regional character with others of a sectoral character. In this respect, IMO measures might *arise from* RFMO measures. An RFMO and the IMO, might agree that IMO regulations and standards arise from *inter alia* an EIA implemented by the RFMO already in place. Article 29(4.b.ii) clarifies that "the regulations or standards" need to be "designed to prevent, mitigate or manage potential impacts *below* the threshold for [EIAs] under this Part, and they have been *complied with*."[342] IMO measures may have to meet a threshold *below* the environmental thresholds prescribed in inter alia Article 30. Considering

[340] ibid 17(b) (emphasis added).

[341] ibid 29(4.b.i). In examining the relationship between the BBNJ Agreement and the regime of the Area, it has been observed that "[t]he conflicting goals of both legal regimes and *the ordinary meaning of the term 'equivalent', may imply a broad margin of discretion for states to decide that conflicting EIAs are actually equivalent*. While such interpretation complies with Article 5 of the BBNJ, it may breach other substantive obligations of environmental protection.", Shani Friedman, 'The Interaction of the BBNJ Agreement and the Legal Regime of the Area, and Its Influence on the Implementation of the BBNJ Agreement' (2024) 167 Marine Policy 106235, 3.

[342] In circumstances where a regional IFB, such as an RFMO, had already designed and implemented measures consistent with Article 29(4.b.i), later regulations and standards of IMO under Article 29(4.b.ii.) may have to arise from RFMO measures under Article 29(4.b.i). Though their different mandates would be important in this respect, a logic following the *principle prior tempore potior iure* underlies in this regard and favors one of the two relevant IFBs. Between the sectoral IMO and the regional IFB that had already implemented an EIA following Article 29(4.b.i), the latter (in the example, an RFMO) is likely to be in the best situation to determine whether the measures being developed under the IMO meet the requirements set out by Article 29(4.b.ii) and how they relate to the existing EIA in force in that region.

the IMO would be the competent body implementing the measure, it would possess the power to ascertain whether the measure with Article 29(4.b.ii) has been complied with consistently.

An important stimulus subsequent to meeting the requirements detailed in Article 29(4) is envisaged in Article 29(6). It may be argued that it awards the use of more stringent measures. It first establishes a rule according to which "Parties shall monitor and review the activities and ensure that the monitoring and review reports are published through the [CHM]". Article 29(6) describes an exception to the rule provided an establishes "[u]nless the planned activities *that meet the criteria set out in* [Article 29(4.b.i)] above are subject to monitoring and review under a [relevant IFB]". It may be argued that the effect of Part III and Part IV awarding proponents meeting more stringent environmental measures leads to a process of decentralization of information. This may have an impact on later proceedings as to the performance of the bodies constituted by the treaty.

What a State party *determines* under Article 29(4) during time-bound consultations may condition the decision that the COP may take and the constitution of 'ABMTs' and 'MPAs' in the high seas under Article 34(2). The determination of a Party under Article 29(4) may happen "[w]hen determining whether the planned activity may proceed under [Part IV]". In this context, under Article 34(2), the Party would also have to determine "that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment." After the determinations of a State party under Article 29(4) and Article 34(2), the COP may take "the decision to authorize the planned activity under the jurisdiction or control of a Party". Following this, according to Article 34(2), the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment. Reasonably, for a State party to submit a determination pursuant to Article 34(2), it should have to rely on the consistency of the existing 'Relevant IFB Measures' with environmental thresholds described in the provision. In a possible connection with Article 24(9) and 34(2), immediately after the BBNJ Agreement was adopted, it was "underscored the risk of politicizing ocean conservation, stressing that any decision can be taken through a simple vote"[343].

Following Article 25(1) under Part III, A COP's decision based on the activation of Article 29(4) may have legally binding effects on the right of all State parties to navigate the high seas. Article 25(1) provides that they "shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under [Part III]." More stringent environmental standards embodied in IMO standards and regulations (consistent with other 'Relevant IFB Measures' in the designated area) may apply to all State parties and restrict their freedoms, without their necessary active participation through the IMO or through the competent RFMO that had engaged in agreeing on the IMO regulations applicable and designed for that area.[344] Non-compliance with Article 25(1), read in conjunction with Article 25(6), would be regarded as non-cooperative conduct challenging the implementation of the treaty.

[343] See statement of Russia in IISD, 'IGC 5(3) Session' (n 29) 4. Although there was no explicit reference to Article 29(4), these words might be interpreted as an implicit reference to the clause under this provision.
[344] BBNJ Agreement art 25(6).

In addition, Article 25(2) Part III allows (and, if read in context, encourages) all States parties to determine "*more stringent measures* with respect to its nationals and vessels or with regard to activities under its jurisdiction or control in addition to those adopted under [Part IV]" (emphasis added). It would be reasonable to state that Article 29(4) is closely related to the provision in Article 25(2).

7.2. Procedure for Non-Regular and Time-Bound Consultations with State Parties

This procedure is essential for strengthening the legal achievements obtained during previous stages of collaboration and also for promoting future collaborations. The COP's competencies are set out in detail in Articles 22 to 24. These rules, however, should be read in conjunction with Article 21 entitled "Consultations on and assessment of proposals". The COP is one of the IFBs consulted. Consultations with it, however, depend on the initiation of the *non-regular* procedures regulated by Part III. This may be inferred by the wording in Article 22(3), which gives the COP the faculties to "make arrangements for *regular consultations*". The term 'regular' makes non-regularity presumable and is consistent with the fact that procedures matter only when a proposal is submitted. Non-regularity characterizes the initiation and finalization of the procedures regulated under Part III. The term 'consultations' allows the characterization of the COP as another IFB able to make contributions and, differently from the others, *make* recommendations and *take* decisions. The COP may become a *collaborator* if arrangements under Article 22(3) are concluded with the IFBs.

The expression utilized in Article 22(1.c) regulating the modalities of the COP for making decisions, refers to "*other* global, regional, subregional or sectoral bodies", making it clear that the COP is not *above* the relevant *regional* IFBs nor the sectoral IFBs. This is important considering that Article 21(6) indicates that "consultation period shall be time-bound". This gains additional relevance inter alia as regards the procedural rules in Article 29(4), included among the provisions for area-based management that regulate the relationship between this Agreement and EIA processes under relevant IFBs. Article 34(2), regarding the *decisions* of the COP, is another important provision in Part IV. In this view, Part IV should be read taking into account the procedural rules of Part III.

7.2.1. The Proposals and the Contributions of 'Stakeholders'

Article 19 is devoted to the requirements for the submission of a proposal. Parties to the BBNJ Agreement may submit proposals 'regarding' a decision for establishing 'ABMTs' and 'MPAs' to the Secretariat.[345] The term 'regarding' allows interpreting that proposals for the adoption of

[345] ibid 19(1).

a recommendation for designing ‘Relevant IFB Measures’, including more stringent measures, are also comprehended within this provision. Proposals could be made individually or collectively.[346] The development of such proposals would involve *collaboration* with ‘relevant stakeholders’. Interestingly, tags for non-state actors like ‘the private sector’, the ‘civil society’, and the ‘scientific community’ are included among the undefined ‘stakeholders’. Article 19(2) indicates that Parties “shall *collaborate* and consult, *as appropriate*, with relevant stakeholders”.[347] Accordingly, stakeholders shall *collaborate* and consult, *as appropriate*, with the State parties. The parties and ‘stakeholders’ may appear to be on an equal footing regarding this collaboration, making the regularity of the proceedings dependent on the will of both groups.

Requirements for the formulation of the proposals are established mainly in Article 19, paragraphs 3 and 4. Article 19(6) suggests that these are not definitive since “[f]urther requirements regarding the contents of proposals (…) shall be elaborated by the [STB], *as necessary*, for consideration and adoption by the [COP].”[348] Any decision made in this regard should be taken with due transparency.[349] Proposals shall be based on “the best available science and scientific information”. [350] Subject to availability, additionally, proposals shall be formulated on the basis of “relevant traditional knowledge of Indigenous Peoples and local communities.”[351] In formulating the proposals, Parties shall “[take] into account the precautionary approach and an ecosystem approach.”[352] Article 19(4) provides a variety of “key elements” for the proposals.[353]

Among the key elements proposals shall include, Article 19 specifies a geographic or spatial description of the area that is the subject of the proposal by reference to the indicative criteria specified in Annex I and information on any of the criteria specified thereof.[354] Annex I to the BBNJ Agreement provides “indicative criteria for the identification of areas”.[355] These criteria may be further developed and revised “as necessary” by the STB.[356] It is worth highlighting that these criteria include the “[e]xistence of conservation and management measures”[357], presumably including measures adopted by circumventing consent. Key elements also include “human activities” in the area and their “possible impact, if any”.[358] It is

---

[346] ibid.
[347] ibid 19(2) (emphasis added). Illustrative examples of stakeholders expressly mentioned in the provision are “States”; global, regional, subregional bodies; sectoral bodies; civil society; the scientific community; the private sector; Indigenous Peoples, and local communities. This list is not exhaustive. The general category of “stakeholders” and all these subcategories remain uncertain or undefined at the moment representing an issue that, most probably, is going to be decided and clarified within the context of the COP.
[348] ibid 19(6) (emphasis added).
[349] ibid 47(5) and 48(1).
[350] ibid 19(3) and 19 (4.j).
[351] ibid 19(3).
[352] ibid.
[353] ibid 19(4).
[354] ibid 19(4.a) and 19(4.b).
[355] ibid Annex I, paras (a-v).
[356] ibid 19(5).
[357] ibid Annex I, para (v). Most likely, this would imply considering conservation and management measures adopted under RFMOs or arrangements under the UNFSA.
[358] ibid 19(4.c).

worth noting that navigation undertaken by commercial vessels would be considered under this latter element. In addition, a "draft management plan encompassing the proposed measures and outlining proposed monitoring, research and review activities to achieve the specified objectives" shall also be included among these key requirements, together with relevant scientific input and, if available, traditional knowledge of Indigenous Peoples and local communities.[359]

Article 21, regarding the time-bound contribution stage, indicates that the proponent would have to review the proposal in light of the 'stakeholders' contributions "as well as" the views and information from the STB.[360] The proponent thence would have two options "as appropriate".[361] One option would be revising the proposal "accordingly", which would mean following the stakeholders' contributions and the STB's views.[362] The other option would be to "*respond* to substantive contributions not reflected in the proposal."[363] It follows that the proponent State Party would always have to consider the *totality* of contributions and views in order to achieve the substantial consolidation of the proposal and its further success.

7.2.2. The STB Preliminary Review

Once the proposal has been submitted in writing, the Secretariat shall make it public and transmit it to the STB to undertake a preliminary review.[364] Article 20 specifies the work of the STB and establishes that "[t]he purpose of the review is to *ascertain* that the proposal contains the information required under article 19, including indicative criteria described in this Part and in Annex I." The term 'to ascertain' clarifies the term used in the title of the provision, which includes the preliminary *review* of proposals. At the same time, the term 'to ascertain' and the term 'determines' or 'determining' in Articles 29(4) and Article 34(2), respectively, appear to have a close relationship and to be somehow interchangeable. If terms are interpreted as close in meaning, it might be said that the purpose of the STB review is *to determine* that the proposal contains the information required under Article 19.

According to Article 20, the outcome of the review shall be made "publicly available", in the terms of the treaty, and transmitted to the proponent by the Secretariat. Subsequently, the proponent shall take into account the observations made by the STB and retransmit the proposal to the BBNJ Secretariat. The latest version of the proposal is then made public.[365] Parties to the BBNJ Agreement are then notified of the completion of this stage to proceed with the time-bound consultation period.[366] Consultations on proposals shall be "inclusive", "transparent",

[359] ibid 19 (4.f) and (4.j).
[360] ibid 21(5).
[361] ibid.
[362] ibid.
[363] ibid.
[364] ibid 20.
[365] ibid.
[366] ibid 20, 21(6).

and “open to *all* relevant stakeholders”.[367] The Secretariat shall facilitate consultations and gather input from the stakeholders, which, it is noteworthy, are recognized as having broad discretion to provide views and information in the form of *contributions*.[368]

7.2.3. Decision-Making

The decision-making of the COP is ruled by *inter alia* Articles 23 in Part III and 34(2) in Part IV. Article 23 provides a series of rules on the normative-making process concerning decisions and recommendations as well as objections. The general rule establishes that decisions and recommendations shall be adopted on a consensus basis.[369] Next, however, the BBNJ Agreement provides rules that allow for the adoption of measures by virtue of majorities. In this concern, the BBNJ COP shall adopt a *decision* “by a two-thirds majority of the Parties present and voting that all efforts to reach consensus have been exhausted.”[370] In this manner, after the BBNJ COP recognizes the impossibility of reaching a consensus, both *decisions and recommendations* “shall be taken by a three-fourths majority of the Parties present and voting.”[371]

Article 34(2) in Part IV, indicates that “[w]hen determining whether the planned activity may proceed under this Part, full account shall be taken of an [EIA] conducted in accordance with this Part. A decision to authorize the planned activity under the jurisdiction or control of a Party shall only be made when, [first,] *taking into account mitigation or management measures*, [and second] the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment.” (emphasis added). The vocabulary utilized in Article 34(2), though similar to the one utilized in the LOSC, is likely to be defined by way of *contributions* based on the previous agreements achieved through *collaborations*.

Regional mechanisms like RFMOs during the consultation period are allowed to provide inputs and clarify whether mitigation or management measures were taken into account and whether the State party has made the efforts referred to in Article 34(2).[372] They may also confirm whether thresholds in Article 29(4) have been complied with and endorse the determination of a State party under that provision. If so, the consensus or majority following the decision-making of the COP would be conditioned by the determination of that State party

[367] ibid 21 (emphasis added). The employment of the term “all” preceding “relevant stakeholders” seems to be emphasizing the broad openness of the consultation stage. This aspect becomes evident after realizing that the term “relevant stakeholders” already appertains to an uncertain and undefined terminology deprived of explicit or clear meaning. Examples given by the provision (i.e. “global, regional, subregional” bodies, “sectoral bodies”, etc.) are susceptible to the same opinion.
[368] ibid 21(2).
[369] ibid 23(1).
[370] ibid 23(2).
[371] ibid.
[372] ibid 21(2.b).

and the inputs given by the RFMO and other 'stakeholders'.[373] Article 29(4) should always be read and interpreted in conjunction with the modalities under which the COP may exercise its competencies, i.e., considering the subsequent limitations for the parties acting through the COP after the clause is triggered.

7.2.4. Emergency Measures

Emergency measures are regulated under Article 24 in Part III. Measures referred to under Part IV, including those in Article 29(4), may be adopted in the manner of emergency measures, notwithstanding the subsequent decentralization of the regime. Such measures may be proposed by Parties or recommended by the STB.[374] Interestingly, emergency measures may be adopted intersessionally.[375] Procedures and guidance for the establishment of emergency measures, including consultation procedures, shall be elaborated by the STB, as necessary, for consideration and adoption by the COP at its earliest opportunity.[376] It is worth noting that "[s]uch procedures shall be *inclusive* and *transparent*"[377]. This may be translated into a special manifestation of the more general goal of promoting transparency established by Article 48.

The *necessity* for the COP to decide on emergency measures would be defined by the outcome of previous collaborations and the modalities under which it has to take the relevant decision. This may be inferred from Article 24(2). Emergency measures could be "considered necessary only if, following consultation with [relevant IFBs], the *serious or irreversible harm* cannot be managed in a *timely manner*"[378]. The 'timely' management of such 'serious or irreversible harm' would have to be undertaken "*through* the application of the other articles of this Agreement *or by* a relevant legal instrument *or* framework *or* a relevant global, regional, subregional *or* sectoral body."[379] The consultation or collaboration of State parties with the IFBs, including RFMOs, could be instrumental in clarifying the term 'necessary' and other empty notions in Article 24. The proposals submitted after the collaboration with the 'stakeholders' would add precision and specificity to the term 'emergency'. Defining geographical aspects concerning the design of 'emergency measures' and their designation would be crucial to protect the area in need of protection. This type of measure would likely become essential for RFMOs and other regional IFBs if they determine that "emergency measures" need to be applied by another IFB, including sectoral bodies like the IMO and other regional IFBs.

Emergency measures shall take into account the precautionary approach. [380] This is relevant considering that such measures may be applied "when a natural phenomenon or

[373] ibid 23(1).
[374] ibid 24(3).
[375] ibid.
[376] ibid 24(5).
[377] ibid.
[378] ibid 24(2) (emphasis added).
[379] ibid (emphasis added).
[380] ibid 24(3).

human-caused disaster has caused, *or is likely to cause*, serious or irreversible harm to marine biological diversity of areas beyond national jurisdiction, to ensure that the serious or irreversible harm is not exacerbated."[381]

Emergency measures are meant to be temporary.[382] An emergency measure may be terminated for three reasons: by the expiration of 2 years from its entry into force, or, before the end of that biennial period, by replacement by another measure, or by a decision of the COP when the circumstances that necessitated the measure cease to exist.[383] Interestingly, Part III authorizes the replacement of an emergency measure with other types of measures under and beyond the scope of Part III.[384] Under the scope of the BBNJ Agreement, an emergency measure may be replaced by ABMTs, including MPAs, "and related measures established in accordance with [Part III]".[385] Concerning issues beyond its conventional scope, Part III attributes a right to relevant IFBs to adopt measures so these can replace the emergency measures originally adopted under its scope with one or different measures under their respective mandates.[386]

7.2.5. Objections

Decisions are the only measures of the COP that can be the subject of an objection.[387] Curiously, the BBNJ Agreement does not provide an objection process for recommendations. This leaves those who disagree with the recommendations, or the 'Relevant IFB Measures' achieved through collaboration and used as the legal basis for these actions by the COP, without a procedural remedy to preserve their legal standpoint. The issue of objections may become relevant among the various scenarios when the clause under Article 29(4) takes effect or when emergency measures are sought.

In principle, decisions shall enter into force 120 days after the BBNJ COP meeting at which they were taken and shall be binding on *all* Parties.[388] During that period, however, any Party may object to the decision by notification in writing to the BBNJ Secretariat.[389] Subsequently, "that decision shall not be binding on *that* Party."[390] In this logic, the decision would be binding on all the Parties except for the objecting Party. This emphasizes the objectives-oriented logic characterizing the BBNJ Agreement while reducing the consequences of dissenting or objecting voices to a minimum.

[381] ibid 24(1) (emphasis added).
[382] "The measures shall be temporary and must be reconsidered for decision at the next meeting of the [BBNJ COP] following their adoption.", ibid 24(3).
[383] ibid 24(4).
[384] ibid.
[385] ibid. "Related measures" might include BBNJ COP recommendations.
[386] ibid.
[387] ibid 23(4-10).
[388] ibid 23(3).
[389] ibid 23(4).
[390] ibid.

The objector shall have to comply with certain rules of conduct and observe procedural rules under the BBNJ Agreement. As to the conduct of the objecting Party, it "shall, *to the extent practicable*, adopt alternative measures or approaches that are *equivalent* in effect to the decision to which it has objected".[391] The term 'equivalent' used here is employed in Article 29(4.b.i) for referring to external EIAs. Simultaneously, the objector "shall not adopt measures nor take actions that would undermine the *effectiveness* of the decision to which it has objected unless such measures or actions are *essential* for the exercise of rights and duties of the objecting Party in accordance with the [LOSC]."[392] The objecting Party shall report to the BBNJ COP on the implementation of these norms on a periodical basis to inform the monitoring and review under Article 26, starting from the meeting following the notification of the objection.[393]

In terms of procedure, the objection process is of a fixed duration, in a logic similar to the consultation process.[394] If the objector is persistent in its view, the objection to the decision would have to be renewed every three years after the entry into force of the measure.[395] This renewal would be subject to the necessity of the objecting Party.[396] As a first step, the objector shall notify its objection to the BBNJ Secretariat, in writing and within 120 days after the BBNJ COP meeting at which the decision was adopted.[397] Article 23(5) restricts the possible arguments sustaining the objection by establishing that they can be based on three types of grounds, those are: (a) that the decision is inconsistent with the BBNJ Agreement or the rights and duties of the objecting Party under the LOSC; (b) that the decision unjustifiably discriminates in form or in fact against the objecting Party; (c) that the Party cannot practicably comply with the decision at the time of the objection after making all reasonable efforts to do so.[398]

The objection may be withdrawn by the express will of the objecting Party or, tacitly and automatically, by the non-renewal of the objection. In this order, an objection to a decision may be withdrawn at any time by written notification to the Secretariat and, thereupon, the decision shall be binding for that Party 90 days following the date of the notification stating

[391] ibid 23(6). Determining the measure equivalence in effect would arguably be a subject matter under the competencies of the COP and, therefore, would not depend on the unilateral view of the objecting Party.
[392] ibid. The *not undermine* duty contained in this latter provision might not necessarily be interpreted as an equivalent to the *respect/not undermine* clause that applies, for instance, to BBNJ COP decisions establishing ABMTs including MPAs, ibid 22(2). See also ibid 5(1), 22(5). How *essential* or *non-essential* measures or actions may be for the exercise of the rights and duties of the objector would be defined under the context of the BBNJ Agreement. The expression 'in accordance with the LOSC' does not imply that the BBNJ Agreement is subject to or below the LOSC, nor does it mean that the interpretation of the essentiality has to be made in a manner *compatible* with the LOSC.
[393] BBNJ Agreement art 23(6).
[394] ibid 21(6).
[395] ibid 23(8).
[396] ibid. The provision also establishes that the renewal of the objection should be made "by written notification to the [BBNJ Secretariat]. Such written notification shall include an explanation of the grounds of its initial objection.", ibid. From this follows that the objecting Party should adopt a consistent and persistent position over time if it intends to sustain its stance in the long term and, following the same reasoning, to be exempted from the obligation established by the decision.
[397] BBNJ Agreement art 23(4).
[398] ibid 23(5).

that the objection is withdrawn.[399] As regards the tacit withdrawal, the Secretariat shall notify the objecting Party 60 days before the date of possible withdrawal.[400] If no notification of renewal is received, the objection shall be considered automatically withdrawn and, thereupon, the decision shall be binding for that Party 120 days after the withdrawal.[401]

As stated above, the objection process provided by Part III of the BBNJ Agreement allows the challenged decision to have binding effects with respect to all non-objecting Parties. In this context, procedural rules pave the way to, what appears to be, an uncontainable evolution through further normative developments. In other words, the objection does not represent the slightest limitation for the majority of Parties that have voted in favor of the decision. The latter may go ahead and achieve the conventional objectives of the BBNJ Agreement, even if the terms for achieving those objectives are not *sensitive* to the view of the objector(s). In this way, the objectives-oriented logic qualifying the BBNJ Agreement prevails over the dissenting position, including the interests and values on which this position is based. Notwithstanding its possible persistence, the objecting party appears to be *left behind* in the evolving legal process that this new treaty may stimulate within (and beyond) its scope.[402]

7.3. Modalities Restricting the Competencies of the COP

The modalities that restrict the powers of State parties acting through the COP are widespread in the BBNJ Agreement. This matter is relevant for State parties when recommending the adoption of new 'Relevant IFB Measures' and establishing 'ABMTs' or 'MPAs' during the time-bound consultations.[403] The modalities and duration are not expressed exhaustively in the text of the BBNJ Agreement.[404] Article 22 is composed of a variety of paragraphs indicating modalities to which the COP shall be subject. Article 22(1) is particularly important. At the same time, Article 22(2) conditions the reading of Article 22(1) and the weight of the limitations for the COP therein included.

[399] ibid 23(4).
[400] ibid 23(9).
[401] ibid.
[402] ibid 23(10). Decisions of the COP adopted under Part III, and objections to those decisions shall be made publicly available by the Secretariat. These decisions and objections shall be transmitted to *all* States and the relevant instruments and bodies. All these recipients, namely States, instruments, and bodies, would find themselves *encouraged* to adopt acts reflecting and following the decision within the scope of its competencies, ibid 25(5). This is without prejudice to the fact that the decision has been challenged, ibid 23(10). This can be connected with the words of Wolfrum, "[i]solated actors – which means those who try to rely solely on their own capacity without having the power of a hegemon – do not constitute a hindrance to the development of international law.", Wolfrum (n 141) 50.
[403] BBNJ Agreement art 21(5) and (6).
[404] "The modalities for the consultation and assessment process, including duration, shall be further elaborated by the [STB], as necessary, at its first meeting, for consideration and adoption by the [COP], taking into account the special circumstances of small island developing States", ibid 21(8). This provision does not mention developing States Parties in general, but only small island developing States.

Article 21 BBNJ Agreement makes it clear that contributions and views may confirm or *optimize* the original proposal, even if they come from States that are not party to the BBNJ Agreement and from bodies established under an instrument to which the proposing State Party might not be a member or party.[405] In a different context, however, if the proponent State Party is unwilling to modify its proposal and decides to depart from the stakeholder's contribution, for example, from what was said by a contributor non-Party to the BBNJ Agreement or, for another example, from the contribution of a body established under an instrument to which the proponent is not a party, the proponent State Party shall anyway have the duty to *respond* for whatever it decided *not* to reflect in the latest version of its proposal.[406] That response, in turn, must respect the time constraints imposed by the consultation process, in other words, a time factor that conditions the proponent's ability to develop its standpoint.[407]

Certainly, views and inputs from the (potentially knowable but still unknown) 'stakeholders' and the STB could influence the making of proposals, including draft management plans and other elements of it, on the basis of this provision and according to, for instance, the stakeholders' operational capacity to participate and the proactive role they might play.[408] After considering all the contributions and views, the proponent shall submit the revised and final proposal to the STB which shall assess the proposal and make *recommendations* to the BBNJ COP.[409]

Article 22 consists of seven paragraphs that provide rules for making recommendations and taking decisions regarding the establishment of 'ABMTs', including 'MPAs'. An overall assessment of Parts III and IV suggests that the term 'establishment' translates into a conferral of powers on the part of State parties. Article 22(1) states:

> "The [COP], on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific input received during the consultation process established under [Part III], and the scientific advice and recommendations of the [STB]:
>
> (a) Shall take decisions on the establishment of [ABMTs, including MPAs], and related measures;
>
> (b) May take decisions on measures compatible with those adopted by [relevant IFBs] in cooperation and coordination with those instruments, frameworks and bodies;
>
> (c) May, where proposed measures are within the competences of other global, regional, subregional or sectoral *bodies*, make recommendations to Parties to this Agreement and to global, regional, subregional and sectoral *bodies* to promote the adoption

405 ibid 21(2)(a)(b).

406 ibid 21(5).

407 ibid 21(6).

408 In connection with this, literature has noted the great capacity of influence of new actors such as non-governmental organizations, interest groups, and other representatives of civil society, see Wolfrum (n 141) 135, 299, 254, 271. Wolfrum points out that "Predominantly, the cooperation required is undertaken between States directly or via the fora established by the individual treaties concerned. Since the Rio Conferences on Environment and Development beginning in 1992, NGOs participate as observers in multilateral conferences concerning the environment. Apart from that, *members of an NGO are frequently members of the delegation of a State and as such have a direct influence on deliberations*. Many multilateral environmental treaties have been initiated by NGOs." ibid 199 (emphasis added).

409 BBNJ Agreement art 19(4),21(7).

of relevant measures through such [relevant IFBs], in accordance with their respective mandates." (emphasis added).

The COP possesses the faculty to take decisions "on measures *compatible* with those adopted by [relevant instruments and bodies] in *cooperation and coordination* with those instruments, frameworks and bodies."[410] This provision is of the utmost importance for avoid duplicating 'Relevant IFB Measures' after contributions and under the COP. Subsequently, cooperation and coordination with sectoral bodies (such as RFMOs or IMO) would be instrumental in preventing incompatibilities between COP decisions and RFMO or IMO measures consistent with the objectives of the treaty.[411] Early consultations to enhance cooperation and coordination, mostly before the adoption of the decision, might be important in reducing the risks of incompatibilities.[412]

Article 22(2) establishes here that the decisions have to "*respect* the competences of, and *not undermine*, [relevant IFBs]."[413] Given this, Article 22(2) may be viewed as a key tool for procedural strategy and as a means to gain influence in the making of norms within the COP. The fact that the insertion of the 'not undermined' clause was supported by fishing states suggests that these states and the relevant stakeholders aligned with them may interpret the clause in their own interest and in the interest of the RFMOs of which they are members.[414] In this connection, in Part I, Article 5(2) provides that the treaty "shall be interpreted and applied in a manner that does not undermine" relevant IFBs. The clause would have to be interpreted in accordance with the objectives and principles of the BBNJ Agreement. Additionally, measures agreed upon under other IFBs would need to be consistently harmonized. This would be decisive in achieving the goal-oriented cooperation and collaboration promoted by the treaty. Article 5(2) conditions the interpretation and application of the treaty by adding that it shall be made in a manner that "promotes coherence and coordination with those instruments, frameworks and bodies". The degree of versatility of the clause in Article 22(2), applicable in the context of time-bound contributions, is likely to be clarified in light of the 'not undermine' clause under Article 5(2) and following the legal practice unfolded following it. The 'stakeholders' may interpret and apply Article 22(2) to solidify the mandate of RFMOs and other regional IFBs for influencing the making and implementation of measures within a body of global character while respecting the sectoral mandate of the body.[415] Through Part III, regional IFBs, like RFMOs, may influence the making of *consistent* measures within the IMO and, in practical terms, even become virtually ranked above the latter over a certain region.[416]

[410] ibid 22(1)(b) (emphasis added).
[411] Aldo Chircop, 'The Use of IMO Instruments for Marine Conservation on the High Seas' in Robert C Beckman and others (eds), *High Seas Governance: Gaps and Challenges* (Brill Nijhoff 2019) 130, 172–173.
[412] BBNJ Agreement art 22(3).
[413] ibid 22(2).
[414] 'Panel on Cooperation with Relevant Instruments, Frameworks and Bodies (IFBs) under the BBNJ Agreement' (n 221) pt min. 6. See also, De Lucia (n 35) 8.
[415] De Lucia (n 35) 8–9.
[416] While grasping the ambiguity and intricacies of the term 'undermine', awareness had been shown to the fact that "[i]n the context of fisheries in ABNJ, it is argued that it then follows that a new instrument should not undermine the effective implementation of UNFSA, nor RFMO conservation and management measures (CMMs), in the sense of reducing their effectiveness, or weakening them. This

State parties that are members of the IMO would have to promote coherence and coordination with RFMOs.[417]

Where the measures proposed fall within the competencies of "other" bodies, the COP is given the powers to make *recommendations* to Parties to the BBNJ Agreement and also to these other bodies "to *promote* the adoption of relevant measures through such instruments, frameworks and bodies, *in accordance with their respective mandates*."[418] These recommendations would be complemented and strengthened by the *obligation* regarding implementation set out by Article 25 which states that "Parties shall promote, as appropriate, the adoption of measures within [relevant IFBs] of which they are members, to support the implementation of the decisions and recommendations made by the [COP]" under [Part III]."[419]

It might be argued that over time, not immediately, recommendations may have a gradual transformative impact on the scope *ratione materiae* of the existing relevant IFBs as they demonstrate increasing receptiveness to the content of these recommendations. Interestingly, this may be possible considering that the COP does not appear to be obliged or limited by the duty to respect and not undermine others' competencies as in the case of decisions.[420] Moreover, even though the term is not expressly included in the provisions, an analysis of the text of the BBNJ Agreement suggests that, over time, it might develop a certain *prevalence* over existing relevant instruments and bodies.

The effects recommendations may have on the measures of sectoral bodies such as the IMO underly the wording of Article 22(7), a provision that illustrates the feasible conferral of powers of State parties by way of decisions and the 'Relevant IFB Measures' these may endorse. It is worth highlighting that the latter provision establishes that "[u]pon the establishment of, or amendment to the competence of, a [relevant IFB], any [ABMTs],

---

would thereby have the effect of strengthening RFMO competences and complementary frameworks.", Scanlon (n 241) 407. Highlighting the latter matters may serve to anticipate the standpoint RFMOs (and 'stakeholders' cooperating with them) may hold during the *contribution process* and how they may invoke Article 22(2) to empower themselves and subsequently disempower the BBNJ COP or, indirectly and through the decisions of the latter, influence external IFBs such as IMO. Indeed, it has not gone unnoticed that "the IMO can expect to be engaged by the new agreement *as the BBNJ COP discharges its obligation to cooperate and coordinate with relevant management Organizations*, particularly with regard to the adoption of measures to support the implementation of COP [*recommendations* and decisions] regarding MPAs and ABMTs.", Julian Roberts, 'Designating Particularly Sensitive Sea Areas in Areas Beyond National Jurisdiction' (2024) 55 Ocean Development & International Law 234, 255 (emphasis added).

[417] BBNJ Agreement art 5(2).

[418] ibid 22(1)(c) (emphasis added).

[419] ibid 25(4); see also ibid 25(6).

[420] BBNJ Agreement art 22(2). Contrastingly, art 22(5) concerns both decisions and recommendations. In the context of the PrepCom, "Greenpeace and the High Seas Alliance argued that "not undermining" under the UNFSA implies "not reducing the effectiveness of measures" adopted by existing bodies, thereby avoiding the lowest common denominator "trap," without preventing the application of best practice.", IISD, 'Summary of the Second Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 26 August – 9 September 2016' (n 242) 17.This understanding of the term "not undermine" focuses on the measure applied but says nothing about the relationships between the instruments or bodies that apply them. From the perspective presented by Green Peace and the High Seas Alliance, as long as the effectiveness of the measure is maintained, a change in the relationships between the different IFBs could be interpreted as a tolerable variable.

including [MPAs], or related measures adopted by the [COP] under [Part III] that subsequently falls within the competence of such [relevant instrument or body], either wholly or in part, *shall remain in force until the [COP] reviews and decides*, in close cooperation and coordination with that [instrument or body], to *maintain*, amend or revoke the [ABMT], including a [MPA], and related measures, *as appropriate*."[421]

8. Remarks

An overview of the general aspects of the text of the BBNJ Agreement and, especially, its Part III and Part IV, constitutes a first step toward assessing some of the factors that might affect the right of States to navigate the high seas freely. These factors include contrasts between this new treaty and the LOSC, where the freedom to navigate was codified in Article 87 LOSC and regulated through other provisions. The particular characteristics presented by the BBNJ Agreement are relevant in this regard.

Though some of the salient features of the BBNJ Agreement, including its Part III, were already assessed above, some considerations on the nature of the treaty might still be added. An understanding of the nature and potential of the BBNJ Agreement could contribute to defining whether this new treaty might or might not affect the freedom to navigate and, if so, whether it might affect that freedom in a manner not provided by the LOSC. The understanding of the importance of the 'Relevant IFB Measures' in Parts III and IV and the weight they have in the development of the treaty is instrumental in this regard. In addition, it sheds light on the binding effects that recommendations and decisions might have with respect of State parties.

The BBNJ Agreement gives 'stakeholders' an instrumental role in its development. In this context, State parties may collaborate and hold a key position when participating under the COP. State parties would have the competencies to perform as unique contributors in the context of the time-bound consultation period regulated by the treaty. In light of this, the cooperation with RFMOs to apply 'Relevant IFB Measures' appears fundamental. Accordingly, RFMOs together with the IMO may collaborate in the making of an area-based management system different from the LOSC. The complexity of the BBNJ Agreement allows considering a high seas law of a new nature that may impact the high seas freedoms in a manner not conceivable under the LOSC.

[421] BBNJ Agreement art 22(7).

CHAPTER 2

THE COOPERATION REQUIRED BY THE BBNJ AGREEMENT

1. Introduction

This chapter provides a preliminary assessment of the content of the obligation to cooperate in terms of the BBNJ Agreement. With that aim, it commences by referring to the cooperation required by Part I and Part VI to later address the cooperation mandated by Part III and Part IV. In doing so, such assessment, relevant provisions of the UNFSA are pointed out. The chapter then refers to the potential role RFMOs may have under the BBNJ Agreement while reflecting on how they are referred to in the LOSC and the UNFSA.

In light of this, the presumptions underlying the duty to cooperate are highlighted together with their impact on the institutional and legal dimensions of the BBNJ Agreement. After clarifying the cooperation needed by the treaty, the chapter points out the possible consequences it may have on the status of some of the relevant institutional arrangements and access to information. In this context, it provides reflections about the COP, the STB, and the CHM. Against this background, the chapter concludes, strengthening the presumption that the equality of States may be affected by the BBNJ Agreement.

2. Cooperation Following Part I and Part VI

Acknowledging the international cooperation required by Parts I and VI is important to approach the cooperation requirements under Part III and, following the latter, Part IV. To analyze the general obligations relating to international cooperation in Part I, it is worth recalling how cooperation is defined in the UNFSA and attempting to draw a parallel. Notwithstanding the differences in scope, the obligations for cooperation under the UNFSA echo in the architecture of the BBNJ Agreement.

Article 8(3) UNFSA, a key provision under this treaty, establishes that "[w]here a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States *shall give effect to their duty to cooperate* by becoming members of such organization or participants in such arrangement, or *by agreeing to apply the conservation and management measures established by such organization or arrangement*."[422] The obligation to cooperate under this provision is defined narrowly and limits the options State parties have for cooperating under the treaty and achieve the objectives of the treaty.

In turn, Article 8 under Part I BBNJ Agreement appears to somehow follow a similar criterion for cooperation. Aligned with how cooperation is regulated by Article 8(3) UNFSA, Article 8(1) BBNJ Agreement provides that "Parties shall cooperate under this Agreement for the conservation and sustainable use of marine biological diversity (…) including through *strengthening and enhancing* cooperation with (…) relevant [IFBs] in the achievement of the objectives of this Agreement."[423] It may be inferred that, under this provision, States may give effect to their duty to cooperate by becoming members or participants of the relevant IFB or by agreeing to apply the measures that are established by such IFB and that fall within the categories of 'Measures' envisaged under Part III. In accordance with the assessment made below, the presumptions underlying the wording of the provisions and widespread through the treaty give reason to this inference.

The expression "strengthening and enhancing cooperation" in Article 8(1) BBNJ Agreement assumes that a legal commitment to cooperate in achieving the treaty's objectives already exists. The drafting of this provision appears to indicate that the duty is to be presumed by States. However, this duty to cooperate for achieving the purpose of this treaty globally has no precedent and constitutes an innovation.

What is interesting about the expression "strengthening and enhancing cooperation with (…) relevant [IFBs]" in Article 8(1) under Part I is, first, the implied reliance of the BBNJ Agreement on existing relevant IFBs for accomplishing success, and, secondly, the underlying premise that such a reliance constitutes a viewpoint positively shared by the international community. In the logic of this provision, cooperating with RFMOs would be crucial to achieve the objectives of the BBNJ Agreement, as it is for meeting the goals under the UNFSA.[424] At the same time, the same may be said about sectoral IFBs such as the IMO named in the treaty. Cooperation with IFBs in these precise terms, however, might affect and transform the rights and obligations of States in the high seas and restrict the undertaking of activities, including

[422] UNFSA art 8(3) (emphasis added).
[423] BBNJ Agreement art 8(1) (emphasis added).
[424] UNFSA art 8(3).

high seas commercial navigation. The question is how State parties may cooperate or, better yet, how the BBNJ Agreement defines cooperation.

The duty to cooperate with relevant IFBs underlying Article 8(1) is set up in goal-oriented wording. In this logic, the means for general cooperation "in the achievement of the objectives of this Agreement"[425] may be identified with the objectives in *inter alia* Part III and, subsequently, with the specific means to achieve the latter. Considering the variety of 'Measures' referred to in Part III, the objective to "[c]onserve and sustainably use areas requiring protection"[426] in Article 17 may be achieved "through"[427] *inter alia* "the establishment of a comprehensive system of ['ABMTs']"[428], "ecologically representative and well-connected networks of ['MPAs']"[429] or "measures that ['relevant' IFBs] have adopted to achieve the objectives of ['ABMTs', including 'MPAs'], established under this Part"[430]. Though spelled out in the form of objectives, Article 17 can nevertheless be read as setting out the obligation to cooperate by applying such 'Measures'.[431] Therefore, 'ABMTs', 'MPAs' and measures adopted and implemented by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies to achieve the objectives established under Part III ('Relevant IFB Measures') should be understood as means of cooperation in the terms of Article 8(1) in Part I. 'Measures such as' these may be single sectoral, multi-sectoral, or cross-sectoral. Somehow aligned with the criteria for cooperation enshrined at the foundations of Article 8(3) UNFSA, *State parties to the BBNJ Agreement could give effect to their duty to cooperate introduced in Article 8(1) by agreeing to apply 'Measures such as…' 'ABMTs', 'MPAs', and 'Relevant IFB Measures' in Part III*. Other objectives listed in Part III confirm this view.[432] Drawing upon Vezzani's views, this would suggest that the duty to cooperate under the BBNJ practically signifies a conferral of powers from the State parties to relevant IFBs through 'Measures' under Part III similar to the one that the UNFSA establishes, relating to RFMOs and RFMO conservations and management measures, respectively.[433]

Apart from this, Article 8(1) establishes that "Parties shall cooperate (…), including through (…) *promoting* cooperation among ['relevant' IFBs] in the achievement of the objectives of this Agreement."[434] States parties may cooperate in such a manner notwithstanding their non-participation in (all) the 'relevant' IFBs.[435] Following Article 8(1), Article 8(2) addresses State parties that do participate in the 'relevant' IFBs and provides that "Parties *shall endeavour to promote, as appropriate,* the objectives of this Agreement when

[425] BBNJ Agreement art 8(1).
[426] ibid 17(a).
[427] ibid.
[428] ibid.
[429] ibid.
[430] ibid 26(2).
[431] ibid 8(1) and 17(a). A different view would be inconsistent with the objective of Part III. The duty to cooperate resulting from Articles 8(1) and 17 BBNJ Agreement, read in conjunction, consists of an obligation of a global character, meaning that *all* State parties to the BBNJ Agreement should behave and cooperate equally.
[432] ibid 17(b).
[433] Vezzani (n 55) 234–237.
[434] BBNJ Agreement art 8(1) (emphasis added).
[435] ibid.

participating in decision-making under *other* ['relevant' IFBs]."[436] The expression 'other' here used implies that the BBNJ Agreement pertains to the generic constellation of 'relevant' IFBs, thought without giving it any explicit status. It is worth noting that this distinctive self-reference the BBNJ Agreement makes of itself suggests that 'ABMTs' and 'MPAs', once implemented, might also be treated as 'Relevant IFB Measures' and thus constitute the legal basis to strengthen cooperation. The wording in Article 19(4.i) in Part III confirms this may happen by way of ulterior proposals.

Article 8(2) in Part I BBNJ Agreement also echoes Article 8(3) UNFSA somehow. In turn, and impliedly, Article 8(2) appears to also introduce a mandatory mechanism for cooperation, meaning that States may give effect to their duty to cooperate by becoming members or participants in 'relevant' IFBs. This finding stems as a matter of logic; the underlying mechanism for cooperation unveiled here constitutes a previous necessary mid-step that enables the State party to comply with that obligation in areas beyond national jurisdiction. Without a doubt, the possibility of being admitted or having a substantial participation in 'relevant IFBs' referred to by the BBNJ Agreement will entirely depend on the respective regional and sectoral 'relevant IFBs' and, therefore, on the willingness of the States that participate in such legal schemes and act through them.

Article 8(1) and Article 8(2) in Part I define and provide content to the duty to cooperate under the BBNJ Agreement as, in turn, Article 8(3) does in the UNFSA. Presuming the existence of this duty is fundamental and functional to both the UNFSA and the BBNJ Agreement and their progressive success. It might be argued that, having a limited subjective scope, Article 8(2) gives precision and specificity to the wider obligation comprehended under Article 8(1), as described above.[437] Interestingly, the term "shall endeavour to promote, as appropriate" in Article 8(2) does not seem to hold the heavier mandatory character of Article 8(1).

Part VI on "Institutional Arrangements" gives a treaty meaning to the term "Transparency" entitling Article 48, which, with a similar generality and at the same level, arguably complements the terms for international cooperation in Part I. International cooperation under the BBNJ Agreement includes 'transparency' and, in this understanding, 'transparency' is a major constitutive element for the cooperation so conceived. It may be argued that Article 48 represents an innovative means for international cooperation conceived in this treaty. It mandates *inter alia* that the COP "shall promote transparency in decision-making processes and other activities carried out under this Agreement."[438] Additionally, it provides that the COP "shall promote transparency in the implementation of this Agreement including through (…) the facilitation of the participation of, and consultations with, *relevant global, regional, subregional and sectoral bodies* (…) and *other relevant stakeholders*, as

[436] ibid 8(2) (emphasis added). It stems clearly from Article 8(2) that the BBNJ Agreement is among the 'relevant' IFBs and that it is grouped with them. However, the provision does not give enough elements to rank it within that wide and undetermined group of 'relevant' IFBs. The overall content of Part III, however, might provide significant elements to understand how the BBNJ Agreement and the State parties to it might be placed in the international ranking.
[437] ibid 8(1).
[438] ibid 48(1).

appropriate and in accordance with the provisions of this Agreement."[439] The term 'consultation' here should not be understated. The inclusion of Article 48 in the Part entitled "Institutional Arrangements" allows interpreting that external arrangements or relevant IFBs (like RFMOs and the IMO) and other 'stakeholders' grouped with the IFBs that the treaty itself constitutes (like the COP). In this view, it appears reasonable to state that international cooperation in Part I and transparency in Part VI together establish general obligations so that State parties cooperate through the COP (by which they act under the non-regular procedures regulated in Part III) with all those entities under the undetermined category of 'stakeholders'.[440] Interestingly, State parties would be bound to cooperate with *inter alia* State non-parties without being provided a legal right that may counterbalance such obligation.[441] The same obligation would apply concerning 'relevant' IFBs in which State non-parties participate. *Neither Article 48 nor other provisions of this treaty discriminate against regional IFBs of limited access, like RFMOs*.

3. Cooperation under Part III and Part IV

International cooperation in terms of Part III and Part IV, following area-based management objectives, contains mechanisms that, once triggered, might inevitably lead to a non-precedented chapter of fragmentation of high seas law. If this were the case, such triggering would open a path to a shift away from the scheme in Part VII LOSC and affect the undertaking of *inter alia* navigation of vessels flying the flag of State parties. All this provides a clearer view of the content and consequences of the duty to cooperate forged by the treaty. This also allows reflecting on the basis upon which the COP may authorize a 'planned activity' or 'category of activity'.[442] Fragmentation may evolve after the clause in Article 29(4) in Part IV is activated and mitigation and management measures are recognized or adopted by the COP. Measures under Article 29(4) comprise external EIAs and more stringent measures like regulations or standards meeting the environmental thresholds in Article 29(4.b)

The establishment of measures regarding EIAs would have to take full account of external EIAs consistent with Part IV.[443] It is important to highlight that the previous assessment of the provisions in Parts I and VI serves to facilitate cooperation under Part III and, subsequently, under Part IV. Though important for the treaty in general, provisions in Parts I and VI will hold considerable weight in the collaboration and contribution sought in the broad context of consultations.[444] The collaboration and contribution required under Parts III and IV

[439] ibid 48(3).
[440] ibid 8 and 48.
[441] State non-parties are included among 'stakeholders', ibid 48(4).
[442] ibid 34(2); see also art 23.
[443] ibid 34(2).
[444] ibid 19(1) and 21.

would shape the behavior that State parties should follow before and after the submission of a proposal.[445] It is under this context that legal mechanisms in Part IV would work.[446]

International cooperation concerns the BBNJ COP decision-making and recommendations-making.[447] The subsequent legal burden on State parties makes the different labeling in 'decisions' and 'recommendations' superfluous, notwithstanding the distinctions concerning the objectives they pursue. Articles 25(4) in Part III and Article 29(1) in Part IV are connected in this respect. Article 25(4) in Part III establishes that "Parties shall promote, as appropriate, the adoption of measures within relevant legal instruments and frameworks and *relevant global, regional, subregional and sectoral bodies of which they are members*, to support the implementation of the decisions and recommendations made by the [COP] under this Part."[448] Forward, Article 29(1) in Part IV provides that "Parties shall promote the use of [EIAs] and the adoption and implementation of the standards and/or guidelines developed under article 38 in relevant legal instruments and frameworks and *relevant global, regional, subregional and sectoral bodies of which they are members*."[449] Both provisions are addressed to State parties participating in the 'relevant IFBs', connected with the general obligation in Article 8(2) in Part I, and may be included among the mechanisms for cooperation that the treaty sets up to achieve the objectives of these Parts.[450] Notice that the BBNJ Agreement may also be understood as an 'IFB', so the aforementioned provisions apply to State parties participating within the COP as well. The adoption and implementation of 'Relevant IFB Measures' referred to in Articles 25(4) and, especially, those related to EIA in Article 29(1), would all be ultimately promoted by State parties to "support the implementation of the decisions and recommendations made by the [COP] under [Part III] ."[451] The wording in Article 19(4.i) makes it explicit that 'ABMTs' and 'MPAs' adopted by decisions taken by the COP would be implemented by 'relevant IFBs' (not by the COP).

---

[445] ibid.
[446] ibid 29(4).
[447] ibid 47(5). The lack of bindingness of a BBNJ recommendation should not lead to underestimating the importance of this source. "The non-binding nature of instruments does not mean that they are without legal significance. In fact, non-binding have an influence on the making of international law", Yoshifumi Tanaka, *The International Law of the Sea* (4th edn, Cambridge University Press 2023) 21. BBNJ recommendations, as soft-law instruments, can certainly play an important role in unconventional lawmaking. Unconventional law "can be defined as including any 'law' not categorized as such by Article 38 of the 1945 Statute of the International Court of Justice (ICJ Statute) (under which 'law' comprises treaties, custom, general principles, judicial decisions and the writings of eminent publicists).", Karen N Scott, 'Unconventional Law Making in the Law of the Sea and Area-Based Conservation Measures' in Natalie Klein (ed), *Unconventional lawmaking in the law of the sea* (Oxford University Press 2022) 307. "Both treaties and soft law instruments can be vehicles for focusing consensus on rules and principles, and for mobilising a consistent, general response on the part of states. Depending upon what is involved, treaties may be more effective than soft law instruments for this purpose because they indicate a stronger commitment to the principles in question and to that extent carry greater weight than a soft law instrument, but the assumption that they are necessarily more authoritative is misplaced.", AE Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 International and Comparative Law Quarterly 901, 904.
[448] BBNJ Agreement art 25(4) (emphasis added).
[449] ibid 29(1) (emphasis added).
[450] ibid 25(4) and 29(1).
[451] ibid 25(4).

Article 8(2) functions as a vertex between Part I, on the one side, and Part III and IV, on the other. It might be argued that Article 25(4) adds precision and specificity to the international cooperation required by Article 8(2). The relation between Article 29(1) and Article 8(2) might be described in the same terms. Aside from this, from a different viewpoint, the rules referred to in Article 25(4) in Part III appear to relate to those mentioned in Article 29 (1). The question is how. The term "measures" or 'Relevant IFB Measures' in Article 25(4) appears broad enough to include standards and/or guidelines of 'relevant' IFBs, whose adoption and implementation are specially pursued and promoted by Article 29(1). In addition to this, it is noteworthy that the bindingness of these provisions appears to entail different burdens to State parties. The term "shall promote, as appropriate" in Article 25(4) appears more stringent than the conduct required by Article 8(2). The same happens with Article 29(1). At the same time, the term "shall promote" in Article 29(1) appears more direct and rigorous than the behavior required by Article 25(4) in Part III, leaving less margin for nuanced interpretations.

Envisaging Article 29(1) in light of the context of Part III is important, considering that compliance with it would have to be consistent with the presumptions and compatibility requirements that Part III enshrines. Accordingly, the promotion of "*the use* of [EIAs] and the adoption and implementation of the standards and/or guidelines developed under Article 38 in ['relevant' IFBs]"[452] requested by Part IV specifies the "cooperation and coordination in *the use* of [ABMTs, including 'MPAs'], among States [and 'relevant' IFBs]"[453] mandated by Part III. This synergic relationship among provisions introduces a factor that inexorably promotes fragmentation to achieve treaty objectives but, curiously, identifies it as a cooperation mechanism.[454] The risk of fragmentation in high-seas law appears when a causal link is drawn between the *possible risk* of such fragmentation happening and the *expected* willingness of certain State parties to push for the hegemony of key *regional* (and sectoral) 'relevant IFBs' of which they are members. It may be inferred that RFMOs, and their members, may be attracted be for such a treaty-based mechanism. This view appears implicit in recent literature.[455] Consistent with Article 29(1), 'Relevant IFB Measures' achieved under these mechanisms of cooperation could *inter alia* contain EIA requirements for an assessment "equivalent to the one required under [Part IV]"[456] or "the regulations or standards of ['relevant' IFBs] (…) designed to prevent, mitigate or manage potential impacts below the threshold for [EIAs] under [Part IV]"[457].

Given the aforementioned comments on cooperation required by this treaty, *the adoption of 'Measures' related to external EIAs would have to be undertaken by complying with the procedures under Part III.* In other words, *those procedures envisaging 'Measures' related to external EIAs would have to be carried out following the provisions within Part IV*. Taking into account that 'Measures' under Part III would not invariably regard EIAs, it may be

452 ibid 29(1) (emphasis added).
453 ibid 17(b).
454 It has been argued that there is "a risk of *continued* fragmentation of activities and conservation efforts taking place in [areas beyond national jurisdiction].", Klerk (n 226) 8 (emphasis added). Fragmentation seems to be functional to the concentration of power in the hands of States that count with agenda-setting power within key IFBs, ibid.
455 see, for instance, Klerk (n 226) 8.
456 BBNJ Agreement art 29(4.b.i).
457 ibid 29(4.b.ii).

argued that the relation between relevant provisions in Part III and Part IV would become evident when the *consultation stage* regards procedures whose material scope includes EIAs as a specific subject matter. From this viewpoint, Part IV may happen to represent *lex specialis* in respect to Part III. All this entails ways of cooperating and complying to "conserve and sustainably use areas requiring protection"[458] and cooperating under an area-based management system that is both global and regional in terms of Part III.[459] It is noticeable, however, that the 'relevant' IFBs might spontaneously and autonomously elaborate norms of this kind and constitute 'Relevant IFB Measures' through their respective contexts, separate from what the BBNJ Agreement mandates and beyond the COP's awareness.[460] Procedural strategies in developing and drafting a proposal and the practical utilization of the procedural rules in Parts III and IV would clarify international cooperation within the BBNJ COP more tangibly.

4. Collaborating and Contributing with RFMOs

Reflecting on the potential key role of RFMOs sheds light on how and with what aim State parties would have to cooperate under the BBNJ Agreement. This provides insights about the terms 'collaboration' and 'contributions' used to described the cooperation under the terms of the treaty. Besides, clarifying how these bodies are regarded in the LOSC and how differently they may be considered under the BBNJ Agreement allows strengthening the view that the BBNJ Agreement and the LOSC have to be interpreted separately.

Contrary to some assumptions that the implementation of the BBNJ Agreement, mainly of its Part III, will need the future constitution of brand-new IFBs, non-existent to date, it has been stated that utilizing the existing architecture established by RFMOs can be more *practical*.[461] Notwithstanding their apparent limited scope to fisheries-related issues, some have seen that RFMOs have the potential to perform the management of biodiversity, based on their world-renowned experience in conserving and managing fisheries.[462] If this were to

[458] ibid 17(a).
[459] ibid 17(b).
[460] ibid 26(2). This stems from the simple "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.", Klerk (n 226) 11.
[461] Scanlon (n 241) 409–412.
[462] ibid. Some highlight that, in the RFMO sector, there are "management measures for fishing activity to minimize harm the surrounding marine environment, which could be expanded, strengthened, or used as models for other measures. Significant scientific research and reported data have now been generated, which might be helpful for other purposes. Monitoring and enforcement regimes and other compliance tools could potentially also be used for compliance in other contexts. Additionally, *the increasing collaborative relationships established by RFMOs have the potential to be beneficial for the protection of biodiversity*. As protections will likely only be improved with enhanced institutional cooperation

materialize, the BBNJ Agreement would then require much less time than expected to be *fully operative*. After the entry into force, the prompt implementation of MPAs and ABMTs may thence fall "within the competence"[463] of those bodies currently known as RFMOs upon the possible "amendment to the competence"[464] of such entities. This would undoubtedly *accelerate* the necessary path and timetable to conserve and sustainably use marine biodiversity in the terms of the treaty.[465]

About RFMOs, in general, it is considered that there are more than forty RFMOs and they cover most of the seas and oceans.[466] Some have noticed that, to date, there is an "absence of an internationally accepted definition"[467] of what an RFMO is. Arguably, because "there is no uniform model of RFMO."[468] This is an aspect to be considered when analyzing the BBNJ Agreement, given that it explicitly recognizes it among the relevant IFBs and the making of 'Relevant IFB Measures' for the conservation and sustainable use of 'marine biological diversity'.

RFMOs have been considered as "an extension of their government members."[469] It has been observed that, in literature, issues relating to RFMOs and the relationship with maritime regions they regulate are often alluded to with the expression 'within the jurisdiction', and RFMO conservation and management measures are usually referred to with the term 'internal law'.[470] Accordingly, it has been explained that those vested with the competence to adopt binding measures are considered to make norms "having a similar content to those enacted by coastal States, States of origin, or flag States."[471] It has been particularly highlighted that measures adopted by an RFMO, meaning its 'internal law', can be equated with that of coastal States over private actors.[472] These considerations about the RFMO might lead some to believe

(Matz-Luck and Fuchs, 2014, 165), existing collaborative relationships could strengthened or expanded and built on", ibid 414 (emphasis added).
463 BBNJ Agreement art 22(7).
464 ibid.
465 ibid 2.
466 Vezzani (n 55) 222–223. In this connection, it has been argued that categorizing the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) as an RFMO is inaccurate. CCAMLR gives effect to the objective and principles of the Convention on the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1329 UNTS, which is an international agreement established to conserve Antarctic marine living resources and is an integral part of the Antarctic Treaty system. Molenaar notes that "[t]he best known debate on the qualification as an RFMO/A relates to CCAMLR. The debate on this between its Members has been ongoing for a considerable period of time, and continues up until today […]. It is evident that CCAMLR is not a typical RFMO, if an RFMO at all.", Erik J Molenaar, 'Regional Fisheries Management Organizations' in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds), *Global Challenges and the Law of the Sea* (Springer International Publishing 2020) 92.
467 Vezzani (n 55) 218.
468 Medy Dervovic and Katharina Heinrich, 'Law-Science Nexus in International Law-Making: Perspectives from Arctic Fisheries Governance' (2023) 92 Nordic Journal of International Law 599, 608.
469 Joy Hyvarinen, Elizabeth Wall and Indrani Lutchman, 'The United Nations and Fisheries in 1998' (1998) 29 Ocean Development & International Law 323, 330.
470 Vezzani (n 55) 218.
471 Vezzani (n 55).
472 It has been asserted that "[RFMO] measures can impact in several ways the legal sphere of private persons. Not only are they transposed into the domestic legal order of Member States [and those parties

that, through them and limited to their competencies, its members exercise a kind of *dominium* that contrasts with principles codified in the context of the LOSC, like the freedoms of the high seas and the principle that no State "may validly purport to subject any part of the high seas to its sovereignty."[473] The fact that RFMOs and their members can be conferred with powers to agree and determine IMO measures, including those more stringent, would allow the virtual appropriation of high seas areas. A regime on navigation in those areas may turn out to be assimilated with the one existing under the territorial sea of States. In this context, the question is to what extent the RFMO architecture and subsequent legal developments through them might represent more than additional regulations for fishing activities and become a true restriction.

It is worth appreciating how these bodies may function. Access to RFMOs and quota allocation are sensitive issues. Access to RFMOs requires the previous consent of States that are already participants or members.[474] Some scholars note that not all States have been given admission to RFMOs and, not all can fish on the high seas under their institutional scope.[475] In this respect, besides the limits to access to these bodies, RFMO measures about the allocation of quotas, signify an important issue.[476] Access, of course, can be granted. Yet, joining an RFMO does not necessarily mean obtaining a right to access the fish stock and the allocation of a quota, which ultimately depends on those who have *historically* been members of the RFMO.[477] Rayfuse notes that "[i]n some cases, joining an RFMO would have disadvantaged a State's vessels because no quota allocation was provided when the pre-existing members took the position that the fishery concerned was already fully exploited or that the new member lacked any historical participation and thus did not have any 'real interest' in the fishery. The preferable solution in such cases (at least to the flag State) appears to have been for flag States to remain outside the RFMO and allow their vessels to fish pursuant to the traditional open access regime of high seas fishing."[478]

---

to the UNFSA]; a number of States also criminalize as an offence fishing by their nationals or persons onboard vessels flying their flag, in breach of RFMO's conservation and management measures. In this context, *the rules elaborated by RFMOs are therefore treated in the same way as foreign law enacted by competent coastal States*", ibid 218–219 emphasis added.

[473] LOSC art 89. "More recently, a new threat to the freedom of fishing has arisen in the wake of the increasing number and activity of regional fisheries management organizations (RFMOs)", Hyun Jung Kim, 'The Return to a *Mare Clausum* Through Regional Fisheries Management Organizations?' (2013) 44 Ocean Development & International Law 205, 205.

[474] Rayfuse (n 59) 446.

[475] Some scholars argue that some "practices are evidence of an unwillingness to share fishing opportunities with new entrants and should therefore be taken into account when assessing the openness of RFMOs", Erik Jaap Molenaar, 'Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations' (2003) 18 International Journal of Marine and Coastal Law 457, 470. Others highlight great impediments for some States to being admitted to the referred instruments or bodies and reflected over the legal structure here referred evoking the return to a *mare clausum*, Kim (n 473) 206–207. See also Helmut Tuerk, 'The Waning Freedom of the Seas' in Rafael Casado Raigón and Giuseppe Cataldi (eds), *L'évolution et l'état actuel du droit international de la mer: mélanges de droit de la mer offerts à Daniel Vignes* (Bruylant 2009) 932–933; Vezzani (n 55) 226.

[476] Rayfuse (n 59) 450.

[477] ibid 446. See also Vezzani (n 55) 226.

[478] Rayfuse (n 59) 446. The notion of *real interest* seems unclear. "In light of the current uncertainty on the meaning of the concept (…) a risk exists that it will be used as a bar to participation.", Erik Jaap

It has been noted that "RFMOs have a difficult task even with *limited membership numbers*; however, reaching agreement on any binding measures would be even more difficult at the global level when a larger number of parties—potentially including those without a direct interest—are involved."[479] Some "seem to focus on momentum for a global movement rather than practical implementation"[480]. However, according to others, "it appears that effective implementation of measures at the regional level rather than global is more likely, as *regional Parties are more likely to have a strong interest in the preservation of the marine environment of that region*."[481] In this view, the "importance of designing a *practical*, effective system that will be implemented by State Parties cannot be understated."[482] Here, *practicality* does not go hand in hand with the idea of open access to areas beyond national jurisdiction, including the high seas. Indeed, this *practical policy* may eventually entail legal tensions with the freedoms of the high seas as are known to date, such as the freedom of navigation.[483] The BBNJ Agreement, by relying on these bodies, inclines towards the paradigm of *mare clausum*, where access to certain regions and the navigation of the high seas would depend on the willingness of RFMO members. Collaborating and contributing with these type of IFBs might not ensure the right to exercise high seas navigation.

The said *practicality* finds the existing limited-access IFBs, including RFMOs, as highly beneficial, i.e., the RFMO scheme on which the UNFSA relies.[484] Following this view, the implementation of the BBNJ Agreement may be achieved by *modernizing RFMO mandates and procedures to improve environmental protections*.[485] Two venues are seen as promising to achieve such modernization.[486] The first would be the amendment of the RFMOs constituent instruments.[487] Alternatively, and faster, by interpretation of the current constituent instruments employing Article 31(3.a) VCLT, a legal task that would have to be achieved within the context of RFMOs themselves by taking into account those RFMO measures that concern the protection of 'marine biological diversity'.[488] It has been noted that the progress already made by some RFMOs in the Pacific and the Atlantic Oceans, particularly in the North Atlantic, are indicative of the efforts and commitment of these bodies to accommodate their legal structure to better protect and manage biodiversity showing the potential those have for having a key

Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (2000) 15 The International Journal of Marine and Coastal Law 475, 499.

479 Scanlon (n 241) 414 (emphasis added).

480 ibid.

481 ibid (emphasis added).

482 ibid.

483 "Several compromises necessary to reach agreement, however, make the BBNJ Agreement's ABMT section fall short of its proponents' goal of establishing *a truly global governance regime* that allows states to establish MPAs *and adopt management measure*s in a holistic, ecosystem-based, multi-sectoral manner.", Bodansky (n 18) 313 emphasis added.

484 Scanlon (n 241) 414.

485 ibid 410.

486 ibid 410–411.

487 ibid 410.

488 ibid 410–411.

role under a framework like the one enshrined in the BBNJ Agreement.[489] Additionally, RFMOs of a more recent constituency, in the North and South Pacific Ocean and the Southern Indian Ocean, are also considered of the utmost importance in this respect.[490] An aspect highlighted about the latter is that they have set up decision-making mechanisms that allow for the possibility of a vote where consensus appears unreachable.[491] Scanlon has pointed out that "decision-making procedures that allow for the possibility of a vote *increases pressure* to reach consensus, and are a more effective way of ensuring RFMOs take *timely* and effective management measures"[492] This type of RFMO decision-making procedures presumably inspired the drafters of the BBNJ Agreement to favor timely and effective conservation and management of 'marine biological diversity'.[493] The modernization of existing RFMOs thus would make them capable of assuming responsibilities such as managing MPAs and ABMTs in Part III BBNJ Agreement much faster and in much less time than the one States would require to, first, initiate negotiations, second, constitute new international bodies for that purpose, and finally, making these bodies fully operational.

The BBNJ Agreement would not be the only treaty featured with practicality. The *practical policy* has been best represented in the legal architecture that the UNFSA, in conjunction with RFMOs, including those with limited access, favored by it. The conventional context provided by the UNFSA has facilitated the making and establishment of norms and special standards conditioning or limiting fishing activities under regional schemes governed by RFMOs and, simultaneously, affecting the exercise of navigation of fishing vessels related to those activities. It has been argued that the freedom of fishing (or open access to high seas fisheries) has been considered one of the primary causes of fishing practices contrary to international law, along with the lack of flag State control and the problem of overcapacity in the fishing area.[494] From a legal perspective, however, the *immediate* association of such freedom with wrongfulness does not seem very convincing. This argument seems to downplay the responsibility of those who actually commit wrongful acts related to fishing and questionably demonizes the freedom to fish, a freedom that has historically represented equality for *all* States.[495] In no way is this reasoning apologetic for *absolute* freedom of fishing. Like the other freedoms, the freedom of fishing is not unrestricted. In the context of the LOSC, in the high seas, States may exercise this freedom with "due regard for the interests of other States in their exercise of the freedom of the high seas"[496] and subject to subject to the conditions laid down in section 2 of Part VII.[497] The duty to cooperate under the LOSC is not

---

[489] ibid. In this respect, some highlight the work undertaken by RFMOs such as the Northwest Atlantic Fisheries Organization (NAFO), the International Commission for the Conservation of Atlantic Tunas (ICCAT), and the Western and Central Pacific Fisheries Commission (WCPFC), ibid.

[490] Scanlon (n 241) 410. In this respect, some highlight the work undertaken by RFMOs such as the North Pacific Fisheries Commission (NPFC), the South Pacific Regional Fisheries Management Organisation (SPRFMO), and the Southern Indian Ocean Fisheries Agreement (SIOFA), ibid.

[491] Scanlon (n 241) 410.

[492] ibid emphasis added.

[493] BBNJ Agreement art 23(1), 23(2), 47(4) and 47(5).

[494] Rayfuse (n 59) 448.

[495] ibid 444.

[496] LOSC 87(2). "…and also with due regard for the rights under this Convention with respect to activities in the Area.", ibid.

[497] LOSC art 87(1.e).

as defined, or as narrow, as within the UNFSA.[498] Notwithstanding the well-intentioned purpose of the UNFSA, practicality in the UNFSA allows limitations and even total impediments to the exercise of fishing rights on the high seas. There is awareness of the consequences of the UNFSA and, subsequently, it has been observed that its regime for straddling fish stocks and highly migratory fish stocks differs from the one conceived at UNCLOS III.[499]

Collaboration and contributions under the BBNJ Agreement with RFMOs would strongly support the scheme under the UNFSA. Less comprehensive than the BBNJ Agreement, the UNFSA addresses sectoral issues strictly related to international fisheries.[500] Article 2 UNFSA establishes that the main objective of the treaty is "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks *through effective implementation of the relevant provisions* of the [LOSC]."[501] Interestingly, among other general principles, the UNFSA establishes that parties to it shall "protect biodiversity in the marine environment"[502] to achieve its objectives. Notwithstanding its limited material scope, the UNFSA has been broadly described as "the missing link between the international law of the sea and international environmental law."[503] This constitutes an important characteristic of the nature of the UNFSA that relates to the core of the BBNJ Agreement.

The functional-regional approach offered by the UNFSA means an alternative view toward the oceans that distinguishes this treaty from the LOSC and the functional-*zonal* approach characterizing it.[504] Consistent with international environmental law at the time of its adoption, to address the constraints set by the functional-zonal approach, the UNFSA moves towards a functional-regional approach based on *inter alia* the biological unit and the ecosystem.[505] The same approach characterizes the BBNJ Agreement.

---

[498] ibid 118.

[499] See discussion in David Freestone, 'Fisheries, High Seas', *Max Planck Encyclopedia of Public International Law* (On line, Oxford University Press 2009) para 20 <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1162> accessed 14 July 2022.

[500] Alan E Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 158.

[501] UNFSA art 2 (emphasis added). The text of the UNFSA does not include "discrete stocks" and allows interpreting that such stocks are not comprehended in the material scope of the treaty, Vezzani (n 55) 174. Some international actors, however, advocate for the inclusion of such species within the context of the treaty, see IISD, 'WG 2nd Meeting' (n 40) 9. Notwithstanding possible flexible interpretations of its text, the lack of formal amending procedures of the UNFSA for including 'discrete fish stocks' discourages this standpoint, UNFSA art 45.

[502] UNFSA art 5(g).

[503] Proelss (n 78) 190.

[504] Gavouneli (n 4) 128; see also Freestone (n 499) para 37.

[505] Some provisions illustrate this point. For example, the UNFSA provides that "In determining compatible conservation and management measures, States shall: (…) take into account *the biological unity* and *other* biological characteristics of the stocks and the relationships between the distribution of the stocks, the fisheries and the *geographical particularities* of the region concerned, including the extent to which the stocks occur and are fished in areas under national jurisdiction", UNFSA art 7(2.d) emphasis added.

International cooperation in the UNFSA is key to achieving the objectives it establishes. More than 20 years ago, Molenaar observed what today is very well-known by pointing out that "[t]he [LOSC] does not accord RFMOs such a pivotal role as the [UNFSA]. It *merely* requires states involved in fishing on the high seas or for transboundary stocks to co-operate with each other but the form of such co-operation is at their own discretion. Moreover, the consequences for a failure to co-operate were not clearly spelled out."[506] Indeed, the content given to international cooperation in the context of the UNFSA differs from that of the LOSC. The eye-catching references to the LOSC, the long wording in the provisions, and tedious reading of the UNFSA, however, do not facilitate arriving at this conclusion immediately. Indeed, the key element to begin understanding how the UNFA's legal changes took place resides in how this treaty distances from the international cooperation as structured in the LOSC, and using a similar vocabulary installs a different duty to cooperate with narrow and specific binding content setting up the legal platform to later solidify a system for the *closed* regional management of fisheries.[507] This viewpoint allows drawing a parallel between the international cooperation mandated by the UNFSA and the enshrined in the LOSC.

In assessing the treaty, Gavouneli has stated that the UNFSA "creates an even more specific obligation to establish regional fisheries organisations and arrangements in order to agree on specific measures of conservation and management fully attuned to the circumstances of each area and the species to be found therein and abide by such measures".[508] Keeping this in mind is important, considering that the content of the obligation to cooperate under the UNFSA echoes in the international cooperation as defined by the BBNJ Agreement. The UNFSA embodies a whole new notion of international cooperation through a profuse diversity of treaty obligations. In this regard, it is well-established that "[t]his cascade of obligations, from the general to the very specific, clearly *modifies* the traditional *rule* of freedom to fish in the high seas."[509] Article 8(4) UNFSA is exemplary in this respect: "[o]nly those States which are members of [an RFMO], or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply." The UNFSA not only establishes RFMOs and the application of their measures as the sole mechanism for international cooperation, but also approves, for the implementation of its norms, a type of RFMO that imposes significant restrictions on access to fisheries, to the point of preventing the free exercise of the freedom to fish.

The practicality pictured here and the idea of *mare clausum* reveal tension with context of the LOSC. RFMOs are comprised among the bodies characterizing the LOSC. Notice that RFMOs are explicitly mentioned in Article 118 LOSC, i.e., within the LOSC *as it is*. Consistently, RFMOs in Article 118 LOSC may be interpreted as bodies of open access to all States and, most importantly, must be regarded as bodies allowing the fishing vessels of all States to fish and navigate freely or else collide with the high seas freedoms as established in

[506] Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473 emphasis added.
[507] LOSC arts 61–66, 118 and 119. Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473; Boyle (n 77) 47.
[508] Gavouneli (n 4) 128. Before making this contrast however, the scholar expresses her view that the obligation of cooperation in the LOSC "is further substantiated in the 1995 Agreement", ibid.
[509] Gavouneli (n 4) 128 (emphasis added).

Article 87 (1.a) and (1.e) LOSC and with Articles 116 to 119 LOSC. At the same time, in the context of the LOSC, if RFMOs were of limited access, RFMO members would have to accommodate their behavior to Article 87(2) LOSC, i.e., "with due regard for the interests of other States in their exercise of the freedom of the high seas". In addition, RFMOs are not the only mechanism that the LOSC constitutes for international cooperation. By not limiting international cooperation to these regional mechanisms or by applying their measures, the LOSC safeguards the freedom of all States to fish in the high seas. This reasoning, feasible in the LOSC context, clearly cannot be extrapolated to a treaty like the UNFSA. The LOSC does not set up the presumption that its objectives may be achieved through RFMOs and their measures only. Herein lies the major difference between the UNFSA and the LOSC. The normative shift from the LOSC becomes evident when comparing what cooperation means in each of them. Differences may be inferred from the contrast with *inter alia* Article 118 of the latter treaty.[510] It is worth noting that, under the label of 'stakeholders', RFMOs in the BBNJ Agreement would have a different aim from that given by the LOSC concerning fisheries.

---

[510] A close look at three sentences in Article 118 included in Part VII LOSC, entitled "High Seas", is crucial to comprehend the contrast between the two treaties. Numbers in brackets are included in the following legal quotation of Article 118 LOSC to better illustrate the reasoning here expressed and ease its understanding. Article 118 establishes that "[*1*] States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. [*2*] States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. [*3*] They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end."

In its first sentence, the provision establishes the overarching general obligation for *all* States to cooperate in the conservation and, also, in the management of living resources in the high seas. Following, the next two sentences develop the content of such general obligation and establish a degree of bindingness depending on the scope. The second sentence of Article 118 LOSC is more specific because of its subjective and material scope respectively. At the same time, the third sentence complements and further clarifies the second. The second sentence is addressed to certain States with specific interests, meaning *States whose nationals exploit identical living resources, or different living resources in the same area*. The material scope of this second sentence emphasizes the conservation, not the management, of living resources. Acknowledging the lightweight of the obligation the States characterized have in this second sentence is critical. The States concerned "*shall enter into negotiations with a view to taking* the measures necessary for the conservation of the living resources concerned." (emphasis added). The extensive and lax wording highlighted here portrays the level of commitment that the negotiating States at UNCLOS III were willing to agree with. A more binding wording might have been, for instance, that the said States *shall take* measures necessary for the conservation of the living resources concerned. This stricter language is definitely not enshrined in Article 118 LOSC. Certainly, Article 118 LOSC gives the relevant States great discretion on how to cooperate on conservational matters by describing how these States would have to undertake negotiations in the second sentence, and by not imposing a necessary outcome in the form of an agreement. This, in no manner, neglects the fact that States are free to agree on those measures as on any other in the vast realm of international law.

Lastly, the third phrase of Article 118 LOSC establishes that "[*3*] They shall, *as appropriate*, *cooperate* to establish subregional or regional fisheries organizations to this end." (emphasis added). As to the subjective scope, the proximity and the sequential order of the second and third sentences lead to the assumption that the term "They" refers to those States mentioned in the second sentence. In this

On this basis, it is arguable that, to meet the treaty objectives, the UNFSA adapted or reconfigured the contents of the right to fish freely in the high seas.[511] Within its scope, the UNFSA has affected and severely restricted the freedom of fishing and, in this connection, the freedom of navigation of fishing vessels flying the flag of its parties. Through the context of the BBNJ Agreement, other freedoms, such as the freedom to navigate, might also be affected when practiced within the regulatory areas under the 'Measures such as.." those falling in Part III BBNJ Agreement. In turn, the rights of all States to free navigation may also be reconfigured by it. In this context, Article 8(3) UNFSA echoes in the international cooperation that the BBNJ Agreement pursues. It is worth noting that RFMO measures under the UNFSA may be

---

reasoning, the weight of the obligation in the third sentence of Article 118 LOSC must be examined based on the low bindingness of the obligation contained in the second sentence. Indubitably, the lightweight bindingness of the second sentence diminishes, even further, the already weak binding standard of the obligation in the third sentence. The weak bindingness featuring the third sentence becomes evident because of the placement of the expression 'as appropriate' in it. The term 'as appropriate' works as a qualifier of the conduct described and to reduce the binding character of the obligation in a provision, determining its construction. In this view, the qualifier 'as appropriate' conditions how rigorously the action described in the third sentence is to be interpreted and, subsequently, elucidates how discretionary is for the States to undertake the conduct therein typified.

Because the expression 'as appropriate' precedes the verb 'cooperate', the third sentence of Article 118 LOSC gives States referred to in the prior second sentence *even wider* discretion for establishing RFMOs. In this context, under Article 118 LOSC, the obligation to establish these organizations should be interpreted as one way (and not the only manner) of complying with the main obligation to cooperate included in the first sentence. Some considerations may be made concerning the qualifier 'as appropriate' in the third phrase of Article 118. The term 'as appropriate' has been used in other instruments and has been regarded as a qualifier that drafters find useful to, first, reflect the discretion States aim at having as regards their commitments, and, second, to reflect an even higher discretionary level when it is used as complementary to another qualifier also aimed at reducing the binding character of an international obligation. Frank, for instance, points out that "The CBD is the only global Treaty, together with the Ramsar Convention, setting out a positive legal duty to create protected areas. However, the 'as far as possible and as appropriate' clause makes the implementation of this duty *highly* discretionary", Veronica Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publishers 2007) 342 emphasis added. For an alternative view see Vezzani (n 55) 222.

In sum, it could be concluded that the apparent binding language in Article 118 LOSC referring to the establishment of RFMOs and cooperating through them may be more accurately described as a faculty available to States but not as a strict binding obligation they must comply with. Under the LOSC, therefore, the duty to establish RFMOs would depend on how appropriate the aforementioned States find this option and, ultimately, on their willingness to cooperate through them. This reasoning seems to fit in the context of the LOSC and is certainly compatible with the freedom of fishing envisaged in Article 87(1.e) LOSC and with Articles 116 to 119. As referred to above, a more binding wording in Article 118 LOSC might have risked the balance with the freedom of fishing in Article 87(1.e) LOSC. To further the functional-regional approach and subsequent regionalization of high seas fisheries law, the drafters of the UNFSA used the language of the LOSC itself, but, presumably, molded and equated the primary obligation to cooperate (first sentence of Article 118) with the obligation to establish such organizations (third sentence of Article 118), as Article 8(5) UNFSA so demonstrates.

[511] UNFSA art 2.

considered as ‘Relevant IFB Measures’ to include in proposals under Article 19 BBNJ Agreement.

The BBNJ Agreement encourages collaboration and contributions for the combination of *inter alia* RFMO and IMO tools. RFMOs may adopt and implement ‘marine protected areas’ (‘MPAs’). It is worth noting that within fisheries management, the ‘MPA’ notion possesses a particular sectoral purpose. Indeed, according to the FAO, “MPAs are generally considered *temporally* and geographically *defined* areas that afford *natural resources* greater protection than is afforded in *the rest of an area as defined in relation to fisheries management* (e.g. the fishery, ecosystem or zone constituting the management unit), i.e. a no-take area to protect spawning of a certain fish species targeted by a fishery or an area with specific gear prohibitions”[512]. Elements such as *defined temporality* and *natural resources* characterize this notion of ‘MPA’, assessed from the approach used for the management of fisheries. It is not the same approach in the area-based management that aims at the conservation of ‘marine biological diversity’. ‘MPAs’ in fisheries management are connected to the specific commercial sectoral interests involved. An ‘MPA’ for conservation purposes, disregarding the commercial value of species under its protection, might be more related to the common concern of the international community and, therefore, may not coincide with the notion used from that sectoral approach.[513] RFMOs measures or ‘MPAs’ may be combined with IMO measures under the treaty, for instance, through Article 29(4).

It has been interpreted that IMO Particularly Sensitive Sea Areas (PSSAs) “may also be established on the high seas.”[514] The IMO PSSA tool is “an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities. At the time of designation of a PSSA, an [APM], which meets the requirements of the appropriate legal instrument establishing such measure, must have been approved or adopted by IMO to prevent, reduce, or eliminate the threat or identified vulnerability.”[515] The possibility that future IMO PSSAs adopted and implemented in ABNJ, first, may arise from an EIA external to Part IV and promoted by it, and, second, result in embodying regulations or standards designed to prevent, mitigate, or manage potential impacts *below* the threshold for EIAs under Part IV makes them important to the subject addressed here.[516] In examining their relationship with the BBNJ Agreement, it has been submitted that

---

[512] ‘MPAs as a Tool for Fisheries Management’ (*Food and Agriculture Organization of the United Nations*) <https://www.fao.org/fishery/en/topic/4400/en> accessed 30 March 2024 (emphasis added).

[513] During the BBNJ negotiations, the appropriateness of RFMOs and marine conservation measures as implementation tools was questioned. It was argued that RFMOs, “given their exclusionary mandates, could not represent the interests of the international community” and that “conservation of biodiversity is a state mandate and, therefore, the exclusion of states when using conservation tools was inconsistent with UNCLOS." IISD, ‘WG 2nd Meeting’ (n 40) 9.

[514] Roberts (n 416) 244. In this connection, about the relation between PSSAs and their possible designation in the Sargasso Sea see, for example, “Sargasso Sea Commission co-hosts a workshop on Particularly Sensitive Sea Areas (PSSAs) on the high seas in Costa Rica” in May 2024 Newsletter Released, available at: https://www.sargassoseacommission.org/publications-a-news/newsletters

[515] Assembly IMO, ‘Res. A.982 (24): Revised Guidelines for the Identification and Designations of Particularly Sensitive Sea Areas’, *24th session* (2006) para 1.2 <https://www.imo.org/en/ourwork/environment/pages/pssas.aspx>.

[516] BBNJ Agreement art 29(4.b.ii).

there are grounds to interpret that the application of this type of IMO measure might eventually impede the freedom of navigation.[517] IMO PSSAs are likely to become 'Relevant IFB Measures' under the BBNJ Agreement and established by 'ABMTs' or 'MPAs'.[518] So far, none have been on the high seas beyond 200nm. If IMO PSSAs are designed consistently with the RFMO measures and with the objectives of the BBNJ Agreement, they would be favored by the presumptions set out by the treaty.

5. The Necessary Presumptions for Collaboration and Contributions

The framework for area-based management and the tools system it aims at fabricating are based on presumptions that hold Part III up.[519] The international cooperation requested by the treaty is exemplary in this respect; binding language mandating State parties to *strengthen and enhance* cooperation with 'relevant IFBs' in Part I, or *strengthen* cooperation and coordination in the use of 'ABMTs' among States and 'relevant IFBs' significantly may rely on the presumption that the international duty to cooperate (with the content that the not-yet-in-force treaty provides) precedes the conclusion of the instrument and already exists in areas beyond national jurisdiction.[520]

The BBNJ Agreement echoes the legal design of the UNFSA. The presumptions set out by the UNFSA are important to assess the framework for area-based management enshrined in Parts III and especially, in Part IV BBNJ Agreement. The UNFSA represents a paradigm shift in international regulations for fisheries. Subjacent to its architecture, lies the idea that inconsistencies emerging from the LOSC functional-zonal scheme between fisheries management measures adopted by the coastal State, within national jurisdiction, and those taken by fishing States, beyond national jurisdiction, are (and will be) a *big obstacle* that needs to be overcome, particularly by implementing Article 7(2).[521] The contrast in approaches might

[517] Roberts (n 416) 247.
[518] About the complementary relation between PSSAs and the BBNJ Agreement seee, for example, Klerk (n 226) 12; Roberts (n 416) 247–253, 255–257.
[519] Lewis (n 87) 24–57.
[520] BBNJ Agreement art 8(1) and 17(b).
[521] "One of the biggest potential obstacles to the effective management of such stocks is inconsistency between the management measures taken by the coastal State(s) and those taken by high seas fishing States. If their measures are not compatible, there is a likelihood that the management efforts of the one will be undermined by the other. That issue is addressed in article 7 of the Agreement.", Robin R Churchill, Alan V Lowe and Amy Sander, *The Law of the Sea* (4th ed, Manchester University Press 2022) 566. To achieve the treaty objectives, then, coastal States and States fishing on the high seas have a duty to cooperate for the purpose of achieving compatible measures in respect of straddling and highly migratory stocks, ibid 567. It is well-established that Article 7(2) UNFSA, considered a key provision in the architecture of the UNFSA, contrasts with Articles 63(2) and 64 LOSC by obliging coastal State parties to it to establish measures in areas under its jurisdiction compatible with those implemented beyond national jurisdiction, as those elaborated by RFMOs, UNFSA art 7(2.c); Moritaka Hayashi, 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish

be extrapolated, and *mutatis mutandis* might be recognized in the BBNJ Agreement. Given this, considering the normative evolution following the UNFSA may shed light on the impact the BBNJ Agreement might have on the freedom to navigate the high seas.

Presumptions are crucial for international cooperation in terms of the UNFSA and the BBNJ Agreement. Presumptions affect legal consequences flowing from the recharacterization of the operative facts, and following the recharacterization of operative facts, the law applies to *the new situation*.[522] In the context of the UNFSA, RFMOs find fundamental support in many treaty-based presumptions and are given a treatment similar to the one given to 'relevant IFBs' in Part III BBNJ Agreement. The same occurs with the 'conservation and management measures' of 'RFMOs' ('RFMO measures'), which are regarded as the 'Relevant IFB Measures' and others in Part III BBNJ Agreement. The UNFSA does set up a presumption in, for instance, Article 7(2), which states that to determine compatible 'RFMO measures', coastal States and States fishing on the high seas shall *inter alia* "take into account previously agreed measures established and applied (…) by [RFMOs]"[523]. The presumption installed at the foundations of the UNFSA, therefore, would consist in that 'RFMO measures' constitute the instrumental means "to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks"[524]. Concerning the BBNJ Agreement, it has been "suggested that (…) vesting implementation exclusively in the hands of existing organizations like RFMOs. These suggestions seem to depend on an assumption that the existing governance framework in ABNJ manages fisheries' impacts on biodiversity effectively or is making sufficient progress in that direction."[525]

The BBNJ Agreement contains many void terms in need of a legal definition of some kind. It is not the legal content, but the legal *molds* that the BBNJ Agreement identifies under the wide expression "Measures such as…" used in the title of Part III. However, this conceptual vacuum does not represent an obstacle to appraising the interplay among the explicit wording in its provisions and reflecting on their subsequent overall potential. It may be argued that the terminology in Part III departs from an intertwined variety of assumptions or presumptions that precondition legal thinking and shape the expectations of the interpreter (whether the latter is conscious or not).

Though not exactly legal, and however undefined it may be, the *invention* or *idea of biodiversity* constitutes *the* primary element that the treaty utilizes.[526] It may be stressed that,

---

Stocks: Significance for the Law of the Sea Convention' (1995) 29 Ocean & Coastal Management 51, 57–58; Alex G Oude Elferink, *The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks* (FAO 1999) 4–19; Proelss (n 78) 190–191.

[522] Lewis (n 87) 12 (emphasis added).

[523] UNFSA art 7(2.c).

[524] ibid 2 (emphasis added).

[525] Andrew Friedman, 'Beyond "Not Undermining": Possibilities for Global Cooperation to Improve Environmental Protection in Areas beyond National Jurisdiction' (2019) 76 ICES Journal of Marine Science 452, 453.

[526] For focusing on strictly legal issues, it may be worth recalling Takacs's words (in italics), which arguably serve to orientate this study and set the basis for addressing the current questions at stake, Takacs (n 167) arts 34–40. In his research, he goes through an in-depth examination of the *invention* of *the idea of biodiversity*, including the impressive emergence of this complex *idea* and the *creation* of the *biodiversity crisis* in the United States in the mid-1980s, ibid. His work concludes with the assertion,

because it is a human construction, those *regional* IFBs that include and give substantial content to the notion of 'biological diversity' or 'marine biological diversity' within their regimes would be in the best position to *manage* or *control* the scope of such quintessential notion, make and designate measures and subsequently fix the environmental standards and restrictions; later, they would also hold the best status to promote the establishment of 'ABMTs' and 'MPAs' (within the global BBNJ COP or sectoral IFBs like IMO) and implement them regionally. The text of the global LOSC does not include the term 'marine biological diversity'. In this view, the 'stakeholders' with such basic conceptual power may rule the BBNJ system.

A great number of presumptions are enshrined through the semantics or terminology used in the treaty, and they establish the foundations of the institutional and legal dimensions. Notwithstanding the definitions made explicit in Part I, basic terms such as 'ABMT' and 'MPA' appear, however, vague and uncertain.[527] The same uncertainty may take place when studying Part III and trying to figure out what it means to "conserve and sustainably use areas requiring protection" and reflect on its implications for high seas activities.[528] Echoing what happens with the undefined term 'marine biological diversity', the interpreter's only way to *ex-ante* provide explanations to some of the provisions would be by resorting to subjective assumptions nourished in other legal contexts different from the BBNJ Agreement.

To demonstrate how the presumptions consolidate, it appears advisable to bear in mind the underlying *apparent* axioms or truisms: first, the expression "such as" in the title of Part III makes it understandable that 'Measures' therein comprised include *inter alia* categories such as 'ABMTs' and 'MPAs' and, secondly, that 'ABMTs' and 'MPAs' constitute 'Measures' to achieve objectives such as "conserve and sustainably use areas requiring protection".[529] In this logic, 'ABMTs' and 'MPAs' would be the principal legal products of procedures following a decision of the COP under Part III.[530] Additionally, turning to the term "such as" in the title, Part III also indicates that 'ABMTs' and 'MPAs' are not all the 'Measures' through which an objective may be achieved. Measures adopted and implemented by 'relevant IFBs' constitute 'Measures' external to the BBNJ Agreement to *directly* achieve the objectives of Part III. Measures such as those of 'relevant IFBs' would be the prevalent legal sources to which

---

"Don't know what biodiversity is? You can't.", ibid 341. He immediately adds, "Perhaps biodiversity is an appropriate term. The confusion it conveys reveals our pathetic weakness in thinking we can define, know, and control a nature that will always dance just beyond our grasp.", ibid. Such an expression discourages *a priori* thinking about the notion and gains a special weight under the current circumstances. Assumptions might turn out precipitated or misleading. In this logic, the term *marine biological diversity* and its *inherent value* in the BBNJ Agreement, at the core of the treaty, would have to be provided with content *ex post* based on the information accessible to those engaged in implementing the treaty, BBNJ Agreement art 2 and para 11 of the preamble.

[527] "While there is no agreed-upon definition of either term, ABMTs are generally understood to be geographically defined areas within which human activities, such as shipping or fishing, are regulated for one or more purposes in order to minimize their (potential) adverse impacts on the ecosystem and its biodiversity (BBNJ, 2023, art. 1(1)). ABMTs simply denote the management of processes and human activities in a given area, whether for conservation purposes or other objectives.", Bastiaan E Klerk, Katharina Heinrich and Raul Primicerio, 'Beyond Equilibrium Thinking: Dynamic Area-Based Management Tools in a Changing Ocean' (2024) 11 Frontiers in Marine Science 1418435, 2.

[528] BBNJ Agreement art 17(a).

[529] ibid 2 and 17(a).

[530] ibid 22(1.b).

procedures conducted under Part III and their legal products would have to adapt. This realization is crucial to articulate the whole framework for area-based management and to understand how the treaty may work.

In this context, the legal and institutional dimensions are closely related, and their consequences shape the entire system. Ubiquitously, Part III sets up another presumption or category of equal or greater significance than that of 'ABMTs' and 'MPAs'. Indeed, Part III grants the 'Relevant IFB Measures' category with a *key status* for a new high seas normative regime to be developed under the comprehensive BBNJ Agreement.[531]

'Relevant IFB Measures' are favored with presumptions and located at the top of the vertical regime built up by Part III, within which 'Measures' such as 'ABMTs' and 'MPAs' are ranked with a lower status. Elaborated elsewhere beyond the scope of the COP, 'Relevant IFB Measures' may be perceived and imported as if they were a *fait accompli,* and their

---

[531] For inputs in the preparatory works see 'Further refreshed draft text' 2022 [A/CONF.232/2023/2] art 21(2). See also textual proposals concerning Article 21 in Compilation of outcomes of small group work submitted after the issuance of the Refreshed draft text (...) and Ending point of the Facilitators-led discussions held on 26 August 2022 2023 [A/CONF.232/2023/INF.2] 122–125. 'ABMTs' and 'MPAs' are mentioned in Article 26, within paragraph 1. Contrasting with Article 26(2), Article 26(1) refers only to State parties (and omits referring to relevant IFBs or those States participating under them). Article 26(1) provides that "*Parties* shall, individually or collectively, report to the Conference of the Parties on the implementation of *area-based management tools, including marine protected areas*, *established under this Part* and related measures." (emphasis added). The difference between 'Measures' such as 'ABMTs' and 'MPAs' in Article 26(1) and "measures" in Article 26(2) (hereinafter, 'Relevant IFB Measures'), becomes evident in light of Article 26(3). Article 26(3) makes a difference between the reports and information "referred to in paragraphs 1 and 2 above" arguably clarifying that 'Measures' assessed in those reports and described separately in each of the preceding paragraphs possess a diverse nature and that subsequently need a differentiated legal treatment. Among the differences in treatment, it is noteworthy that the expression "shall" in Article 26(2) not only introduces an obligation for State parties but also an expectation (and maybe even an international right) of IFBs to "be invited". The expression "shall" in Article 26(2) prevailed against the term "may" considered during negotiations, see textual proposals concerning Article 21 in ibid.

Other aspects reinforce the difference between the 'Measures' just referred to. It appears reasonable to assert that the expression "related measures" in Article 26(3) has a wider scope *ratione materiae* than the equally written expression in Article 26(1). Article 26(1) refers to 'ABMTs' and 'MPAs' "established under this Part *and* related measures" (emphasis added). Instead, Article 26(3) refers to 'ABMTs' and 'MPAs' "established under this Part*, including* related measures" (emphasis added). This wording in Article 26(3) replicates in Article 26(4). In this context, the conjunction "and" in Article 26(1) suggests that the "related measures" it points out enjoy a close connection with 'ABMTs' or 'MPAs' or that, more clearly, they are considered as having been *all* approved through a procedure under Part III. In contrast, the preposition ", including…" in Article 26(3) appears to suggest that the expression "related measures" that follows it introduces items that are part of a whole or group. Accordingly, in Article 26(3) it may be interpreted that the expression "related measures" groups 'Measures' indicated "in paragraphs 1 and 2 above, respectively." In Article 26(1), because of its location, the same expression "related measures" appears to have a narrower scope. *Paragraphs 1 and 2 in Article 26, though different in content, have in common that they both refer to 'Measures' that are recognized as means to achieve the objectives of the treaty.* This is so, without prejudice to the fact that "related measures" in Article 26(2) ('Relevant IFB Measures') are not necessarily elaborated under proceedings with universal participation under Part III. Furthermore, according to Article 26(2), the feasibility of the Secretariat publishing information on the implementation of 'Relevant IFB Measures' provided for in Article 26(1) will depend on the willingness of 'relevant' IFBs to provide such information in advance to the COP and, through the COP, to State parties.

compatibility with the objectives of Part III is given for granted *ex-ante*. The aforementioned is confirmed by how Part III strongly (and blindly) relies on that presumption to the point of building up a legal verticality of global impact in the different regions beyond national jurisdiction. The compatibility requested by Article 22(1), which refers to 'Relevant IFB Measures', strongly endorses this view.[532]

The integrated reading of Articles 22(1), including paragraphs (a) to (c), and 22(2), is instrumental in the structurization of this innovative normative order. Article 22(2) establishes that "[i]n *taking decisions* under this article, the [COP] shall respect the competences of, and not undermine [relevant IFBs]." (emphasis added). In this concern, views shared here assume that Article 22(2) would most likely function as a key device for the 'stakeholders' to unfold procedural strategies oriented towards fostering the empowerment of regional IFBs such as RFMOs.[533]

Article 22(1.a) provides that "the establishment of [ABMTs, including MPAs], and related measures"[534] shall be decided by the COP.[535] Next, Article 22(1.b) indicates that the decisions that the COP "may take"[536] are to be "compatible with those adopted by [relevant IFBs]"[537]. Article 22(1.b) also indicates the modality under which decisions may be taken, i.e., "in cooperation and coordination with those [relevant IFBs]"[538]. Against this backdrop, arguing that the term "may"[539] in Article 22(1.b) could be interpreted as authorizing the COP to decide measures that do not meet the requirements listed in the provision would be disruptive with the legal dimension highlighted here and risks colliding with Article 22(2). More clearly, Article 22(1.b) may be better read as stressing that the COP *may not* take decisions on 'Measures' that are non-compatible "with those adopted by [relevant IFBs]"[540] or that do not follow the requested modality, meaning "in cooperation and coordination with those [relevant IFBs]"[541] Lastly, the view that this is limiting to the COP is consistent with the interpretation given to Article 22(1.c) and the modality conditioning the issuance of this body's recommendations.[542]

---

[532] BBNJ Agreement art 22(1.b).

[533] There is a degree of certainty about that regional IFBs and 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.", Klerk (n 226) 12. The versatility of the clause in Article 22(2) allows its adaptation according to the circumstances. Its usefulness would be clarified by practice. In this view, it may be argued that the 'stakeholders' may employ it to solidify the mandate of RFMOs and other regional 'relevant IFBs' to influence those of global character. Given this, Article 22(2) may be viewed as a key tool for procedural strategy and as a means to gain influence in the making of norms outside and within the COP. Comments made here illustrate these aspects.

[534] BBNJ Agreement art 22(1.a).

[535] ibid.

[536] ibid 22(1.b).

[537] ibid.

[538] ibid.

[539] ibid.

[540] ibid.

[541] ibid.

[542] It has been asserted that the modality conditioning the making of the COP's recommendations at the end of Article 22(1.c) (i.e. "in accordance with their respective mandates") ensures that "the BBNJ Agreement does not undermine relevant IFBs, by way of effectively relinquishing competence to adopt measures, and rather to 'promote' relevant measures to be adopted by one or several relevant IFBs.", De Lucia (n 35) 12. In turn, however, the link between the *not-undermining* rule and decisions or

Indeed, following Article 22(1), 'ABMTs' or 'MPAs' can be directly established by the COP in areas devoid of overlapping jurisdiction only.[543]

In sum, the apparent dominant status of the BBNJ COP can be left aside to appraise it as *one more body* in the plethora of IFBs elaborating 'ABMTs', even ranked below those regional and sectoral deemed 'relevant'.[544] The 'relevant IFBs', though not enabled to adopt 'Measures' such as 'ABMTs' or 'MPAs' in Part III, can, however, adopt and implement their own 'Measures' to directly achieve objectives like "conserve and sustainably use areas requiring protection"[545]. Within the COP, State parties would have to assess such measures according to the limitations in Article 22(2). Additionally, as implied by the wording in Article 26(2), the designation and the subsequent categorization as 'Measures' would be a matter to be determined by the same 'relevant' IFB that adopted and implemented them (*before* any possibility of providing that information to the COP).[546] This confirms the standpoint that "the institutional model that was opted for is decentralized, a mere 'global' system in disguise"[547].

Following these presumptions, crucial for cooperation, it may be argued that the BBNJ Agreement focuses on the "effectiveness of measures, as opposed to competence, is (…) consistent with [other] provisions of the BBNJ Agreement"[548]. This connects with the fundamental relevance given to 'Measures' in Part III, '..such as' 'Relevant IFB Measures' under Part III, EIAs equivalent to the EIA regulated in Part IV, regulations and standards arising from the latter in Part IV, 'ABMTs' and 'MPAs'. The focus on effectiveness suggests that those State parties that do not *collaborate* with the implementation of measures embodied in the recommendations made by the BBNJ COP or in the decisions taken by it within the IFBs recipients of such measures may be regarded as non-cooperative in the terms of Article 25(6) in Part III.[549] In turn, Article 25(6) BBNJ Agreement echoes the obligation in Article 8(3) UNFSA according to which State parties "*shall give effect to their duty to cooperate* (…) *by*

recommendations would have to be reviewed in light of the consequences of the duty to cooperate in Article 25(4) in Part III.

[543] Klerk (n 226) 10. To prevent any collision between mandates and, notably, to avoid any risk of the presumptions favoring 'Relevant IFB Measures' being lifted, Article 22(1) in Part III authorizes the 'relevant' IFBs to participate in the work of the COP through "cooperation and coordination"[543]. This mechanism will be of the utmost importance to make sure that, no matter what measures are proposed in the future, decisions on 'Measures' such as 'ABMTs' and 'MPAs' by the COP invariably achieve compatibility with 'Relevant IFB Measures'. In this manner, the legal mechanism and requirements in Article 22(1) secure the subsequent *adaptability* of proposed measures under Article 19 to 'Relevant IFB Measures' and guarantee the institutional *stability* of the mandates of the 'relevant' IFBs. This significantly obstructs any development of the potential implied powers that the COP might desire to gain. See discussion on the doctrine of implied powers in Jan Klabbers, *An Introduction to International Organizations Law* (4th edition, Cambridge University Press 2022) 56–63.

[544] BBNJ Agreement art 22(2).

[545] ibid 17(a).

[546] ibid 26(2).

[547] Klerk (n 226) 7.

[548] De Lucia (n 35) 11.

[549] "A Party that is not a party to or a participant in a relevant legal instrument or framework, or a member of a relevant global, regional, subregional or sectoral body, and that does not otherwise agree to apply the measures established under such instruments and frameworks and by such bodies shall not be discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.", BBNJ Agreement art 25(6).

agreeing to apply the conservation and management measures established by such organization or arrangement."[550] Simultaneously, Article 25(6) practically replicates the text of Article 17(1) UNFSA.[551]

6. Consequences of Cooperation on the Status of Arrangements Constituted by the Treaty

---

550 UNFSA art 8(3) (emphasis added).

551 Rayfuse (n 59) 444. The UNFSA has been criticized for its supposed *normative* effects on non-parties, See discussion in Freestone (n 499) para 20. This is connected to the wording used in drafting the UNFSA, which in some of its provisions refers directly to 'State' or 'States' widely. For instance, Article 17 UNFSA (Part IV) concerns States that are non-members of RFMOs and non-participants in RFMAs. A broad interpretation of the terms 'A State' or 'States' might (mistakenly) lead to assuming that it does not distinguish between parties and non-parties to the UNFSA. The provision precludes 'States' from authorizing vessels flying their flag to engage in fishing operations for straddling or highly migratory fish stocks that are subject to conservation and management measures established by such regional instruments or bodies, UNFSA art 17(2). Among other obligations, the provision establishes that 'a State' that falls in that description and is reluctant to apply the measures adopted by RFMOs or RFMAs "is not discharged from the obligation to cooperate (…) in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.", ibid 17(1). In this respect, the criticism of the UNFSA based on the assumption that it has legal effects on non-parties may not have a strong legal basis in light of the *pacta tertiis* maxim, notwithstanding the importance of the criticism from a political point of view. The criticism reasoned on this basis seems to be grounded on an implicit interpretation of the criticized relevant provisions of the UNFSA, which paradoxically recognizes a certain legal weight to the provisions in question and acknowledges that they have effects on non-parties to the treaty. This criticism seems inconsistent with the alleged legal logic on which it is supposedly based. Rather, in light of the *pacta tertiis* maxim codified and enshrined in Article 34 VCLT, it is arguable that the provisions of the UNFSA that refer to 'A State' or 'States' have no legal effect at all on non-parties to the UNFSA and cannot in any way be invoked against them. In this view, if, for example, an RFMO member (or RFMA participant) or a State Party to the UNFSA were to act on the basis of Article 17(1) UNFSA and require a non-party to cooperate in the implementation of regional measures, it would be acting in disregard of the maxim in Article 34 VCLT. This is consistent with the view that semantics cannot override the principle that treaties are binding only on ratifying states, Erik Franckx, 'Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea' (2000) 8 Tulane Journal of International and Comparative Law 49, 71. This allows concluding that, to be fully effective, the UNFSA "must be universally accepted as a treaty instrument.", Harrison (n 293) 113. This is important for practical purposes considering that it has been acknowledged that RFMO members do not take into account limits imposed by their mandates when dealing with non-contracting or non-cooperative States, Molenaar, 'Regional Fisheries Management Organizations' (n 466) 101. These aspects, including the sometimes questionable interpretation of UNFSA and the practice following it, might have led some to conclude that the UNFSA undermines the basic concept of freedom of fishing on the high seas and may be seen as "a departure from the letter of the [LOSC].", See discussion in Freestone (n 499) para 20. Curiously, with some differences, Article 25(6) Part III BBNJ Agreement practically replicates the wording in Article 17(1) UNFSA.

551 BBNJ Agreement art 1(9) and 29(4).

The context assessed above allows recognizing the weight of the COP and the STB for this regime (institutional dimension) and their limitations (legal and scientific-technical dimensions respectively). Accordingly, Part III allows the implementation of 'Measures such as' the 'Relevant IFB Measures', 'ABMTs', or 'MPAs' to fall within the competence of the global sectoral 'relevant' IFBs acting *at the regional level*.[552] This may have consequences on the competencies of IMO and thus on shipping. Reflecting on more assertive terms may entail an oversimplification of the complexity of the treaty. At the same time, this reflection might be quite useful to understand the overall functioning of the treaty and the order that it means to provide to the institutional and legal constellation with which it will connect. The legal canvas pictured above suggests that the Part III BBNJ Agreement could be described as a universal 'implementing agreement' of the 'Relevant IFB Measures' that the 'stakeholders' may support and condense in the form of 'ABMTs' and 'MPAs' through the sectoral, multi-sectoral or cross-sectoral material scope of the decisions that the BBNJ COP will consent to endorsed by the STB assessment.

6.1. The COP

Following the assessment of the international cooperation requested by Parts I and VI and, particularly, by Parts III and IV, it may argued that the COP can be described as a body that *clusters* the States Parties, which, together with this body, are inserted under a constellation of indeterminate 'stakeholders' such as the 'relevant IFBs' (existing and forthcoming), all packaged and ranked following presumptions and the subsequent verticality enshrined in Part III of the BBNJ Agreement. The COP may be grouped with the other 'relevant IFBs' and even rank below IFBs 'relevant' to the BBNJ Agreement. According to Article 22(2), the COP "shall respect the competences of, and not undermine" relevant IFBs. In line with the arguments here unfolded and assumptions made about the procedural usage of Article 22(2), the type of relationship between the UNFSA Review Conference and RFMOs in that treaty appears to be reflected, under the BBNJ Agreement, in the relationship that the BBNJ COP is to have with the 'relevant IFBs' to which the implementation of 'ABMTs' and 'MPAs' may be *conferred*. The interplay among Part III provisions and other parts of the treaty allows the gradual weakening of the BBNJ COP and the progressive simultaneous empowerment of (regional) 'relevant IFBs' that would be joined by other 'stakeholders' in the pursuit of the objectives of the treaty.[553] In these circumstances, the equality of all States (including States non-parties

[552] BBNJ Agreement art 22(7) and 25.
[553] In this connection, it is worth considering discussion in which "[t]he US noted that the ILBI could identify areas for additional protection, but *regional and sectoral bodies should have primacy over establishing, and enforcing compliance with, management measures*. Singapore and Australia cautioned against creating a hierarchy, with the Russian Federation questioning if a new body under the ILBI would be more competent than existing regional and sectoral organizations." , IISD, 'Summary of the First 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

acting as 'stakeholders') is likely to be challenged as well as their freedom to navigate the high seas.

This may be illustrated with, for example, the *consultation stage* comprising the *non-time-bound phase* referred to in Article 19(2), which precedes the submission of the proposal; and its continuation in the *time-bound phase* under Article 21 Part III, which saves time and allows avoiding widely rediscussing substantial matters agreed and given *consistency* in the preceding consultations for developing a proposal. It may be argued that the assessment of those substantial matters would be oriented to develop "in a manner consistent" with the threshold in Article 34(2) in Part IV. According to which a decision to "authorize the planned activity" shall be taken. According to Article 4 in Part I, the navigation of all States and their respective jurisdiction over vessels flying their flags may be affected by this.

Given that limited-access regional IFBs such as RFMOs will be pivotal to the network of 'relevant' IFBs, they and their members are likely to be the most committed to achieving the purposes of the BBNJ Agreement together with other 'stakeholders' and may be expected to *collaborate* in the development of proposals based on IMO regulations and standards among other 'Relevant IFB Measures' to implement "a geographically defined area through which one or several sectors or activities are managed"[554]. Considering other sectors, RFMO measures, to give an example, shall have to be considered to achieve that aim. Arguably, grouped with the 'stakeholders', the COP constitutes another *contributor* to Part III procedures, *consulted* to the extent the *time-bound phase* under Article 21 allows and subject to Article 23 decision-making terms.[555] Whatever relevant *contributions* of the COP may turn out to be in the normative making process or the taking of decisions impacting the high seas, there is no doubt that the COP will have a decisive role in ultimately endorsing universal bindingness to the 'ABMTs' and 'MPAs' decided.[556] The prevalence of the BBNJ Agreement gives 'conservation' of 'marine biological diversity' may subsequently weaken the rights of States not able to achieve that goal. The consequences might go further if universal participation of States is not achieved, and capacity building or financial resources cannot be obtained to meet those aims.

Part III entails a great stimulus for 'stakeholders' such as 'relevant' IFBs and States participating in them to "collaborate"[557] with the proponent. The stimulus for these 'stakeholders' to collaborate in developing the proposal to establish 'ABMTs' and 'MPAs' matches well with the obligation of the proponent to "collaborate and consult, as

---

Biodiversity of Areas Beyond National Jurisdiction: 4-17 September 2018' (2018) 25 Earth Negotiations Bulletin 1, 7 (emphasis added).

554 BBNJ Agreement art 1(1).

555 This poses the question of how the COP, among *other contributors* recognized by the treaty, may contribute to developing the regime following Part III. Without a doubt, rules limiting the COP's competences will equally limit the participation of State parties during sessions, for which their saying in such meetings shall also "respect the competences of, and not undermine" 'relevant' IFBs, ibid 22(2). Because the elaboration of decisions in Part III requires "cooperation and coordination" (ibid 22(1.b).) with the 'relevant' IFBs and for reasons of "transparency" (ibid 48(3) and 48(4).), it seems coherent to infer that the representatives of 'relevant' IFBs will be granted the possibility to immediately correct any potential dealignment with that rule during the procedures and to set the ground for discussing those 'Measures' "compatible with those adopted by"[555] them (and not otherwise), ibid 22(1.b). It is on this basis that the COP "[m]ay take decisions", ibid.

556 BBNJ Agreement art 22(1.b).

557 ibid 19(2).

appropriate"[558] with them. The stimulus for 'relevant IFBs' and other 'stakeholders' to collaborate becomes clear when acknowledging that substantial collaboration increases the chances for a proposal to prosper. According to the presumptions and the compatibility thresholds State parties should follow under Part III, if the measure proposed is based on 'Relevant IFB Measures' and these are supported by the collaborators, the proposal's success would be practically ensured.[559] Later, in the *time-bound phase* under Article 21 Part III, the same 'stakeholders' initially supporting the proposal are allowed to continue backing up the proposal and contribute to achieve the subsequent adoption of a decision by the COP. During deliberations, the COP is obligated to take the contributions of 'stakeholders' into account.[560] Moreover, IFBs, particularly those with competences over the relevant area, are given another opportunity to endorse such a proposal through "cooperation and coordination" with the COP, which constitute a requirement of Article 22(1) to achieve 'Measures' compatible with those already implemented by competent relevant IFBs.[561]

In this context, Article 22(7) appears to explain to what extent relevant IFBs, and arguably 'stakeholders' supporting them, are conferred with powers. It mandates that "any [ABMTs, including an 'MPA', or related measures] adopted by the [COP] under [Part III] that subsequently falls within the competence of [a 'relevant' IFB established or whose competence has been amended], either wholly or in part, shall remain in force until the [COP] reviews and decides, in *close* cooperation and coordination with that [IFB], to maintain, amend or revoke the [ABMTs, including an 'MPA', and related measures], as appropriate."[562] The fact that the remaining in force of an 'ABMT' depends on a COP's decision implies that another proposal would have to be submitted, and its success would have to be supported by the relevant IFBs and other 'stakeholders' as just mentioned.[563] This time, however, by requiring "*close* cooperation and coordination"[564], the compatibility threshold imposed by Article 22(1) appears to be more stringent.[565] Part III suggests that the efficiency of the institutional machinery that the COP embodies is highly dependent on the willingness and support of the 'relevant' IFBs. At the same time, this appears highly stimulating for the empowerment of relevant IFBs and other 'stakeholders' such as States participating in them.[566] By very concrete legal means, including presumptions and institutional verticality, the BBNJ Agreement forges an institutional dimension guaranteeing the hegemony of States participating in (limited access) IFBs relevant to it, like RFMOs.

[558] ibid.
[559] ibid 22(1.b).
[560] ibid 22(1).
[561] ibid 22(1.b).
[562] ibid 22(7) (emphasis added).
[563] ibid 19(2), 21 and 22(1.b).
[564] ibid 22(7) (emphasis added).
[565] ibid 22(1.b).
[566] The stimulation is likely to be renewed over time, considering that ulterior proposals will gain strength when based on, first, 'ABMTs' and 'MPAs' obtained in previous procedures under Part III, and, certainly, 'Relevant IFB Measures' "existing" at the time of the submission, ibid 21(2.b.iii). This would allow developing the BBNJ Agreement and possibly accelerating "the establishment of a comprehensive system of area-based management tools", ibid 17(a).

6.2. The Dual Role of the STB

Observations made above shed light on the treaty legal structure conditioning the work of the STB, a scientific and technical body constituted by the treaty with a key role in procedural stages oriented toward adopting 'Measures' allowed by procedures regulated in Part III and for assessing the norms applicable to 'planned activities' or 'category of activities' under Part IV. It is worth recalling that, following Article 22(1), the COP will have to establish 'ABMTs' or 'MPAs' by taking into account "the scientific advice"[567]and "recommendations of the [STB]"[568]. This and all other issues mentioned here will weigh in *inter alia* its preliminary review of the proposal submitted, under Article 20, the assessment of the proposal revised after the contributions, and the subsequent making of recommendations to the COP, under Article 21(5).

The STB functions rely on the performance of its members, who will be "*serving* in their expert capacity and *in the best interest of the Agreement.*"[569] The so-called 'interest' is here associated with the overall idea of the BBNJ Agreement, set up in goal-oriented terms or *practicality*. Given that the BBNJ Agreement is a goal-oriented treaty, "the best interest of the Agreement"[570] is likely to be clarified *ex post* during *inter alia* "the implementation of this Agreement"[571] that the COP shall support.[572] The 'best interest' modality that the STB would have to follow makes it arguable that its review might comprise legal elements decided in contexts politically diverse from that of the BBNJ COP, making the strict scientific-technical reasoning that the STB is meant to employ uncertain.[573] There is a possibility that this may be confirmed when proposals meeting the requirements of Article 29(4) in Part IV are submitted.

Though constituted by the BBNJ Agreement, it would be mistaken to argue that the STB is *its* scientific-technical body. The STB may be described as one of the COP's "subsidiary

[567] BBNJ Agreement art 22(1).
[568] ibid.
[569] ibid 49(2) (emphasis added).
[570] ibid.
[571] ibid 47(6.d).
[572] ibid.
[573] Notwithstanding the name chosen for this body, it seems hard to describe the work of the STB as *rigorously* scientific and technical under the *classic social assumptions*. The comprehensiveness of the "multidisciplinary expertise"[573] required to become an STB member might raise questions as to what the "scientific and technical advice" and "functions assigned" are supposed to entail, ibid 49(2) and 49(4). Though not limited to them, the multidisciplinary expertise required levels the void notion of "relevant scientific and technical expertise" with another one like "expertise in relevant traditional knowledge of Indigenous Peoples and local communities, gender balance and equitable geographical representation", ibid 49(2). The term "including" preceding these notions in Article 49(2) suggests that there might be other fields of so-called *expertise*. In this view, it may be wondered what "suitable qualifications" mean and which Parties, among all, would be in a position to nominate candidates, ibid. See discussion about the assessment of values related to biological diversity in Takacs (n 167) 194–197. It is worth noting that the BBNJ Agreement clarifies nothing about the kind of relationship that STB members should (or should not) have with 'stakeholders'.

bodies (…) to support the implementation of this Agreement"[574]. Article 49 makes it explicit that the STB will perform its functions "[u]nder the authority and guidance of the [COP]"[575]. As a COP subsidiary body, the work of the STB could not be used as a basis for decisions or recommendations that depart from the limitations imposed by Part III, as *inter alia* the mandate to "respect the competences of, and not undermine relevant [IFBs]."[576] In this reasoning, Article 49 provides mechanisms that presumably might contribute to making the STB's work consistent with the treaty legal context, including presumptions and the subsequent verticality among measures. For example, Article 49 authorizes the STB to draw on appropriate "advice"[577] emanating from 'stakeholders' like the 'relevant' IFBs and "*other* scientists and experts, as may be required"[578]. Such a request is most likely to be made by the COP, to which the STB is subsidiary, when it performs "in cooperation and coordination with"[579] those same 'relevant' IFBs during the making of decisions on 'Measures' compatible with 'Relevant IFB Measures'.[580] Though widely vague, the term "other scientists and experts"[581] seems flexible enough to comprise "the scientific community"[582] supported by other 'stakeholders' who collaborate and contribute during the *consultation stage*.[583]

Curiously, Article 29 Part IV imposes a particular mandate precisely on the STB (not the COP), which "shall, as appropriate, *collaborate with* ['relevant' IFBs]"[584] "[w]hen developing or updating standards or guidelines for the conduct of [EIAs] of activities in areas

[574] BBNJ Agreement art 47(6.d).
[575] ibid 49(4).
[576] ibid 22(2).
[577] ibid 49(3).
[578] ibid (emphasis added).
[579] ibid 21(1.b).
[580] ibid 22(1.b) and 49(3).
[581] ibid 49(3).
[582] ibid 19(2) and 21(1).
[583] ibid. The references to "scientists and experts" in Article 49(3) and "the scientific community" are unclear at the moment. Notwithstanding that this is expected to be clarified after the entry into force of the BBNJ Agreement, it is worth noting that some discussions on the role of scientists in the conservation of biodiversity point out that science and legal reasoning or legal making are interconnected, David Takacs, 'Whose Voices Count in Biodiversity Conservation? Ecological Democracy in Biodiversity Offsetting, REDD+, and Rewilding' (2020) 22 Journal of Environmental Policy & Planning 43, 48–51. Takacs's views might shed light on the possible role of scientists and experts referred to in Article 49 or that of the "scientific community" as in inter alia Article 21(1): "[t]he law explains who is formally entitled to speak for or against a particular biodiversity conservation endeavor. Epistemology and axiology ask: Whose voices should be privileged? Conservation biologists may speak to both: Science has a privileged voice in answering what interventions will promote the goals of a biodiversity preservation law, but scientists will often assert that they should have a privileged voice in democratic normative discourse due to their expertise about the natural world. They position themselves to fulfill a role that Robyn Eckersly (2011) calls 'nature advocates,' speaking for the needs of nonhuman entities from a diverse set of wisdoms. The rationales biologists assert for their voices speaking loudest (or at least being preferentially heard) are legal (the law requires 'best available science' or something similar), epistemological (their knowledge and way of acquiring that knowledge is the most objective, data driven, and credible) and axiological (the values they endorse and promote are, in some way, preferable).", ibid 50.
[584] BBNJ Agreement art 29(3) (emphasis added).

beyond national jurisdiction by Parties to this Agreement under article 38"[585]. The term 'collaborate', present also in Article 19(2), suggests that the relation between the STB and the 'relevant' IFBs precisely does not depend on the activation of proceedings for non-regular consultations under Part III and develops outside of it and without a pressing time-bound period. The STB seems to have a dual role: on the one hand, as a *collaborator with the relevant IFBs* and their subsequent strengthening of their mandates, and on the other hand, as a *subsidiary body of the COP* and consequently with functions that cannot circumvent limitations imposed on that body. It has been highlighted that "*collaboration* between the STB and the bodies mentioned above will be crucial in order to harmonize EIA undertaken by multiple legal instruments or frameworks."[586]

Though the provision does not give precision as to what that collaboration may consist of, it seems possible that, without the accountability of the State parties or the COP, the 'relevant IFBs' can strengthen their mandates through it and subsequently adopt 'Relevant IFB Measures' containing *inter alia* EIA frameworks "equivalent to the one required under [Part IV]"[587] and "regulations or standards of the ['relevant' IFBs] (…) designed to prevent, mitigate or manage potential impacts below the threshold for [EIAs under Part IV]"[588]. Article 21(8) indicates that "[t]he *modalities* for the consultation and *assessment process*, including duration, shall be further elaborated by the [STB], as necessary" (emphasis added). Considering that limitations imposed on the COP have also been interpreted as *modalities*, it might be presumable that the STB may turn out to be more influential over the rights and obligations of States parties than the BBNJ COP.[589] This might explain why it has been argued that "the BBNJ Agreement seems to reflect a *vertical relationship* between the STB and contracting parties with respect to EIAs."[590] This assertion appears further justified in the fact that, for the development of proposals, Part III requires State parties to "*collaborate* and consult, as appropriate, with relevant stakeholders"[591], including 'relevant' IFBs. However, it is worth suggesting that the alleged verticality concerning the STB could be described as a mere reflection of the legal and institutional dimensions enshrined in the BBNJ Agreement. Article 29-mandated collaboration might contribute to strengthening an *institutional* verticality between the relevant IFBs, like RFMOs, and State parties to the BBNJ Agreement.[592] Indeed, this collaboration may signify the prelude to triggering the conflict clause in Article 29(4), subject to what a "Party with jurisdiction or control over the planned activity determines". Issues of under the competence of the STB, and not so much under the COP, may thus settle the basis for defining the rights of States to navigate.

---

[585] ibid. Article 38 deals with STB EIAs related standards and/or guidelines. It is worth noting that STB standards shall be set out in an Annex to the BBNJ Agreement and, unless otherwise provided, will form an integral part of it, ibid 38(3) and 74(1). Further confirming the subsidiarity of the STB, standards and guidelines developed by the STB shall be subject to the consideration and adoption of the COP, ibid 38(1).
[586] Tanaka (n 209) 110 (emphasis added).
[587] BBNJ Agreement art 29(4.b.i).
[588] ibid 29(4.b.ii).
[589] De Lucia (n 35) 13.
[590] Tanaka (n 209) 111 (emphasis added).
[591] BBNJ Agreement art 19(2) (emphasis added).
[592] ibid 29(3) (emphasis added).

7. Consequences of Cooperation on Access to Information

Information would be fundamental for the large-scale environmental policy of the BBNJ Agreement.[593] Access to information is an issue that should be assessed while keeping in mind the decentralized institutional architecture and the subsequent problems concerning the legal fragmentation that inherently characterize Parts III and IV. It has been "highlighted that *regional* organizations have an advantage regarding the collection of scientific information on local ecosystems compared to a global body, adding that the financing structure is insufficient to cover implementation expenses."[594] The leveling weight that information (and access to it) plays in the *status quo* among States, and as to the status between them and the 'stakeholders', differentiates the BBNJ Agreement from the LOSC. Contrasting with the capacities needed to establish maritime zones under the LOSC, the power of States to create regulatory areas under the BBNJ Agreement is practically defined by the availability of scientific information.[595]

A decisive aspect like access to information, together with the necessary funding, would certainly pre-condition a State party's capacity for submitting proposals or acting within the COP. It has been acknowledged that these issues could impact how IMO regulations or standards may be established, underscoring that this question can *de facto* restrict the group of subjects able to provide content to a proposal of this nature.[596] This obstacle, however, may not turn out to be an absolute deterrent to look for the adoption of a decision. The obligation in Article 19(2) to "collaborate and consult, as appropriate, with relevant stakeholders" is meant to be inclusive and permits States parties lacking information or financing resources to make

---

[593] This assertion stems from the realization that "[m]arine ecosystems and habitats and their associated biodiversity form essential parts of the marine environment and together they extend throughout ocean space. Therefore, marine biodiversity cannot be adequately protected by slicing up ocean space into parts that are protected and parts that are not.", Philomène Verlaan, 'The Interface of Science and Law' in Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill | Nijhoff 2021) 425.

[594] IISD, 'IGC 5(3) Session' (n 29) 4 (emphasis added).

[595] To illustrate to what extent information required is decisive to participation or performance of State parties see, for example, BBNJ Agreement art 19(4.b) and 21(2).

[596] To identify an area as a PSSA, the area must meet the criteria set out in the PSSA Guidelines. In discussing this issue, it has been considered that "In the context of the PSSA Guidelines, practice to date has required states to clearly demonstrate that the boundary of the proposed PSSA accurately reflects the limits of the environmental vulnerability and, therefore, the protection needed. *It has been widely accepted, therefore, that a de facto burden of proof exists whereby an area can only be justified as a PSSA if harm from shipping can be demonstrated throughout*.67 This is notwithstanding the fact that the zone of influence may extend well beyond the boundaries of the area where direct evidence of shipping impacts can be demonstrated. *The onus for demonstrating this rests solely with the proponent(s) of the PSSA proposal. Unfortunately, information pertaining to the environmental vulnerability of specific areas is not always readily available, particularly for least developed or developing states, and in particular for high seas areas that are costly to access and study.*", Roberts (n 416) 244 (emphasis added).

proposals and participate while entrusting substantive and expensive aspects of its development to the 'stakeholders'.[597]

Information or lack of it may greatly affect how the rights and obligations of State parties are constituted under the BBNJ Agreement. It transversally affects Parts III and IV. This issue of access to information concerns the extent to which the treaty considers preferable that State parties report to the COP, and provide the information, or the review of the implementation of Part III.[598] It also relates to how the text of *inter alia* Article 26 under Part III and Articles 35, 36, and 37 under Part IV, all related to monitoring and reviewing, may be interpreted or function in the overall context of the treaty. Eventually, this circumstance might also impact the capacity of the STB to monitor and periodically review 'ABMTs' and 'MPAs' and the assessment of the effectiveness of those 'Measures'.[599]

It may be argued that the BBNJ Agreement prevents access to information from entailing a problematic disclosure of information of 'stakeholders', like, for instance, those in 'the private sector' or the 'relevant' IFBs. This should be read considering that the BBNJ Agreement sets rules that arguably encourage complementarity between the 'stakeholders' to strengthen goal-oriented behavior. Indeed, the occasional ambiguity characterizing some of the treaty's wording might lead to the reflection that 'stakeholders' are not obligated to make their information accessible to the BBNJ COP or State parties. Some 'stakeholders' may find this a distinctive *asset* of the treaty that allows them to influence its development. Furthermore, given that the treaty does not set strong obligations for 'stakeholders' to fully cooperate and share information among themselves, those seeking to keep a central role within the architecture of the BBNJ Agreement are likely to see an opportunity in this to later influence the decision-making of other 'stakeholders'. Those favoring a scheme based on the RFMO model might find strategic legal pathways to solidify centralized global governance. In turn, if the decision-making capacities of IMO depend on the information about 'marine biological diversity' provided by RFMOs or RFMO members, the autonomy of IMO might gradually dilute, and it might become *de facto* dependent on the willingness of RFMOs and their members to cooperate. This is possibly connected with the effects of recommendations on the mandates of recipients of IFBs. The scenario pictured here may significantly alter the dynamics of *collaborations* and *contributions,* including the *consultation stage*. Assessing the figure of the Clearing House Mechanism (CHM) may illustrate this question.

7.1. The Function of the CHM in the Context of Decentralization

[597] It has already been "argued that the IMO could be called upon to more proactively discharge its responsibilities to apply the precautionary approach to its own activities.", ibid 245. In this respect, it has been highlighted that "the obligation to conduct an EIA is integrally linked to the precautionary principle/ approach", Tanaka (n 209) 97.

[598] BBNJ Agreement art 26(1) to 26(4).

[599] ibid.

The CHM is established and mainly regulated by Article 51 in Part VI. According to Article 51(3), the CHM would serve as a centralized platform to enable State parties to access, provide, and disseminate information "with respect to activities taking place pursuant to the provisions of this Agreement" including information relating to "(ii) The establishment and implementation of ['ABMTs']" and "(iii) Environmental impact assessments". Until the BBNJ Secretariat commences its functions, the CHM shall be managed by the Division of Ocean Affairs and the Law of the Sea of the Office of Legal Affairs of the United Nations Secretariat (DOALOS).[600] According to Article 51, DOALOS, performing as the BBNJ Secretariat, could manage the CHM "without prejudice to possible cooperation with *other* ['relevant' IFBs]" "as *determined* by the" COP, "including" the IMO.[601] The expression "without prejudice to possible cooperation" is not clear. Interestingly, notice that RFMOs may be included among those IFBs as well.

The CHM appears to have a *dual role*. The CHM is obligated to "[f]acilitate international cooperation and *collaboration*, including scientific and technical cooperation and *collaboration*"[602]. The term 'collaboration' implies its relationship with 'stakeholders' beyond the procedural boundaries of Part III. This might relativize its function in relation to the COP and its status when it is not considered the preferred mechanism. This observation may be strengthened in light of its constituent mandate to "[f]oster *enhanced* transparency"[603]. The specific meaning given to the term 'transparency' in Article 48, preceded by the term 'enhanced', presumably appears to put additional weight on the duty for the CHM with respect to the 'stakeholders'. Besides this, the CHM may work as a subsidiary body to the COP, meaning that the status of the COP might impact the capacities of the CHM. The illustration of its dual functions may be found at the bottom of the list of its mandates in Article 51(3), which states that the CHM shall "[p]erform *such other* functions as may be determined by the [COP] or assigned to it under this Agreement"[604]. Illustrating its dual function, the last part of the provision may suggest that the CHM possesses a certain autonomy from the COP and its functions have to be considered separately. However, the term 'such other functions' leads to the impression that the preceding list of mandates corresponds to a subsidiary body of the COP. In addition, Article 51(2) points out that "[t]he specific *modalities* for the operation of the [CHM] shall be determined by the [COP]." Highlighting this aspect matters considering that the status of the COP might eventually impact how and to what extent the CHM may perform its functions.

In parallel to the establishment of the CHM, the BBNJ Agreement constitutes itself into a sort of *decentralize*d platform to access, provide, and disseminate information through different dispersed provisions. Considering that limited access IFBs like RFMOs and practically OSPAR are included among the 'relevant IFBs', it may be assumed that such other less evident platforms do not enable State parties to fully access information. Though constituted by the BBNJ Agreement, it would appear that the external IFBs may be preferred over the CHM under certain circumstances. In this context, Article 33(5) on the publication of

[600] ibid 50(2).
[601] ibid 51(4).
[602] ibid 51(3.f) (emphasis added).
[603] ibid 51(3.e) (emphasis added).
[604] ibid 51(3.g) (emphasis added).

EIA reports and Article 36(2) on monitoring reports appear explicative. The term "including through" in Articles 33(5) and 36(2) in Part IV arguably implies that the CHM is not the only way in which such reports may be made 'public'.[605] It may be argued that the term 'public' or 'the public', as the term 'transparency', may host notions or contents that are better explained in the context of the treaty and thus cannot be easily extrapolated from it.[606] The obligation to promote links "with publicly available private and non-governmental platforms for the exchange of information" and that of building on "global, regional and subregional clearing-house institutions (…) when establishing regional and subregional mechanisms under the global mechanism" entrusted to it, are limited by the terms "where possible" and "where applicable" respectively.[607] Simultaneously, the CHM is obligated to *inter alia* "provide links to relevant global, subregional, national, and sectoral clearing house-mechanisms"[608]

The BBNJ Agreement arguably encourages monitoring and review to be externalized, which might eventually imply the weakening of the global institutions it constitutes for that same function and the downplay of the COP's weight in the making of law. In this concern, under Part IV, Article 29 is devoted to the relationship between the BBNJ Agreement and EIAs processes under 'relevant IFBs'. The provision, in Article 29(4), makes special reference to certain *determinations* that a State Party may make during the procedures under Part III. The issue of Article 29(4) and the conflict clause within it will be taken up again by the end of this work, concerning the decentralized normative-making technique employed by the BBNJ Agreement. As to the topic assessed here, the *determinations* of a State party under *inter alia* Article 29(4) appear to set the basis for the subsequent determinations of the COP.[609] In turn, the effects of Article 29(4) may have defining consequences on the CHM's possible cooperation with *inter alia* IMO or RFMOs as referred to in Article 51.

A State party may be exempted from conducting a screening or an EIA of a 'planned activity' in ABNJ, provided that the party with jurisdiction or control over the 'planned activity' 'determines' *inter alia* that "the assessment already undertaken for the planned activity is *equivalent* to the one required under this Part, and the results of the assessment are taken into account" (emphasis added) as required by Article 29(4.b.i). The given 'Relevant IFB Measure' constituting the legal basis of that 'equivalent' external EIA would then become prevalent over an EIA process that may be conducted under Part IV. If that is the case, the 'planned activities' could be subject to monitoring and review by the 'relevant IFB' (and not by the institutions constituted by the BBNJ Agreement).[610]

[605] A similar reflection stems from the term "including through" also present in Article 37(2) relating to the review of authorized activities and their impacts, and that curiously includes the expression "the public".
[606] The expression "the Conference of the Parties, other Parties *and the public*" (emphasis added) in Article 37(2) suggests that 'the public' might consist of entities diverse from the COP and State parties. Highlighting this might be important when attempting to determine the content of the obligation of making something 'public' in other provisions of the treaty and, subsequently, to clarify when such an obligation may be considered broken.
[607] BBNJ Agreement art 51(3.c) and 51(3.d).
[608] ibid 51(3.c).
[609] See also ibid 28(1).
[610] ibid 29(4.b.i).

Article 29(4) relates to Article 29(6), which deals with monitoring and reviewing activities and subsequent reports under Part IV. Article 29(6) establishes a rule and an exception. It first mandates that State parties shall monitor and review the activities and ensure that the monitoring and review reports are published through the CHM (rule).[611] This rule in Article 29(6) would apply by default, "unless" the planned activities that meet the criteria set out in Article 29(4.b.i) are subject to monitoring and review under 'relevant IFBs' (exception). The aforementioned may be envisaged in light of Article 26(2), which concerns "Monitoring and review" under Part III. Article 26(2) Part III allows those IFBs to accept the invitation and provide information to the COP after (*not necessarily before*) the proposal had been submitted, i.e., during the time-bound *consultation stage* under Article 21.[612] Article 26(2) under Part III seems to connect with the exception under Article 29(6) in Part IV. Consistently, it establishes that the 'relevant IFBs' "shall be invited to provide information to the [COP] on the implementation" of 'Relevant IFB Measures', thus implying that the supply of information to the COP respects the willingness of the external regional or sectoral 'relevant IFB'. In this relation, however, notice that Article 51 on the CHM already provides that the "confidentiality of information provided under this Agreement and rights thereto shall be *respected*."[613] It continues by adding that "[n]othing under this Agreement shall be interpreted as requiring the sharing of information that is *protected* from disclosure under the domestic law of a Party *or other applicable law*."[614]

7.2. Further Consequences for the Functioning of the System

Access to information *may* be important for the STB. It should not be overlooked that, according to Article 33(6), the development of the guidelines, including the 'identification of the best practices', depends on the access the STB would have to the 'final EIA reports'.[615] In this connection, according to Article 36(3), the STB's capacity for "developing guidelines on the monitoring of impacts of *authorized* activities" (emphasis added) would very much depend on its access to monitoring reports on impacts of those activities. The same goes for the STB's capacity to develop "the identification of the best practices" emphasized in that same provision. Article 36 allows interpreting that these functions may not be performed when suggesting that a preliminary and essential element to do so may not be available to the STB: the reports. Article 36(2) states that the STB "*may* consider and evaluate the monitoring reports" (emphasis added). The wording in Article 36(2) may appear to imply that the consideration and evaluation

[611] This rule is consistent with the mandate according to which "[w]hen [an EIA] for a planned activity in [ABNJ] has been conducted under [a 'relevant IFB'], the Party concerned shall ensure that the [EIA report] is published through [CHM].", ibid 29(5). It is clear that the State party, not the IFB, is the one obligated by this provision.
[612] ibid 26(2).
[613] ibid 51(6) (emphasis added). This limit arguably connects with the modality prescribed by Article 22(2).
[614] ibid (emphasis added).
[615] ibid 33(6).

of the monitoring reports depends on whether they are made public "through the [CHM]". The lack of clarity leads to uncertainty in this respect. The capacity of the STB to review authorized activities, or its option to do so, appears subject to the availability and reception of the reports referred to in Article 36.[616] Importantly, if full access to relevant information is not possible or its capacity to develop 'the identification of the best practices' is not performable, the STB function "to *ascertain* that the proposal contains the information required under Article 19" in Article 20 (emphasis added) might eventually be interpreted in the narrowest or literal sense. In other words, such limited access might remove the apparent legal weight of the term 'preliminary review' entitling Article 20. This situation would probably benefit the 'stakeholders' that would find themselves more than favored by the legal verticality enshrined in Part III, in contrast to State parties that do not participate in regional 'relevant IFBs' and are excluded from the making of 'Relevant IFB Measures' and relied on the means of the STB to *reduce that gap* in the *status quo*.

The dissemination and supply of information is key to securing equality among State parties within the COP. The level of accessibility to information could balance the status and capabilities of the BBNJ COP (and, consequently, that of State parties) with respect to the 'stakeholders'. For example, during the *consultation stage,* the review would condition the autonomy of the COP with respect to the 'stakeholders' to take decisions or recommendations on the amendment, extension, or revocation of 'ABMTs' and 'MPAs', and any related measures that the COP itself had already adopted.[617] It should not be understated that the COP would be obligated to decide following the modality in Article 22(7), that is, "in close cooperation and coordination with" the 'relevant IFB' "as appropriate".[618] In case the COP does not have access to relevant information, *close* cooperation with IFBs like IMO and RFMOs is likely to result in these IFBs accordingly defining what is "the best available science and scientific information" and, as a consequence, clarifying the subsequent power that the BBNJ COP may have to decide on the issue.[619] This section does not exhaust the subject. After the conclusion of the treaty, concerns were shown about the fact that "MPAs will be designated for political reasons without the necessary scientific research."[620]

8. Remarks

The comments made above clarify which would be the potential consequences of the cooperation established by the BBNJ Agreement. Some remarks shed light on how the BBNJ Agreement reflects the cooperation required by the UNFSA. The presumptions the treaty presents, and the institutional and legal verticality fabricated upon them, are hardly conceivable

---

[616] ibid 37(6); see also ibid art 35 and 37(1).
[617] BBNJ Agreement art 26(5).
[618] ibid 22(7).
[619] ibid 22(7) and 26(5).
[620] IISD, 'IGC 5(3) Session' (n 29) 4.

under the terms of the LOSC. RFMOs appear as the key bodies. In contrast, the COP, the STB, and the CHM established by the treaty may not be fundamental to the substantial development of measures. Though the relationship between the BBNJ Agreement and the LOSC is not clear, the conclusion of the BBNJ Agreement suggests support for a new era for high seas law. In this view, a legal parallelism and thus a geographical fragmentation (at least) appears to be about to take place in areas beyond national jurisdiction.

The interaction of the treaty provisions allows sustaining that the obligation to cooperate contrasts with that mandated by the LOSC. Provisions important to the freedom of navigation, like Article 87 LOSC, appear not to fit with the same legal strength within the context of the BBNJ Agreement. In this respect, international cooperation is goal-oriented and inclines towards a teleological reasoning to achieve the objectives of the treaty in a manner that considers equality of all States as a non-fundamental legal basis. This feature departs from the legal foundations of the LOSC. Instead, international cooperation sets up presumptions that favour the prevalence of the 'conservation' of 'marine biological diversity' over the equality of all States to *inter alia* navigate. The treaty, however, brings new actors and new assumptions through the elastic label of 'stakeholders'. State parties acting through the BBNJ COP might have a lower status. This stems from the fact that these 'stakeholders' interact with and within the BBNJ COP or with the STB in a stronger modality than that of the COP or State parties acting through the latter. All this is allowed and even facilitated by Parts I and VI and promoted by Parts III and IV. Forward in this work, procedural strategies oriented toward practicality and efficiency may provide further views. In this respect, the thesis follows the views of the literature that IFBs would seek to solidify their mandates and assumes that RFMOs, among other regional 'relevant IFBs', will look forward to their empowerment by way of the technicalities of the BBNJ Agreement. It is worth noting that members and participants of regional IFBs and 'the private sector' may also be attracted by this regime to ensure a stronger status before other States.

Among 'stakeholders', regional IFBs are allowed to be empowered with and through the architecture of the BBNJ Agreement. The fact that the treaty has not entered into force may be a limitation on going further in the examination. However, given the similarities, how the UNFSA provides content to international cooperation within its context, assessing lessons learned from the UNFSA may help visualize the possible progressive developments following the entry into force of the BBNJ Agreement.

CHAPTER 3

LESSONS LEARNED FROM THE UNFSA

SUMMARY: 1. Introduction. – 2. A Normative Shift in International Fisheries Law Echoing in the BBNJ Agreement. – 3. Understanding the Freestanding Status of the UNFSA with Respect to the LOSC. – 3.1. Influence of Contemporary International Environmental Law. – 3.2. The Selection and Importation of the LOSC Provisions into a Different Scope. – 4. The Dependence on RFMOs as the Way to Success. – 4.1. The Conferral of Powers by International Cooperation. – 4.2. The Core Role of RFMOs for Developing Sectoral Measures. – 5. Decentralized Normative Making and Its Consequences for Treaty Interpretation. – 5.1. The Importance of the UNFSA Model in Developing the BBNJ Agreement through RFMO Measures. – 5.2. The Subsequent Practice under RFMOs and the Authentic Interpretation of the UNFSA. – 5.3. The Subsequent Practice under IFBs and the Authentic Interpretation of the BBNJ Agreement. – 5.4. The Subsequent Agreements under Recommendations and Decisions and the Interpretation of the BBNJ Agreement. – 5.5. The Contrast between the UNFSA and the BBNJ Agreement. – 6. Potential Developments following the BBNJ Agreement. – 6.1. The Term 'Planned Activities' in the BBNJ Agreement. – 6.2. An Assessment of the Term 'Unregulated Fishing'. – 6.3. Impact on the Freedom of Navigation of Fishing Vessels and Potential Consequences for Commercial Navigation. – 6.3.1. Enforcement under the UNFSA. – 6.3.2. The PSMA. – 7. Remarks.

1. Introduction

This chapter addresses some of the general features of the UNFSA that are now reflected in the BBNJ Agreement. Focusing on this issue clarifies the ties between these treaties and thereby recognizes the UNFSA's relevance as a key precedent and model treaty for the drafting of the BBNJ Agreement. Given that both treaties underpin a functional-regional approach that departs from the functional-zonal approach enshrined in the LOSC, a study of the UNFSA model would contribute to realizing some of the possible consequences of the BBNJ Agreement. More particularly, this would set the basis to consider the extent to which the freedom of navigation might potentially be affected by the BBNJ Agreement.

This chapter offers a review of the UNFSA by focusing on three of its features, schematized: its freestanding status with respect to the LOSC; its dependence on RFMOs mainly; and the decentralization characterizing its normative making. The examination in this schematic form illustrates how salient aspects of the UNFSA, in conjunction with later legal developments supported by it, have affected the freedom of fishing and, together with it, the freedom of navigation of the relevant fishing vessels. In this way, the chapter aims at strengthening the presumption that the BBNJ Agreement may affect the freedom of navigation by somehow mirroring the features of the early treaty. The chapter ends with some final remarks on the nature of the UNFSA and points out that RFMOs in particular may become instrumental in the success of the BBNJ Agreement. In the case of the BBNJ Agreement, however, RFMOs and other regional IFBs would have to interact with sectoral IFBs like the IMO.

2. A Normative Shift in International Fisheries Law Echoing in the BBNJ Agreement

This chapter aims to assess the UNFSA by paying attention to its freestanding status with respect to the LOSC, its dependence on regional international bodies, focusing mainly on Subregional or Regional Fisheries Management Organizations (RFMOs), and, lastly, the decentralized normative-making technique supporting its development. The UNFSA consists of a preamble, a main text of 50 articles, distributed in 13 parts, and two annexes. It was negotiated as a package deal and on the basis of consensus, including the coastal and major (distant water) fishing States.[621] Its consideration requires having in mind that "[t]he most fundamental high seas freedom after navigation is the freedom to fish."[622]

An analysis of the UNFSA is of the utmost relevance because some of its features, presumably, inspired the drafters of the BBNJ Agreement. However, the UNFSA is not referred to anywhere in the text of the BBNJ Agreement. During the initial works, several delegations

[621]"The 1995 UN Fish Stocks Agreement was negotiated as a package deal between coastal and distant water fishing states, and adopted by consensus in which all important fishing states participated, but a number of these have subsequently expressed opposition to the Agreement or have failed to become parties.", Boyle and Chinkin (n 500) 158. In this respect, the argument in favor of an instant crystallization of customary law conferring customary status to some of the provisions of the UNFSA because, primarily, it was adopted *by consensus* seems difficult to sustain. The critical approach of Caminos and Molitor concerning those holding the view that an instant crystallization of customary law of norms negotiated in UNCLOS III and later reflected in the LOSC occurred may, in turn, be extrapolated to understand the obstacle of recognizing such effects to the UNFSA. "Those who hold this view maintain that the requirements of time and *opinio juris* must be discounted because the entire international community acted collectively and swiftly to indicate its consent to these norms. This proposition is indeed difficult to accept for two important reasons. First, an individual state not formally objecting to a particular provision may not, in every instance, be indicating its consent to be bound, regardless of whether or not the entire international community is participating in the consensus. Moreover, the true test for the existence of a customary norm of international law is state practice. *The legal relations arising from instruments concluded in multilateral negotiations are not customary in nature but rather contractual*. State practice, therefore, remains the exclusive means of identifying customary norm.", Hugo Caminos and Michael R Molitor, 'Progressive Development of International Law and the Package Deal' (1985) 79 The American Journal of International Law 871, 889 emphasis added.
[622] Guilfoyle (n 91) 682.

were keen to see the UNFSA, among other instruments, as an exemplary instrument for the juridical architecture of the future agreement, arguing that it would provide a *uniform* regime for 'biodiversity beyond areas of national jurisdiction'.[623] In literature, some directly assert that "[i]t is generally accepted that a BBNJ Convention *will* be an implementing agreement of the [LOSC] *in the same legal manner* as the [UNFSA]."[624] This assertion provides relevant guidance considering that both the UNFSA and the BBNJ Agreement have been *misleadingly* tagged as 'implementing agreements' of the LOSC.[625] Moreover, these are observations that simultaneously relativize the weight of Article 4 UNFSA and Article 5(1) BBNJ Agreement, and shed light on the nature of treaties.

The words of Churchill, Lowe, and Sander are enlightening in approaching the study of the UNFSA. They consider that "[r]ather than regulating particular straddling or highly migratory fish stocks, the [UNFSA] establishes a *general framework of principles and rules* within which, given the necessary political will, such stocks may be better managed *at the regional level*. The success or otherwise of the [UNFSA] has therefore largely depended on its implementation at *the regional level*, as well as on the extent to which high seas fishing States and relevant coastal States have become parties to it."[626] The words of these scholars shed light on the UNFSA and how to interpret its nature. Despite the wording in Article 2 and, more particularly, the explicit reference to the LOSC, the UNFSA gives prevalence to regional management and deviates from the zonal approach featured in the LOSC. *Regional* organizations apply and implement *regional* measures.

The achievement of the objectives of the treaty demonstrates dependence on regional management schemes. At the same time, these schemes give strength *to a whole system*. Their role might be comparable to that of *regional* 'relevant IFBs' in Part III BBNJ Agreement. The general framework provided by the UNFSA relies on a functional-*regional* approach and the subsequent dependence on *inter alia* organizations that it labels as 'RFMOs'. Besides RFMOs, the UNFSA also refers to subregional or regional fisheries management *arrangements* ('RFMAs').[627] 'RFMAs' are important in the context of the UNFSA and are favored by the same presumptions that enshrine 'RFMOs'. Many of the issues dealt with in this chapter can be related to such arrangements. Concerning the BBNJ Agreement, however, RFMOs have been specially regarded. RFMOs and other regional 'relevant IFBs' participated in the work that led to the conclusion of the BBNJ Agreement, and several international actors supported the BBNJ Agreement being implemented by RFMOs. The BBNJ Agreement makes explicit

[623] "Several delegations suggested that the future arrangement should build on the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 and 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, as well as other relevant treaties, to provide a uniform regime for biodiversity beyond areas of national jurisdiction.", Recommendations delivered by the WG, UN Document A/69/780*, Annex, Section I, para. 15.

[624] Ted L McDorman, 'A Few Words on the "Cross-Cutting Issue" - The Relationship between a BBNJ Convention and Existing, Relevant Instruments and Frameworks and Relevant Global, Regional and Sectoral Bodies' in Myron H Nordquist and Ronán Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction*, vol 24 (Brill Nihoff 2021) 275 emphasis added.

[625] Wolfrum (n 141) 107.

[626] Churchill, Lowe and Sander (n 521) 565 emphasis added.

[627] UNFSA art 1(1.d).

reference to ‘regional seas organizations’ and ‘regional fisheries management organizations’ (RFMOs) in its Annex II.[628]

Notwithstanding how the UNFSA strongly complements RFMOs with mandate over other species, the regionalization specifically caused by the UNFSA concerns straddling and highly migratory stocks only. Though complementary treaties, it is worth noting that the fragmentation parallel to the LOSC and regionalization supported by the UNFSA are not as comprehensive as the wide-ranging consequences of Part III and IV BBNJ Agreement. Recommendations made and decisions taken after the procedures regulated in Part III and IV are likely to have a broader impact. At the moment, “[n]one of the existing mechanisms, however, allows for the *designation* of *MPAs* that manage activities in a holistic manner and bind states globally.”[629] The BBNJ Agreement would set the global foundations for the ulterior *designation* of ‘measures adopted and implemented by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies’ (‘Relevant IFB Measures’).

3. Understanding the Freestanding Status of the UNFSA with Respect to the LOSC

The freestanding status of the UNFSA with respect to the LOSC can be inferred from its openness to the participation of States that are not parties to the LOSC.[630] This openness has been replicated in the BBNJ Agreement.[631] The subsequent independence or autonomy of the UNFSA from the LOSC is also confirmed by the influence of contemporary international environmental law on it and, in that connection, by the degree to which the provisions of the LOSC are considered relevant under that law (in particular, Article 87(1.e) of the LOSC.

The freestanding characterization of the UNFSA relates firstly to Articles 37 and 39 UNFSA, regarding the signature and the accession to the treaty respectively. According to these provisions, a State may establish its consent to be bound by the UNFSA without consenting to be bound by the LOSC.[632] Literature has recognized the freestanding status of the UNFSA and provided some insights into what an *implementing agreement* to the LOSC could mean. Boyle observes that “[u]nlike protocols to environmental framework treaties (…), implementing agreements can be freestanding treaties, in which participation is not dependent on participation in the LOSC itself.”[633] In distinguishing the UNFSA from the Part XI Implementation Agreement,[634] Harrison stresses that the UNFSA consists of a freestanding treaty and explains this is justified by the fact that “the [UNFSA] does not go as far as saying that [it] and the

[628] BBNJ Agreement para (d.ix).
[629] Bodansky (n 18) 312 (emphasis added).
[630] UNFSA arts 37 and 39; Boyle (n 77) 42; Harrison (n 293) 103.
[631] BBNJ Agreement arts 60, 65 and 66.
[632] UNFSA arts 37 and 39.
[633] Boyle (n 77) 42. Considering the provisions in Article 4 Part XI Implementation Agreement, Boyle’s comment may be better regarded as referring to the UNFSA.
[634] Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, entered into force 28 July 1996) UNTS 31364.

[LOSC] should be considered as a single instrument. Indeed, the [UNFSA] does not even require states to be a State Party to the [LOSC] before they become a party to [it]."[635] Arguably, the freestanding status of the UNFSA makes it possible to understand that, notwithstanding their apparent close relationship, the LOSC and the UNFSA would have to be analyzed as separate international treaties providing different treaty contexts.[636] This allows inferring that the title of the UNFSA, the preamble, and the formula contained in its Article 4 are aspects that are not conclusive in characterizing the nature of the treaty or its relationship with the LOSC.[637] In a similar direction, drawing on Boyle's and Harrison's observations, a similar freestanding status arguably characterizes the BBNJ Agreement.[638]

3.1. Influence of Contemporary International Environmental Law

The functional-regional approach for the respective fish stocks management, highlighted by some as instrumental to the success of the UNFSA, appears to be closely linked to contemporary international environmental law present at the time.[639] Seemingly to the later BBNJ Agreement, developments in international environmental law later to the 1972 Stockholm Declaration proved decisive in the drafting of the UNFSA.[640] Principles expressed in the instruments adopted after the conclusion of UNCLOS III, including the 1992 Rio

[635] Harrison (n 293) 103. Article 4 Part XI Implementation Agreement, entitled "Consent to be bound" establishes that "1. After the adoption of this Agreement, any instrument of ratification or formal confirmation of or accession to the Convention shall also represent consent to be bound by this Agreement. 2. *No State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the Convention*." (emphasis added). Because of this, the UNFSA and *mutatis mutandis* the BBNJ Agreement have to be regarded differently from the Part XI Implementation Agreement, ibid.
[636] UNFSA arts 37 and 39; Boyle (n 77) 42; Harrison (n 293) 103. For an alternative approach, see the discussion in ibid 107.
[637] Accordingly with the title of the treaty, the preamble of the UNFSA recalls the "relevant provisions" of the LOSC and Article 4 UNFSA establishes that "Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention." The recognition of the said freestanding status of the UNFSA, and the fact that literature recognizes that the characterization of a treaty is not determined by, among other aspects, its title, suggest that the content of these provisions is misleading, Matz-Lück (n 140) para 2.
[638] BBNJ Agreement arts 60 and 66.
[639] Churchill, Lowe and Sander (n 521) 565 emphasis added.
[640] For instance, the UNFSA indicates that parties to it seek "to address in particular the problems identified in chapter 17, programme area C, of Agenda 21 adopted by the United Nations Conference on Environment and Development, namely, that the management of high seas fisheries is inadequate in many areas and that some resources are overutilized; noting that there are problems of *unregulated fishing*, over-capitalization, excessive fleet size, vessel reflagging to escape controls, insufficiently selective gear, unreliable databases and lack of sufficient cooperation between States", UNFSA para 5 of the preamble emphasis added. See Harrison (n 293) 104.

Declaration on Environment and Development[641], Agenda 21,[642] and the 1992 CBD[643], had an instrumental role in the drafting of the UNFSA.[644] Sustainability, the precautionary principle, and the ecosystem approach enshrined in Article 5 UNFSA so reflect it.[645] Accordingly, it has been affirmed that the UNFSA "has had the effect of modifying the international law of high seas fisheries in light of *subsequent developments in international environmental law*."[646] The influence of international environmental law in the drafting of the UNFSA is a factor that must be taken into account considering that these relate to the assertion the UNFSA limitations on high-seas fishing are more incisive and comprehensive than norms of the LOSC.[647]

Proelss confirms that the UNFSA was "strongly influenced by the language, approaches and objectives"[648] of the CBD. For its part, Boyle asserted that "[t]o a significant extent [the UNFSA] gives effect to some of the general objectives of the CBD. Notice however that it is *formally* an agreement implementing the LOSC, not an agreement implementing the CBD (…). The range of matters covered by the [the UNFSA] simply could not have been addressed with the same freedom or priority as an addendum to the CBD."[649]As the UNFSA, the BBNJ Agreement also reflects the international environmental law of its time.[650] Moreover, the functional-regional approach based on biological unity and the ecosystem featuring the UNFSA has arguably echoed in the BBNJ Agreement, as the *ABMT model* demonstrates. It might be worth considering how the elements behind these similarities interact and what this represents for the high seas freedoms.

3.2. The Selection and Importation of the LOSC Provisions into a Different Scope

High seas freedoms such as fishing or navigating are preserved by the *constitutional* status of the LOSC as *it is*, and understanding it as *a whole*. Given this, another aspect highlighting the freestanding status of the UNFSA concerns the degree to which the provisions of the LOSC are considered relevant under the UNFSA, what arguably emphasizes its autonomy from the LOSC. Though some scholars point out that freedom of fishing is differently regarded under the UNFSA, others directly assert that the UNFSA, and subsequently the norms under it, *fully*

---

641 'Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992. Volume 1, Resolutions Adopted by the Conference' (n 151) Annex I.
642 ibid Annex II.
643 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) UNTS 1760 UNTS 79.
644 Harrison (n 293) 104 emphasis added.
645 Churchill, Lowe and Sander (n 521) 565.
646 Harrison (n 293) 104 emphasis added.
647 Vezzani (n 55) 174.
648 Proelss (n 78) 190.
649 Boyle (n 77) 58 emphasis added.
650 Chapter 1.

derogate such freedom.[651] While there is no doubt that the UNFSA takes elements from the LOSC, the relationship between the two treaties is not as obvious as it might appear at first glance.[652] Wolfrum observes that "[t]he term 'implementation agreement' is in fact misleading. In reality they significantly modified the convention, at least one of them progressively." [653] Further, alluding to the BBNJ Agreement (not yet adopted at the time), he goes on to add "[a] *further agreement of this type on biological resources beyond national jurisdiction is in preparation*."[654]

The normative-making technique employed in the UNFSA builds upon normative materials or sources given by it and others elaborated outside of it. Article 30(5) UNFSA illustrates the normative materials or legal sources considered relevant for achieving the treaty objectives. In establishing the applicable law for the settlement of disputes, Article 30(5) UNFSA refers to the applicable law and packages it in different sets of norms: "the relevant provisions of the [LOSC]"[655], "of this Agreement *and* of any relevant subregional, regional, or global fisheries agreement"[656], "as well as generally accepted standards for the conservation and management of living marine resources *and* other rules of international law not incompatible with the [LOSC]"[657]. In light of the content of Article 30(5) UNFSA, it is reasonable to argue that the *corpus juris* that the UNFSA aims to develop is, first, not exhaustive, quite varied, and somehow undefined as regards its sources and, secondly, not restricted in any explicit way to the LOSC and the UNFSA, i.e. combining them into a *single instrument*. Adding to the fact that a provision recognizing explicit prevalence to the LOSC provisions over the rest of the sources is nowhere to be found in the text of the UNFSA, it becomes clear from Article 30(5) that the (vaguely referred to as) relevant provisions of the LOSC are leveled with the other sources and, subsequently, are deemed as one juridical component among many others.[658] The applicability and implementation of this variety of

---

[651] Boyle commented that "high seas freedom of fishing under the UNFSA is significantly different from the traditional concept found in Articles 116–119 of the LOSC, most notably in regard to access to high seas stocks and enforcement jurisdiction on the high seas.", Boyle (n 77) 47. See UNFSA art 8(4) and 21. More assertive, Scovazzi considers that the UNFSA "contains provisions that fully derogate from the traditional principle of freedom of fishing on the high seas.", Tullio Scovazzi, 'The Evolution of International Law of the Sea: New Issues, New Challenges', *Recueil des Cours*, vol 286 (2000) 141. "With respect to fisheries, the idea underlying the 1995 UN Fish Stocks Agreement seems to be that the high seas is no longer the province of *laissez-faire*, governed by a practically indiscriminate freedom of fishing; instead, 'the sea is free only for innocent and inoffensive use'. Also the high seas is an area where the principle of sustainable development applies, which can lead to the exclusion of those States which persistently undermine the conservation and management measures agreed upon by the others. In this regard, the 1995 UN Fish Stocks Agreement takes a step forward and brings an evident, but welcome, encroachment on the traditional principle of freedom of the high seas, as States which are not willing to comply with the conservation and management measures can be excluded from fishing on the high seas. *This important consequence was not spelled out in the UNCLOS*.", ibid 142–143 emphasis added.
[652] UNFSA art 4.
[653] Wolfrum (n 141) 107.
[654] ibid emphasis added.
[655] UNFSA art 30(5).
[656] ibid emphasis added.
[657] ibid emphasis added.
[658] ibid.

norms would thus be accommodated to follow the overarching treaty objective, which concerns only the parties.[659] How the UNFSA leaves it to any court or tribunal or its parties to decide which or to what extent LOSC provision can be considered relevant, and which other rules can be considered compatible, could be said to contribute, on the one hand, to more flexible judicial reasoning and, on the other hand, to support the *pactum de negotiando* approach that the literature has highlighted as embodied in other provisions of the UNFSA.[660] In a manner consistent with the treaty context, arguably, the text of Article 30(5) allows visualizing the UNFSA and the law under RFMOs as forming a self-standing package of norms that operates as a single instrument or as *a whole*. In this view, the objectives of the UNFSA and those of RFMOS would appear to converge in a complex normative body seeking to achieve mutual success.[661] These considerations merit the critical review of Articles 2 and 4 UNFSA.

The UNFSA regime arguably builds upon the sources mentioned by combining them to establish norms intended to ensure 'the long-term conservation and sustainable use of straddling and highly migratory fish stocks'.[662] This would indicate that Article 2 UNFSA should not be read in isolation but in the overall context of the treaty. The variety of sources that the UNFSA utilizes weakens the (apparently strong) assertion that the treaty objective must be achieved "through effective implementation of the relevant provisions of the [LOSC]."[663] In this sense, it does not seem possible to understand that the simple reference to *the relevant provisions of the LOSC* serves to place those provisions at the top of a normative verticality within the UNFSA context. This may imply a similar reflection as regards the construction of Article 2 BBNJ Agreement, which has replicated the terms in Article 2 UNFSA just quoted.[664] In addition, Article 4 UNFSA establishes that the UNFSA "shall be interpreted and applied in the context of and in a manner *consistent* with the [LOSC]."[665] Wolfrum's observations would lead to a critical view of the formula in Article 4 to the point of relativizing its apparent weight. The wording of Article 4 UNFSA suggests that the UNFSA and the LOSC might be related in

[659] ibid 2.
[660] ibid 30(5); Proelss (n 78) 190–191.
[661] Churchill, Lowe and Sander (n 521) 565.
[662] UNFSA art 30(5).
[663] ibid 2 emphasis added. The UNFSA applies exclusively to highly migratory species, specified in Annex I to the LOSC, and straddling fish stocks (Annex I to LOSC.). This leaves aside fishing of "discrete stocks", Vezzani (n 55) 174. Straddling species consist of fishery resources that cross national and international waters, mainly the EEZ and the high seas. Their movement is more limited compared to highly migratory stocks. Sometimes, this treaty is referred to by the misleading acronym "FSA" or just "Fish Stocks Agreement". This relates to the idea that the treaty has a broader scope and includes other stocks different from those expressly specified in its text. The UNFSA text does not include the so-called "discrete" high seas species or stocks. Some international actors, however, advocate for the inclusion of such species, see IISD, 'WG 2nd Meeting' (n 40) 9. In contrast with this viewpoint, some scholars suggest the inclusion of discrete fish stocks in the context of the UNFSA Review Conference, Tullio Treves, 'Law of the Sea', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2011) para 104 <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022. However, this position might be challenged arguing that formal amending procedures for the inclusion of such discrete fish stocks were never initiated, UNFSA art 45.
[664] BBNJ Agreement art 2.
[665] UNFSA art 4 emphasis added.

the terms enshrined in Article 31(3.a) VCLT.[666] The content of this provision, however, does not seem consistent with the freestanding status of the UNFSA nor with its normative sources, development, and implementation. In this sense, the provision in Article 4 UNFSA might be one of the prominent reasons contributing to the conclusion that the notion of *implementing agreement* of the LOSC is misleading.[667] Once more, drawing on Wolfrum's assertion, the fact that the terms in Article 2 and 4 UNFSA are now mirrored in Article 2 and Article 5(1) BBNJ Agreement certainly strengthens the view that these provisions can contribute to misleadingness about the relation of the latter treaty and the LOSC. [668] Remarks made here on the UNFSA certainly condition *mutatis mutandis* the study of the BBNJ Agreement, for instance, the examination of features of the most recent treaty like its title, and, also, its possible description as an *implementing agreement* of the LOSC.[669] Accordingly, the application of the UNFSA norms and, presumably, those of the BBNJ Agreement could hardly be interpreted as the implementation *stricto sensu* of any LOSC provision.

Following the fragmentation trends of the times in which it was adopted, the UNFSA has arguably contributed to the fragmentation of international fisheries law in the context of the high seas by regulating fishing activities on straddling and highly migratory fish stocks *in parallel with* the broad freedom of fishing embodied and codified in Article 87(1.e) LOSC.[670]

---

[666] The apparent meaning of Article 4 requires some inquiry mainly because the UNFSA has provided a normative context *through which* norms contained in the LOSC are modified, Freestone (n 499) paras 19–21. The formula used in Article 4 UNFSA suggests that the treaty might serve for the authentic interpretation of the LOSC. In this respect, Berner sustains that "[a]uthentic interpretation is law-making in all but name […]. In contemporary public international law, it is readily depicted as a tool to obscure and conceal modifications and amendments of treaty law and to undermine and circumvent amendment requirements such as voting procedures, quora, or substantive principles (….).", Katharina Berner, 'Authentic Interpretation in Public International Law' [2016] ZaöRV 845, 875–876. Notwithstanding this, the nature of the UNFSA does not seem to fit in Article 31, paragraph 3(a), VCLT nor in Berner's reasoning. The arguments unfold in this chapter, and mainly *the great picture* concerning the normative context described above which downplays the apparent relevance of Article 4 UNFSA, arguably discard any possibility of comprehending it as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions", 'VCLT' (n 322) art 31(3)(a).

Besides this, it is worth noting that the UNFSA contrasts with Part XI Implementation Agreement, namely because of its freestanding status respecting the LOSC and the lack of explicit prevalence over that earlier treaty. As to the first issue, Article 4, paragraph 2, Part XI Implementation Agreement sets out that "[n]o State or entity may establish its consent to be bound by this Agreement unless it has previously established or establishes at the same time its consent to be bound by the [LOSC]." As to the normative prevalence over the provisions of the LOSC, Article 2, paragraph 1, Part XI Implementation Agreement explicitly establishes that "[t]he provisions of this Agreement and Part XI shall be interpreted and applied together as a single instrument. In the event of any inconsistency between this Agreement and Part XI, the provisions of this Agreement shall *prevail*." (emphasis added). Against this backdrop, primarily because of Article 4, paragraph 2, Harrison, sustains that Part XI Implementation Agreement "is not a freestanding instrument but it is intimately connected with the [LOSC].", Harrison (n 293) 91; Part XI Agreement art 4(1-2).

[667] Wolfrum (n 141) 107.

[668] ibid.

[669] ibid. See Chapter 1.

[670] Pauwelyn (n 116) paras 2–4. "The diagnosis of fragmentation refers to the dynamic growth of new and specialized subfields of international law after 1989, to the rise of new actors beside states (international organizations, non-governmental organizations (NGOs), and businesses), and to new

To deal with the harvesting of straddling or highly migratory fish stocks, the UNFSA supports regionalizing the ocean, including a maritime zone such as the high seas, through a diversity of regimes or tools established and managed under RFMOs.

This entails that, besides the parallelism with the LOSC, the system in which the UNFSA is included allows inner fragmentation and provides it with positive connotations as it is functional to its structure and supportive of the international cooperation set up by it. RFMOs would be the main institutional vehicles through which fragmentation and a subsequent harmonization of norms feed a legal system parallel to the LOSC. International legal harmonization would be embodied in the RFMO measures relating to fisheries. In the context of the BBNJ Agreement, RFMOs could also see *collaborating* with fragmentation as functional or practical; this may signify an instrumental step to later *contribute* to a harmonization of diverse measures within the 'MPAs' and 'ABMTs'.[671] IMO may also engage in *collaborations* and *contributions*, so the COP can later take a decision.[672] For instance, the IMO may engage in the elaboration of regulations of standards that arise from *inter alia* RFMO measures.[673] In this context, the functional-regional approach endorsing this regionalization departs from the overall view of the high seas as presented in Article 86 LOSC and neglects the idea of fishing freely in this maritime zone, conceived in its broadest legal sense. In this connection, contrary to what may appear, the need of the UNFSA to "maintain the integrity of the marine ecosystems"[674] would seem to promote the detachment of high seas as the regulatory area envisaged in Article 86 LOSC and, furthermore, to set up the very foundations for a unique legal development. Accordingly, the objective of the Part III BBNJ Agreement is *inter alia* to "maintain biological diversity and ecosystems"[675].

Against this background, arguing that the UNFSA holds a true freestanding status concerning the LOSC and, therefore, develops autonomously from that earlier treaty seems more compelling and reasonable than seeing it as a subsequent agreement to the LOSC in the terms of Article 31(3.a) VCLT. This view is further strengthened by the dependence on RFMOs and the decentralized normative making characterizing the UNFSA. The UNFSA proved to affect and ultimately limit the freedom of fishing on the high seas in a manner not envisaged in the LOSC.[676] In this respect, the normative evolution following the UNFSA sheds light on

---

types of international norms outside the acknowledged sources. That evolution was triggered by the break-down of the communist bloc in 1989 which brought to an end the stable bi-polar world order.", Anne Peters, 'The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization' (2017) 15 International Journal of Constitutional Law 671, 673.

[671] BBNJ Agreement art 19(2) and 21.

[672] ibid.

[673] ibid 29(4).

[674] UNFSA para 7 of the preamble.

[675] BBNJ Agreement art 17(c).

[676] In this view, the formula employed both in Article 4 UNFSA and now in Article 5, paragraph 1, BBNJ Agreement could hardly be seen as a diriment saving or a conflict clause helpful for understanding the relationship with the LOSC. Nele Matz-Lück, 'Treaties, Conflict Clauses', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2006) paras 2–7 <https://opil.ouplaw.com/home/mpil> accessed 12 August 2024; ILC Study Group, 'Report of the Study Group of the International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Finalized by Mr. Martti Koskenniemi' (International Law Commission 2006) Document A/CN.4/L.682 and Add.1 268–271,

how the BBNJ Agreement might develop after entering into force, at least, to the extent its architecture considers the UNFSA as a model treaty. In this reasoning, the regionalization of the high seas law by means of MPAs and other ABMTs governed by competent regional management organizations may impact other freedoms, such as that of navigating.

4. The Dependence on RFMOs as the Way to Success

The dependence on *external* regional bodies can be appreciated when assessing, first, how international cooperation is regulated under the UNFSA and, secondly, the regional management scheme it supports. This is very much reflected in the RFMO model in conjunction with the RFMO measures. These two aspects imply the conferral of powers by the parties to the treaty to international entities. This conferral has had a major impact on the freedom of fishing (straddling and highly migratory fish stocks) and, simultaneously, on the navigation of fishing vessels. From a different perspective, the dependence of the UNFSA on RFMOs may be construed as proportional to the strength and influence RFMOs gain through and thanks to the UNFSA. In contrast, the LOSC "does not accord RFMOs such a pivotal role"[677].

4.1. The Conferral of Powers by International Cooperation

The UNFSA builds upon international cooperation, and provisions are vast in this respect. International regional instruments and bodies, namely regional fisheries *management* arrangements (RFMAs) or organizations (RFMOs), are crucial for achieving the UNFSA objectives.[678] This is evidenced by how the treaty defines the duty of cooperation, namely in Articles 8(3) and 8(4) UNFSA. According to Article 8(3) UNFSA, different from the flexible Article 118 LOSC, the duty of cooperation consists of the obligation of the treaty parties to become an RFMO member or (an RFMA participant) and to apply the conservation or management measures adopted under these international schemes. Article 8(4) establishes that access to fisheries resources under the UNFSA is limited, first, to those States that are members of RFMOs (and participants in RFMAs) or, second, to those States that agree to apply the conservation or management measures adopted by RFMOs (and RFMAs). Though norms can

---

272–282. Some indicate that in those cases where the conflict clause leaves the conflict issue unsettled, reference must be made to general principles such as *lex posterior*, Pauwelyn (n 116) para 40.

[677] Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473 emphasis added.

[678] See, for instance, UNFSA art 7(2.c), 8(3), 8(4), 8(5).

ultimately be enforced by the coastal State, the flag State, or the port State, conservation and management measures are primarily adopted and implemented by RFMOs (or RFMAs).[679]

It is noteworthy that, according to Article 8(5), if an appropriate RFMO (or RFMA) does not exist in a particular region, one must be created.[680] This relates to the BBNJ Agreement since support has been demonstrated to the standpoint following which "[i]n an area where there is no RFMO with competence over the proposed new fishing activity, BBNJ provisions would apply directly. Thus, when a State Party has reasonable grounds for believing the planned fishing activity is likely to have more than a minor or transitory effect on the marine environment in ABNJ, that State would be responsible for ensuring the conduct of an EIA in accordance with the provisions in the BBNJ Agreement."[681] This appears feasible under the area-based framework provided by the BBNJ Agreement.

Following Vezzani, international cooperation under the UNFSA reflects a conferral of powers on the part of those States that consent to the treaty.[682] Before becoming parties to the UNFSA, States cannot accurately acknowledge or anticipate the identity of the RFMOs in light of the treaty text alone. RFMOs are not constituted by the UNFSA or specified by it but are formed outside its context.[683] In this sense, references to RFMOs can be said to include those existing at the time of the conclusion of the treaty and those formed in the future. The same happens *mutatis mutandis* with the 'relevant IFBs' in the BBNJ Agreement, like RFMOs. Accordingly, widespread terms in the UNFSA like 'conservation and management measures' or 'measures' are also illustrative of the conferral of powers. In this connection, in the context of the BBNJ Agreement, the terms 'Relevant IFB Measures', 'MPAs' or 'ABMTs', profusely used in Part III, may also be regarded as manifestations of a conferral of powers. The same applies to external regulations and standards, and 'equivalent' EIAs referred to in Part IV.[684] In both contexts, the UNFSA and the BBNJ Agreement, this type of nomenclature entails the development of binding undertakings on the part of State parties.[685]

The consent on the part of States that become parties to the UNFSA seems to rely on their wishful assumption that conferring competencies to undetermined RFMOs (and RFMAs) and binding themselves to undetermined conservation and management measures is a key element without which the conservation and sustainable use of fishing of straddling and highly migratory fish stocks cannot be ensured. This assumption sets the basis that forms a legal verticality broadly supported by the treaty. However, it should be clarified that this assumption does not necessarily include the freedom of fishing or the exercise of jurisdiction on fishing vessels as historically conceived outside the UNFSA (in customary law or the context of the LOSC). All this may be reflected in the context of the BBNJ Agreement.

In perspective, almost 30 years after the adoption of the UNFSA, it is confirmed that cooperating in the terms of the UNFSA, (primarily, becoming an RFMO member or an RFMA

---

679 ibid 19–23.
680 ibid 8(5); Churchill, Lowe and Sander (n 521) 567.
681 High Seas Alliance (n 245) 3–4.
682 Vezzani (n 55) 234–237.
683 "Contracting Parties of the [UNFSA] have agreed to subject themselves automatically to legal development within different treaty *régimes* that they are unable to influence or anticipate", ibid 250.
684 BBNJ Agreement art 29(1) and 29(4).
685 See for instance UNFSA art 8(3); BBNJ Agreement art 22(1.a).

participant, or agreeing to apply the measures under them), does not necessarily or automatically give a State the possibility to effectively *exercise* the right to fish the relevant stocks on the high seas, as confirmed by the fact that some States have been prevented from exercising it.[686] Like the UNFSA, the BBNJ Agreement does not give certainty to the primacy of the not-expressly-mentioned right of States to navigate the high seas when such right enters into conflict with the general objectives in Article 2 or, specially, those of Part III or Part IV.[687] The BBNJ Agreement, as in the UNFSA, lacks a determinant explicit conflict clause, plus, the issue of *who* and *how* would balance the rights and obligations of the parties does not appear to be entirely up to the State parties.[688] The BBNJ Agreement appears to deserve similar comments to the exercise of the freedom to navigate or the exercise of jurisdiction over a vessel in the high seas.

4.2. The Core Role of RFMOs for Developing Sectoral Measures

The UNFSA does not define RFMOs or set a standard to differentiate which of them suits the purposes of the treaty. This highlights the uncertain and broad manner in which parties to the UNFSA have conferred powers on these organizations.[689] Notwithstanding this, it is well assumed that RFMOs are regarded as the *primary regional mechanisms* for implementing the UNFSA and cooperation under it.[690] The regional management of fisheries within a defined maritime area is reflected in the functional-regional approach followed by the UNFSA.[691]

The UNFSA strongly supports the presumption that RFMO measures are consistent with the treaty objective.[692] Under the UNFSA, RFMOs are empowered to *establish* binding measures of *management*, including the determination of the volume of admissible catches and

---

[686] Rayfuse (n 59) 446.
[687] BBNJ Agreement art 7(c).
[688] After the entry into force of the BBNJ Agreement, those who are included in the uncertain term 'stakeholders', which comprises States not party to the treaty and presumably includes RFMOs, may come to have a significant say in the development of norms, standards and guidelines and other matters pertaining to the further development of the instrument and the consolidation of its institutions. While the States parties to the BBNJ Agreement may not have the desired prominence over these issues, there is no doubt that they will be legally bound by the resulting norms. This might be inferred from, for example, ibid 19(2), 19(4.a), 20, 21(1), 21(2.a), 21(2.b), 21(5), 29(4), 48(3), 48(4), 49(3) and 55(4).
[689] "International law does not prevent the State of origin, or the coastal State, from assigning to a fisheries organization the powers it enjoys to enact conservation and management measures.", Vezzani (n 55) 234.
[690] Churchill, Lowe and Sander (n 521) 567.
[691] An RFMA can be defined according to Article 1(d), UNFSA, that is, as a cooperative mechanism established (...) by two or more States for the purpose, among other things, of establishing conservation and management measures in a subregion or region for one or more straddling or highly migratory stocks. ibid. In this view, it has been pointed out that an RFMA "is thus a less formal and institutionalised means of regulating fisheries than an RFMO, doing so directly in a treaty or by decisions taken by meetings of the parties to a treaty.", ibid.
[692] UNFSA arts 2, 7(2.c), 8(3-5).

its allocation among its members.[693] Limited to straddling and highly migratory stocks, the UNFSA allows relevant RFMO measures to gain additional recipients for its measures, besides their members.[694] Interestingly, the UNFSA does not bind RFMO members to become parties to the treaty. This has amplified the reach and power of these organizations and, subsequently, of its members. Those members of an RFMO, i.e. those making the binding measures, and parties to the UNFSA, recipients of the binding measures, are not necessarily the same.[695] Either way, RFMO members and parties to the UNFSA are all bound by the said binding measures *but* not equally allowed to participate in their normative making.[696] The BBNJ Agreement presumably echoes the UNFSA in not requiring members of the relevant IFBs managing 'marine biological diversity' to become parties to the treaty. In the context of Part III BBNJ Agreement, RFMOs may safeguard the *status quo* of the organization and that of its members. Article 22(2) would be key in this respect.

The reliance of the UNFSA on the RFMO model is notorious. Though not immediately evident in the main text, the BBNJ Agreement considers them as important with "North-South and South-South collaboration" in paragraph d(ix) of Annex II. Under the UNFSA, not becoming an RFMO member (or RFMA participant) would, in principle, signify a breach of the duty to cooperate.[697] However, that breach would not materialize if a State, albeit not a member of an RFMO (or a participant in an RFMA), agrees and complies with the conservation and management measures.[698] This reliance can be additionally illustrated by the fact that the UNFSA Review Conference competencies are limited to "review and assess the adequacy of the provisions of this Agreement and, *if necessary, propose* means of strengthening the substance and methods of implementation of those provisions in order better to address any continuing problems in the conservation and management of straddling fish stocks and highly migratory fish stocks."[699] Thus, as long as the need is recognized, the UNFSA Review Conference can only make proposals to RFMOs (or RFMAs).[700] This means that parties to the treaty, through the UNFSA Review Conference, hold limited powers over RFMO mandates and their measures and give a permissive treatment of these bodies' actions.[701] After activating the procedural mechanism in Article 29 concerning external 'equivalent' EIAs, State parties to the BBNJ Agreement and the BBNJ COP might be given a similar importance. The fact that the success of UNFSA depends on bodies as just characterized, particularly on the measures RFMOs adopt, shows its freestanding status concerning the LOSC.[702]

---

693 Vezzani (n 55) 221.
694 UNFSA art 8(3)-8(4).
695 ibid.
696 "Cooperating Non-Contracting Parties accept being bound by conservation and management measures enacted by the RFMOs. They have neither the possibility to influence the Organization's decision-making process, nor the faculty to contract out of the obligation stemming from its resolutions.", Vezzani (n 55) 237.
697 UNFSA art 8(3).
698 ibid.
699 ibid 36(2) emphasis added.
700 ibid.
701 ibid.
702 Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473 emphasis added.

Under the UNFSA, the competencies of the parties arguably resulted in being significantly limited over the competencies of RFMOs by not being sufficient to ensure open access to these bodies and to broadly acknowledge the exercise of the right to freely fish in the high seas. The last sentences of Article 8(3) UNFSA are relevant in this respect. According to this provision, the terms of participation in RFMOs shall not preclude States having a "real interest"[703] in the fisheries concerned from membership or participation; nor shall they be applied in a manner that discriminates against any such State or group of States. Though (a light reading of) the provision suggests that defining the expression 'real interest' might fall within the competence of the parties and that, subsequently, it might be an asset for them to ensure and push for wide access to RFMOs, the operationalization of the UNFSA showed that the 'real interest' is practically determined not by the parties to this treaty but by the RFMO members through deliberations within the context of such organizations.[704] In other words, RFMOs and States non-parties to the UNFSA that act through RFMOS are *de facto* allowed to interpret the provisions of the treaty to shape the rights of State parties but without a counterbalancing obligation. In this connection, it has been noticed that the level of cooperation and coordination demonstrated by RFMOs to make flexible any restrictive interpretation of the vocabulary in Article 8(3) UNFSA and allow wider participation within them is meager.[705] Given how these treaties resemble each other, it may be presumed that 'stakeholders' in the BBNJ Agreement are likely to be allowed to behave similarly concerning the State parties, possibly weakening the status of the BBNJ COP. This would, however have consequences on the wide range of high seas activities. Moreover, the BBNJ Agreement may complement the UNFSA in a way that States that remain nonparties to the UNFSA can be indirectly bound by its terms based on 'Measures such as' those comprised in the BBNJ Agreement.

The UNFSA gives RFMOs an essential role, making their conservation and management measures a core element, thus decisive for the exercise of fishing rights. The presumed legal weight of some of the provisions in UNFSA becomes apparent when these are read in context and, even more apparent when recognizing how autonomous RFMOs are and to what extent these have affected the freedom to fish of State parties, which have low influence in respect of competencies of RFMOs.[706] Some acknowledge that aspects regarding the functioning of RFMOs might raise concerns, the same concerns that might affect any expectation for the number of ratifying States of the UNFSA to increase.[707] As said above,

[703] UNFSA art 8(3).

[704] Before the entering into force of the UNFSA, some already considered that because of "the current uncertainty on the meaning of the concept [of 'real interest'] a risk exists that it will be used as a bar to participation.", Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (n 478) 499.

[705] Some claim that "[a]lthough the conceptual scope of the state having 'a real interest' does not mean all states, it should include at least those states willing or desiring to fish in the regulatory area of an RFMO", Kim (n 473) 207.

[706] Rayfuse (n 59) 446. For instance, the UNFSA establishes that "[t]he terms of participation in such organization or arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.", UNFSA art 8(3).

[707] Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (n 478) 499. In this regard, it has been pointed out that States "that

according to the UNFSA, access to the harvesting of fish stocks in the high seas is restricted to RFMO members, or those to agree to apply the conservation and management measures established by such RFMOs.[708]

Against this backdrop, the BBNJ Agreement follows the UNFSA as a model treaty, albeit not clarifying which of the IFBs would ultimately manage biodiversity. Like the UNFSA in respect of conservation and management measures of RFMOs, the BBNJ supports the presumption that 'Relevant IFB Measures', 'MPAs' and 'ABMTs' are consistent with the general objective and, especially, with the objectives in Part III.[709] States parties to the BBNJ Agreement through the BBNJ COP would have to act according to the *modalities* that the BBNJ Agreement sets out in *inter alia* Article 22(1) and Article 29(4). With this in mind, as RFMOs achieve the goals of the UNFSA, it is reasonable to assume that the 'relevant IFBs' with mandates including 'marine biological diversity' *will* be the primary mechanisms for the success of the BBNJ Agreement. [710]

In contrast to the UNFSA, the BBNJ Agreement provides that State parties, through the BBNJ COP, hold the *formal* competence to *make* recommendations and *take* decisions and not the relevant competent IFBs or other 'stakeholders'. A superficial analysis of the text would suggest that State parties would have more powers than the 'stakeholders'. The establishment of measures under the UNFSA is understood as an issue falling entirely within the RFMO's scope, which, in appearance, would make them look more influential in the UNFSA than the 'stakeholders' under the consultation process under Part III BBNJ Agreement. However, the BBNJ Agreement mirrors the UNFSA by endorsing *collaboration* and *contributions* that result in the conferral of *implementation* powers to the 'relevant IFBs'. The limitation imposed on the 'relevant IFBs' (i.e. the non-conferral of *formal* powers to make recommendations and take decisions the tools through the Part III BBNJ Agreement) would not signify a premise for concluding that they are less influential or powerful than RFMOs in developing the UNFSA. This would become evident when acting together with other *collaborators* or *contributors*.

It has been asserted, before the BBNJ Agreement was concluded, that the fact that RFMOs are currently devoted to fishing sectoral issues appears to be an obstacle that may be reasonably overcome shortly.[711] Concerning RFMOs, it has been argued that "significant progress for the protection of marine biodiversity has been made by many of these bodies and treaty frameworks, especially in recent years, and that *the potential to achieve further*

are uncertain of having a 'real interest' could be discouraged from becoming parties to the Agreement.", ibid.

[708] UNFSA art 8(4). Simultaneously, where there are no RFMAs or RFMOs, relevant coastal States and States fishing on the high seas "shall cooperate to establish such an organization or enter into other appropriate arrangements" and "shall participate in the work of the organization or arrangement" to ensure conservation and management of such stock, ibid 8(5). Clearly, these obligations are much stronger than the less stringent duty under the LOSC, according to which "States whose nationals exploit identical living resources, or different living resources in the same area (…) shall*, as appropriate*, cooperate to establish subregional or regional fisheries organizations to this end.", LOSC art 118. Under the LOSC, it is evident that the freedom of fishing in art 87(1.e) is in no way conditioned nor restricted by any membership in or participation in subregional or regional fisheries organizations.

[709] BBNJ Agreement arts 2 and 17.

[710] Churchill, Lowe and Sander (n 521) 567.

[711] Scanlon (n 241) 410–415.

protections through this existing architecture exists."[712] This possibility turns bodies currently known as 'RFMOs', apparently limited in scope to fisheries issues, into outstanding candidates. It has been highlighted that "RFMOs have also taken measures *specifically* to protect 'biological diversity' in ABNJ. Many of these measures should be seen as a form of *area-based management*[713]. To the extent the BBNJ Agreement reflects the architecture of the UNFSA, RFMOs with more comprehensive mandates could affect or restrict the freedom of the high seas, especially navigation. In light of the comments made here, it is worth noting that RFMOs promise to become more relevant when *modernizing* and *adapting* their mandates to protect 'marine biological diversity'. Article 22(7) BBNJ Agreement encourages such policy.

5. Decentralized Normative Making and Its Consequences for Treaty Interpretation

The BBNJ Agreement innovates in respect of the UNFSA. The *corpus juris* comprising the UNFSA relates to a great diversity of normative materials or sources. The legal decentralization promoted by the UNFSA concerns an *institutional aspect*, that is, an elaboration of norms through RFMOs or the FAO and not under institutions constituted under or dependent on it. Second, decentralization regards a *substantive aspect*, meaning the implementation of norms elaborated within those external instruments or bodies. Next, some comments are made about the legal relationship RFMO measures have with States parties to the UNFSA. Forward, it follows the question of 'unregulated' fishing.

It is worth clarifying that, given how the UNFSA defines international cooperation, distinctions between formal bindingness and non-bindingness do not seem to be fully useful. Non-binding and binding instruments both have a great impact in conditioning the conduct of international public and private actors related to the UNFSA.[714] Albeit not negotiated nor adopted by the States parties to the UNFSA, some instruments and the norms they provide prove to ultimately hold weight for the functioning of this treaty and its further development.

5.1. The Importance of the UNFSA Model in Developing the BBNJ Agreement through RFMO Measures

[712] ibid 409 emphasis added.
[713] ibid 411 emphasis added.
[714] It is important to add that the UNFSA has served to constitute a normative order, in the sense that it is complemented by binding and non-binding instruments. As Wolfrum recognizes, "the combination of legally non-binding norms (but politically binding ones) and legally binding ones renders the traditional differentiation between legally non-binding norms and binding ones questionable, or it demands a recalibration of the normative system of international law.", Wolfrum (n 141) 260.

RFMO measures relevance for interpreting the UNFSA might be important to assess how the BBNJ COP measures might develop the BBNJ Agreement. Accordingly, following Article 19 Part III BBNJ Agreement, RFMO measures would be important for developing the content of a proposal when *collaborating* with the proponent. The measures *made* within RFMOs that RFMO members consider as 'Relevant IFB Measures' following Part III and IV of the BBNJ Agreement may be included in a proposal (for example, by making an explicit *reference* to them). Other regional IFBs may adopt the same view. The legal sources for authentic interpretation may have a decisive weight in developing the UNFSA and, more widely, the BBNJ Agreement. It is worth noting that, besides the legal technicalities assessed here, *political undertakings* are likely to take place within regional IFBs (among those 'stakeholders' participating in and through them) and not within the BBNJ COP. In other words, 'stakeholders' may turn out to be those deciding which instruments may be interpreted following the rules of treaty interpretation and, thus, how the BBNJ Agreement may be interpreted and applied.

As to the UNFSA, the practice following constituent instruments and measures of RFMOs for straddling and highly migratory fish stocks might have certain relevance for interpreting and even developing the treaty.[715] This is consistent with how Article 30(5) regards the relevant provisions of "this Agreement *and* of any relevant subregional, regional, or global fisheries agreement".[716] Accordingly, following Article 8(3) UNFSA, the *practice* of States that willingly agreed to apply the measures of regional mechanisms such as RFMOs might be considered relevant for the interpretation of the UNFSA in the terms of Article 31(3.b) VCLT. Article 31(3.a) and 31(3.b) VCLT indicates that:

> "3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;"

5.2. The Subsequent Practice under RFMOs and the Authentic Interpretation of the UNFSA

Contrasting with the LOSC, the UNFSA has innovated by increasing the number of recipients of RFMO norms and extending their legally binding consequences beyond the membership, to all parties to the treaty. It is worth recalling that, as an alternative to becoming RFMO members or RFMA participants, Article 8(3) UNFSA defines that applying RFMO or RFMA measures means giving effect to the general duty to cooperate. Given this, the UNFSA presumably allows

[715] "It must be recognized that the objectives of a RFO may change over time either through amendments to the constitutive document or because objectives do not get acted upon. In practice, many RFOs have dead letter provisions.", Are K Sydnes, 'Regional Fishery Organizations: How and Why Organizational Diversity Matters' (2001) 32 Ocean Development & International Law 349, 354.
[716] UNFSA art 30(5) emphasis added.

the practice following those RFMO constituent instruments and measures to become a key element for the authentic interpretation of the treaty to *all* States that consented to it, disregarding whether they participate (RFMO members) or not (RFMO non-members) in the normative making within RFMOs. In relation to RFMO measures, the reasoning here expressed further explains the wide conferral of powers to RFMOs made by those States that decided to consent to the treaty and, subsequently, the measures adopted by these organizations. As acknowledged by Molenaar, UNFSA gives RFMOs a pivotal role.[717] Here also, the UNFSA significantly amplifies the reach of the powers of RFMOs and, indirectly, those of its members.

While the UNFSA certainly influences and improves the functioning of RFMOs, some are of the view that, *under certain conditions*, RFMOs may also influence or clarify the interpretation of the UNFSA.[718] The UNFSA relies upon regional entities like the RFMOs to achieve its purpose; the latter bodies are constituted freely and independently, beyond its scope. As seen above, this is primarily explained by the fact that RFMO members are not necessarily parties to the UNFSA and *vice-versa*. Something similar may be said about the BBNJ Agreement. While Parts III and IV allow enhancing the powers of regional IFBs, *under certain conditions*, RFMOs might also *collaborate* with the development of the treaty and, through the time-bound *consultation stage*, make *contributions* to further interpret the BBNJ Agreement.

The content of some UNFSA terms is defined. The term 'fish stocks', for instance, is used to indicate straddling and highly migratory fish species.[719] Contrastingly, the UNFSA does not define what a 'fishing vessel' is. This has caught the attention of some scholars, who indicate the need to clarify this notion.[720] In this respect, Vezzani sees that the constituent agreements of RFMOs "should be taken into account for interpretative purposes (…) pursuant to Article 31(3)(b) VCLT."[721] Additionally, he conditions this legal reasoning by emphasizing that it would be feasible "considering that those agreements establishing new RFMOs have been created in the implementation of the rules and principles embodied in the [UNFSA]."[722] It is worth noticing that concerns about the consequences over the *authentic* interpretation of a term of the UNFSA, or any other treaty, are reasonable considering that the interpretation of subsequent practices is sometimes regarded as a manner to amend treaty law.[723] It is worth noting that there is an awareness that clarifying the term 'fishing vessel' concerns sensitive interests and remains debatable.[724] Such treaty-based systems and mechanisms, however, are important to assess the notion of 'unregulated' fishing, analyzed below.

---

[717] Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473 emphasis added.
[718] Vezzani (n 55) 259.
[719] UNFSA art 2.
[720] Vezzani (n 55) 259.
[721] ibid.
[722] ibid.
[723] Berner illustrates this viewpoint by sustaining that "[a]uthentic interpretation is law-making in all but name.", Berner (n 666) 875–876.
[724] Vezzani (n 55) 259. The non-definition of the term fishing vessels has opened a debate by submitting doubts about the inclusion of vessels engaged in fishing activities other than harvesting operations, like factory ships. A permissible view on the inclusion of such vessels under the notion of fishing vessels would allow, for instance, their inspection by foreign flag governmental vessels, see ibid. Defining what the term "fishing vessel" comprises, thus, becomes a sensitive issue considering that the inspection of a vessel beyond national jurisdiction is acknowledged as an exception to the basic principle of international law which establishes the exclusive jurisdiction (control) of States on the high seas on

Vezzani's views lead to additional reflections concerning the narrow openness of RFMOs and the subsequent limited access.[725] In relation to the UNFSA, constituent instruments and measures of RFMOs could not be regarded as subsequent agreements in the terms of Article 31(3.a) VCLT mainly because not all parties to the UNFSA participate in their constitution or the making of measures. It has been recognized that RFMO measures may be useful to interpret the constituent instruments of those same bodies in terms of Article 31(3.a) VCLT and thus develop their full potential.[726] In light of Article 31(3.b) VCLT, RFMO members, meaning those States constituents of RFMOs that participate in the normative making under them, may be bound by the subsequent practice as long as this serves as a means for the authentic interpretation of the constituent instrument or measures of the relevant RFMO.

5.3. The Subsequent Practice under IFBs and the Authentic Interpretation of the BBNJ Agreement

In virtue of Article 31(3.b) VCLT, it has been considered that what subsequent practice comprises varies according to the subject matter of the treaty in issue.[727] The essence of subsequent practice is what can be demonstrated to have been done systematically or repeatedly in implementation and application of a treaty.[728] The defining test, when searching for *practice relating to interpretation of a particular treaty provision*, is that the practice must establish the agreement of the parties.[729]

In this context, the subsequent practice of States following the 'Relevant IFB Measures', and the recommendations and decisions of the COP adopted after them, would have consequences over the jurisdiction that State parties exercise over *inter alia* vessels flying their flag and, as a corollary, on how they may enjoy the freedom of navigation. The practice following a constituent instrument of an IFB, including an RFMO, would allow those participating through them to interpret the provisions of the constituent instrument. In this context, the relevant evidence is that which shows "the 'concordant' conduct of the parties, that is that they have done essentially the same thing expressly in pursuance of the treaty or, if the conduct is unilateral, that it reveals the agreement of the other party or parties."[730]

---

vessels flying its flag, including fishing vessels, Ariel R Mansi, 'The System of Inspection of the Commission for the Conservation of Antarctic Marine Living Resources' in Lilian Del Castillo (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Brill | Nijhoff 2015) 216. Recent agreements establishing RFMOs have defined the term "fishing vessels" including those providing support services to fish-catching vessels. For instance, Article 1(e) of the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean of Western and Central Pacific Fisheries Commission (WCPFC Convention) establishes that 'fishing vessel' means any vessel used or intended for use for the purpose of fishing, including support ships, carrier vessels and any other vessel directly involved in such fishing operations."

[725] Vezzani (n 55) 259.

[726] Scanlon (n 241) 410–411.

[727] Richard K Gardiner, *Treaty Interpretation* (2nd ed, Oxford University Press 2017) 226–227.

[728] ibid.

[729] ibid.

[730] ibid 227.

In this regard, considering the conferral of powers on the part of State parties to IFBs through 'Relevant IFB Measures', the practice within RFMOs or limited access IFBs might become a powerful element for interpreting decisions and recommendations, including the provisions of the BBNJ Agreement referred to in them. The practice following 'Relevant IFB Measures' referred to in a recommendation or decision of the COP would allow those with a membership under the RFMO or participating in the limited-access IFB to interpret the provisions of those recommendations or decisions.[731]

Regulatory areas implemented through 'ABTMs' and 'MPAs' established by the COP would thus be governed by RFMOs in conjunction with other IFBs with sectoral powers. In more practical terms, navigation and other activities would be governed by States making and applying law through such IFBs. Powers of IFBs over an area would increase after triggering the clause in Article 29(4) and implementing measures under that provision over several sectors.

'Relevant IFB Measures' together with recommendations and decisions may have consequences on the domestic legislation that flag State parties will be obligated to enact, and therefore, in the prescriptive jurisdiction over their vessels. Following cooperation in the terms of the BBNJ Agreement, according to Article 25(2), those flag States may have to adopt "more stringent measures with respect to its nationals and vessels or with regard to activities under its jurisdiction or control (…) in support of the objectives of the Agreement." Not doing so might entail a breach of the international cooperation promoted by the BBNJ system.

Lastly, it is worth recalling the legal consequences this may have on States parties that do not participate through RFMOs or limited access IFBs. Article 25(6) mandates that "[a] Party that is not a party to or a participant in a [relevant IFB], and that does not otherwise agree to apply the measures established under such instruments and frameworks and by such bodies shall not be discharged from the obligation to cooperate".[732]

In practical terms, this may be translated into relevant IFBs, exercising powers over areas beyond national jurisdiction comparable to the power States have over their territory (like an RFMO and the IMO after cooperating with the RFMO). In this logic, vessels navigating areas regulated by the 'Measures such as' those provided by the BBNJ Agreement may then be subject to the prescriptive jurisdiction of the overarching regional IFBs. The flag State would nonetheless be the one with the immediate legal relationship with the vessel, and therefore it might be interpreted that the flag State continues exercising prescriptive jurisdiction by following its environmental commitments. The reasoning unfolded here sheds light on a possible contrast with, for instance, Article 86 LOSC, according to which "[n]o State may validly purport to subject any part of the high seas to its sovereignty." Furthermore, this might

[731] ibid 226–227.

[732] Individuals such as those representing 'the private sector' have great chances of becoming interpreters of BBNJ measures in light of the 'transparency' promoted by the BBNJ Agreement and their authorized participation in the *consultation stages*. This would end up equating the status of the 'private actor' with that of the State party, which, in legal terms, would be innovative. In traditional legal reasoning, it has been assumed that contracting parties cannot be equated with individual interpreters, Berner (n 666) 876.

entail a fragmentation and a parallelism with the LOSC, considering that Article 92 indicates that ships "shall be subject to its *exclusive* jurisdiction on the high seas" (emphasis added).

5.4. The Subsequent Agreements under Recommendations and Decisions and the Interpretation of the BBNJ Agreement

Lessons learned from the UNFSA may somehow contribute to the future development of the BBNJ Agreement. Recommendations and decisions taken by the COP would be of the utmost importance in this regard. The measures adopted by the COP would contribute to interpreting the BBNJ Agreement and decisively the 'marine biological diversity' notion at the core of the treaty. Despite their labelling, they entail a significant commitment to international cooperation on the part of State parties, under *inter alia* Article 25(4), 25(6), and Article 29(1). Given this commitment, it is worth bearing in mind that the measures of the COP would find their main basis in the 'Relevant IFB Measures' referred to in the proposal and later inputs.

The measures of the COP known as 'recommendations' and the lack of binding force that such categorization suggests do not detract from appreciating the relevance of the undertakings concluded for the authentic interpretation of the BBN Agreement. A recommendation may contain a measure made through *collaboration* and adopted within bodies like RFMOS or through them. How RFMO members interpret provisions of the BBNJ Agreement within the context of the specific RFMO measure may turn out to be more relevant than how non-members of the relevant RFMO and parties to the BBNJ Agreement would prefer to interpret the global treaty. An agreement on the interpretation of certain provisions of the BBNJ Agreement inserted within the text of an RFMO measure referred to in a recommendation may turn out to be admissible to interpret the recommendation and the BBNJ Agreement as well. Following Article 25(6), the manner in which RFMO members would have *agreed* to interpret a provision of the BBNJ Agreement referred to in the RFMO measure would have to be consistently applied and endorsed by all State parties.

It is noteworthy that agreements on the meaning of terminology or provisions may be reached without using the forms commonly used, for example, by political instruments.[733] In this sense, agreements on the interpretation of the provisions of the BBNJ Agreement may even arise from RFMO measures non-binding on States members of the RFMO or non-binding agreements adopted between RFMOs and other IFBs. In this respect, it is crucial to emphasize

[733] Gardiner explains that "while all (…) indicators (particularly when present together) will usually show conclusively that the intention is to set out the terms of a treaty, that is not the issue over article 31(3)(a). It is not a question of whether that provision adds to the assessment that any given instrument was intended to be a binding treaty, but whether the parties to a treaty have, subsequent to its conclusion, reached a firm agreement on what one of its provisions means. Thus it does not necessarily follow that such an agreement will be recorded in one of the forms commonly used for a treaty", Gardiner (n 727) 217. He further explains, "[t]he less formal the agreement, the greater the significance of subsequent practice confirming less formal agreement or understanding.", ibid 222.

that "[f]act of agreement, not form, is the key factor"[734]. Highlighting this is important because recommendations based on 'Relevant IFB Measures' would have consequences on the rights and obligations of State parties in the high seas. The obligation to cooperate in the terms of Article 8 in Part I, Article 25(4) in Part III, and Article 29(1) in Part IV may lead to the promotion of agreements on the interpretation of the relevant provisions of the BBNJ Agreement made through or with IFBs other than the COP. With clear binding effects on State parties, interpretative criteria like the one assessed here may also be included by means of decisions taken by the COP.

The decisions taken by the BBNJ COP would embody an agreement by the State parties subsequent to the BBNJ Agreement in terms of Article 31(3.a) VCLT.[735] Notice that some conditions may improve the status of the relevant IFBs willing to collaborate or contribute to the interpretation of the global BBNJ Agreement. This may lead to, for example, a scenario that facilitates amending the norms applied within geographical areas subject to area-based management, including provisions of the BBNJ Agreement. It might be worth bearing in mind that the function of 'amending' is not always carefully distinguished in its title from the function of clarifying, amplifying, or supplementing a framework treaty.[736] In this case, amendments may be achievable by way of the authentic interpretation made by the States acting through the IFBs that implement an 'ABMT' or 'MPAs' established by the COP.

In the context of the UNFSA, it is possible to suggest that RFMOs may amend the UNFSA by authentic interpretation. For this to happen, an RFMO would have to be constituted upon agreements that concern the implementation of the rules and principles embodied in the UNFSA.[737] The text of Article 22(7) appears receptive to the idea of RFMOS, among other IFBs, adopting such a policy when referring to "amendment to the competence". States participating in those IFBs would have to adapt the mandates of such bodies to protect 'marine biological diversity' following the rules and principles embodied in the BBNJ Agreement. Sensitivity about this aspect has been shown by asserting that regional IFBs "may undergo

---

[734] Gardiner (n 727) 216. About less formal or informal agreements (in general) and their relation to the notion of subsequent agreements in Article 31(3.a) VCLT, it has been stated that "[i]n its reference to 'any subsequent agreement' in article 31(3)(a), the Vienna Convention does not specify that such an agreement must constitute a treaty or have the same formal status as the instrument which is interpreted. Hence, *any good evidence that parties to a treaty have reached an agreement on its interpretation seems admissible*.", ibid 220 (emphasis added).

[735] It might be worth bearing in mind that the function of 'amending' is not always carefully distinguished in its title from the function of clarifying, amplifying, or supplementing a framework treaty, Gardiner (n 727) 222. If amendments and the law-making they entail are made by way of interpretive authentication, then it might be expected that amendments of regional IFBs are done by those participating in and through them after the treaty had entered into force and, if a more far-reaching legal effect on the rights and obligations of State parties is pursued, not before a great number of States had ratified the BBNJ Agreement. Sensitivity about this aspect has been shown by asserting that regional IFBs "may undergo significant transformations in the future, potentially leading to a proliferation of regional MPA initiatives.", Klerk (n 226) 12. The text of Article 22(7) appears receptive to the idea of regional IFBs adopting such policy. States participating in them would have to adapt the mandates of the IFBs to protect 'marine biological diversity'. This would be of the utmost importance for being capable of, for instance, triggering Article 29(4) in the context of procedures under Part III, during non-regular consultations to the COP.

[736] Gardiner (n 727) 222.

[737] Vezzani (n 55) 259.

significant transformations in the future, potentially leading to a proliferation of regional MPA initiatives."[738] This would be of the utmost importance for, among other possibilities, developing EIAs in accordance with Part IV and agreeing on regulations and standards *arising from them* to meet the thresholds in Article 29(4). In turn, such a transformative power of IFBs might be utilized for unfold procedural strategies encouraged by Part IV, and thus for developing a proposal to activate the provision in Article 29(4) in the context of time-bound consultations under Part III.

If the law-making and potential amendments are made by way of interpretive authentication of the measures achievable under the BBNJ Agreement, the COP and State parties would not have much margin to dissent. Indeed, by ratifying the BBNJ Agreement State parties would have conferred powers to the IFBs to engage in pursuing the goals of the treaty. Revoking such conferral would imply following the procedural steps indicated in Article 22(7), "in close cooperation and coordination" with the competent IFB.

5.5. The Contrast between the UNFSA and the BBNJ Agreement

Though there are some similarities with the UNFSA, the BBNJ Agreement seems to give IFBs with mandates comprising 'marine biological diversity' a *greater* pivotal role because of the greater conferral of powers by State parties it allows (generically, those concerning the activities in the oceans or, more particuarlly, 'planned activities' including navigation in the high seas). It is worth noting that undertaking the general study of which IFBs meet this requirement may provide much more certainty about which of them may turn out to be the most relevant among the 'relevant IFBs' immediately after the treaty enters into force. According to Article 19(2) and the well-known maxim *prior tempore potior iure*, developing a proposal would require consulting and collaborating with them.

The aspects outlined above, in turn, would be important for RFMOs for developing the BBNJ Agreement. Part III, in its Article 22(7) acknowledges the importance of 'relevant IFBs' which *amend their competence*. The consequence of such an amendment would empower the status of the 'relevant IFB' in developing the BBNJ Agreement and interpreting it as well. Simultaneously, this would translate into a stimulus for regional 'relevant IFBs', which would be in a better procedural position to support proposals of recommendations or decisions. RFMOs or other regional 'IFBs' willing to influence the IMO may find this especially important to *inter alia* define what 'marine biological diversity' is and subsequently set the legal basis for developing law for achieving the objectives of Part III in the pursuit of achieving the conservation of areas requiring protection. Certainly, the *modernization* of RFMOs may become a key step for introducing 'Relevant IFB Measures' resulting from the collaboration with other 'stakeholders'.[739] Then, the 'Relevant IFB Measures', including those of the RFMOs, may be included in decisions *taken* and recommendations *made* by the BBNJ COP following the modalities in Article 22(1). In this case, 'Relevant IFB Measures' embodied in

[738]Klerk (n 226) 12.
[739] Scanlon (n 241) 410–411.

recommendations and decisions may become sources for interpreting the BBNJ Agreement and its wording (sometimes imprecise) following the terms for authentic interpretation in Article 31(3.a) and 31(3.b) VCLT.

Some aspects of what Part III calls the 'establishment' of MPAs and other ABMTs would appear to be the object of future questioning.[740] In this sense, 'MPAs' and other 'ABMTs' would be constituted by a binding decision that would, naturally, embody an agreement in which all State parties, acting through the BBNJ COP, participate and become bound.[741] This conferral of competencies signifies the power to *implement* measures and, additionally, to *fully develop* the regulations concerning 'MPAs' and 'ABMTs'. This is not immediately evident in the text, but it is easily inferred from the fact that no provision indicates that the BBNJ COP retains implementation powers over 'MPAs' and other 'ABMTs' in Part III. More clearly, Article 19 (4.i) dissipates any doubt about implementation being undertaken by IFBs. In this respect, it has been acknowledged that "States are reluctant to be subjected to ABMTs and MPAs to which they have not explicitly given their consent, and it may be questioned whether (quasi)automatic recognition is consistent with the principle of *pacta tertiis nec nocent nec prosunt*"[742].

6. Potential Developments in the BBNJ Agreement: The Reasoning underlying 'Planned Activities' and 'Unregulated Fishing'

This section considers some of the legal developments that provided strength to RFMOs measures and that signified impressive inputs to the international cooperation under the terms of the UNFSA. Given how the BBNJ Agreement mirrors the UNFSA, it seems admissible to presume that the term 'planned activity' or 'category of activity' may be given a content that strengthens international cooperation following the logic embodied in the term 'unregulated fishing'. On this basis, an assessment of the term 'unregulated' fishing appears timely. The aim of this section is merely illustrative of some of the legal aspects that may be echoed later in the BBNJ Agreement.

After assessing the notion, other comments may be made as to the possible potential evolution of the framework for area-based management in the BBNJ Agreement and its consequences on the exercise of navigation. In this respect, the impact of the UNFSA on navigation of fishing vessels and the effects of RFMOs measures as to the port State may motivate further developments for strengthening the system achievable through Part III BBNJ Agreement with the complementarity of Part IV.

[740] BBNJ Agreement art 22.
[741] ibid 22(1.a).
[742] Klerk (n 226) 15–16.

6.1. The Term 'Planned Activities' in the BBNJ Agreement

The term 'planned activity' has been used in the drafting of Article 206 LOSC on environmental impact assessment.[743] Now, it is employed in Part IV BBNJ Agreement together with 'category of activity'. Nonetheless, given that the BBNJ Agreement represents a normative context notoriously distinct and separate from the LOSC, such a historical-legal reference might lead to some confusion.[744] The legal term 'activity' in Article 1(7) in Part I BBNJ Agreement would appear to hold considerable flexibility and thus an extraordinary capability to encompass practically every activity occurring on the oceans. In Part IV BBNJ Agreement, however, the term 'activity' is preceded by the expression 'planned' which presumably qualifies the main term. Acknowledging the weight of the expression 'planned' might provide awareness of the restrictions it may imply. Presumably, activities falling outside this qualified term would not be regarded in the same manner as those that meet the requirements to fall into it. The BBNJ Agreement provides no clarification about this issue. Recently, however, Tanaka has shown legal sensitivity toward this term and observed that "strictly speaking, an 'activity' in an EIA means a 'proposed' or 'planned' activity."[745] This *strict* interpretation of a provision in Part I in light of another in Part IV is certainly revealing because of the legal reasoning underlying it. Two aspects are worth noting. First, it may be argued that Tanaka's legal reasoning unfolds on the (legal) assumption that provisions within other Parts of the treaty may condition the interpretation and legal relevance of the general provisions in Part I to the extent of defining their scope and effects.[746] Secondly, not 'an activity' but a 'planned activity' seems the *only one* that may be authorized to achieve the treaty objectives.[747]

6.2. An Assessment of the Term 'Unregulated Fishing'

To illustrate how fisheries law develops in this context and how the decentralized normative technique unfolds, it is worth recalling the contribution of the FAO and the norms elaborated by it regarding *unregulated* fishing.[748] It has been noticed that "[o]ne mechanism to get around the *pacta tertiis* rule is to have recourse to a soft law instrument. This is the technique used by the Food and Agriculture Organization (FAO) (…). The other technique to sideline the *pacta tertiis* rule operates in the context of implementation. Under the system referred to as 'port state

743 The threshold for invoking the obligation to conduct EIA is "[w] hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment", LOSC art 206.
744 Tanaka (n 209) 99.
745 ibid 96.
746 ibid.
747 BBNJ Agreement art 1(7), 28(1) and 34(2).
748 'Homepage' (*Food and Agriculture Organization of the United Nations*) <https://www.fao.org/home/es>; Churchill, Lowe and Sander (n 521) 585–595.

control' States implement environmental standards and standards on fishing *vis-à-vis* vessels under a foreign flag that are voluntarily in the port of the former. A port State may undertake an investigation of such vessels and may take certain enforcement measures if that vessel has violated the standards applicable in the port State. It is irrelevant as to whether the flag State has *accepted* the standards *concerned*."[749] It might be worth clarifying that the latter reference to the non-necessity of express acceptance of determined standards (for example, of a certain RFMO measure) should be considered as having juridical relevance only in the specific circumstance in which both the flag State and the port State are parties to an instrument that allows the *direct recognition* of RFMO measures such as the 2009 Agreement on Port State Measures to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (PSMA), discussed below.[750] In sum, the techniques described here result in instruments that seek adherence and are "directed to both [FAO] members and non-members."[751] These instruments, thus, are also directed to both UNFSA parties and non-parties and RFMO members and non-members.[752]

Having this in mind, it seems appropriate to approach the concept of 'unregulated' fishing, considering its effect might be somehow mirrored, in the BBNJ Agreement, by the term 'planned activity'. Notions such as 'unregulated activity' (or 'unregulated navigation') do not seem to fit in the vocabulary of the BBNJ Agreement. However, deprived of any specific content, the term 'planned activity' is vastly spread in the BBNJ Agreement, particularly in Part IV. Because of the reiterated reference and of being composed of two particular terms, the legal expression 'planned activity' deserves special attention. The complementarity between Part III on MPAs and ABMTs and Part IV on EIA in the BBNJ Agreement is explained by the fact that EIAs are considered "relevant to the issue of what kinds of activities or projects should be regulated within certain MPAs and what kinds of concrete conservation or management measures should be taken or implemented to regulate those kinds of activities or projects within the MPAs in ABNJ."[753] Against this background, exploring the notion of 'unregulated' fishing might be relevant to approach the terminology brought by the most recent treaty.

The concept of unregulated fishing has become essential for the RFMO model and, because of its dependence on it, for the UNFSA. Its importance is clarified by Molenaar's words who explains that "[u]nregulated fishing is generally dealt with by means of a two-tier approach. The first tier is based on the need for cooperation between all states involved in fishing for the regulated species […]. The second tier consists of specific measures to deter unregulated fishing *by forcing non-co-operating non-members to co-operate with or join the*

[749] Wolfrum (n 141) 355 emphasis added.
[750] Agreement on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing (adopted 22 November 2009, entered into force 5 June 2016). At the current moment, the PSMA has 79 parties, including the European Union, see 'Status of PSMA' (*FAO Treaties Database*) <https://www.fao.org/treaties/results/details/en/c/TRE-000003/>. The PSMA, worth noting, arguably complements the content of Article 23 UNFSA concerning measures that port States may take.
[751] Wolfrum (n 141) 355.
[752] ibid.
[753] Wen Duan and Luoyi Shen, 'The Role of Environmental Impact Assessments in the Establishment and Management of Marine Protected Areas under the UNCLOS and the BBNJ Agreement' (2024) 33 Review of European, Comparative & International Environmental Law 303, 307.

RFMO, or stop fishing altogether."[754] The UNFSA seems to be highly supportive of the latter tier of that approach.[755] The term 'unregulated' fishing seeks to consolidate the role of RFMOs in international fisheries law and, in so doing, strengthens the legal architecture developed under the UNFSA. An instrument providing a strict definition of 'activity' might be similarly useful for consolidating the role of bodies with competencies to manage marine biodiversity and the legal architecture developed following the BBNJ Agreement.[756]

The UNFSA refers to *the problem of unregulated fishing* in its preamble but does not define its meaning.[757] The FAO has contributed to the making of the concept of unregulated fishing by further developing the *global* concept of illegal, unreported, and unregulated (IUU) fishing.[758] IUU fishing "undermines efforts to conserve and manage fish stocks in all capture fisheries."[759] In this context, "[c]ooperative initiatives to address IUU fishing abound at international and regional level. These are undertaken by a myriad of different organisations, including the UN Specialised Agencies and other intergovernmental organisations (IGOs), regional fisheries management organisations (RFMOs), non-governmental organisations (NGOs), private international cooperatives, and states."[760] As with the UNFSA objective, the functional-zonal approach characterizing the LOSC is seen as a *big obstacle* to combat IUU fishing.[761] Some notorious examples of relevant and influential instruments are *non-binding* such as the 1995 Code of Conduct for Responsible Fisheries (FAO Code of Conduct),[762] and,

---

[754] Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473–474 emphasis added.
[755] The UNFSA, for instance, permits parties to it that are RFMO members (or RFMA participants) to "take action in accordance with international law, including through recourse to subregional or regional procedures established for this purpose, *to* deter *vessels* which have engaged in activities which undermine the effectiveness of or otherwise violate the conservation and management measures established by that organization or arrangement from fishing on the high seas in the subregion or region until such time as appropriate action is taken by *the flag State*.", UNFSA art 20(7) emphasis added. The terms 'vessel' and 'flag State' in this provision might suggest that the provision is addressed to international subjects other than the parties to the treaty. However, semantics cannot overrule the *pacta tertiis* principle according to which treaties are binding only on ratifying States, Franckx (n 551) 71.
[756] Scanlon (n 241) 411; Tanaka (n 209) 96.
[757] UNFSA para 5 of the preamble. Tullio Treves, 'La pesca ilegal, no declarada y no reglamentada: Estado del pabellón, Estado costero y Estado del puerto' in Jorge Pueyo Losa and Julio Jorge Urbina (eds), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel 2009) 138.
[758] FAO Committee on Fisheries IPAO (n 73) para 3(1-4). "As a wickedly complex problem that spans international, national, regional, and local scales, IUU fishing requires strategic policy development, action, implementation, and coordination at and across each of these levels. Indeed, international fisheries governance and IUU fishing have been identified as areas requiring regime interaction (Young 2011) and regulatory pluralism (Lindley and Techera 2017), concepts which highlight the need for continuing interaction and cooperation between institutions dealing with different facets of a problem to ensure an effective response.", Kathleen Auld and others, 'The Collective Effort of the United Nations Specialised Agencies to Tackle the Global Problem of Illegal, Unreported and Unregulated (IUU) Fishing' (2023) 243 Ocean & Coastal Management 106720, 2.
[759] FAO Committee on Fisheries IPAO (n 73) para 1.
[760] Auld and others (n 758) 2.
[761] "While attention on tackling IUU fishing has increased over the past time, progress toward its elimination remains slow, largely due to the inherently transboundary nature of IUU practices *and the practical limitations of flag and coastal state jurisdiction*", Callum Musto and Efthymios Papastavridis, 'Tackling Illegal, Unreported and Unregulated Fishing Through Port State Measures' (2021) 22 Melbourne Journal of International Law 1, 1 emphasis added.
[762] FAO, Code of Conduct for Responsible Fisheries 1995.

complementing it, the 2001 International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (IPAO),[763] while others are *binding* such as the PSMA. These FAO instruments are related between them and to the functioning of the UNFSA.[764] In light of Vezzani's reasoning, the later incorporation of the notion 'unregulated fishing' in the *corpus juris* of RFMOs and the subsequent practice of States parties may be regarded as a substantial contribution in the terms of Article 31(3.b) VCLT to the development of a concept included in the text of the UNFSA but not defined by it.[765]

Using an acronym such as "IUU" fishing can be certainly practical. However, it might lead to the misconception that all three conducts mean a breach of international law and thus that *all* can be sanctioned. Illegal fishing and unreported fishing seem to refer to sanctionable behaviors, i.e. those opposed to international law. [766] Instead, the concept of *unregulated* fishing, at the tail of the acronym, has particular characteristics that, according to some, could introduce problematic issues.[767]

The concept of unregulated fishing relates to the RFMO scheme as shown by paragraph 3(3) IPAO (subparagraphs 3(3.1) and (3.2)) and, especially, to paragraph 3(4). The combat against IUU fishing, which includes unregulated fishing, has a crucial role in the context of the UNFSA and the (expansive) work of the RFMOs. According to the IPAO, unregulated fishing refers, first, to fishing activities "in the area of application of a relevant [RFMO] that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organization",[768] and, second, to fishing activities "in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law."[769] After this definition, paragraph 3(4) IPAO establishes that "certain unregulated fishing may take place *in a manner which is not in violation of applicable international law*" [770] and may not require the application of measures envisaged under the

[763] FAO Committee on Fisheries IPAO (n 73).

[764] In 1998, shortly after the adoption of the UNFSA, some noted that "[t]he FAO Code was negotiated in parallel to the [UNFSA], and -although voluntary in nature- it contains many of the elements of the [UNFSA] (…).", Hyvarinen, Wall and Lutchman (n 469) 330. Also considering the FAO Code of Conduct, before the UNFSA had entered into force in 2001, these authors saw that "[w]*hile the short-term outlook appears bleak for the UN Fish Stocks Agreement, acceptance of its provisions in application of the FAO Code may provide some impetus for entry into force and effective implementation*.", ibid emphasis added.

[765] Vezzani (n 55) 259.

[766] FAO Committee on Fisheries IPAO (n 73) para 3(1–2).

[767] "The worst confusion, assuming that is what it is, concerns unregulated fishing. When one dissects the oft-repeated phrase "prevent, deter, and eliminate IUU fishing", it is easy to see why States would want to prevent, deter, and eliminate illegal and unreported fishing, but less certain whether they realise what they are calling for in wanting to 'eliminate' unregulated fishing.", Andrew Serdy, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press 2016) 147–148. For a discussion on the assimilation of unregulated to illegal fishing, see ibid 151–171.

[768] FAO Committee on Fisheries IPAO (n 73) para 3(3.1).

[769] ibid 3.3.2.

[770] ibid 3(3.4) emphasis added.

IPAO.[771] Paragraph 3(3) read in conjunction with paragraph 3(4) IPAO, suggests that the concept of unregulated fishing comprehends conducts in violation of international law and others *not* in violation of international law, respectively.

The IPAO is addressed to all States, including those parties to the UNFSA. The first meaning of unregulated fishing, enshrined in subparagraph 3(3.1) IPAO, concerns RFMOs and, by extension, the UNFSA. The provision typifies fishing undertaken in an RFMO area of application that breaches its measures. According to the second meaning, in paragraph 3(4) IPAO, the concept of unregulated fishing is permissive of the freedom of fishing. Paragraph 3(4) allows the concept of 'unregulated' fishing to be consistent with Article 87(1.e) LOSC. The importance of paragraph 3(4) IPAO, thus, is crucial to understanding that the freedom of fishing is not contrary to international law and that it is not equivalent to illegal fishing. Coherently, Treves has emphasized the relevance of paragraph 3(4) IPAO and has seen that unregulated fishing, as defined in paragraph 3(3) IPAO, may be illegal *only if* its undertaking is proven to be in breach of a general rule of international law applicable to *all* States.[772]

Highlighting the differences between the two meanings of unregulated fishing is relevant considering that some legislation, when importing (or hardening) the concept, has omitted the inclusion of paragraph 3(4) IPAO excluding from the definition of IUU fishing the legal conduct described in that paragraph.[773] This might be seen as a curious adaptation of the concept of unregulated fishing, possibly resulting in the assimilation of the lawful behavior described in paragraph 3(4) IPAO to illegal fishing.[774] This suggests that unregulated fishing is

---

[771] ibid.

[772] Treves (n 757) 138. "Esta parte de la definición hace hincapié en los límites que el Derecho internacional impone a las OROP en su actividad de reglamentación. Por un lado, el alcance de esta reglamentación no se extiende a los buques que no enarbolen el pabellón de los estados parte de (o cooperantes con) las OROP. Por otro lado, hay poblaciones de peces que no están incluidas en el marco espacial o material de una OROP. Por ello, el párrafo cuarto añade la observación de que 'puede que cierta pesca no reglamentada tenga lugar de una manera que no esté en violación del derecho internacional aplicable'. Me parece posible advertir que la pesca no reglamentada, según está definida en el Plan de Acción, puede ser ilegal únicamente si se demuestra que ha sido realizada en violación de una regla general de Derecho internacional aplicable a todos los Estados. Hay que subrayar que las distinciones entre pesca ilegal, pesca no declarada y pesca no reglamentada, aunque interesantes analíticamente, no tienen en la práctica demasiada importancia por el hecho de que en todos los instrumentos aplicables los tres conceptos se utilizan acumulativamente.", ibid.

[773] For instance, Council Regulation (EC) No 1005/2008 2008 art 2(4). "This Regulation establishes a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. The system shall apply to all IUU fishing and associated activities carried out within the territory of Member States to which the Treaty applies, within Community waters, within maritime waters under the jurisdiction or sovereignty of third countries and on the high seas. IUU fishing within maritime waters of the overseas territories and countries referred to in Annex II of the Treaty shall be treated as taking place within maritime waters of third countries.", 'Council Regulation (EC) No. 1005/2008' (*FAOLEX Database*, 21 February 2024) <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC090889/#:~:text=This%20Regulation%20establishes%20a%20Community,and%20unregulated%20(IUU)%20fishing.> accessed 30 March 2024. See also, Andrew Serdy, 'A Wrong Turning in International Fisheries Law: The Flawed Concept(s) of Illegal, Unreported and Unregulated Fishing', *The New Entrants Problem in International Fisheries Law* (Cambridge University Press 2016) 149–150.

[774] There is awareness of the fact that "consciously or otherwise, many States appear to favour eliminating unregulated fishing by assimilating it to illegal fishing, at least when it is done by others", Serdy (n 773) 149. In this respect, it has been noted that "unregulated fishing is markedly different to

legal only when practiced according to the stricter terms of paragraph 3(3) IPAO, leaving no place for unregulated fishing beyond the scope of that provision. In other words, following this criterion, fishing on the high seas would be in accordance with international law as long as it is exercised by following the conservation or management measures established by RFMOs. On the one side, this normative adaptation empowers the role of RFMO in fisheries law and, simultaneously, enhances that of the UNFSA.[775] On the other side, it might be argued that this adaptation contrasts with the freedom of fishing as envisaged in Article 87(1.e) LOSC and, more broadly, downplays the *constitutional* role of the LOSC.[776]

The issue of unregulated fishing is also important considering that some RFMOS have grouped multiple vessels on so-called "IUU lists" resulting in the *blacklisting of IUU vessels*.[777] The inclusion of a vessel in an IUU list results in that the vessel concerned becomes subject to various kinds of dissuasive actions by the RFMO members.[778] These measures are aimed at making fishing without following RFMO measures something unprofitable.[779] It is worth

its counterparts, and including it in the IUU definition has led to confusion and, in some cases, the demonisation of those who are unregulated through no fault of their own. Illegal and unreported fishing, on the other hand, have more in common, as both entail the contravention of management measures, and can more justly be consolidated in one definition.", Auld and others (n 758) 2.

[775] In 2003, Molenaar pointed out that "[m]easures to deter unregulated fishing are designed to force non-members to either join or co-operate with the RFMO or stop fishing altogether.", Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 479. See UNFSA art 20(7). In this connection, the question arises as to whether these measures to deter unregulated fishing are in accordance with international law when unregulated fishing is practiced as contemplated in Article 3.3.4 IPAO, i.e. *not* in violation of international law, by non-parties to the UNFSA and non-members of RFMOs. In principle, it would seem that the adoption of such deterrent measures, if regarded as a constraining of rights, would be inconsistent with international law.

In recent times, the same scholar has highlighted that "[t]he recognition that RFMO/As are the preeminent vehicles for regional fisheries regulation that is implied in these obligations, give RFMO/As a clear mandate to deal with free rider-behavior by non-Members and [non-cooperating non-contracting parties]. While such a mandate is strictly speaking only available vis-à-vis parties to the [UNFSA], *RFMO/As have not taken this into account in their actions so far*.", Molenaar, 'Regional Fisheries Management Organizations' (n 466) 101 emphasis added.

[776] "The UN Convention on the Law of the Sea was seen by its framers as the 'constitution of the oceans'. They were keener to ensure its stability than its adaptability.", Treves (n 663) para 73.

[777] Serdy (n 773) 157; Vezzani (n 55) 232–234. The so-called *blacklists* can be found on RFMOs websites. See also Trygg Mat Tracking, 'Combined IUU Vessel List' (*Combined IUU Vessel List*, 30 March 2024) <https://www.iuu-vessels.org/>.

[778] Vezzani (n 55) 232–234.

[779] ibid. Sanctions against fishing vessels named in an IUU list could include the confiscation of the vessel's catch if they call into one of the Member States' ports, or refusal of port access altogether, Serdy (n 773) 157. The listing of a vessel on the IUU list of an RFMO may become problematic if, in time, the flag State of the listed vessel wishes to become a member of the RFMO whose measures the vessel has violated. The admission to an RFMO, dependent on the approval of its members, is often conditioned by the requirement that the fishing vessel does not have to possess a history of IUU fishing, Vezzani (n 55) 233. Interestingly, RFMO members are generally the ones who notify the relevant RFMO secretariat of vessels suspected of IUU fishing and the evidence available, ibid 234. This is a relevant issue considering that "in practice non-Member's vessels are predominantly listed", ibid 233. Inclusion on the IUU list may be appealed before the domestic courts of the State that imposed the sanction, ibid. Against this backdrop, the IUU listing shows the great influence RFMO members can have over the fishing practices undertaken within the regulatory area of the RFMO to which they belong. The influence of RFMO members can also go beyond the scope of the RFMO, considering the increasing

noting that in Article 17 UNFSA it is established that members of RFMOs and participants in RFMAs shall exchange information concerning the activities of fishing vessels flying the flags of 'States' non-members of RFMOs (and non-participants in RFMAs) which are engaged in fishing operations for the relevant stocks.[780] In this respect, "some RFMOs have agreed to reciprocal recognition of each other's lists."[781] Subsequently, those RFMO members and RFMA participants "shall take measures (…) to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures."[782]

The concept of IUU fishing has been included in the PSMA adopted in 2009. The objective of the agreement "is to prevent, deter and eliminate IUU fishing through the implementation of effective port State measures, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems."[783] Albeit IUU fishing is at the core of the PSMA, this agreement does not include its definition and, instead, refers to and relies on the definition given by the IPAO.[784] In this sense, a modification of the meaning of IUU fishing in the IPAO could change the objective of the PSMA. The PSMA recalls the UNFSA in its preamble together with other instruments.[785] It does the same with the LOSC.[786] The importance of the PSMA has been highlighted at the UNFSA Review Conference, thus demonstrating the commitment to combat IUU fishing.[787]

The fact that the concept of IUU fishing has become quintessential to the UNFSA normative order and that of RFMOs demonstrates the importance of the *decentralized* normative-making technique that develops and converges in the broader UNFSA regime and how definitory it might be over time.[788] International institutions like the RFMO and FAO seem

tendency for reciprocal recognition of the IUU lists between different RFMOs, ibid. From this follows that the blacklisting of a fishing vessel under a certain RFMO might have punitive implications for that vessel under other RFMOs. Besides this, in some cases, actions have been undertaken against, not the vessel that committed IUU fishing, *but against the entire fleet of the vessel's flag State*, ibid.

780 UNFSA art 17(4).

781 Vezzani (n 55) 233. See for instance joint publication of tuna RFMOs in 'IUU Vessel Lists' (*Tuna-org*) <www.tuna-org.org>.

782 UNFSA art 17(4). Article 20, regarding international cooperation in enforcement, is relevant in this respect. Among others, Article 20 UNFSA establishes that "States shall assist each other in identifying vessels reported to have engaged in activities undermining the effectiveness of subregional, regional or global conservation and management measures.", ibid 20(4). It also provides that "States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other States evidence relating to alleged violations of such measures", ibid 20(5).

783 Agreement on port State measures to prevent, deter and eliminate illegal, unreported and unregulated fishing art 2.

784 ibid 1(e).

785 ibid para 11 of the preamble.

786 ibid para 10 of the preamble.

787 UNFSA Review Conference, Report of the resumed Review Conference on 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 2023 [A/CONF.210/2023/6] para 32.

788 Recently, "[m]any delegations emphasized the fundamental role of enforcement to support monitoring, control and surveillance in efforts to combat illegal, unreported and *unregulated fishing*.", ibid 115 emphasis added.

to provide norms that substantially contribute to meeting the objectives of the UNFSA. Although this issue is not explored further, raising it serves to show how an 'implementing' agreement and the regime developed strengthening it, can propitiate the birth of a 'problem' and thus a normative impact on the freedoms on the high seas, giving place to contrast with the freedom to fish as dealt with in the LOSC.[789] As some acknowledge, the UNFSA propitiates limitations on high-seas fishing that are more incisive and comprehensive than under other normative contexts.[790] These limitations relate to the central role of RFMOs in the success of that treaty.[791]

In sum, considering the issues raised above, it seems difficult to argue that the UNFSA implements the LOSC, and more reasonable to sustain it concerns a paradigm shift in fisheries law and consists of an instrument not *under the LOSC* but at the same rank. In this connection, if the terms 'planned activity' or 'category of activity' included under Part IV BBNJ Agreement are provided with a meaning similar to that of 'unregulated' fishing, then parallelisms with the LOSC would become evident. Drawing on Molenaar's words, if the term 'planned activity' were provided with a content similar to that of 'unregulated' fishing, it would be dealt with utilizing a two-tier approach: the first tier would be based on the need for cooperation between all states involved in the conservation of areas requiring protection and the second tier would consists of specific measures to deter activities not falling within the notion of 'planned activity' *by forcing non-co-operating non-members to co-operate with regional IFBs, or stop exercising a freedom such as navigation altogether*.[792] Part III appears to set the basis for such *systemic* development. Article 25(5) states that "Parties shall encourage those States that are entitled to become Parties to this Agreement, in particular those whose activities, vessels or nationals operate in an area that is the subject of an established area-based management tool, including a marine protected area, to adopt measures supporting the decisions and recommendations of the [COP] on [ABMTs, including MPAs], established under this Part."

6.3. Impact on the Freedom of Navigation of Fishing Vessels and Potential Consequences for Commercial Navigation

In light of all this, it has been argued that the BBNJ Agreement should be improved, mirroring the enforcement mechanism of the UNFSA.[793] It has been sustained that the UNFSA "featured

[789] In discussing the three conducts encompassed in IUU fishing, it has been sustained that "[w]hile all of these practices can lead to stock depletion and its associated effects, it is somewhat more challenging to address the *problem* of unregulated fishing, as in many cases this arises *because there are no applicable management measures in place*.", Auld and others (n 758) 2 emphasis added.
[790] Vezzani (n 55) 174.
[791] Churchill, Lowe and Sander (n 521) 565.
[792] Molenaar, 'Participation, Allocation and Unregulated Fishing' (n 475) 473–474.
[793] Efthymios Papastavridis, 'Implementation, Enforcement and Dispute Settlement of the BBNJ', *Analysing the Biodiversity Beyond National Jurisdiction Treaty* (British Institute of International and Comparative Law 2023) 7 <https://www.biicl.org/publications/analysing-the-biodiversity-beyond-national-jurisdiction-treaty>.

robust enforcement mechanisms including a provision for flag state enforcement, flag state inspection between state parties, and port state enforcement. All these are missing both in terms of *marine protected areas* and in the general implementation elements of the BBNJ treaty."[794] As a contribution, it has been stated that "[t]o address this, the [BBNJ COP] could consider adopting additional measures and surveillance tools to enhance the agreement's implementation."[795] If the BBNJ Agreement were to be developed in the sense suggested by the literature here quoted, observations made above to norms in the UNFSA and considerations about related instruments may eventually be extrapolated to the regime adopted for the conservation and sustainable use of marine biodiversity and, particularly, to the implementation of the MPAs and ABMTs at the regional level. Under the BBNJ Agreement, new duties for the flag State party, its potential wider tolerance towards inspection and boarding, and the possible increase of competencies of the port State might all affect navigation and significantly condition the freedom to exercise it. Whether this new legal framework would also find its legal challenges in the essential aspects that have traditionally characterized the inherent structure of international law remains up for discussion.[796]

The UNFSA has had effects on the freedom of navigation, besides those evident restrictions on the freedom to fish. Article 18(1) UNFSA, concerning the duties of the flag State, establishes that it "shall take such measures as may be necessary to ensure that vessels flying its flag comply with subregional and regional conservation and management measures and that such vessels do not engage in any activity which undermines the effectiveness of such measures." It is worth recalling that the freedom to fish is of the utmost importance for States in general and fishing States in particular. Guilfoyle highlights "[t]he most fundamental high seas freedom after navigation is the freedom to fish."[797] For States, the importance of the high seas freedoms, including fishing, results from the fact that high seas freedoms, including fishing, reflect an inherent principle of international law such as the (Westphalian) equality of States.[798] Consequently, under (current) international law, the degree to which high seas freedoms are affected by a norm might also impact legal equality. It is well established that, in the UNFSA context, a right such as the freedom to fish on the high seas, qualified and adapted to achieve the overarching objectives of the treaty, is "significantly different"[799] from the freedom to fish as codified in Article 87(1.e) LOSC and as found in Articles 116 to 119 LOSC.[800] This impact is consolidated, "most notably in regard to access to high seas stocks and enforcement jurisdiction on the high seas."[801] In light of this, some directly stress that the UNFSA *fully derogates* the freedom to fish (straddling and highly migratory stocks) in the high seas.[802]

Suggestions to use the mechanisms in UNFSA as a model endorse the view that the UNFSA and the BBNJ Agreement may have great complementarity and develop

---

794 ibid (emphasis added).
795 ibid emphasis added.
796 Rayfuse (n 59) 444.
797 Guilfoyle (n 91) 682.
798 Rayfuse (n 59) 444.
799 Boyle (n 77) 47.
800 ibid.
801 ibid.
802 Scovazzi (n 651) 141.

synergically.[803] An overview of some of these enforcement mechanisms becomes relevant considering, first, how these have affected navigation under this specific treaty context. Secondly, assessing this is important, taking into account the reflections that emerge from the realization that a treaty such as the BBNJ Agreement may ultimately accommodate a similar regime for activities other than fishing, including shipping, once these meet the requirements to be considered 'planned activity' under the terms of Part IV.[804] The implementation of Part III and Part IV BBNJ Agreement may depend on the bodies devoted to the forthcoming management of biodiversity.[805]

The freedom to fish in the high seas correlates with the freedom to navigate. In this context, it is worth recalling that freedom of navigation has never been an *absolute* freedom."[806] Indeed, the right of free navigation, and unimpeded passage, is subject to a series of international norms that affect and condition its exercise.[807] Fishing vessels need to navigate to accomplish their tasks and, in so doing, they have to respect international rules to which they are bound. When being analyzed, the principle of freedom of navigation should be assessed considering the corollary principle of exclusive jurisdiction of the flag State of which the vessel is a national.[808] The principle of exclusive jurisdiction of the flag state is an integral part of the freedom of navigation.[809] Exclusivity in jurisdiction results in that "no State is entitled to exercise its jurisdiction over foreign ships and crews on the high seas."[810] Given their close relationship, the infringement of the principle may be considered a violation of the freedom of navigation.[811] Thus, a balance between the principle and this freedom is critical for the coexistence of vessels flying the flags of different States in the oceans. Against this background, some comments can be made about those flag States and port States connected with those fishing activities falling within RFMO competencies. This may shed light on how the functions of the flag State and the port State have been affected by the UNFSA and, among other many instruments, the PSMA.

The jurisdiction of a flag State over its vessels constitutes the main way in which order on the high seas is maintained.[812] To date, the flag State remains the main player in implementing and enforcing international rules and standards for the oceans.[813] At the same

[803] Papastavridis (n 793) 7.
[804] ibid.
[805] BBNJ Agreement art 29(4).
[806] Doris König, 'Flag of Ships', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2009) para 58 <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024.
[807] Guilfoyle (n 91) 681–682. "In order to ensure that the freedom of navigation is exercised in a reasonable way, each vessel must be subject to the jurisdiction of a State that regulates and controls its activities. Therefore, each vessel has to possess the nationality of a State.", König (n 806) para 1.
[808] "The idea of vessels as having nationality and being subject to the law of a flag State was consolidated only in the mid-to-late in the eighteenth century." Douglas Guilfoyle, 'Article 91. Nationality of Ships' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 695."Before that time, merchant vessels were regarded as belonging to the subjects of a State, but not to the State itself.", König (n 806) para 1.
[809] König (n 806) para 58.
[810] ibid 1.
[811] ibid 58.
[812] Guilfoyle (n 808) 693.
[813] König (n 806) para 60.

time, by flying its flag, the vessel lets others on the high seas know the State it is protected by.[814] Given the circumstances, the flag State is entitled to assume diplomatic protection over its vessels and to come to their defense.[815] However, a flag State can consent to limit its prescriptive or enforcement jurisdiction over the vessel by submitting it to others' jurisdiction and, subsequently, restrict its freedom to navigate.[816] Otherwise, without consent, the actions of other States may have a substantial impact on the flag State's rights and, consequently, on freedom of navigation.[817] In this connection, inspections on the high seas are a relevant issue.[818] The inspection of a vessel beyond national jurisdiction may be acknowledged as an *exception* to the basic principle of the exclusive jurisdiction of States in the high seas on vessels (including fishing vessels) flying its flag.[819] According to this exception to the principle, a State confers competencies to another subject to undertake measures for ensuring compliance.[820]

6.3.1. Enforcement under the UNFSA

Some brief considerations about the enforcement under the UNFSA. Enforcement mechanisms providing the term 'planned activities' with the power of the term 'unregulated' and a similar effect may be an asset for constituting the BBNJ Agreement system. Under the UNFSA, Part VI UNFSA provides compliance and enforcement rules.[821] The flag State has the primary responsibility for ensuring compliance of fishing vessels flying its flag.[822] Article 19 UNFSA

[814] ibid 2.
[815] ibid 1.
[816] Under the LOSC, for instance, the flag State consents to limiting its jurisdiction within the EEZ of coastal States. "Foreign ships may be hindered by artificial islands or installations used by the coastal State to explore and exploit its natural resources, such as oil and gas or wind energy. The coastal State may establish safety zones around such installations, which have to be respected and complied with by all ships." ibid 43. See LOSC art 60(4-6).
[817] König (n 806) 44.
[818] During the 2023 UNFSA Review Conference, "[s]everal delegations highlighted the importance of implementing *high seas boarding and inspection schemes as valuable means of improving compliance* with conservation and management measures adopted by regional fisheries management organizations and arrangements. Delegations also stressed the need for increased efforts *by regional fisheries management organizations and arrangements* to adopt high seas boarding and inspection schemes, in accordance with the provisions of the Agreement", UNFSA Review Conference 2023 Report of the resumed UNFSA Review Conference (n 787) para 115 emphasis added.
[819] Tanaka (n 447) 342.
[820] Inspections "should be undertaken with caution, since they may run the risk of creating disputes relating to participation, cost recovery, objectivity of inspections, interference with fishing activity, economic loss, and the evidentiary value of surveillance information as well as inspection reports.", ibid. Some scholars highlight that the principle of exclusive jurisdiction of the flag State "is inherent to state sovereignty and, therefore, derogations from it should be interpreted restrictively.", Mansi (n 724) 216; see also Giuliana Lampo, 'Jurisdiction Beyond Territorial Sovereignty: Defining the Scope of Exclusive Flag-State Jurisdiction Under Art. 92 UNCLOS' (2022) 82 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law 195, 196.
[821] UNFSA arts 19–23.
[822] ibid 19.

establishes *inter alia* that "[a] State shall ensure compliance by vessels flying its flag with subregional and regional conservation and management measures for straddling fish stocks and highly migratory fish stocks." Additionally, the UNFSA also gives States parties a meaningful responsibility in enforcing norms under it and RFMO measures. Under Article 21, in any high seas area covered by an RFMO (or an RFMA), "a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, *whether or not such State Party is also a member of the organization or a participant in the arrangement*, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement."[823] Article 21(2) UNFSA provides RFMOs with normative-making competencies and, in doing so, it indirectly confers powers to RFMO members. RFMO members, including those not parties to the UNFSA, are given the right to establish the procedures for boarding and inspection.[824] Boarding and inspection are undertaken with governmental vessels.[825] As said above, the UNFSA never requires RFMO members to become parties to it. In this sense, the functional-regional scheme provided by the UNFSA, to which RFMOs are pillars, provides the legal basis upon which the exercise of navigation necessary for harvesting fish stocks under the treaty is qualified in accordance with a treaty context different from the LOSC.

To further illustrate how RFMOs are strengthened by the UNFSA, it is noteworthy that Article 21(16) UNFSA establishes that actions taken by States other than the flag State shall be proportionate to the *seriousness* of the violation of RFMO measures.[826] Interestingly, the provision empowers RFMOs to typify what a "serious violation" means and amplify the list of meanings included in the treaty.[827] The situation of those States that consented to the UNFSA and, later, found out that they could not be admitted to an RFMO is particularly interesting for understanding that then UNFSA relevant norms contain elements for the potential dilution of the principle of exclusive jurisdiction of the flag State and, in this reasoning, for a substantial affection of the freedom to navigate. Arguably, the conferral of powers made by that group of States, through the UNFSA, to RFMOs is strikingly vast and widely uncertain.[828] In such a case, the extent to which their before-exclusive jurisdiction as flag States and their freedom to navigate on the high seas can be affected would be ultimately determined in the context of an RFMO, in a decision-making process that is alien to them.[829] During the works preceding the

---

[823] ibid 21(1) (emphasis added).
[824] ibid 21(2); see also ibid 21(6).
[825] UNFSA art 21(4).
[826] ibid 21(16).
[827] ibid 21(11.i). Among other aspects, it is worth noting that, following board and inspection, where a *serious violation* presumably occurs, and the flag State of the vessel has either failed to respond or failed to take action in accordance with Article 21(6) and (7), inspectors of the inspecting State may remain on board and secure evidence and may require the master to assist in further investigation *including, where appropriate, by bringing the vessel without delay to* the nearest appropriate port, or to *such other port as may be specified in procedures established by RFMAs and RFMOs*, ibid 21(8).
[828] UNFSA art 21(2). See Vezzani (n 55) 234–237.
[829] Churchill, Lowe and Sander (n 521) 569; UNFSA art 21(1)(2).

BBNJ Agreement, some States marked that RFMOs have the mandate to establish fishing-related measures as binding on RFMO non-members that are however party to the UNFSA.[830]

Relating to this issue, the inspection of vessels that navigate flying the flag of non-parties to the UNFSA emerges as a rather delicate concern and "needs careful consideration with regard to its legitimacy."[831] As regards this, it is well known that the inclusion of 'unregulated' fishing "in the IUU definition has led to confusion and, in some cases, the demonisation of those who are unregulated through no fault of their own".[832] The undertaking of inspection procedures may depart from an alleged presumption of RFMO measures being violated. Tanaka has noted that the *presumption* of undermining measures by RFMOs is key to this subject matter.[833] In this respect, it has been pointed out that "the presumption of undermining the effectiveness in the regulatory areas shifts the burden of proving innocence to vessels of non-Contracting Parties. Nonetheless, there may be scope to consider the question of whether the reversal of the burden of proof is not contrary to the principle of freedom of fishing."[834] Certainly this presumption "may entail the risk of de facto applying these measures to non-Contracting Party vessels on the high seas without their explicit consent."[835] An inspection of this kind may signify a breach of the principle of exclusive jurisdiction and the freedom of navigation if the vessel flies the flag of an RFMO non-member and UNFSA non-party. Such a situation might be the consequence of how 'unregulated' fishing is defined by an RFMO in a given circumstance. The RFMO non-member and UNFSA non-party that objects to the inspection procedures would presumably recall paragraphs 3(3) and 3(4) IPAO and their bond. If a fishing vessel is in a certain area exercising the freedom to fish and navigate recognized in the LOSC, in conformity with paragraph 3(4) IPAO, then an inspection procedure and the presumption underlying it would have no international legal basis. The combined reading of paragraphs 3(3) and 3(4) IPAO allows arguing that "*in many cases* [unregulated fishing] arises because there are no applicable management measures in place."[836] By contrast, the non-consideration of paragraph 3(4) IPAO might derive in (mistakenly) asserting that in *all cases* 'unregulated' fishing arises because there are no applicable management measures in place. Highlighting the importance of paragraph 3(4) IPAO is crucial to unveil the possible weakness of the presumption here discussed in a certain scenario.[837]

Therefore, because they might affect the exclusive jurisdiction and free navigation, any initiative to conduct inspection procedures of vessels flying the flag of UNFSA non-parties would always require previous and cautious consideration of the possible legal outcome. The *pacta tertiis* maxim codified in Article 34 VCLT, constitutes a strong limit impeding requiring UNFSA non-parties to comply with RFMO measures and a legal boundary to RFMOs

---

830 See stance of Island in IISD, 'Summary of the Eighth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 16-19 June 2014' (n 34) 4.

831 Tanaka (n 447) 343. Tanaka notes that "at-sea inspection of vessels of non-Contracting Parties is undertaken by some RFMOs", ibid. Following this, he assesses relevant norms of the NEAFC and NAFO. See also Molenaar, 'Regional Fisheries Management Organizations' (n 466) 101.

832 Auld and others (n 758) 2.

833 Tanaka (n 447) 343.

834 ibid.

835 ibid 344.

836 Auld and others (n 758) 2 emphasis added.

837 Tanaka (n 447) 343.

exercising their competencies.[838] During the works preceding the adoption of the BBNJ Agreement, it was made clear that RFMO measures are not binding on non-members of such bodies or non-parties to the UNFSA, presumably alluding to the overarching *pacta tertiis* maxim and the freestanding status of the UNFSA with respect to the LOSC.[839] Of course, this all represents a significant difficulty in achieving conservation and sustainability in fishing straddling and highly migratory fish stocks in terms of the UNFSA. Indeed, this has taken some to acknowledge that the full implementation of RFMO law, and possibly that of the UNFSA, faces *structural challenges* resulting from the inherent structure of international law itself.[840] This observation may signify that the BBNJ Agreement and later developments may have to face similar challenges.[841]

6.3.2. The PSMA

Port State issues are another subject that deserves to be mentioned. Comments about the PSMA made here are aimed at briefly showing that navigation can be affected by treaties that extend the reach of the powers of regional bodies such as RFMOs and make the point that similar developments may further challenge the freedom of navigation. In the context of the BBNJ Agreement, collaboration and contributions of the IMO may consist of adopting an instrument regarding the port State to combat those activities that are considered non-cooperative with the system of area-based management. The formal bindingness or non-bindingness characterizing such an instrument may not be decisive considering its procedural mechanism for *hardening* law.

Besides the major responsibility of the flag State concerning vessels flying its flag, the port State (together with the coastal State) has been traditionally granted control to ensure that the flag State complies with its obligations, always by way of treaty legal basis.[842] The PSMA

[838] "The most basic challenge to RFMOs arises as a result of the application of the *pacta tertiis* rule.", Rayfuse (n 59) 444.
[839] "[T]he capability of RFMOs to guide the international community [was questioned], noting that their decisions are not binding on non-members.", IISD, 'WG 2nd Meeting' (n 40) 4. As to the guide the RFMO model represents for the international community, its popularity and effectiveness, meaning its positive impact on the conservation of marine living resources, does not seem certain and is sometimes questioned. Rayfuse, for instance, recognizes that "despite the establishment of an increasing number of RFMOs, the status of global marine capture fish stocks has declined markedly.", Rayfuse (n 59) 440. With a critical view, this scholar adds that "[t]his continuing decline in the status of high seas fisheries resources rather begs the question as to the efficacy of the measures adopted by RFMOs to ensure the long-term conservation and sustainable use of the fish stocks under their management. This in turns raises the question as to the legitimacy of RFMOs as stewards for the international community of the world's high seas fisheries resources.", ibid. Accordingly, others argue that RFMOs give greater importance to the distribution and allocation of resources than to conservation objectives, pointing out that allocation involves the appropriation of resources and the creation of future rights, see discussion in Serdy (n 767) 279. Illustrating this, Serdy notes that allocative conflicts in these regional institutions can hamper overall conservation efforts, ibid.
[840] Rayfuse (n 59) 444.
[841] ibid.
[842] König (n 806) para 59.

has complemented the UNFSA and endorsed RFMOs' work. Under the PSMA, the port State *integrates* its measures with those of RFMOs.[843]

According to *The State of World Fisheries and Aquaculture* (SOFIA) 2024 published by the FAO "[b]y establishing the framework for port states to request specific information from foreign-flagged vessels seeking entry into ports under their jurisdiction, the PSMA empowers port states to check compliance of these vessels with applicable conservation and management measures (CMMs) and *deny entry or use of port services if there is clear evidence of IUU fishing or related activities*."[844] According to SOFIA, "[i]n such a way, it promotes adherence and efforts to implement the United Nations Fish Stocks Agreement (UNFSA), the FAO Compliance Agreement, regional CMMs, voluntary fisheries instruments including the [FAO Code of Conduct] and related instruments. Moreover, through its requirements on information exchange between port state, flag state, coastal state and regional fisheries management organizations, the PSMA facilitates transparency of the fisheries sector and strengthens cooperation, coordination and consultation of relevant international instruments, frameworks and bodies."[845]

Article 9 PSMA, on port entry, authorization, or denial, acknowledges the right of the port State to decide whether to authorize or deny the entry to a fishing vessel.[846] The denial of entry or use of port services based on evidence of IUU fishing (which includes 'unregulated fishing') or related activities is an issue that significantly conditions the navigation of those vessels that are considered engaged in such conduct. A port State party shall deny the vessel entry into its port if there is 'sufficient proof' determining that the vessel has engaged in IUU fishing or fishing-related activities in support of such fishing, in particular, the inclusion of a vessel in an IUU list "adopted by a relevant regional fisheries management organization in accordance with the rules and procedures of such organization"[847]. The *blacklisting* of the 'IUU vessel', addressed above, is considered 'sufficient proof' by the PSMA. This indicates that, though the PSMA provides the port State party with an additional enforcement competency, it does not acknowledge the latter's participation in deciding whether a vessel is engaged in IUU fishing or in judging whether the proof received conforms with international law.[848] The relevant decision in this regard, preceding the denial of entry into port, remains a subject matter falling within the context of RFMOs and dependent on what their respective members consider. The PSMA, in this sense, amplifies the reach of RFMO powers, giving the port State parties a key role in applying RFMO measures and subsequently tackling IUU fishing. The port State, in this treaty context, turns into a critical figure for executing the fisheries policy of RFMOs.

The PSMA complements the UNFSA, which establishes that "[a] port State has the right and the duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures. When taking such measures, a port State shall not discriminate in form or fact against the

[843] PSMA art 5(b).
[844] *The State of World Fisheries and Aquaculture 2024 – Blue Transformation in Action* (FAO 2024) 146 emphasis added.
[845] ibid.
[846] PSMA art 9(2).
[847] ibid 9(4).
[848] ibid 9.

vessels of any State."[849] In the same manner, an instrument adopted by the IMO by way of cooperation with the BBNJ Agreement may complement the BBNJ Agreement and even complement the PSMA.

7. Remarks

The chapter has focused on some of the main characteristics of the UNFSA and schematized them by highlighting, first, its freestanding status with respect to the LOSC, clarified by the influence of contemporary international environmental law and the relative relevance of the LOSC provisions in such treaty context. Second, the chapter has focused on how dependent the UNFSA is on regional bodies and instruments, pointing out how international cooperation is particularly defined in this treaty and the core role that RFMOs play in such context. Third, attention has been devoted to the decentralized normative-making technique, which concerns instruments, and the respective treaty interpretation oriented towards the strengthening of RFMOs, highlighting the importance of 'unregulated' fishing in the functioning of the UNFSA framework. All of this has been proven to affect the freedom of navigation of fishing vessels. In sum, this constitutes a prelude to assessing the BBNJ Agreement, since "[i]t is generally accepted that a BBNJ Convention *will* be an implementing agreement of the [LOSC] *in the same legal manner* as the [UNFSA]."[850] The fact that the UNFSA and instruments following and complementing it are seen as a model to be followed suggests that a stronger affectation of the freedom of navigation will be materializing.

The overview of the UNFSA in this chapter shows that the BBNJ Agreement may be deemed an evolution and further expansion of the former legal architecture, created almost 30 years ago and reflected in it. Notwithstanding the differences in scope, the UNFSA can be considered thus as *the* model treaty that inspired the drafters of the BBNJ Agreement. Simultaneously, the light shed by the BBNJ Agreement might lead to reconsidering the nature of the UNFSA. This would require focusing only on these two instruments and, only for this purpose, isolating them from their surrounding normative universe. Indeed, these agreements assimilate and complement, suggesting a sort of *legal symbiosis*. The fact that both treaties allow for promoting international cooperation, having RFMOs a key 'stakeholders', appears to endorse this viewpoint. Lessons learned from the UNFSA suggest that the conferral of powers by State parties under the BBNJ Agreement allows the freedom of navigation to be derogated for pursuing the objectives of the treaty. In this respect, 'Measures' such as those falling within the Part III may found legal basis not founded in the presumptions that characterized the LOSC, most importantly the equality of all States.

Against this backdrop, it might be suggested that a tendency to move away from the original LOSC framework has unfolded in these last decades, not by utilizing amending

[849] UNFSA art 23(1) emphasis added.
[850] McDorman (n 624) 275 emphasis added.

procedures but through *normative shifts* toward a different international law for governing the oceans.[851] Indeed, this linear evolution, developed in parallel to the LOSC in force, seems to pursue the full implementation of a functional-regional approach while leaving behind the traditional functional-zonal approach. Therefore, in light of the linear evolution just drawn, arguing that the UNFSA or the BBNJ Agreement *amend*, *modify*, *clarify*, or *implement* (etc.) the LOSC would not appear accurate in light of the striking international legal shift the two most recent treaties embody. The complementarity between the two treaties and, above all, the holistic approach to the ocean in their foundations may support the view that they are *international environmental law frameworks that deal with matters that historically belonged to the branch of international law of the sea*. On this basis, it may be presumed that, as time goes on, a new branch of international law for the oceans will gradually form and seek consolidation in the near future. The nuances included in this description try to contribute to the previous attempts in the literature about the UNFSA.[852]

The BBNJ Agreement shares the characteristics of the UNFSA here schematized. The freestanding status with respect to the LOSC was clarified in the previous chapter. The necessary dependence on regional bodies for its success will be discussed in depth later in this work. In this respect, the relevant IFBs with competencies to manage biodiversity, including through the implementation of MPAs and ABMTs, are likely to have a key role also in this treaty context. These IFBs conferred with the powers to implement Part III, and the term 'planned activity' profusely used in Part IV BBNJ Agreement are likely to contribute to the strengthening of the BBNJ Agreement through a decentralized normative-making technique, similar to that used in the UNFSA context. All this combined endorses the presumption that the freedom of navigation is going to be affected more broadly, through the implementation of a new legal framework for *inter alia* shipping. Considerations made in the first chapter have already shown that there are grounds to sustain that the BBNJ Agreement could be regarded as a freestanding agreement constituent of an international environmental law framework that, albeit dealing with aspects of the law of the sea, should be studied separately from the LOSC. Given this view has been further confirmed here, Article 87 (1.a) LOSC, and simultaneously, Article 7(c) BBNJ Agreement might be seen as parallel provisions related to the customary freedom of navigation within separate conventional contexts that pursue different objectives.

[851] "Articles 312 to 316 of UNCLOS set out mechanisms for amending UNCLOS, but they have never been used", Whomersley (n 46) 72.
[852] Boyle (n 77) 58; Proelss (n 78) 190.

CHAPTER 4

IMPLEMENTATION OF THE BBNJ AGREEMENT

1. Introduction

The objective of this chapter is to address substantive elements of the main research question about how the BBNJ Agreement might affect the regulation of commercial navigation, together with the freedom of navigation of State parties in the high seas. In so doing, the chapter assesses relevant aspects of the relationship between Part III on marine protected areas and other area-based management tools and Part IV on environmental impact assessments. The arguments in this chapter unfold above the idea that the framework for area-based management embodied in Part III BBNJ Agreement represents a shift away from the law of the sea and the LOSC. At the same time, the chapter builds upon the existing awareness about the solidification of relevant international instruments and frameworks and relevant global, regional, subregional, and sectoral bodies allowed by Part III and, in this view, sustains that the 'stakeholders' would play a key role as to the authorization of activities such as navigation in areas beyond national jurisdiction. Special attention is devoted to the role of the RFMOs and the IMO.

Endorsing the view that the BBNJ Agreement reflects the main characteristics of the UNFSA and is arguably going to have the same status with respect to the LOSC, the chapter builds upon the scheme utilized to study the UNFSA in the previous chapter. The chapter starts by highlighting the legal presumptions at the foundations of the treaty. Next, it examines the freestanding status of the BBNJ Agreement to the LOSC, appraising Part III as an instrumental sign of this feature; the international cooperation and the dependence on external regional bodies and instruments; and, lastly, the decentralization of normative making. The chapter concludes with some insights into the possible consequences of Part III on commercial navigation on the high seas.

2. A Normative Shift Through Presumptions: The Framework for Area-Based Management

This chapter considers the freestanding status of the BBNJ Agreement with respect to the LOSC, how it defines international cooperation, and the subsequent dependence of Part III on relevant legal instruments and frameworks and relevant global, regional, subregional, and sectoral bodies ('relevant IFBs'), especially regional or sectoral bodies like RFMOs and IMO respectively, and, additionally, the decentralized normative technique necessary for the development of the area-based management framework. In its assessment, the chapter attempts to explain how provisions in Part III and Part IV interact and, lastly, how that might eventually impact navigation on the high seas. Part III entails the development of law for areas beyond national jurisdiction (ABNJ) through syncretism and synergy or, more accurately, by means of fragmentation, as positively conceived by the BBNJ Agreement, and ultimate harmonization, within the area-based management tools ('ABMTs'). Notwithstanding how the subsequent universal regime would unfold, parallelisms with the LOSC may arguably persist.

To approach the Part III BBNJ Agreement, it is necessary to highlight that the strength of the architecture it proposes relies upon the presumption at its foundations and the subsequent normative verticality created by the treaty for ABNJ. Part III aspires to adapt external existing (and future) institutional and legal planes to its scope in a way that allows the achievement of its objectives. The legal dimension arguably defines the weight of the institutional dimension in Part III and other parts of the BBNJ Agreement, and *vice versa*. This relates to Part IV, which concerns EIAs regulated by it and, importantly, external EIAs of regional and sectoral nature. Clarifications should be made in this regard.

An overall view of the treaty allows sustaining that the development of Part III would depend mainly on two groups: the 'stakeholders' and State parties acting through the COP. Part III is meant to balance the interest of the former with that of the COP, and it does so by following the teleological criteria that it and the BBNJ Agreement fix through the setting up of overarching objectives. The entrance of 'stakeholders' in the high seas decision-making scenario allows splitting the legal reasoning needed to follow the BBNJ Agreement from the one usually requested by the LOSC, which gives the main role to States and is based on a functional-zonal approach. This and the subsequent appraisal of Part III contribute to the realization that the BBNJ Agreement has a freestanding status with respect to the LOSC. In more detail, the criteria to understand and rank the undetermined number of uncertain actors falling within the 'stakeholders' label and the COP are given by the presumptions and subsequent legal verticality that Part III constitutes. The 'relevant IFBs' are subsumed in the 'stakeholders' category and, because of how the treaty regards them, are meant to have a protagonist role within that particular group.

International cooperation under the BBNJ Agreement would be instrumental in reshaping high seas law, including the terms under which navigation could be regulated. Interestingly, depending on who undertakes them, Part III gives a different treatment to conducts that, practically, might have similar transformative effects on the material scope or *mandate* of existing and future 'relevant IFBs'. Part III, on the one hand, obligates the COP to "respect the competences of, and not undermine" 'relevant IFBs'.[853] On the other hand, Part III (as, in turn, Part IV especially does) obligates State parties to engage in goal-oriented cooperation to support the COP's measures outside the BBNJ Agreement by promoting the adoption of measures within 'relevant IFBs' after the former.[854] Always based on the common denominator of 'marine biological diversity', international cooperation of State parties through Part III would appear to have been conceived to have a more extensive reach and impact than cooperation of State parties through the COP. Additionally, international cooperation of State parties through Part IV seems even less limited and more encouraged than the one mandated by the more general terms in Part III. Transformative effects within 'relevant IFBs' external to the treaty might become feasible by way of international cooperation undertaken by State parties to the BBNJ Agreement that, at the same time, can act from within those IFBs.[855] International cooperation under Part III, followed by Part IV, opens a whole new chapter of legal fragmentation in the high seas international law while submitting the parallel external solidification of the power of certain IFBs and cooperative 'stakeholders' as the solution to overcome that problem.[856]

The dependence on external institutions and the solidification of their mandates above the rank assigned to an 'international arrangement' such as the BBNJ COP, combined with a subsequent decentralization in normative making, might lead to worldwide regional centralization of law-making power outside the COP. This scheme may be appealing and convenient to States and regional economic integration organizations with a great capacity for participation and agenda-setting power in international fora.[857] In this view, the BBNJ

[853] BBNJ Agreement art 22(2).
[854] ibid 25(4), 29(1).
[855] ibid 8, 25(4), 29(1).
[856] On the fragmentation and solidification of the mandates of IFBs allowed by Part III, Klerk (n 226) 12–15.
[857] "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.*", ibid 11 note 63 (emphasis added).

Agreement may redefine the current *status quo* of States and their possibilities to *inter alia* exercise navigation based on the equality that the LOSC has historically enshrined.[858]

The treaty already gives a glimpse into which IFBs would be considered 'relevant' to its development. The architecture of the IFBs explicitly mentioned in the text of the treaty, or the *status quo* of States within them, is likely to be preserved by Part III and even strengthened. IFBs preserved in this sense would comprise the International Seabed Authority (ISA) and the IMO, as well as the Food and Agriculture Organization of the United Nations (FAO) and the Intergovernmental Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC).[859] More comprehensively, the treaty makes explicit reference to 'regional seas organizations' and 'regional fisheries management organizations' (RFMOs) in its Annex II.[860] Notwithstanding that other IFBs may be deemed relevant to the BBNJ Agreement after it commences functioning, the explicit reference to the ones listed here presumes that they represent 'relevant IFBs' to Part III. As indicated by Part III, 'Measures such as' those adopted and implemented by them, as well as those of the COP, would be of the utmost relevance to achieve the objectives.[861] To a certain extent, this chapter assesses the role external IFBs like RFMOs and IMO might have in light of Part III and, subsequently, their role under Part IV. RFMOs and the IMO have been recognized to be among the IFBs considered to hold "the only tools available for regulating access to areas on the high seas"[862].

The institutional and normative-making decentralization technique promoted by Part III does not seem incidental but, more convincingly, systemic. This confirms, first, a clear dependence of the BBNJ Agreement on external 'relevant' IFBs, which, together with other 'stakeholders' and the institutions that the treaty itself constitutes, are encompassed within the flexible label "Institutional Arrangements" with which Part VI is entitled. Secondly, the resulting decentralized normative-making technique employed by Part III would be key to edifying that balance. In other words, the rank under which 'Measures' are accommodated by Part III (legal dimension) is likely to make *progressively* clearer that of the COP with respect to the 'relevant IFBs' (institutional dimension). Despite the treaty not being in force, works undertaken before the adoption of the treaty may give some input and allow visualizing possible future developments.[863]

[858] It should not go unnoticed that "law of the sea remains a branch solidly attached to the trunk of general international law.", Treves (n 663) para 72.
[859] BBNJ Agreement art 51(4); Klerk (n 226) 12.
[860] BBNJ Agreement para (d.ix).
[861] ibid 26(2). "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.", Klerk (n 226) 11 note 63.
[862] Roberts (n 416) 236.
[863] See, for example, 'Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction' (n 28).

3. Understanding the Freestanding Status of the BBNJ Agreement with Respect to the LOSC

Part III BBNJ Agreement arguably constitutes the core of the BBNJ Agreement and, subsequently, illustrates how different and autonomous this treaty is from the LOSC. Part III BBNJ Agreement and the UNFSA arguably strive to have the same participation and rank as the LOSC and seek to obtain a status similar to the oldest treaty for the overall ruling of fishing, navigation, and other activities happening in the oceans.[864] A first indication of the treaty's freestanding status is its openness to the participation of States that have remained non-parties to the LOSC.[865] More importantly, the fact that 'biodiversity' is distinctive of the UNFSA and at the core of the BBNJ Agreement does not represent a strong argument to assert that it is a "subject matter"[866] falling under the scope of the LOSC.[867] The common features and expected complementarity between the UNFSA and the BBNJ Agreement, particularly Part III, make it possible to argue that they could be envisaged as paving the way to a new legal field that deals with activities that take place in the ocean. This would be achievable by using an approach different from the functional-zonal approach, as traditionally used in the law of the sea.[868]

The influence of contemporary international environmental law turns out to be a key factor in this regard. The subtle transition to this *new* law, based on a functional-*regional* approach, relies on the format chosen. Indeed, the format allows the progressive selective

---

[864] Chapter 2.

[865] BBNJ Agreement arts 60, 65 and 66.

[866] 'VCLT' (n 322) art 30(1).

[867] See Chapters 1 and 2. The observation made above is notwithstanding the occasional resort to a systemic or evolutive interpretation of the LOSC in subsidiary means for the determination of rules of law, like literature and jurisprudence. Though efforts to keep the LOSC updated may be laudable, interpretations of this kind might sometimes devote great attention to particular provisions and omit acknowledging the LOSC *as a whole* or *as it is* and subjectively focus on what it *ought to be*. In those views the limits imposed by conflict clauses like those embodied in Article 197, 237, or 311 LOSC might not be given full weight. The wording in the latter provisions appear to relate to the views of representatives after the Third United Nations Conference on the Law of the Sea (UNCLOS III) and the willingness to guard the legal scheme and content of the LOSC in conjunction with the balance of interests underlying it.

According to their mindset, it is impossible for States to pick what they like and disregard what they do not like. This aligns with the standpoint that the provisions of the LOSC are closely interrelated and form an integral package and that compromises forming an integral whole explain why the treaty does not provide for reservations. See assessment of comments made by Ambassador Tommy Koh of Singapore, the President of UNCLOS III, referring to the statements made by states at the signature session in Montego Bay in Caminos and Molitor (n 621) 886. However, it seems sensible to argue that literature and jurisprudence following systemic or evolutive interpretation of the LOSC are most likely to be deemed authoritative contributions in a possible future, when guiding their interpretation and implementation under the context of the BBNJ Agreement. In this other treaty context, the absence of conflict clauses allows to practically fully unpack the LOSC, including Part VII, and adapt the rights and obligations to States in ABNJ. See Conclusions.

[868] The zonal approach and its functionalization have been fundamental to the LOSC. It has been recalled that "[t]he most important task States have to undertake on the basis of the UN Convention on the Law of the Sea is to complete the process of delimitation of maritime areas that is necessary to make the 'zonal approach' of the Convention functional and, in general, to further the good governance of the seas and oceans.", Treves (n 663) art 83.

importation of LOSC provisions relevant through 'Relevant IFB Measures' and later proposals to, subsequently, develop the separate freestanding set of rules ultimately supported by the BBNJ Agreement. Aspects endorsing this assertion unfold below.

3.1. Influence of Contemporary International Environmental Law

The CBD and the BBNJ Agreement demonstrate a close relationship.[869] Drawing on Boyle's comments on the UNFSA quoted earlier, it may be asserted that, to a significant extent, the BBNJ Agreement gives effect to some of the general objectives of the CBD.[870] Notice however that, formally, it is introduced to States as an agreement implementing the LOSC, not an agreement implementing the CBD.[871] Echoing the view Boyle had about the UNFSA, the range of matters covered by the BBNJ Agreement "simply could not have been addressed with the same freedom or priority as an addendum to the CBD."[872]

The latter observation provides legal guidance for approaching the study of the BBNJ Agreement and its effects on the rights and obligations of States in ABNJ. In this connection, it not idle to note that Article 1 Convention on Biological Diversity (CBD) establishes that its objectives are "to be pursued in accordance with its relevant provisions". Instead, Article 2 BBNJ Agreement provides that the objectives are to be achieved "through effective implementation of the relevant provisions of the [LOSC]". While Article 2 BBNJ Agreement, concerning the selection and importation of LOSC provisions 'relevant' to the treaty, is assessed below, matters of international cooperation are addressed when dealing with the dependence on external IFBs.

---

[869] The linkage between the two treaties appears reflected in *inter alia* Target 14 Kunming-Montreal Global Biodiversity Framework, which among the tools and solutions, includes "[ensuring] the *full integration of biodiversity and its multiple values into policies, regulations, planning and development processes*, poverty eradication strategies, *strategic environmental assessments, environmental impact assessments* and, as appropriate, national accounting, *within and across all levels of government and across all sectors, in particular those with significant impacts on biodiversity, progressively aligning all relevant public and private activities*, and fiscal and financial flows with the goals and targets of this framework" (emphasis added), Kunming-Montreal Global Biodiversity Framework 2022 [CBD/COP/DEC/15/4] 11. The connection between the BBNJ Agreement and the CBD relates to the views exchanged by delegations immediately before labeling the treaty as an agreement under the LOSC. There were contrasting points of view about how to frame the legal instrument. It was argued that "the adoption of the legally binding agreement under UNCLOS is the only way to resolve issues of exploitation of BBNJ", See position of the African Group IISD, 'Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015' (n 17) 3. It was also argued that "a new instrument on BBNJ could be developed under the CBD", see position of Venezuela ibid. Russia "expressed skepticism over the need for a new agreement", ibid. As to the binding nature of the instrument, worth noting, China noted that "a new instrument on BBNJ should not include legally binding mechanisms or be too specific", ibid.

[870] Boyle (n 77) 58.

[871] ibid.

[872] ibid.

3.2. The Selection and Importation of the LOSC Provisions into a Different Scope

The freestanding status of the BBNJ Agreement with respect to the LOSC concerns the degree to which the LOSC, *as a whole*, might eventually be considered a 'relevant IFB' for the objectives fixed by Part III. The normative-making technique submitted by the BBNJ Agreement is mostly characterized by the inherent need to unpack and resort to certain provisions of the LOSC *sine die*, including its Part VII, where the freedom to navigate, and the principle of exclusive jurisdiction are enshrined.[873] Given the assessment made in previous chapters, the BBNJ Agreement and the LOSC can be posed at the same level and thus appreciated as two universal legal alternatives, with overlapping spatial scopes, through which States may decide to frame *inter alia* navigation and other activities on high seas. Addressing this issue is important considering that "[t]he various international navigation rights in the LOSC were *collectively* one of the most contentious issues negotiated at the Third United Nations Conference on the Law of the Sea, 1973–1982 (UNCLOS III)."[874]

Article 2 BBNJ Agreement may be one of the most referential provisions giving elements indicative of the fact that the LOSC would not be considered relevant as *a whole* or as *it is*. Plainly, it points out that the provisions of LOSC that the BBNJ Agreement means to ultimately implement is limited to those that are "relevant" to "ensure the conservation and sustainable use of marine biological diversity". With such formulation, it is arguable that, first, the LOSC will be relevant only when (any) certain provisions are identified through *ex-ante* selective legal reasoning and imported as legal material useful within the context of the BBNJ Agreement.[875] Second, for further clarification, the possibility that a provision of the LOSC is found 'relevant' in its context, including Part III, will be highly conditioned by the objective of the BBNJ Agreement, to which proceedings under Part III are subject. The phrase "the relevant provisions of the LOSC" appears leveled and complemented with the words after it (i.e., "and further international cooperation and coordination"), which qualify the former.[876] This wording should not be understated. International cooperation and coordination are fundamental to this goal-oriented global framework and, because of how the treaty defines them, would arguably nuance the relevance of the LOSC provisions if the latter are confronted with 'Relevant IFB Measures'. The objective of the treaty, worth recalling, regards a subject matter alien to the LOSC.[877] Therefore, it may be expected that the provisions of the LOSC remain important only to the extent that the general and particular objectives of the treaty deem necessary.

The aforementioned strengthens the view that the BBNJ Agreement and its Part III, whatever the appearances suggest, signify more than an *additional* normative proposal and,

[873] Caminos and Molitor (n 621) 886.
[874] Aldo Chircop, 'The International Maritime Organization', *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 418 (emphasis added).
[875] BBNJ Agreement art 2.
[876] ibid.
[877] Chapter 1

most likely, a departure from the legal scheme enshrined in LOSC, historically guarded by conflict clauses in provisions such as Article 197 or Article 237(2) in Part XII. This view contrasts with the fact that the BBNJ Agreement is often tagged as the 'third implementation agreement' of the LOSC.[878] Though undeniably fashionable, the expression 'implementation agreement' appears of poor or nonlegal weight when it comes to accurately describing the nature of the treaty. This may not be as striking as it appears, considering that, for some time now, it has been recognized that "[t]he term 'implementation agreement' is in fact misleading. In reality, they significantly modified the convention, at least one of them progressively." [879] In addition, presumably alluding to the BBNJ Agreement (not yet adopted at the time), Wolfrum commented, "[a] *further agreement of this type on biological resources beyond national jurisdiction is in preparation*."[880] This view is somehow reflected in, for instance, the provisions in Articles 25 and 53 in Parts III and VIII respectively, which deal with none other than "Implementation" and were drafted without including any reference to a prevalent status of the LOSC *as a whole* or indication to an unwavering crystal-clear submission to it.

Notwithstanding the reference to procedures on dispute settlement in Article 60(8), the BBNJ Agreement lacks a provision with the structure of Article 30(5) UNFSA, assessed previously in this work. However, keeping the structure of Article 30(5) UNFSA in mind, it may be argued that the applicable law of the BBNJ Agreement includes a pack or set of norms composed of the BBNJ Agreement and of any 'relevant IFB'. Like the UNFSA, the *corpus juris* the BBNJ Agreement aims to develop would be, first, not exhaustive, quite varied, and somehow undefined as regards its sources. Secondly, that *corpus juris* would not be restricted in any explicit way to the LOSC and the BBNJ Agreement by enclosing them into a single hermetic instrument. The normative-making technique on which the BBNJ Agreement relies builds upon normative materials or sources given by it, as 'ABMTs' and 'MPAs' of the COP exemplify, and others adopted and implemented outside of it, as the 'Relevant IFB Measures' that bodies like *inter alia* those already recognized by the treaty may elaborate. The early explicit recognition suggests that IMO and, generally, RFMOs are given a special status among the myriad of 'relevant' IFBs.[881] Following these considerations, IMO management and mitigation measures consistent with measures described in Article 29(4.b), including more stringent measures, would be among the 'Relevant IFB Measures' designed to rule navigation.[882]

---

[878] The European Union (EU) "emphasized that a new agreement *should become a third implementing agreement under UNCLOS*, expressing willingness to compromise on 'a new agreement under UNCLOS'", IISD, 'Summary of the Ninth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 20-23 January 2015' (n 17) 6 emphasis added. Before that, "The Russian Federation opined that flag states could establish requirements for the conservation of BBNJ independently, *without the need for an implementing agreement*. The EU said it is impossible to establish MPAs unilaterally and recalled the global commitments to a global MPA network under the Aichi Biodiversity Targets and the outcome of Rio+20", IISD, 'Summary of the Eighth Meeting of the Working Group on Marine Biodiversity Beyond Areas of National Jurisdiction: 16-19 June 2014' (n 34) 4 (emphasis added).

[879] Wolfrum (n 141) 107.

[880] ibid emphasis added.

[881] BBNJ Agreement art 51(4); ibid (d.ix) of Annex II.

[882] "Submitting proposals for high seas MPAs through the BBNJ Agreement may well strengthen the arguments for utilizing the PSSA regime as an adjunct ABMT to protect identified areas from the threat

The *substance* of the *corpus juris* would develop significantly in parallel with the LOSC, notwithstanding the possibility of later interactions by measures proposed to harmonize the two treaties. A proposal consistent with Article 29(4.b) and referring to IMO regulations or standards may represent a mechanism through which RFMOs could develop synergy with the IMO in a geographically defined area.[883] Strengthening this synergy would, more accurately, rely on States parties to the BBNJ Agreement, including States cooperating with such 'relevant' bodies that, without membership, would, however, be obligated to apply the implemented 'Relevant IFB Measures'.[884] The content of the proposal and the (format of the pursued) 'Measure' of the COP may vary. It may be argued that though recommendations and decisions may differ as to their material content and purposes (proposals for new 'Relevant IFB Measures' or 'ABMTs' and 'MPAs' respectively), they would, however, constrain State parties to ultimately follow a similar mandatory cooperative behavior.[885]

In conclusion, the BBNJ Agreement makes it clear that, within its context, considerations about how 'relevant' provisions of the LOSC would be guided by teleological interpretation to achieve the goals of *inter alia* Part III. The LOSC (as a whole) is not reached by the presumption favoring 'ABMTs' or MPAs' or the ranked 'Relevant IFB Measures' designed in coordination and cooperation with and through RFMOs or with the IMO. This might lead to a (perhaps rash) generalization that, though there was a moment in which the LOSC was acknowledged with *constitutional* importance, historical considerations about the 1982 treaty have subtly and gradually changed over the years. The well-known reluctance to organize an UNCLOS IV, however, appears to discourage conjectures that generalize the approach of *all* States towards the LOSC.[886] This current situation may be considered unclear in this respect. To circumvent discussions about the matter, it may at least be argued that the LOSC and the BBNJ Agreement embody different *constitutional paradigms*.[887] The paradigm

---

posed by international shipping. To what extent this will be realized, however, will be highly dependent on states' participation and commitment.", Roberts (n 416) 256. The author adds "[u]ltimately, protection of biodiversity in ABNJ is a political decision; while legal advice and sound science are prerequisites, conservation decision-making also requires political momentum, particularly where such decisions may constrain the activities which sectoral bodies oversee.", ibid.

[883] See illustration in De Lucia (n 35) 12.

[884] BBNJ Agreement arts 8, 25(4) and 29(1).

[885] ibid.

[886] "The idea of a Fourth Law of the Sea Conference, or of changes to key provisions, has been sometimes advocated but never seriously pursued in view of the negative reactions.", Treves (n 663) para 73. This observation, worth noting, does not neglect that the development of geopolitics and interests are not the same as those at the times of UNCLOS III. In this respect, according to some, international law has turned into a *battlefield,* and the law of the sea is no exception, Jill I Goldenziel, 'Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare' (2021) 106 Cornell Law Review 1085, 1102–1104.

[887] Based on the *pacta tertiis* principle, choosing to be obligated by one or the other would always rely on the States' endorsement of *inter alia* the *idea* of 'biodiversity' or 'marine biological diversity', and the subsequent concern for protecting the complex *values* it may enshrine. As regards the idea of 'biodiversity' and the 'values' related to it, see, for example, Takacs (n 167) 9–40, 194–286. In discussing this subject, some have observed that "[t]he idea of biodiversity owes its conception to the coupling of science and environmentalism", Aidan Davison, 'Unity in Biodiversity: Reinventing Nation and Nature in Australia' (2010) 29 Social Alternatives 7, 8. Davison explains that "[t]he alliance of facts and values found in biodiversity has two principal sources. First, human values associated with biodiversity are presented as facts of nature (…). Second, advocates see in biodiversity a synthesis of

of the BBNJ Agreement sets out a balance where conservation prevails over the right of (all) States to exercise high seas freedoms and favors a conferral of powers consistent with the idea of *mare clausum*. In this reasoning, a group of States would decide over the high sea freedom of others. Regardless of how the situation may evolve within this scope, the right to navigate and the jurisdiction of a flag State, party to the treaty, over a vessel flying its flag would have to adapt to a completely new conventional context and be interpreted consistently after the BBNJ Agreement.

3.3. Openness to 'Stakeholders' and Departure from State-Centric Normative Development

When appreciating *the broader international legal landscape* where the BBNJ Agreement is framed, the 'stakeholders' appear to hold a privileged status. According to Article 19(2) and Article 21(1), they are, first, *collaborators* and, lastly, *contributors* to achieve the objectives of the treaty, and for that reason, they are *consulted* respectively. Awareness about the entire *consultation stage*, first, referred to in Article 19(2) and, secondly, regulated in Article 21, contributes to visualizing the emergence of a *community* like never before in high-seas international law. In the context of this *community* (in the lack of a better ultra-modern legal notion), it would be expected that the possible heterogeneity between the different 'stakeholders' would dissolve when confronted with the *lofty* objectives that are listed in the treaty and that demand a consistent alignment. In their character, the 'stakeholders' would strongly influence the agenda-setting power and normative-making competencies that the COP would lastly exercise to establish the 'ABMTs' and 'MPA'.[888] By having the right to collaborate and contribute, the 'stakeholders' might also develop competences to interpret the BBNJ Agreement or give inputs on how the selected provisions of the LOSC should be applied. This suggests a renewed view of the meaning and reach of the term "universal participation" that the treaty aspires to achieve according to its Preamble.

The uncertain term 'stakeholders' is meant to be a container for other equally undetermined categories, for what, every time the term is referred, the totality of the sub-categories that the treaty includes in it, widespread in the text, is arguably pulled with it. Though given a key status to participate in the lawmaking of decisions and recommendations, a 'stakeholder', collaborator, or contributor to Part III, may not necessarily have to *directly* assume the treaty obligations that will be addressed to State parties by default.[889] Relevant

human-centred and nature-centred ethics.", ibid. In the author's view, "[b]iodiversity is a recent cultural invention (…), although it belongs to a long linage of modern concepts about nature. […] To regard biodiversity as a product of culture is not to deny that it is also a product of nature.", ibid 7. Against this backdrop, it has been noted that "[p]olitical will, competing interests and availability of resources determine the extent to which different aspects of the conservation and sustainable use of biodiversity become the subject of specific regulation at the global level.", Sands and others (n 36) 388.

[888] See for instance BBNJ Agreement art 19(2), 21(1), 21(5), 22(1) and 48.

[889] ibid 21(1).

IFBs, granted with more competencies than any of the ‘stakeholders’, would most certainly represent the interests of the whole goal-oriented group. Part III gives relevant IFBs (and, indirectly, States participating through them) an opportunity to *optimize* the regional area-based management designed for a given geographically defined area by encouraging proposals based on ‘Relevant IFB Measures’.[890] Following this view, RFMOs and, indirectly, RFMO members, would be conferred with powers *additional* to those already conferred by way of the UNFSA.[891] The IMO (and, through it, its members) would have to adapt the sectoral organization’s mandate following the measures of such regional IFBs.

In discussing ideas about the future treaty, “quite a few pointed to the need to devise [a BBNJ Agreement] that can ‘bring on board’ the private sector, be that fisheries or pharma.”[892] The leveling of the ‘private sector’ with the characteristics mentioned above with States parties to the BBNJ Agreement might result in some degree of surprise for a legal reasoning anchored in traditional conceptions and state-centered paradigms of the law of the sea and embedded in the LOSC.[893] Articles 19 and 21, read in conjunction, allow sustaining that “the private sector”[894] is among the “relevant stakeholders”[895] granted the faculty to contribute to the law-making process in Part III.[896] This might be highly beneficial for the private sector in commercial navigation, as well as for related non-governmental organizations (NGOs) representing “the civil society”[897] with common interests in this respect.[898] Part III sets a framework that welcomes the inputs of these ‘stakeholders’ and promotes their engagement.[899]

[890] ibid 19.
[891] ibid 10(2).
[892] IISD, ‘Summary of the Third Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 27 March – 7 April 2017’ (2017) 25 Earth Negotiations Bulletin 1, 16. In that context, “according to many, delegations and stakeholders will need to think harder regarding what incentives can be offered or leverage applied to the private sector for it to opt into engaging in a new regime, rather than going around it.”, ibid.
[893] “The corporate sector has also fought to ensure that its voice is heard, especially as international rules have expanded and touched directly upon industrial and other economic activities. At the international level, non-state actors play a formal role in several ways. They identify issues requiring international legal action; they participate as observers in international organisations, and in treaty negotiations; and they participate, formally and informally, in the national and international implementation of principles and rules adopted at the regional and global levels.”, Sands and others (n 36) 89.It is worth recalling that States have been the prominent actors in modern law of the sea. “The basic engine for the development of the law of the sea has been and still is the interests *of States* (…). Only towards the last quarter of the 20th century has the interest in scientific progress and the protection of the marine environment become important. In parallel, collective *State i*nterests have acquired relevance especially (…) as a consequence of the fact that the interconnection of seas and oceans makes the protection of the marine environment a global concern.” Treves (n 663) para 7.
[894] BBNJ Agreement art 19(2).
[895] ibid 19(2) and 21(1).
[896] Strengthening this view, the inclusion of the sub-category of the ‘the private sector’ within the category of ‘relevant stakeholders’ is consistent with its treatment in other provisions of the BBNJ Agreement. ibid 41(2).
[897] ibid 19(2) and 21(1).
[898] IMO, ‘Member States, IGOs and NGOs’ (*International Maritime Organization*) <https://www.imo.org/en/About/Membership/Pages/Default.aspx> accessed 30 March 2024.
[899] The ‘stakeholder’ label and the sub-labels within it appear relatable to the ‘non-state actor’ label. In this respect, it is worth taking into account that “[t]he term ‘non-state actor’ is omnipresent within international biodiversity law and practice. Indeed, the proliferation of non-state actors and non-state

Part III might even enable the 'private sector' based in States that are skeptical to engage in global environmental challenges to directly and substantially contribute to the making of 'ABMTs' and 'MPAs' without that State having to ratify the BBNJ Agreement.[900] The fact that Part III does not impose any direct obligational counterbalance for 'the private sector' or for the non-party with jurisdiction or control over a respective private entity possibly makes the area-based management regime highly attractive for supporting or even consolidating private sector interests in the high seas.[901]

In light of this, Part III BBNJ Agreement certainly opens a world of possibilities for those private entities that, working *hand in hand* with relevant IFBs, may acquire considerable influence over the BBNJ COP from *outside* the treaty. Part III appears to provide these 'stakeholders', among others, with a potentially significant role in the making of norms of which, worth noting, they would later become ultimate recipients. In this view, it might be

---

actor influence in international biodiversity law are defining features of the current era of transnational law-making. But the 'non-state actor' moniker is an unsatisfactory and ultimately misleading label for a number of reasons", Natasha Affolder, 'Non-State Actors' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar Publishing 2017) 387. "[T]his broad-brush label (much like the term 'non-governmental organization' or 'NGO') has a monolithic character that brushes over the diversity of actors involved. Again, this allows hidden assumptions to breed unchecked. In the NGO context, this means that benevolence is attributed to actors based solely on their political form. It is thus unsurprising that many business interests have harnessed the NGO form to advance their goals.", ibid 388. It is noticeable that "[t]he 'lumping' encouraged by the 'non-state actor' label also leads to uneven attention being paid to those individual actors which are subsumed by this label. On topics of biodiversity law, corporations and NGOs attract the majority of attention. (…) Much less is written about individuals: the philanthropists, scientists or treaty negotiation committee chairs who are individually shaping legal regimes and their implementation. Even less is written about the foundations whose funding decisions shape where biodiversity conservation initiatives are happening, (…) or the insurers who operate as a tap, denying insurance coverage or applying premiums to development activities with high risks for biodiversity. The framing of individual non-state actors into 'constituencies' further blurs vital distinctions between them. Indigenous peoples and local communities, for example, are commonly grouped in with NGOs, municipalities, trade unions, and business interests in 'non-state actor' discussions'.", ibid.

[900] BBNJ Agreement art 19(2). Notwithstanding the opportunities this may give to 'stakeholders' in general, this might result in considerably appealing particularly for the "private sector" that, first, is under the control or jurisdiction of States that participate in 'relevant IFBs' that do not solemnly consent to the BBNJ Agreement and that, second, would practice its activities in regions ruled by those IFBs. Notwithstanding that they will have to be submitted by a State party, proposals following the latter criteria are not only allowed but expected by Part III, ibid.

[901] The International Chamber of Shipping (ICS) "has been representing the shipping industry in the discussions to ensure that the international maritime community is engaged, and that the industry's unique nature is considered. ICS's position has also been to support government's understanding of the International Maritime Organization's role as shipping's global regulator.", ICS, 'ICS Welcomes Adoption of the High Seas Treaty at the United Nations' (*International Chamber of Shipping*, 19 June 2023) <https://www.ics-shipping.org/press-release/20042/> accessed 3 April 2024. "ICS is the global trade association for shipowners and operators, representing the world's national shipowner associations and over 80 % of the world merchant fleet (…). ICS continues to support shipping and be the leading advocate for high operational standards and a regulatory environment embracing safety, environment, open markets and fair competition (…) ICS is an international, independent, not-for-profit London-based trade association.", 'About Us' (*ICS*) <https://www.ics-shipping.org/about-ics/>. In view of this, expectations related to those mentioned above would be likely to find appropriate receptiveness when making the regulatory regime for the 'ABMTs' or 'MPAs'.

stressed that terms such as 'ABMTs' or 'MPAs' represent an interesting step in the pursuit of self-regulation of 'the private sector'. By confirming the innovative normative shift that the BBNJ Agreement embodies, comments here show a nitid contrast with the maritime zones determined in the LOSC (legally determined zones that are a direct result of limits exclusively defined by States, such as 'the high seas').[902] Having said this, the broad access given to *contributors* in the formation of 'measures' promises to reshape high seas law under a functional-regional approach promoted by Part III.

Lastly, though it is certain that the modalities for consultation, in general, would be elaborated by the STB, "as necessary"[903], Part III already reveals caution concerning 'the private sector' by not explicitly including its contributions among those that "shall be made publicly available by the Secretariat."[904] Part III arguably regards the contributions of 'the civil society' with the same attention acknowledged to the contributions of the 'private sector'.[905] This does not seem to preclude the 'private sector' or 'the civil society' from demanding the proponent to comply with its obligation to "consider [all] the contributions received during the consultation period"[906] and proceed "as appropriate"[907]. It appears unclear whether these contributions shall be made publicly available by the Secretariat to all State parties through other means in the future.[908]

Part IV is consistent with this treatment. In connection with the *consultation stage*, Article 31(1) provides that State parties are obligated to ensure that the process for conducting an EIA according to Part IV includes a series of steps and, in so doing, establishes that "(e) Parties shall ensure public notification and *consultation* in accordance with article 32" (emphasis added). Article 32(7), in turn, introduces the obligation to ensure access to information related to the EIA process "under this Agreement". The same provision continues and adds, "Notwithstanding this, Parties shall not be required to disclose confidential or proprietary information. The fact that confidential or proprietary information has been redacted shall be indicated in public documents.".

4. The Dependence on External Regional and Sectoral Bodies as The Way to Success

Cooperation in the terms of the treaty will have to be consistent with presumptions like those at the foundations of Part III and embedded in Part IV. In an overall sense, the BBNJ Agreement is impregnated with international cooperation. It echoes the cooperative mindset and goals that inspired the drafting of the UNFSA but applies it to activities other than fishing, like high-seas

[902] LOSC art 86.
[903] BBNJ Agreement art 21(8).
[904] ibid 21(3).
[905] ibid.
[906] ibid 21(5).
[907] ibid.
[908] ibid 21(3).

navigation happening in 'Relevant IFB Measures' and 'ABMTs' or 'MPAs'. Because of this, it may be argued that the BBNJ Agreement sets up the foundations for a regime dependent on external regional or sectoral IFBs that, thanks to that dependence, could strengthen their respective mandates and impact high seas navigation. The general obligations for international cooperation in Part I are considered important in this respect. In line with this, "[i]f a state wants to propose a shipping rule, it must ultimately go to the IMO for a decision; for a fishing rule, to the relevant RFMO; and for a rule to cordon off part of the seabed, to the International Seabed Authority. It may not use the BBNJ Agreement to circumvent these existing IFBs."[909] The *status quo* of these IFBs is pretty much preserved.

The cross-examination of Part III and Part IV below is justified by their great complementarity. Undertaking an EIA allowed by Part IV would be crucial to manage, restrict, or control human activities that jeopardize biodiversity conservation in an MPA.[910] Indeed, external EIA processes equivalent to one that may be conducted under Part IV may ultimately define whether a vessel flying the flag of a State party can be authorized to undertake navigation on the high seas.[911] This is likely to become evident by way of a decision issued by the COP that refers to such external rules, after the contributions in Part III.

4.1. Externalization of Rule-Making Powers by International Cooperation

The Part III ABMT system and the MPA network proposed by this new framework reveal the latter's dependence on IFBs with regional coverage or competencies and show that the area-based management they propose is a reflection of the functional-regional approach that inspired the UNFSA. The closeness between area-based management and a functional-regional approach may be inferred from the fact that RFMO measures can and are considered to be tools supportive of area-based management characterizing the BBNJ Agreement.[912] This view strongly suggests that RFMO measures *for conserving marine biodiversity* will be endorsed by the presumption and norms enshrined in Part III and, particularly, in the category of 'Relevant IFB Measures'.[913]

---

[909] Bodansky (n 18) 320.

[910] Jakobsen (n 52) 194. "In comparison with the scientific assessment of sites selection for MPAs per se, EIAs are more relevant to the issue of what kinds of activities or projects should be regulated within certain MPAs and what kinds of concrete conservation or management measures should be taken or implemented to regulate those kinds of activities or projects within the MPAs in ABNJ.", Duan and Shen (n 753) 307.

[911] BBNJ Agreement art 28(1) and 34(2); and 29(4.b.i).

[912] "The IMO, MARPOL, *and RFMOs* can adopt only sectoral measures, and the regional sea programs apply only to states in that regional. As a result, there is no way to protect a high seas area from the full range of human activities that threaten it. *Proponents of the BBNJ Agreement's ABMT mechanism hoped to remedy this deficiency*.", Bodansky (n 18) 312 (emphasis added).

[913] This is notwithstanding that fisheries is not a subject matter falling within the material scope of the BBNJ Agreement and that COP does not have competencies on the issue, BBNJ Agreement art 10(2).

It has been acknowledged for some time now that, among the existing IFBs, the BBNJ Agreement would preserve the *architecture* of regional IFBs like RFMOs, to which it generically and explicitly refers (together with others, with a geographical scope that matches the specific description included in it), and of sectoral IFBs, like the case of the IMO.[914] They would be grouped among IFBs that are 'relevant' to achieve the objectives of the treaty and be encompassed by the presumptions supported by Part III. In this connection, however, there seems to be an awareness that the mandates of some of the current IFBs will go through a *significant transformation* in the time to come.[915] In the language of Part III, it may be said that the "amendment to the competence"[916] of 'relevant' IFBs, such as IMO, is expected to adapt their mandates in a manner that allows making the issue of 'marine biological diversity' a core assignment.

Against this background, Article 8 in Part I and Article 25(4) in Part III are particularly relevant to support the implementation of decisions and recommendations adopted under Part III and the 'ABMTs' and 'MPAs' established on that basis. Besides this, Article 29(1) in Part IV is also important for cooperation. The interplay of provisions serves to show how legal mechanisms in Part IV might work to systematize the high seas following a functional-regional approach permitted (and, sometimes, promoted) by the objectives of the BBNJ Agreement. Such mechanisms rely on the assumptions and subsequent verticality that Part III installs at the international treaty plane and, notoriously, on the conflict clauses that Part IV provides. Acknowledging these aspects facilitates a more accurate view of the role of the COP and the STB in the context of the BBNJ Agreement.

4.2. The Cooperation of the IMO with RFMOs

[914] Klerk (n 226) 8; see also Bodansky (n 18) 312. The ABNJ covered by the geographical scope of the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (adopted on 22 September 1992, entered into force 25 March 1998) matches the description of Article 21(4) in Part III, which refers to "areas that are entirely surrounded by the exclusive economic zones of States". The 'maritime area' covered by the OSPAR Convention comprises "the internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to the extent recognised by international law, and the high seas, including the bed of all those waters and its sub-soil, situated within the following limits: (i) those parts of the Atlantic and Arctic Oceans and their dependent seas which lie north of 36° north latitude and between 42° west longitude and 51° east longitude, but excluding: (1) the Baltic Sea and the Belts lying to the south and east of lines drawn from Hasenore Head to Gniben Point, from Korshage to Spodsbjerg and from Gilbjerg Head to Kullen, (2) the Mediterranean Sea and its dependent seas as far as the point of intersection of the parallel of 36° north latitude and the meridian of 5° 36' west longitude; (ii) that part of the Atlantic Ocean north of 59° north latitude and between 44° west longitude and 42° west longitude.", OPAR Convention art 1.

[915] Klerk (n 226) 12.

[916] BBNJ Agreement art 22(7). The wording in Article 22(7) alludes to the progressive and transformative effects to be developed after the BBNJ Agreement, mostly by consequence of the COP's recommendations.

The BBNJ Agreement aims to develop upon the existing institutional architecture, where RFMOs can play a key role. This would undoubtedly *accelerate* the necessary path and timetable to conserve and sustainably use 'marine biological diversity' in terms of the treaty.[917] At the same time, within the scope of the treaty, a new fragmentation of high seas law appears as the inevitable consequence of the distinctive international cooperation that the treaty pursues. In this respect, though not restraining from happening, the *collaboration* between 'stakeholders' and their *contribution* could be crucial for providing harmony to the treaty and for the success of Part III. *Collaboration* entails international cooperation under the terms of the treaty, as, in turn, *contribution* does. It would be basic for transformation that the IMO makes 'Relevant IFB Measures' directly or, indirectly, that the BBNJ COP makes recommendations addressed to the IMO to adopt such 'Relevant IFB Measures'. The transformative effects following the latter situation may rely on the duty to cooperate to which IMO members that participate in the BBNJ Agreement had consented. Such State parties would then promote, for instance, the adoption of EIA frameworks within IMO for high seas areas where they are deemed to be needed. Recommendations of the COP would arguably overcome any potential reluctance for transforming the IMO by incorporating environmental law as suggested by them.

Looking for solutions beyond the scope of the COP may contribute to dealing with fragmentation. Outside the proceedings of Part III, 'stakeholders', including 'relevant IFBs' such as RFMOs and the IMO, already recognized, may collaborate to attempt to *contain* fragmentation without disregarding the objectives of the treaty. The level of collaboration and coordination between 'stakeholders' like these 'relevant' IFBs and the necessary support of their members would become strategic to respond to the consultations of cooperative State parties and develop a proposal for a later submission following Article 19.[918] Moreover, close cooperation between 'stakeholders' would probably assist the COP in adopting 'Measures' consistent with the prevention of significant adverse impacts on the whole marine environment, 'taking into account mitigation and management measures' that 'Relevant IFBs' or 'ABMTs' and 'MPAs' may comprise.[919] Cooperation between 'stakeholders' may even help define the prevention of 'significant adverse impacts' under this treaty context or, within the scope of a 'relevant' IFB'.

Cooperation and coordination with 'stakeholders' could be complemented with substantial contributions during proceedings and enable the COP to, first, *decide* to establish 'ABMTs' and 'MPAs' and, in so doing, *decide* whether to authorize planned activities under

[917] ibid 2. "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.", Klerk (n 226) 11.

[918] In developing a proposal, *collaboration* between, first, the 'stakeholders' themselves and, second, the proponent and the STB with the same 'stakeholders' would be a first significant step to ensure a harmonious regime, BBNJ Agreement art 19(2) and 29(2). Once procedures under Part III have been triggered, the preceding collaboration and the robust proposal could be pushed forward by the *contributions* of the 'stakeholders' avoiding open and long deliberations that could undermine the robustness of the proposal in the COP. The presumptions and verticality in Part III could contribute substantially to that strategy.

[919] ibid 34(2).

the jurisdiction or control of State parties compatible with 'Relevant IFB Measures'.[920] In this respect, documentation issued by the IMO endorsing a State party's determination that *inter alia* the potential impacts of navigation have been assessed in accordance with its requirements would surely become fundamental for authorizing the navigation of a commercial vessel under the jurisdiction or control of a State Party.[921] The issuance of such a document would add to the development of a proposal.[922]

RFMOs' protagonism for dealing with fragmentation stems from the well-known strong international support to such bodies and the likeliness of that support to persist (and increase) after the BBNJ Agreement enters into force. It has been "emphasized that [RFMOs] are crucial in protecting biodiversity in [areas beyond national jurisdiction]"[923]. Part III BBNJ Agreement allows such an outcome, permits, and even encourages the development of a system revolving around the RFMO architecture and its complementation with the IMO. It has not gone unnoticed that "[t] he mandate of the IMO vis-à-vis PSSAs in ABNJ remains unchanged, though the IMO can expect to be engaged by the new agreement *as the BBNJ COP discharges its obligation to cooperate and coordinate with relevant management Organizations*, particularly with regard to the adoption of measures to support the implementation of COP decisions and recommendations regarding MPAs and ABMTs"[924].However, this may leave RFMOs with wide discretion in this regard, and the degree of coordination and cooperation with the IMO appears to be left to the willingness of their members. It has been noted that "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 hinges, to some extent, on the cooperative spirit of IFBs."[925]

---

[920] ibid 22(1.a), 22(1.b), 23, 34(2). Reading Article 23 and 34 in conjunction, both entitled "Decision-making", it may be argued that the COP would not be able to take a decision on the authorization of a planned activity if the Party with jurisdiction and control over the activity has not made a determination following requirements in Article 38(2). With the inclusion of the term "mitigation and management measure" in its wording, the second sentence of Article 38(2) arguably introduces a rule of reference to 'Relevant IFB Measures' or 'Measures' the COP may adopt. Adding to the complex interactions within the treaty, the reference to the *determinations* that a Party may make in Article 38(2) in Part IV suggests that it should be read according to Article 29(4) in Part III, which also permits *determinations* of a Party. Article 38(2) appears to complement the conflict clause embodied in Article 29(4), which may be followed by the COP's determination on whether Part IV or an external EIA of a 'relevant' IFB applies. In this view it may be argued that in light of the contents of Article 29(4.b) and Article 38(2), the authorization issued to the State party with jurisdiction or control over the planned activity may have to connect with the determination made by the Party on the regulations and standards containing mitigation or management measures, and the results of the applicable EIA taken into account (i.e. an EIA external and equivalent to the one required under Part IV). Consultations under Article 21 are likely to show how these two provisions may interplay in a given case.

[921] ibid 29(4.a).

[922] It is worth taking into account that "*Decision documents* shall clearly outline any conditions of approval related to mitigation measures and follow-up requirements. *Decision documents* shall be made public, including through the Clearing-House Mechanism", ibid 34(2) (emphasis added).

[923] See position of Norway in IISD, 'Summary of the Third Meeting of the Working Group on Marine Biodiversity in Areas Beyond National Jurisdiction: 1-5 February 2010' [2010] Briefing Note on UNGA WG on Marine Biodiversity 1, 2.

[924] Roberts (n 416) 255 (emphasis added).

[925] Klerk (n 226) 9–10.

With the cooperation of the IMO, RFMOs would be able to engage and cooperate in creating mechanisms to prevent *delaying* discussions during consultations under Article 21. It has been stressed by FAO that "only a few [areas beyond national jurisdiction] not under RFMOs' management"[926]. Invariably, however, a system strongly reliant on a limited-access RFMO system would lead to a centralization of powers that would impact practically all freedoms and activities happening in the high seas, including the navigation of commercial vessels. The latter would correspond to the explicit recognition of the IMO in the text and, thus, correlate to the cooperative status the treaty presumably grants it. At the same time, making a regime of such characteristics strong would serve to, first, impede scenarios of undesirable non-aligned decentralization or elaboration of norms and, second, discourage and correct non-cooperative conduct. In this reasoning, the designation of mechanisms for EIA processes, external to the BBNJ Agreement, are likely to bring the order necessary to better collaborate and contribute to conserve and sustainably use areas requiring protection under Part III. Such cooperation would somehow follow the suggestion "that ABMTs: *be established under regional leadership as guided by UNFSA*, based on strong science and the identification of areas requiring attention, *and work with existing organizations, including RFMOs*"[927]

In assessing key EIA provisions proposed by it, the High Seas Alliance highlighted "[w]hile the new Agreement cannot *directly* impose EIA requirements on the IMO, States Parties to the new Agreement that are IMO members would be under the obligation to ensure the proper conduct of an EIA that comports with the requirements of the BBNJ Agreement when proposing substantial changes to existing shipping regulations and/or activities that are likely to have more than a minor or transitory effect on the marine environment."[928] In this connection, "[t]he EIA provisions of the BBNJ Agreement offer the opportunity to update and modernize the practice of environmental assessment in ocean areas beyond national jurisdiction (ABNJ). While the BBNJ Agreement will not directly impose EIA procedures on existing bodies such as RFMOs, the ISA or the IMO, the requirements will apply to those States that have agreed to by the BBNJ Agreement's provisions by becoming Parties to the new Agreement. Those States Parties that are also party to regional and sectoral organizations such as RFMOs, the ISA and the IMO, would promote the adoption by those organizations of the EIA standards and procedures in the BBNJ Agreement."[929] The latter would become important when the IMO or other IFB receives recommendations from the COP for the adoption of subsequent regulation and standards for EIA processes, among potential transformations of their mandate. Even without participating in regional or sectoral IFBs, a State party "that is not

---

[926] IISD, 'PrepCom 3rd Session' (n 892) 17. The FAO also called for "for extensive consultations when establishing ABMTs under RFMOs' jurisdiction.", ibid.

[927] See position of Australia in IISD, 'Summary of the First Session of the Preparatory Committee on Marine Biodiversity of Areas Beyond National Jurisdiction: 28 March - 8 April 2016' (n 238) 10 (emphasis added).

[928] High Seas Alliance (n 245) 5. The word 'directly' emphasized in italics appears to have anticipated that the BBNJ Agreement would serve to promote (or, using the terms of the quotation, 'impose') EIA requirements on the IMO *indirectly*, through the duty of cooperation that State parties to it would have and because of the content that the treaty provides to such an obligation. Consistently, given how Article 22(1) was drafted and the modalities it imposes on the COP, a *direct* imposition by the COP on a sectoral IFB such as the IMO would hardly occur. De Lucia (n 35) 5–12.

[929] High Seas Alliance (n 245) 1.

a party to or a participant in a [‘relevant IFB’], and that does not otherwise agree to apply the measures established under such instruments and frameworks and by such bodies shall not be discharged from the obligation to cooperate”[930].

In addition to the adoption of EIAs by sectoral or regional IFBs, it might be worth recalling the idea of establishing an EIA *standing advisory body* external to the BBNJ Agreement to collaborate and help in attending consultations. Before adopting the treaty, in some context, there already was the conviction that “establishing a standing advisory body of EIA experts to assist in the international management and protection of high seas resources seems a necessary step to consolidate knowledge and build a global community of practice on this fundamental issue”[931] It was acknowledged that “*beyond the development of the BBNJ treaty itself*, the establishment of a standing advisory body made up of expert senior-level EIA practitioners would be helpful.”[932] Against this background, “[o]ne of the top concerns expressed (…) was the need for harmonization of EIA practices to ensure that all member states elevate their own EIA procedures to a minimum standard, at least for the purposes of BBNJ.”[933] It has been sustained that such EIA *standing advisory body* may help achieve the following: establish guidelines that would define standardized procedures and requirements for how to implement EIA, a review mechanism so that inadequate EIAs are identified; assist in stakeholder identification and engagement; carry out and/or advise on stakeholder consultations and serve as advisors.[934] An EIA *standing advisory body* might result in a useful mechanism for the STB to collaborate with ‘relevant IFBs’ when developing or updating standards or guidelines for the conduct of EIAs.[935] This possibility appears fully consistent with Part III and, at the same time, implies that Part III moves away from the LOSC, where the States are the main rulers of the oceans and Article 206 is not centralized or *institutionalized*.[936]

[930] BBNJ Agreement art 25(6).
[931] *Implementation of EIA in Areas Beyond National Jurisdiction Under the UN BBNJ Agreement: Next Steps in EIA Guidelines* (Environmental Law Institute 2021) 18 <https://www.eli.org/research-report/implementation-eia-areas-beyond-national-jurisdiction-under-un-bbnj-agreement-next>. The Environmental Law Institute EIA Working Group “was convened specifically to consider *post-BBNJ-agreement* EIA implementation issues for the high seas; it was not formed as another forum for litigating proposed BBNJ treaty language itself.”, ibid 7. “On April 27, 2021, more than 25 senior officials with expertise in international law and ocean policy, environmental management, and environmental impact assessment (EIA) met at the invitation of the Environmental Law Institute, based in Washington, D.C., to discuss challenges to the successful implementation of an EIA regime as proposed under the United Nation’s draft agreement for the protection of marine biodiversity in areas beyond national jurisdiction (the BBNJ treaty). Participants in this working group (WG) came from a cross-section of sectors, including current and former federal government employees, NGOs, industry, academia, and international foundations. Each participant had decades of experience working in the United States and internationally. Each came to the workshop with a shared goal of bringing a practitioner’s perspective to the UN BBNJ process, thereby helping to move the treaty forward in a substantive way.”, ibid 5.
[932] *Implementation of EIA in Areas Beyond National Jurisdiction Under the UN BBNJ Agreement: Next Steps in EIA Guidelines* (n 931) 7 (emphasis added).
[933] ibid.
[934] ibid 8. It was noted that “traditional EIA is not solely a scientific analysis; it is a decision-making tool that addresses the entirety of a project and sets forth a decision space that includes not only scientific and technical concerns, but also international law and/or policy-related issues.”, ibid.
[935] BBNJ Agreement art 29(3).
[936] See discussion on the institutionalization of EIA procedures through the BBNJ Agreement in Tanaka (n 209) 110–111. Article 29(2) and 29(3) in Part IV appear to enable the COP and the STB to relate to

Cooperation among 'stakeholders' such as the IMO, RFMOs, their members, and the shipping and fishing entities related to 'the private sector' could be instrumental to navigation-related law-making in a given high seas area. After procedures regulated by Part III formally commence, Article 29 in Part IV is likely to become an important mechanism to overcome (or prevent) any *latent* parallelism generated between, on the one side, regional or sectoral EIAs and the regulations or standards *arising from* them, all developed externally from the COP, and, on the other, the desire to establish cross-sectoral or multi-sectoral EIAs regulated by Part IV. It is worth considering the likely *timing* of the procedures, i.e. after the previous engagement of *the most interested actors* in negotiations oriented to balance their particular regional interests over a defined area. In this illustration, in other words, the proposal would be submitted following *collaboration* among 'stakeholders' such as 'relevant IFBs' with spatial competence in the area, like an RFMO and IMO. Also, as part of the *collaborations*, those 'stakeholders' should always be consulted to develop a proposal.[937] By then, the regional or sectoral EIA as the regulations or standards arising from it could have been well designated and already implemented as if they already were 'Relevant IFB Measures'.

Keeping that in mind, the initiation of procedures entails a possibility that the EIA under Part IV and the standards and guidelines adopted by the COP under Article 38 may potentially be established for the geographically defined area where the 'Relevant IFB Measures' would already apply. This might lead to the impression that the *consultation stage* following the procedural *iter* regulated by Part III may constitute the scenario of a spectacular clash between the selected interests of 'stakeholders' and those wider represented by the comprehensive BBNJ COP. However, such a situation may hardly occur when 'stakeholders' commit to meeting the requirements in Article 29(4). This provision constitutes a key stimulus for IFBs to develop measures under it. If the requirements in Article 29(4) are met, the clash may be prevented from happening. After these aspects are *determined*, according to Article 29(6), whether the results of the 'equivalent' EIA are "taken into account" or whether regulations and standards "have been complied with" is something that the same 'relevant IFBs' would end up monitoring and reviewing.[938]

This suggests that collaboration and contributions of the private sector to achieve the objectives of the treaty can be synergic with that of the regional and sectoral 'relevant IFBs'. The fact that the BBNJ Agreement allows such results shows how this regime can greatly stimulate actors in sectors like shipping and fishing which, most likely, would find themselves more comfortable with the idea of measures being adopted, monitored, and reviewed in IMO and in competent RFMOs with which they are historically familiarized. Results giving prevalence to regional and sectoral measures would arguably be preferred by such 'stakeholders' when *consistency* in management and mitigation was already achieved before consulting the COP.[939] Notice that the time-bound criterion arguably contributes to preventing

---

a body of such functions. In this connection, see draft Article 23(2) in 'Further revised draft text' 2022 [A/CONF.232/2022/5].

[937] Given the goal-oriented nature of the treaty, the term 'as appropriate' in Article 19(2) should be interpreted as a qualifier to the obligation imposed. Concerning the interpretation of the term 'as appropriate', see discussion in Jakobsen (n 52) 148–149.

[938] BBNJ Agreement art 29(4.b).

[939] ibid 34(2).

the COP from unpacking and revising the content of those measures and diminishes the risks of Article 22(2) being broken.[940] No less important, by making the content of the "decision to authorize the planned activity"[941] reasonably predictable, procedures and mechanisms like Article 29(4) safeguard the interests of 'the relevant stakeholders' in a given area. In the case of commercial navigation, following Article 29(4), cooperation among 'stakeholders' may be oriented *inter alia* to show how a designated IMO PSSA *arises from* an EIA external to that regulated by Part IV.[942] If incorporated as a *rule of reference* within the text of the decision and enshrined in an 'ABMT' or 'MPA', it could constitute a basis for adopting other 'Relevant IFB Measures' in IMO or other IFBs with competencies in the area, and, subsequently, strengthen regulations or accumulate others to cooperate as Part III demands.[943] The development of law on that basis and such reasoning appears mandatory for triggering Article 29(4) in future procedures, considering that it first mandates that "the potential impacts of the planned activity or category of activity have been assessed in accordance with the requirements of *other* relevant legal instruments *or* frameworks *or* by relevant global, regional, subregional *or* sectoral bodies" (emphasis added).

4.3. The Strengthening of Regional and Sectoral IFBs Different from the COP

The institutional interplay allowed by Part III stimulates cooperation and would certainly ensure the adoption of 'Measures' with multi or cross-sectoral legal consistency to 'prevent significant adverse impacts on the marine environment' and, in this direction, to 'conserve and sustainably use areas requiring protection'.[944] Both the practicality featuring goal-oriented cooperation under Part III, and the teleological legal reasoning after it, appear to detach from (and arguably prevail over) the legal equality of States (parties and non-parties). This is possibly one of the effects of cooperative State parties having to promote the adoption and implementation of 'Relevant IFB Measures' on EIAs and their use to 'prevent, mitigate, or manage potential impacts below the threshold' for EIAs consistent with Part IV.[945]

Goal-oriented collaboration and contributions under the BBNJ Agreement may be expected to leverage the governing powers of regional and sectoral relevant IFBs in those areas requiring protection, as well as the influence of cooperative 'stakeholders' with an aligned interest in those regions. The cooperation of the IMO with each of the RFMOs, and other collaborative regional IFBs, would be key to achieving the treaty's objectives. At the same time, close collaboration and cooperation outside of the BBNJ Agreement among certain relevant IFBs, as well as the creation of a mechanism for this purpose, could reduce the COP's

[940] ibid 21(6).
[941] ibid 34(2).
[942] The task that the Party would have to accomplish is that of indicating that IMO 'Relevant IFB Measures' arise from the relevant EIA, i.e., another 'Relevant IFB Measures'.
[943] BBNJ Agreement art 17(b).
[944] ibid 34(2) and 17(a).
[945] ibid 29(1) and 29(4.b.).

scope of power. Access to information, whether open, limited, or nonexistent, relates to this issue and influences the capacity of normative-making to perform as a proponent or stand a case as a member of the COP.[946]

Possibilities allowed for dependence on external 'relevant IFBs' or institutional decentralization leading to the creation of preferable legal frameworks are evident as is the inevitable subsequent weakening of the COP. This gives a more accurate idea of the weight that the COP might have within this regime and sheds light on that of regional IFBs like RFMOs, as well as those of a sectoral character, like IMO. However, this decentralization and the strengthening of the latter may become greatly functional in achieving the objectives of the planetary treaty. The time-bound *consultation stage* allows regional IFBs (RFMOs included) to, first, circumvent their spatial scope and contribute to the *making* of recommendations to establish 'Relevant IFB Measures' elsewhere. Secondly, through the initiation of later procedures, the consultation allows promoting the establishment of subsequent 'ABMTs' or 'MPAs' in the same area.

Regional IFBs and other 'stakeholders' looking to have a leading role in the protection of 'marine biological diversity' might find it compelling to be the first to find out that establishing external EIAs or stricter regulations and standards than those regulated under the BBNJ Agreement.[947] As to the extension of these tools, a regional IFB has sustained "that general rules for coastal area-based tools tend to be based on numerous small areas, those relevant to areas beyond national jurisdiction should be fewer in number but larger in scope."[948] State members of such a type of body might be motivated to act with and through regional IFBs to commit to the same *global* purpose.[949] Against this background, it may be sustained that the

---

[946] It is a truism that access to information is fundamental to participating in (multilateral) decision-making, and, under the BBNJ Agreement, access to 'the best available science and scientific information' might permit or block playing a meaningful role in the deliberations under the COP. Subsequently, State parties with limited or no access to 'the best available science and scientific information' or without membership to those IFBs having the key information on 'marine biological diversity', like RFMOs, would never be able to cooperate at the same level as those with access to such information or similarly influence the setting up of the multilateral agenda. However deprived of key information, Part III allows nonetheless that these less influential State parties may cooperate with the BBNJ Agreement by consenting to proposals supportive of 'Relevant IFB Measures'. See the discussion about 'Access to Information' in Chapter 2. In addition to the issue of limited or no access to key information, the assumptions and the normative verticality enshrined in Part III, assessed above, increase the gap with respect to members of regional IFBs with full access to relevant information, like RFMOs, and solidify differences in the *status quo* among States. Part III makes it clear that the 'relevant' IFBs are not obligated to provide information to the COP, ibid 26(2). From this, it follows that international cooperation in terms of Part III might not be fully inclusive. RFMO members would have a privileged position for "promoting cooperation among [RFMOs and relevant IFBs] in the achievement of the objectives of this Agreement" (ibid 8(1).) and, additionally, especially motivated to "promote transparency (…), including through the facilitation of the participation of, and consultation with" RFMOs, other IFBs capable of adopting 'Relevant IFB Measures' like IMO, and other relevant 'stakeholders', ibid 48(3).

[947] BBNJ Agreement art 29(4).

[948] See standpoint of OSPAR in IISD, 'WG 2nd Meeting' (n 40) 7.

[949] During the early *exchange of views*, "[t]he OSPAR Commission for the Protection of the Marine Environment in the North-East Atlantic and the North East Atlantic Fisheries Commission (NEAFC) underscored the OSPAR Convention as a case study", ibid 4. The comprehensiveness of the BBNJ Agreement would allow, for example, regional 'relevant IFBs' with mandates in the Northern regions

BBNJ Agreement shows a great dependence on external 'relevant' IFBs for governing a "geographically defined area through which one or several sectors or activities are managed"[950]. This would manifest through inter alia the related 'Relevant IFB Measures' adopted and implemented through a decentralized normative-making technique.

5. The Core Role of RFMOs and the Cooperative IMO in Decentralized Normative Making

The global legal architecture of the BBNJ Agreement would be able to remain in place (global level) while permitting its substantive normative content to be developed by the importation of norms of geographically defined scope elaborated externally (with a sectoral approach and at the regional level). According to Parts III and IV, the treaty itself recognizes preference for the substance of the latter over measures entirely designed by the COP. With the collaboration and contribution of the COP, an RFMO may design and implement a global regulatory scheme under the measures provided in Part III on an area-by-area basis.

Highlighting this aspect is key to assessing the normative-making decentralization and the subsequent fragmentation the BBNJ Agreement may bring (problem). Simultaneously, this aspect appears instrumental to analyzing alternatives to attempt to counterbalance such legal challenges and harmonize normative-making for the high sea regions subject to area-based management (solution). In this reasoning, a limited number of regional and sectoral IFB members would certainly find themselves in the best position to collaborate with the States parties to clarify which (existing and forthcoming) IFBs and measures are important enough to be 'relevant' to the universal BBNJ Agreement, outside and within the treaty. The substantial selection of relevant LOSC provisions is likely to be made by those participating in and through regional IFBs rather than within the BBNJ COP.

5.1. The Fragmentation Promoted by Parts III and IV: An Element of Strength rather than Weakness

Cooperation for institutional and legal interaction seems to be the main cause of the fragmentation inherent to the area-based management system under Part III, its dependence on

---

to extrapolate lessons learned in their respective contexts by supporting the making of recommendations or the taking of decisions aimed to apply to Southern regions. In this respect, on that same occasion, the WWF proposed "to establish a Southwest Atlantic Squid High Seas MPA" and the proposal was contested, ibid 10. OSPAR argued that general rules for area-based tools "relevant to areas beyond national jurisdiction should be fewer in number but larger in scope.", ibid 7.

[950] BBNJ Agreement art 1(1).

‘relevant’ IFBs (institutional dimension), and the subsequent normative-making decentralization (legal dimension).[951] The area-based management pursued by Part III and the cooperation purported to develop a regime following it greatly nourishes from fragmentation and, distinctively, aims at building an entire system upon it. The normative-making decentralization would be based on the external elaboration of norms within and through ‘relevant’ IFBs oriented towards, first, the preparation and implementation of ‘Relevant IFB Measures’, and, secondly and optionally, their potential subsequent importation to the broad scope of Part III by its explicit inclusion in a proposal in the character of conservation or management measures.

Under Article 21, goal-oriented cooperation within the time-bound *consultation stage* could optimize the package of measures contained in the proposal and create momentum to give input and accommodate measures comprehensively.[952] Though fragmentation might represent a *problem*, it does not appear *problematic* to the regime sought by the BBNJ Agreement nor conceivable as an undesirable incidental *phenomenon* of the *consultation stage* set up by Part III. The legal logic for the normative making of Part III would be to deconstruct *the old* and then build *the new* for a novel purpose, all through the selective use of the legal materials designable for areas requiring protection. Therefore, fragmentation here represents an original twist that the treaty itself facilitates and utilizes in its favor.

Next, this section focuses on how legal mechanisms may be triggered by a State party during the time-bound *consultation stage* to determine the preference of regional or sectoral assessments and regulations and decide whether or how activities in the area requiring protection may be authorized following the legal verticality enshrined in Part III.[953] The interplay among some of the provisions, together with trends and contextual aspects surrounding the BBNJ Agreement and reflections arising from the works preceding the adoption of the treaty, allows reasoning and some degree of reasonable predictability while diminishing the margin of speculation to a sound minimum. A series of steps is drawn in an attempt to visualize possible paths towards the evolution of Part III by way of Part IV.

5.2. Recommendations to Make ‘Relevant IFB Measures’: Fragment First to Harmonize Later

Recommendations might be said to be the desired product of *contributing to fragmentation* through the procedures regulated by Part III.[954] Some have seen fragmentation as an

---

[951] It is recognized that the BBNJ Agreement “gives precedence to [sectoral] mechanisms over the global ABMT process”, Klerk (n 226) 12. Such reflection stems from realizing that “the institutional and normative dimensions of Part III are intricately linked and must be analyzed in tandem, rather than in isolation.”, ibid 3.

[952] See discussion on how to combat fragmentation in Klerk (n 226) 12–14.

[953] BBNJ Agreement art 38(2).

[954] Adding a positive connotation to fragmentation, it has been argued that “[a] related benefit is the competitive pressure exercised by fragmentation: competition between regimes, organizations, courts,

opportunity and argued that "[f]ragmentation is beneficial, too. First of all, fragmentation is an adequate reaction to modernity and modern complexity of life."[955] Recommendations would follow after proposing and requiring the adoption of *new* 'Relevant IFB Measures' which, once recommended, would serve the recipient 'relevant IFB' to adopt those relevant measures within its context and implement them. This would set up the basis to *collaborate with fragmentation* and feed legal parallelism concerning the LOSC. For instance, fragmentation might occur after 'stakeholders' show support for proposals seeking recommendations for the adoption of IMO regulations or standards or EIAs under IMO consistent with Article 29(4) and subsequent implementation in a given region. Ultimately, State parties would have to promote such measures and their use through the IMO.[956] In this respect, notice that fragmentation would concern different legal planes such as the BBNJ Agreement, including a potential EIA that might be conducted under the COP, and the LOSC, including EIAs that might be undertaken under Article 206. Notwithstanding the later effectiveness of mechanisms on harmonization provided by the BBNJ Agreement, this parallelism would become evident by the initial juxtaposition of the spatial scope of the concerned IFBs in a geographically defined area.

After its implementation, the 'Relevant IFB Measure' may serve to *collaborate with harmonization*. Collaboration is likely to be achieved by the IMO cooperating with a competent RFMO to designate and design IMO regulations or standards, or EIAs under IMO, consistent with RFMO management and mitigation measures.[957] According to Article 19(2), collaboration may also happen by way of the consultations that proponents shall, as appropriate, undertake with the 'stakeholders'. Subsequently, referred to in a proposal, the 'Relevant IFB Measures' implemented may be useful legal material to *contribute to harmonization through and within* 'ABMTs' and 'MPAs' through the time-bound consultations regulated under Part III. In the context of consultations and contributions, State parties would have to promote such 'Relevant IFB Measure' and their use within the COP and through it.[958] In such a situation, if it were an EIA under the IMO or another relevant IFB, State parties would have to especially promote such a measure and its use within the COP.[959] Cooperation and coordination with relevant IFBs would be mandatory for the COP to take a decision on 'ABMTs' or 'MPAs' compatible with

---

and any other institutions may promote productive exploration and experimentation, enhances creativity, allows for correcting mistakes, (…).", Peters (n 670) 681. Contrastingly, it has also been sustained that the "result is conflicts between rules or rule systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.", ILC Study Group (n 676) 10.

[955] Peters (n 670) 680. The author discusses various viewpoints on fragmentation in international law.

[956] BBNJ Agreement art 29(1). In this connection, it has been acknowledged that "[w]hile the IMO is the only international body with a mandate to designate PSSAs and APMs, the adoption of the BBNJ Agreement has implications for the IMO and how its member states consider the potential application of PSSAs in ABNJ. In particular, parties to the BBNJ Agreement will be obliged to promote the objectives of that Agreement in other fora, and more specifically with respect to recommended ABMTs.", Roberts (n 416) 255. BBNJ Agreement 8 and 25(4).

[957] Article 34(2) in Part IV provides that "[w]hen determining whether the planned activity may proceed under this Part, full account shall be taken of an [EIA] conducted in accordance with this Part. A *decision* to authorize the planned activity under the jurisdiction or control of a Party shall only be made when, *taking into account mitigation or management measures*, the Party has determined that it has made all reasonable efforts to ensure that the activity can be conducted in a manner *consistent* with the prevention of significant adverse impacts on the marine environment." (emphasis added).

[958] BBNJ Agreement art 24(5).

[959] ibid 29(1).

mitigation or management measures taken by RFMOs (including EIAs by RFMOs).[960] In this manner, recommendations can become the milestone for commencing an international legal transformation and, subsequently, forming a global system of sectoral and regional IMO mitigation or management measures by the respective decisions.

Four aspects worth highlighting regarding recommendations *made* by the COP to promote the adoption of 'Relevant IFB Measures' as indicated by Article 22(1.c), especially those indicated in Article 29(1). The first regards the relationship between the recommendations and the BBNJ Agreement. The second concerns the effect those recommendations may have on the legal interpretation and development of the BBNJ Agreement. The third concerns recalling who would have to be interested in recommendations to IFBs being adopted, i.e. the supporting 'stakeholders'. Fourth, the consequences for the recipient IFBs after State parties comply with their duty to cooperate in the terms of Articles 25(4) and 29(1) within that other IFB. It may be important to consider the recommendation under the broadest picture of the *consultation stage*, including collaborations and contributions. Additionally, recommendations would be made in accordance with the respective (sectoral) mandates of IFBs.[961]

First, recommendations might indirectly reflect an agreement subsequent to the BBNJ Agreement and Part III in the terms of Article 31(3.a) VCLT.[962] Recommendations, in this sense, might allow the explicit recognition of 'Relevant IFB Measures' or confirm 'ABMTs and MPAs'. Their apparent formal non-binding character may not represent an impediment to binding legal effects when, for instance, such 'Relevant IFB Measures' on management or mitigation are incorporated as *rules of reference* within the text of recommendations.[963] The legal considerations and political agreement underlying recommendations would depend on issues of sectoral, multi-sectoral, or cross-sectoral character. Legal undertakings may be

960 ibid 22(1.b).
961 ibid 22(1.c).
962 About less formal or informal agreements and their relation to the notion of subsequent agreements in Article 31(3.a) VCLT, it has been stated that "[i]n its reference to 'any subsequent agreement' in article 31(3)(a), the Vienna Convention does not specify that such an agreement must constitute a treaty or have the same formal status as the instrument which is interpreted. Hence, any good evidence that parties to a treaty have reached an agreement on its interpretation seems admissible.", Gardiner (n 727) 220. Gardiner has emphasized that "[f]act of agreement, not form, is the key factor", ibid 216. Gardiner explains that "while all (…) indicators (particularly when present together) will usually show conclusively that the intention is to set out the terms of a treaty, that is not the issue over article 31(3)(a). It is not a question of whether that provision adds to the assessment that any given instrument was intended to be a binding treaty, but whether the parties to a treaty have, subsequent to its conclusion, reached a firm agreement on what one of its provisions means. Thus it does not necessarily follow that such an agreement will be recorded in one of the forms commonly used for a treaty", ibid 217. He further explains, "[t]he less formal the agreement, the greater the significance of subsequent practice confirming less formal agreement or understanding.", ibid 222. In connection to the latter, see BBNJ Agreement arts 8, 25(4) and 29(1), and consider Article 25(6).
963 The rules of reference entail a mechanism by which the need to formally express consent may be circumvented. Notwithstanding the different context, it is worth recalling that "[s]ometimes, through references made in the UN Convention on the Law of the Sea, *soft law rules are given an effect similar to that of binding rules*. For example, under Art. 211 (2) UN Convention on the Law of the Sea, laws and regulations adopted by States Parties to prevent pollution by vessels 'shall at least have the same effect as that of generally accepted international rules and standards established through the competent international organization or general diplomatic conference'", Treves (n 663) para 69 (emphasis added).

included by a combined reference to *rules* such as regulations, standards, or EIAs designed or designated by regional 'IFBs' in cooperation and coordination with those of relevant IFBs of sectoral character and meeting the description in Article 29(1) and 29(4). RFMO measures, including EIAs, regarding 'marine biological diversity' would be guiding and fundamental for the combination of these 'Relevant IFB Measures'. Recommendations taken by the COP for an area considered to require protection may refer to a pack of 'Relevant IFB Measures' and, also, reflect their systematization or harmonization after the collaborations and contributions of 'stakeholders' within the broad consultation stage. As decisions, recommendations also hold the capacity to provide *continuous adaptability* to the BBNJ Agreement, and may arguably save *time* and *effort* in taking future decisions over the same geographical area. Recommendations that seek to achieve the subsequent adoption of a IMO regulations or standards or an EIA under IMO 'arising from' *inter alia* implemented RFMO management or mitigation measures in a given area and that refer to them, explicitly or implicitly, as 'Relevant IFB Measures', would show great adaptability to be used in later procedures under Part III, disregarding the time passed after their making. In the context of future time-bound consultations, when the time comes to take a decision on an 'ABMT' or 'MPA', referring to the recommendation within the proposal may be considered practical and convenient. This would be mostly useful when the desired decision aims to comprehend the IMO mitigation or management measures achieved as a consequence of the preceding recommendation. The adaptability of the recommendation may be achieved through the evolutive interpretation or amendment of the mitigation or management measures thereof referred to. This may not require the involvement of the COP; indeed, the evolutive interpretation of measures referred to in a recommendation may be undertaken directly through the competent IFB that adopted, interpreted, and applied such a measure. In sum, undertaking this *continuous adaptability* would fall within the competence of 'stakeholders' like the regional and sectoral relevant IFBs and may not be an issue needing the collaboration of the COP.[964]

Second, the recommendations would serve for the case-by-case authentic interpretation of the BBNJ Agreement, including its Part III. This case-by-case interpretation would be spatially circumscribed to the areas requiring protection covered by the recommendation. Recommendations might signify a source of *lex specialis* for the BBNJ Agreement as they define the notion of 'marine biological diversity'.[965] Additionally, authentic interpretation is sometimes considered a law-making method by which treaties might be *modernized*.[966] The

[964] Note that those IFBs having difficulties following recommendations and subsequently adapting their mandates risk losing relevance to the scope of the treaty and, in this perspective, might be eventually considered *non-cooperative*. This may turn out important after the COP, intersessionally, recommends an IFB to adopt emergency measures under Article 24, given that "measures shall be temporary and must be reconsidered for decision at the next meeting of the [COP] following their adoption.", BBNJ Agreement art 24(3).

[965] Recommendations may become a prevalent instrument to resolve conflicts of norms within the BBNJ Agreement. "The priority of the *lex specialis* is mainly justified by gains in legitimacy: special norms are normally better tailored for the regulation of an issue, and special institutions are normally better equipped to apply them.", Peters (n 670) 682.

[966] In this respect, see, for instance, how authentic interpretation may allow the *modernization* of RFMO mandates and procedures to improve environmental protections in Scanlon (n 241) 410–411. In this connection, it has been argued that "[w]hereas authentic interpretation in a *Kelsenian* sense means subordinate law-making, *authentic interpretation as traditionally understood in general public*

possibility of recommendations having this impact on the BBNJ Agreement would probably be considered a positive sign of *adaptability* to achieve the environmental goals of the treaty.[967] The BBNJ Agreement, for example, allows RFMO measures to contribute to defining *inter alia* the notion of 'marine biological diversity' and to adjust that of 'conservation' in certain high seas areas. If entitled to the power to provide content to the notions at the core of the whole BBNJ system, RFMOs may automatically become the most relevant of all relevant IFBs. Just to illustrate this point, among the bodies involved in the management of deep-sea fisheries, the North East Atlantic Fisheries Commission (NEAFC), already defines what 'marine biological diversity' is (together with other notions that correspond to its material scope, like 'fishery resources' and 'living marine resources'), and the North Pacific Fisheries Commission (NPFC) has incorporated "protecting biodiversity in the marine environment, including by preventing significant adverse impacts on vulnerable marine ecosystems" among its general principles".[968] By giving specificity and precision to these fundamental notions, RFMOs' role may be strategic to develop the 'Measures' under Part III under its spatial scope, including the 'Relevant IFB Measures' of other IFBs. RFMOs may gain a strategic critical role in the BBNJ Agreement and even influence lawmaking in a global IFB like the IMO, which does not include 'marine biological diversity' at the core of its mandate.[969] This would greatly impact the formation of recommended norms in potential recipients of various sectors like the IMO and, eventually, in the elaboration of mitigation or management measures consistent with Article 29(4.b). In this regard, it is worth noting that the influence an IFB may have over others through the BBNJ Agreement and how reciprocal it may be would depend on the open admission of States and, mainly, on the full access to key information within each of the IFBs, among other issues.

Third, the transformative legal process with global effects that the BBNJ Agreement may signify to the right to navigate, and to its exercise would necessarily have to be backed up by *inter alia* the States that impersonate maritime powers; the shipping sector, other persons within the private sector; representatives of the civil society like the sector-related NGOs; and sectoral IFBs like the IMO and its members. The support of IFBs with different mandates like RFMOs would be fundamental considering their modernization to protect biodiversity and knowledge on the matter. Such a legal process would also require the support of RFMOs and their members; States that have historically represented fishing powers and continue to govern RFMOs; the fishing sector; non-state actors, such as NGOs, for monitoring and surveillance;

---

international law is coordinate law-making. Subordinate law-making through interpretation and coordinate law-making are not mutually exclusive concepts. Nonetheless, it is important not to confuse them.", Berner (n 666) 851 (emphasis added).

[967] The BBNJ Agreement has been considered as a multilateral environmental agreement (MEA), Bodansky (n 18) 323. In light of this, it is worth keeping in mind that "[e]l objeto y fin del tratado, la *textura abierta* de sus disposiciones y el carácter continuo del régimen o de las obligaciones asumidas pueden determinar una interpretación no sólo amplia, sino *dinámica*, incluso *evolutiva* de sus términos (…). Está, asimismo, en la naturaleza de las cosas y el objeto y fin de los tratados de protección medioambiental optar por interpretaciones evolutivas, que permitan incorporar los progresos técnicos y combatir las amenazas sobrevenidas", Antonio Remiro Brotóns (ed), *Derecho internacional: curso general* (Tirant lo Blanch 2010) 379.

[968] North East Atlantic Fisheries Commission (NEAFC) Convention (adopted on 18 November 1980 and entered into force in 1982), Article 1. NPFC Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean, Article 3.

[969] In this connection, see Scanlon (n 241) 410–411.

and international fisheries bodies, such as the FAO. It is important to note that support from the scientific community and related public and private institutions would be crucial.[970] The support of the generically referred to as 'Indigenous Peoples' and the uncertain 'local communities' would appear to be important as well, and is likely to be clarified after the treaty enters into force, together with other uncertain notions. Stakeholders' support would be fundamental to promoting the making of recommendations and endorsing the subsequent compliance with Articles 25(4) and 29(1).

Fourth, State parties would be obligated to cooperate in the terms of Articles 25(4) and 29(1) BBNJ Agreement, and of other provisions like Articles 8, 17(b), and 27(e), within the context of the external IFBs recipients of the recommendations like, in turn, the IMO. The scope of Article 22(2) restricting the COP's decision-making refers to decisions and does not limit the material scope of recommendations.[971] Given that recommendations of the COP are not constrained by the limits imposed on decisions and therefore not by the mandates IFBs have, they might become a convenient pathway under Part III to stimulate a significant transformation of existing global bodies, such as the IMO.[972] Logically, the 'stakeholders' endorsing the making of a recommendation at the time of the time-bound procedures under Part III would not oppose to favor the receptiveness to the recommendation when it is received by the IFB to which it is addressed, and, where that same 'stakeholders' have a degree of influence over the policy of the recipient. The transformation within a recipient IFB might be triggered even by non-parties to the BBNJ Agreement who had collaborated and contributed as 'stakeholders' in the making of the recommendation received. The adoption of recommended measures would become possible through the subsequent cooperative practice and collaboration of those State parties acting within the recipient IFBs.[973] This potential situation appears consistent with the 'not undermine' clause under Article 5(2) *interpreted in the context of the BBNJ Agreement*.[974] The support of the main maritime and fishing powers would be key for the recommendations to become successful. This could contribute to overcoming the reluctance to adopt higher environmental standards and to even multiplicate mitigation or management measures under the IMO.[975]

If the IMO becomes competent on the subject matter of 'marine biological diversity', the COP will have to assess whether measures it desires to adopt are compatible before any decision is taken. Unless the IMO reciprocally incorporates decision-making modalities like those in the conflict clause provided by Article 22(1.b), among other limitations, the COP

[970] Takacs (n 583) 50–51, and 54.
[971] See discussion on Article 22(2) in Chapter 1.
[972] BBNJ Agreement art 22(1.c); Klerk (n 226) 12.
[973] According to Article 8, the recommendations of the COP might become important for "strengthening and enhancing cooperation with" relevant IFBs "and promoting cooperation among" them "in the achievement of the objectives of this Agreement.", BBNJ Agreement art 8(1).
[974] De Lucia (n 35) 5–14.
[975] "The 'anti-proliferation' argument pervasive in the international shipping industry appears to reflect a concern that there should be as minimal regulatory intrusion as possible into the exercise of the freedom of the high seas, so that the designation of marine areas entailing higher standards or particular rules ought to be exceptions rather than more frequent and general practice.", Chircop (n 411) 178.

would end up virtually ranked below the IMO.[976] If the current situation (i.e., where those modalities have not been reciprocally incorporated) persists, recommendations would have the effect of progressively empowering sectoral external IFBs and gradually, sector by sector, downplaying the status of the COP. Notice that the same reasoning could apply to regional IFBs. However high-ranked the global IMO may become about sectoral matters, regional IFBs like RFMOs might arguably be ranked above that sectoral body because of the presumptions with which the BBNJ Agreement and the UNFSA vest them and, in more practical terms, because of their knowledge of 'biological diversity' and the presumable agenda-setting powers that come with it.[977] The possibility that IMO measures *arise from* RFMO measures may confirm this view.[978] The subject matter of 'marine biological diversity' incorporated into the mandate of the myriad of IFBs through the *vehicle* that recommendations could represent, appears to be destined to become the common denominator for constituting a global institutional verticality reliant on the BBNJ Agreement.[979] The desired result of recommendations, i.e., new regional and sectoral 'Relevant IFB Measures', would be at the foundations of the whole planetary normative system.

5.3. Collaboration after the Making of Recommendations: A Mid-step for Strengthening (External) Area-based Management

Strengthening the area-based management and the 'Relevant IFB Measures' achieved by collaborating IFBs other than the COP, like RFMOs or IMO, would require initiating time-bound consultations for the establishment of 'ABMTs' or 'MPAs'. Collaborating to develop a proposal may entail forging a procedural strategy *before and after* submitting a proposal to establish 'ABMTs' and 'MPAs'. In this context, the conflict clause in Article 29(4) would presumably be regarded with the utmost consideration by IFBs. Having achieved the consent of State parties through the COP, the decision would have legally binding effects on all parties.

It is worth reminding that Article 29 BBNJ Agreement provides legal mechanisms for promoting normative-making decentralization. This entails the prelude for the fragmentation of high-seas law in regulatory areas known as 'ABMTs' or 'MPAs' aimed at containing harmonized bodies of norms or measures following a consistency threshold with the objectives

[976] After the recommended transformation takes place, an overlap concerning the protection of 'marine biodiversity' between the material scope of the mandate of the IFB transformed and that of the BBNJ COP might happen. If this were to occur, it would inexorably diminish the already limited powers of State parties by acting through the decisions of the COP over a geographically defined area, BBNJ Agreement art 22(1.b); Klerk (n 226) 12.
[977] Regional IFBs may grow stronger. In connection with this, it has been argued that regional seas conventions and 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.", Klerk (n 226) 12.
[978] BBNJ Agreement art 29(4.b).
[979] ibid 22(1.c); Klerk (n 226) 8. "The adoption of the BBNJ Agreement has the potential to change the dynamics within sectoral organizations, including the IMO, vis-à-vis their willingness to consider the designation of ABMTs on the high seas.", Roberts (n 416) 237.

of the treaty.[980] This might be illustrated with the provisions in Part IV that, like Article 29(1), define what the treaty means by international cooperation and open the way to a *first* desirable fragmentation through the adoption and implementation of 'Relevant IFB Measures' in regions and areas requiring protection. A close look at Article 29(2) allows recognizing that it entitles relevant IFBs engaged in normative making to "regulate activities in areas beyond national jurisdiction" and to "protect the marine environment" in the terms of the treaty in that phase.[981] Within relevant IFBs, the participation of the COP (or all State parties) is deemed unnecessary in the initial steps to form a regulatory area. According to Article 29(3), the STB would be able to *collaborate* with IFBs engaged, though, following Article 29(2), the development of the mechanisms for that to materialize depends on the competencies of the COP and the willingness of the relevant IFBs. These are aspects that need to be considered while efforts are oriented towards achieving a COP's decision.

5.3.1. The Development of the Proposal as a Matter of Procedural Strategy

It is worth keeping in mind that 'stakeholders' having the development of a proposal as a main goal may find collaborating to an *early* harmonization highly appealing. Doing so would ease achieving the *later* decisive harmonization by time-bound contributions. Before the submission of a proposal, efforts of 'stakeholders' should be directed towards *consistency* among 'mitigation or management measures' with a particular focus on 'the prevention of significant adverse effects'.[982] After receiving a recommendation and when in search of cooperation to protect 'marine biological diversity', 'relevant IFBs' like the IMO may follow the consistency goal and coordinate and cooperate with competent RFMOs to adopt measures in areas requiring protection. IMO regulations or standards or potential IMO EIAs applicable to the area, among the possible measures that may be recommended, could then be elaborated and incorporated or referred to in the proposal. In this relation, measures achieved by RFMOs with the cooperation of IMO may be elaborated in light of Article 29(4) under Part IV. Article 29(4) embodies a conflict clause that allows *contributing to harmonization*, most likely grounded on the preceding *collaboration to fragmentation*. The functioning of Article 29(4) conflict clause would be facilitated by its subjection to what, not the COP, but a State party primarily *determines*.

Though measures meeting the requirements of Article 29(4) may be referred to from the start of procedures under Part III within the proposal, the triggering of the conflict clause may also take place by the end of the time-bound *consultation stage* under Article 21, during deliberations within the COP. Following the other contributors, the COP would give its input on the final proposal and draft management plan on the basis and modalities set out in Article 22(1.b), among other relevant provisions. The COP, among all the contributors, is the only one

[980] BBNJ Agreement art 1(9).
[981] ibid 28(2).
[982] ibid 34(2).

entitled to *take* decisions on the 'ABMTs' and 'MPAs' *made* throughout the preceding overall *consultation stage*. Among all the contributors, however, State parties would have to participate, and the COP would have to decide subject to the limits of Article 22(2). Inputs of State parties and decision-making within the COP on matters related to Article 34 would have to adapt to procedural requirements in Article 23 and, overall, Article 21.[983] This allows reflecting that Article 29(4) can be seen as a mechanism for directing the legal products of fragmentation achieved through collaboration into a harmonization process taking place in the time-bound *consultation stage* that concludes with the decision of the COP.

5.3.2. The Importance of Collaborating and Designing Measures under Article 29(4)

When it comes to developing a proposal, it could be crucial for IFBs to consider collaborating and designing measures consistent with those referred to in Article 29(4). Article 29 in Part IV refers to the relationship between the BBNJ Agreement and the variety of external regional and sectoral EIAs processes under relevant IFBs. Article 30 in Part IV contains thresholds provided by EIAs, and the stimulus Article 29(4) entails for IFBs mainly consists of *adopting more stringent measures*.[984]

In its *chapeau*, Article 29(4) provides that if "the Party" with jurisdiction or control over a "planned activity" "determines" that they have complied with certain requirements listed in the provision, "[i]t is not necessary to conduct a screening or an [EIA] of a planned activity"[985]. What the Party *determines* under Article 29(4) suggests the possible consequences of establishing 'ABMTs' or 'MPAs' that refer to specific EIAs, as well as regulations and standards *arising from* them. In this respect, Part III could function as a mechanism through which measures related to external management or mitigation under Article 29(4) of the BBNJ Agreement, which apply to activities on the high seas, may become prevalent and binding on all state parties. The restrictions derived from the prevailing measures appear to *ex post* affect the interest of other State parties in their exercise of the freedoms of the high seas to the point of defining how these interests may be regarded in the area requiring protection. If *due regard* were to be taken into account for the interest of flag State parties exercising navigation, it would be under such legal conditions.[986] Article 29(4), worth considering, could become a legal channel for hardening sources that lack formal binding force. The inclusion of a simple reference to such legal sources within the COP's binding decisions might show the usefulness

[983] ibid 29(1).
[984] ibid 25(2).
[985] ibid 29(4).
[986] If law entailing restrictions to other States would prevail, the activation of Article 29(4) may create a legal contrast or parallelism with Article 87(2) LOSC, which, after the freedoms indicated in Article 87(1), provides that "[t]hese freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area".

of Article 29(4) as a harmonizing device. This would be important when designing universally binding IMO measures consistent with the objectives of the treaty, for example.[987]

A proposal including 'Relevant IFB Measures' consistent with those described in Article 29(4) would have great chances for prospering thanks to the verticality built up by Part III. IFBs and collaborating 'stakeholders' may foresee that a decision following such a proposal would be challengeable only by the type of objections the treaty allows.[988] As to the objections, it may be argued that a decision based on a proposal of this nature is, at the very least, likely to, first, be considered consistent with the treaty as with the rights and duties of potential objectors and, second, would be 'justified' by the presumptions and legal and institutional verticality so constituted under Part III.[989] Therefore, it may be stressed that after collaborations and contributions given by other 'stakeholders', the competent 'relevant IFB' would *continue implementing* the 'Relevant IFB Measures', now *optimized* and made opposable to all State parties by way of the resulting 'ABMTs' and 'MPAs' decided and established by the COP. Indeed, EIA processes and the regulations or standards arising from that assessment would be ultimately implemented in a "geographically defined area through which one or several sectors or activities are managed"[990].[991]

5.3.3. Looking for Recognition of External Measures by Means of a Decision

---

987 BBNJ Agreement art 1(9).

988 ibid 23(4) to 23(10).

989 ibid 23(5). See discussion about objections in De Lucia (n 35) 16–22. It has been noticed that the reasons to object in Article 23 Part III might occasionally appear to reflect the decision-making of RFMOs. De Lucia makes an acute observation by pointing out that "[t]he idea of raising objections to measures taken by an international body is not unprecedented. For example, objections are permitted under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFC), pursuant to Article 17(2)(a), if a 'decision unjustifiably discriminates in form or in fact against the member of the Commission or is inconsistent with the provisions of this Convention or other relevant international law.'", ibid 17. During the time-bound *consultation stage*, the reasons to object in Article 23(5.a) might be difficult to invoke or sustain against 'Relevant IFB Measures' that, first, reflect the consistency described in Article 34(2) Part IV and, in so doing, restrict the freedom to navigate. By then, such measures would have been negotiated and elaborated among regional and sectoral IFBs like an RFMO and the IMO, outside of the COP, and incorporated in a proposal (for instance, by reference) to ultimately include them among the sources of a decision. Challenges in interpreting the provision have not gone unnoticed: "[o]ne immediate question is whether high seas freedoms may be invoked under this provision in order to raise an objection, and under what conditions a decision may be considered to be inconsistent with such rights and obligations. *This in turn may depend entirely on the specific details submitted with the management plan associated with the decision, rather than with the decision in and of itself.*", ibid 18 (emphasis added). In this regard, it is worth noting that the BBNJ Agreement does not provide procedural mechanisms to object to proposals, and objecting to 'Relevant IFB Measures' is a procedural aspect that does not appertain to the scope of the treaty.

990 BBNJ Agreement art 1(1).

991 ibid 29(4.b.i) and 29(4.b.ii).

The harmonization taking place during the time-bound consultations, promoted by Part IV and Part III, is meant for a treaty that is very different from the LOSC, including Part VII or XII LOSC. In this connection, it is worth noting that Part I defines an EIA as a "process to identify and evaluate the potential impacts of an activity to inform *decision making*."[992] "Decision making" regards Article 23 and, especially, 34(2). Article 34(2) points out that a decision on EIAs would *determine* whether a "planned activity may proceed".[993] This latter aspect, more than others, explains the importance of looking for the triggering of the mechanism under Article 29(4) and the subsequent recognition of measures under this provision. On this basis, drafting a proposal may require considering how time-bound consultations would work and the role the COP may play in this respect.

Article 34(2) indicates that "full account shall be taken of [an EIA] conducted in accordance with [Part IV]". Despite the ambiguity of the term "full", it seems to suggest a particular approach to assessing external EIAs. The COP is explicitly given the competence to take 'full account' of EIAs not designed by it. The limitation for the COP on how to assess external EIAs is given by the modalities applicable to it, established by the provisions in *inter alia* Articles 22(1), 22(2), and 34(2) itself. Article 34(2) thus should be read in conjunction with Part III Modalities in Part III It may be interpreted that Article 34(2). This suggests that taking "full account" would hardly allow the COP to overrule or circumvent modalities. If this were to happen, the COP might act beyond the competencies defined in Part III.

It is important to acknowledge this in order to evaluate how the conflict clause in Article 29(4) may be assessed. In light of Article 34(2), initiating in-depth discussions about the consistency of external EIA with the objectives of the treaty, as well as the same consistency in respect of other external measures designed for the prevention, management, and mitigation under Article 29(4), might turn into a challenge for the COP. The COP must take into account "mitigation or management measures"[994] when adopting the decision. Acknowledging this is relevant to clarify the weight of a *determination* of a State party (including the proponent) under Article 29(4) and consequences on the *determination* of the COP in a subsequent decision following Article 34(2). If a determination that meets the requirements is made within the proposal or during later deliberations by another contributor, the time-bound consultation stage may turn into a global mechanism for (semi-automatically) recognizing 'Relevant IFB Measures' that meet the criteria of Article 29(4).[995] Indeed, the impact of triggering Article 29(4) would arguably unchain the later recognition of 'Relevant IFB Measures' by practically all State parties acting through the COP, including those on EIAs.[996] Following the wording in Article 34(2), such triggering is likely to occur "[w]hen determining whether the planned activity may proceed". Importantly, to be granted authorization to exercise a 'planned activity' under its jurisdiction or control, a State party would have to make other *determinations*

[992] ibid 1(7) (emphasis added).
[993] ibid 34(2).
[994] ibid.
[995] IISD, 'IGC 1st Session' (n 553) 8.
[996] During preparatory works, the High Seas Alliance "called for global recognition of existing MPAs that meet [the BBNJ Agreement] criteria.", ibid. "Norway proposed automatic recognition of ABMTs established according to certain procedures and requirements.", ibid 7. IGC 2018 p. 7. Previously, "Canada queried whether in establishing MPAs specific conservation measures would automatically be triggered.", IISD, 'WG 7th Meeting' (n 42) 5.

complementary to those in Article 29(4). Article 34(2) refers to additional *determinations* in that respect.[997] This would matter when approving the management plan.[998] Article 34(1) entitles the State party to *determine* if a planned activity under its jurisdiction or control "may proceed" and considers it "responsible" for such a determination. Considering these and other issues in the drafting of a proposal may be a key aspect for achieving the adoption of the decision and better meeting the objectives of the treaty.

5.3.4. Key Aspects in the Transition from Interim Harmonization to Final Harmonization

In the context of procedures regulated by Part III, Article 29(4) conflict clause arguably embodies a mechanism to *contribute* to harmonization and, in so doing, avoid any risk of possible parallelism concerning *inter alia* an EIA regulated by Part IV and conducted under the COP. It may be argued that mechanisms such as that in Article 29(4) are crucial to making the time-bound *consultation stage* in Part III function as if it were one unprecedented great machinery to circumvent the necessity of express formal consent generally required by treaties.[999] The COP may take decisions by embodying or referring to measures that show *compatibility* with the *consistency* that the relevant IFBs previously achieved when adopting external measures.[1000] The RFMOs and the IMO may safeguard the consistency among their measures thanks to the fact a compatible decision would require the COP to act "in cooperation and coordination"[1001] with them. The harmonization achieved, however, would likely unfold in parallel to the separate and freestanding LOSC.

---

[997] The Party is, first, required to *determine* "that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of *significant adverse impacts on the marine environment*.", BBNJ Agreement art 34(2) (emphasis added). This *determination* could be endorsed by documents issued by a regional or sectoral IFB with competencies in the area requiring protection, where their implemented mitigation and management measures embodied in 'Relevant IFB Measures' apply. Such 'Relevant IFB Measures' may coincide with those referred to in Article 29(4.b.ii). Together with that *determination*, second, Article 34(2) requires "mitigation or management measures" to be taken into account. These two requirements, potentially regarding matters falling beyond the scope of the COP, are mandatory for the State party before the COP issues a decision to authorize a 'planned activity', ibid.

[998] BBNJ Agreement art 22(1).

[999]To understand the relevance that the procedural rules and objectives of Part III may achieve universally and how groundbreaking it might be, it is useful to recall earlier reflections relating to the challenges that the principle of *pacta tertiis* may present sometimes: "If these objectives are to be realized, the basic challenge is to find means to oblige all states to impose new restraints on their nationals. The means chosen must overcome the obstacles to achieving fairly widespread assent to new obligations. The problem remaining is then to close the gap between 'widespread' and 'universal.'", Bernard H Oxman, 'The Duty to Respect Generally Accepted International Standards' (1991) 24 New York University Journal of International Law and Politics 109, 113–114.

[1000] BBNJ Agreement art 22(1.b) and 34(2).

[1001] ibid 22(1.b).

It should be noted that the requirement in Article 29(4.a) appears invariably necessary to trigger the clause under Article 29(4.b). The conjunction "or"[1002] in the text of Article (29.4.b) might support the idea that requirements established in Articles 29(4.b.i) and 29(4.b.ii), represent exchangeable alternatives. It seems necessary to highlight some issues in this concern.

First, in Article 29(4.a) the requirements with which "the potential impacts of the planned activity or category of activity" should be assessed would have to be those of "other relevant legal instruments *or* frameworks *or* by relevant global, regional, subregional *or* sectoral bodies" (emphasis added). This wording distinguishes the provision: it somehow illustrates the BBNJ regime, as Article 30(5) does in the UNFSA. Moreover, the conjunction 'or' reiterated in Article 29(4.a) connects possibilities and thus suggests the relevant regional and sectoral EIA requirements may be elaborated through different contexts and combined in a comprehensive and consistent *corpus juris*. This *corpus juris* would be at the foundations of the BBNJ Agreement and would be comprehensive of the 'Relevant IFB Measures'.[1003] That same *corpus juris* may be viewed as the cooperation and coordination among States and 'relevant' IFBs that Part III sets up as an objective.[1004] It may be argued that the more this *corpus juris* would develop and grow upon the subject matter of 'marine biological diversity', the less powerful the COP becomes and, curiously, that collaborating and contributing to such disempowerment is a way to cooperate in terms of the treaty.[1005] In this relation, it is crucial to recall that Part III discourages the COP from adopting decisions incompatible with that *corpus juris* of 'Relevant IFB Measures' and that the COP "shall respect the competences of, and not undermine" relevant IFBs.[1006] By the time the COP would be consulted through time-bound proceedings, importantly, IFBs different from the COP and other 'stakeholders' would have already provided meaning to the 'not undermine' clause in Article 5(2) on the basis of political arrangements and subsequent agreements consistent with the BBNJ Agreement. Thus, decentralization could have the side effect of ranking the COP below the other 'relevant' IFBs as regards normative making.[1007] Though unprecise as to their contents, it is noteworthy that the term "planned activity" in the *chapeau* is given the same treatment provided to the notion of "category of activity" inserted below.[1008]

Second, a close look at Article 29(4.b) further confirms that Part III sheds light on how Article 29(4) should be read. Both provisions in Article 29(4.b) set up conflicts between EIAs conducted under the COP, on the one side, and regional and sectoral EIAs undertaken under external 'Relevant IFB Measures' on the other, while, simultaneously, Part III resolves such

[1002] ibid 29(4.b.i). This suggests that the potential impacts would not be assessed by one entity (except that the BBNJ Agreement is viewed as an *international organization*). Rather, the assessment appears to fall within the capacities of the 'stakeholders', among which regional IFBs like RFMOs stand out.
[1003] Elements of the parallelism schematized above with respect to the LOSC suggest such a *corpus juris* may be deemed as a legal fragmentation in substance which unfolds along geographical or regional lines upon the space historically known as the high seas that the treaty subsumes in the broader notion of 'ABNJ', Pauwelyn (n 116) para 3.
[1004] BBNJ Agreement art 17(b).
[1005] ibid 19(2) and 21.
[1006] ibid 22(1.b) and 22(2). See discussion on Article 22(2) in Chapter 1.
[1007] ibid 17(b).
[1008] ibid 29(4.a).

systemic tensions with the modalities under Article 22 on *inter alia* compatibility with external measures.[1009] In this logic, what the Party *determines* would consist of a unilateral declaration to be made in some procedural moment of Part III to express what had already been decided within the scope of the relevant IFB involved, that is, elsewhere, previously, and outside the BBNJ COP.[1010] The *determination* and the *decision* to which Article 34(2) refers, thus, might result to be a procedural *confirmation* of past decisions made outside the COP. After the adoption of the treaty, in what might be possible to interpret as a possible allusion to this procedural mechanism, it was "underscored the risk of politicizing ocean conservation, stressing that any decision can be taken through a simple vote"[1011]. Article 34(2) gives precision on how decision-making should be practiced when there are substantive issues especially related to EIAs, after a State party "has *determined* that it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment" (emphasis added). It may be submitted that the *determination* of the State party in Article 34(2) may also fall within the competence of external IFBs and that it complements limitations to the COP in Articles 22(1) and 22(2). A later engagement of the COP in testing and determining whether Article 29(4) requirements are met, or those in Article 34(2), is likely to be interpreted as a breach of its obligation to "respect the competences of, and not undermine,"[1012] relevant IFBs. In such cases, the *determination* made by the Party may activate a mechanism, following which a measure following Part IV entirely under the COP can lose its chances of applicability and is replaced by 'Relevant IFB Measures' to which prevalence is acknowledged.[1013] This may give a disadvantaged status to those State parties with no substantial participation in the regional or sectoral relevant IFBs (like limited access RFMOs or IMO), which adds to the lack of open access to information or other assets that the 'relevant' IFBs. For them, triggering the mechanisms in Article 29(4) may become difficult if not impossible. If another State party triggers it, these disadvantaged States would be, however, obligated to comply with 'ABMTs' and 'MPAs', regardless of how restrictive the regulations thereof may be.[1014]

Observations on Article 29(4.b.i.) constitute a third point. The *determination* should state that "the assessment already undertaken for the *planned activity* is *equivalent* to the one required under [Part IV], and the results of the assessment are taken into account; *or*"[1015]. In the reasoning here submitted, the competent regional and sectoral relevant IFBs would be the ones legally defining key contents of Article 29(4.b.i) like the notions of 'planned activity' or 'equivalent', including whether "the results of the assessment are taken into account". These key contents would be subject matter beyond the competencies of the COP notwithstanding they may fall within the broad scope of the BBNJ Agreement.[1016]

1009 ibid 22(1.b) and 22(2).About the question of conflicting norms and mechanisms to save them, see Pauwelyn (n 116) 32–40.See discussion on Article 22(2) in Chapter 1.
1010 BBNJ Agreement art 29(4).
1011 See statement of Russia in IISD, 'IGC 5(3) Session' (n 29) 4.
1012 BBNJ Agreement art 22(2).
1013 ibid 29(4).
1014 ibid 25(6).
1015 ibid 29(4.b.i) (emphasis added).
1016 ibid.

Though Article 29(4.b.ii) does not explicitly refer to 'planned activity' nor to 'category of activity', its complementarity to Article 29(4.a) seems to imply that both notions are, however, encompassed by it. Article 29(4.b.ii) puts emphasis on qualified "regulations or standards of the ['relevant' IFBs]", that is a certain type of 'Relevant IFB Measures'.[1017] These 'Relevant IFB Measures' would have to meet three conditions. First, they would have to "[arise] from the assessment".[1018] The term "arising from" seems unclear and does not override considering the possibility that regulations and standards of a sectoral IFB like IMO may eventually be deemed to *arise from* the 'equivalent' EIA of a different IFB like RFMOs. The chapeau in Article 29(4) suggests that this type of combination is possible. This is consistent with the fact that "despite its single-sector focus, the PSSA concept has, in most cases, been utilized in conjunction with other types of ABMT"[1019]. The *consistency* generically required by Article 34(2), relating to 'the prevention of significant adverse impacts on the marine environment' and the 'mitigation or management measures' to be taken into account, may motivate a similar reasoning. Because of the specialty of its mandate, the IMO, as such, would develop its own sectoral 'equivalent' EIAs, most likely, after being recommended to do so. The second requirement is that regulations or standards "were designed to prevent, mitigate or manage potential impacts below the threshold for [EIAs] under [Part IV]".[1020] As allowed by Article 25(2) in Part III, this requirement aims at being the most stimulating to those participating in relevant IFBs so they make all reasonable efforts to ensure more stringent measures than an EIA regulated by Part IV. Lastly, the provisions requires "[that]they have been complied with."[1021] Also here, the competent relevant IFBs engaged would be the ones able to decide *ex-ante* whether the conditions set out by Article 29(4.b.ii) have been met, not the COP. Accordingly, based on Article 29(4), the Party may *determine* that compliance with such conditions was confirmed by the competent relevant IFBs, possibly by submitting a document certifying it. Under these terms, IMO, and possibly other cooperative 'stakeholders', would be expected to play an important role in issuing the respective documentation.[1022]

The legal consequences of Article 29(4) may impact the exercise of those activities to be labeled as 'planned activities' or 'category of activities' happening in areas potentially covered by 'ABMTs' and 'MPAs' optimizing 'Relevant IFB Measures' that fall under the scope of sectoral IFBs like IMO or regional like RFMOs and, more decisively, become important *for the regional and sectoral EIA processes they and their respective members deem 'equivalent' to the EIA that may be conducted under Part IV*. Other interested 'stakeholders' are encouraged to support proposals involving different sectors during the *consultation* stage to collaborate and contribute to circumventing the EIA process that may be conducted entirely under the COP according to the thresholds under Part IV. The support of RFMOs might become key to endorsing *determinations* that aim at "[achieving] a coherent [EIA] framework for [ABNJ]"[1023] and thus establishing a "geographically defined area through which one or several sectors or

[1017] ibid 29(4.b.ii).
[1018] ibid.
[1019] Roberts (n 416) 244.
[1020] BBNJ Agreement art 29(4.b.ii).
[1021] ibid.
[1022] ibid 34(3).
[1023] ibid 27(e).

activities are managed"[1024]. Article 29(4.b.ii) and the decision to be taken following Article 34(2) would likely concern those situations where proposed IMO measures *consistently* juxtapose with the spatial scope of RFMO measures, or, eventually, with IMO EIAs, for the prevention of significant adverse impacts on the marine environment.

5.4. Harmonization by Way of 'ABMTs' and 'MPAs': The Final Step to Strengthening (External) Area-based Management

This section focuses on the measures that only the COP may decide and with which it may *contribute* to legal harmonization within areas requiring protection. Notice that the resulting 'ABMTs' and 'MPAs' would not be meant to remain strictly autonomous self-contained regimes and that, over time, the goal to establish a system of ABTMs and a well-connected network of MPAs under Part III would provide the COP with opportunities to contribute to harmonizing 'ABMTs' and MPAs' established in earlier procedures with those sought by new proposals. In that manner, the law implemented in areas defined on a case-by-case basis by the scope of each respective procedure could be harmonized with the law implemented in other high seas areas protected by the BBNJ Agreement.

In this context, the usage of a plethora of words like *interaction*, *interplay*, *interconnectivity,* etc., to describe aspects of this harmonization might appear more appealing and appropriate to aesthetically circumvent the negative connotations of the notion of fragmentation that, anyway, remains subjacent to them. In light of the objectives of Part III, a final step for fragmentation of high seas law through 'ABMTs' and 'MPAs' would signify a main goal and is therefore deemed to have a positive connotation. This may create a legal parallelism with the LOSC, particularly with Parts VII and XII, with which the BBNJ Agreement overlaps spatially.

5.4.1. Decisions containing 'ABMT' and 'MPAs'

Three aspects worth highlighting regarding decisions taken by the COP. The first regards the relationship between the decisions establishing 'ABMTs' or 'MPAs' and the BBNJ Agreement. The second concerns the effect those decisions may have on the legal interpretation of the BBNJ Agreement as in its later development. The third concerns recalling not who takes decisions, but who makes 'ABMTs' and 'MPAs' and implements them, i.e. the 'stakeholders'. Besides contributing to harmonization during the time-bound *consultation stage* referred to in Article 21, relevant IFBs play a role as regards the second aspect.

[1024] ibid 1(1).

First, decisions would embody an agreement subsequent to the BBNJ Agreement and Part III in the terms of Article 31(3.a) VCLT.[1025] Decisions may be of a sectoral, multi-sectoral, or cross-sectoral character, and include *references to external rules,* regulations, and standards, or EIAs designed by regional or sectoral relevant IFBs that meet the description in Article 29(4.b). In other words, decisions taken by the COP for an area considered to require protection may reflect a consistent combination of 'Relevant IFB Measures' and, also, their harmonization after the collaborations and contributions of 'stakeholders' within the broad *consultation stage*. Decisions, including reference to external regional and sectoral rules in 'Relevant IFB Measures' would provide *continuous adaptability* to the BBNJ Agreement and may arguably save time and effort that the initiation of new procedures under Part III may require for taking decisions over the same geographical area. Decisions that include reference to IMO regulations or standards, for example, may be adapted to new environmental challenges by an amendment made directly through the IMO and with the participation of the relevant members. This provides for decisions that refer to (external) regional and sectoral EIAs in the area under protection to be amended more practically (i.e., EIAs following the description in Article 29(4)). Interestingly, it seems possible that undertaking this *continuous adaptability* would fall within the competence of 'stakeholders' like the regional and sectoral 'relevant IFBs' and would not necessarily be an issue within the scope of the COP.[1026]

Second, the decisions would serve for the case-by-case (or 'ABMT' by 'ABMT') authentic interpretation of the BBNJ Agreement, including its Part III. This case-by-case interpretation would very much depend on the law applicable in areas requiring protection. Within the geographical scope covered by it, the content of a decision may serve to clarify or define terms such as 'marine biological diversity' or 'conservation', not defined among the terms used by the treaty in Part I; or terms such as 'areas requiring protection' within the objectives of Part III; or terms not explained in Part IV such as 'planned activity' or 'category of activity', or others like '[consistency] with the prevention of significant adverse impacts on the marine environment' in Article 34(2) or 'substantial pollution of or significant and harmful

[1025] It might be worth bearing in mind that the function of 'amending' is not always carefully distinguished in its title from the function of clarifying, amplifying, or supplementing a framework treaty, Gardiner (n 727) 222. If amendments and the law-making they entail are made by way of interpretive authentication, then it might be expected that amendments of regional IFBs are done by those participating in and through them after the treaty had entered into force and, if a more far-reaching legal effect on the rights and obligations of State parties is pursued, not before a great number of States had ratified the BBNJ Agreement. Sensitivity about this aspect has been shown by asserting that regional IFBs "may undergo significant transformations in the future, potentially leading to a proliferation of regional MPA initiatives.", Klerk (n 226) 12. The text of Article 22(7) appears receptive to the idea of regional IFBs adopting such policy. States participating in them would have to adapt the mandates of the IFBs to protect 'marine biological diversity'. This would be of the utmost importance for being capable of, for instance, triggering Article 29(4) in the context of procedures under Part III, during non-regular consultations to the COP.

[1026] Peters (n 670) 680. To these observations, it might be possible that the proliferation of decisions for area-based management sought by Part III risk becoming a *normative labyrinth* developed upon a practically unlimited cross-reference legal design among and between a myriad of norms implemented by way of 'ABMTs' and 'MPAs'. Also, it should be considered that amending, *modernizing*, or *optimizing* the BBNJ Agreement might be seen as a sort of *legal chain reaction* where those participating from the regional IFBs may transform the treaty globally. See considerations on the possible negative effects of fragmentation in ILC Study Group (n 676) 10.

changes to the marine environment in areas beyond national jurisdiction' in Article 28(2).[1027] Even the terms in Part III, such as 'ABMT' and 'MPAs' would also be given precision and specificity through the decisions and notions related, like 'comprehensive system' and 'well-connected networks'. Besides subsequent agreements to the BBNJ Agreement, decisions, as recommendations, might signify a source of *lex specialis* with respect to the BBNJ Agreement.[1028] The authentic interpretation of decisions and recommendations or practices developed upon them in the terms of Article 31(3.b) VCLT might be a way to even modify the BBNJ Agreement.[1029] Useful as it may be to *modernize* the mandate of RFMOs or the IMO, authentic interpretation of 'ABMTs' and 'MPAs' may also become a powerful way to amend and *modernize* the BBNJ Agreement.[1030] Though a *modernization* and *adaptability* of this kind would have to be legally materialized from within the BBNJ COP and through its decisions, the *modernization* of the BBNJ Agreement is likely to find its true legal origin within the external regional and sectoral 'relevant IFBs' on which it depends to function. The transforming effects of that *modernization*, however, would very much depend on how IFBs implementing such 'ABTMs' and 'MPAs' might interpret, apply, implement, modify, or amend the 'Relevant IFB Rules' referred to in the text of the respective decision. This scheme ensures the stability and *status quo* within, for instance, the IMO, which, having put the protection of biodiversity at the core of its mandate, would hardly find itself *non-respected* or *undermined* by authentic

[1027] At the regional level, Article 28(2) and Article 34(2) would have particular importance in the Arctic region, where the ABNJ "are entirely surrounded by the exclusive economic zones of States", BBNJ Agreement art 21(4). It is noteworthy considering that, notwithstanding Article 3 in Part I, Part IV would have legal effects in areas within national jurisdiction. In this respect, "[i]t must also be remembered that contracting parties are required to conduct an EIA if activities in marine areas within national jurisdiction, such as fishing and *navigation*, are likely to cause substantial pollution of or significant and harmful changes to the environment of the marine Arctic beyond national jurisdiction, in accordance with Article 28(2) of the Agreement.", Tanaka (n 209) 109 (emphasis added). At the same time, Tanaka has reflected that "[w]hile this obligation does not explicitly relate to an EIA of a planned activity that may have adverse impacts on the environment of another state, it is not unreasonable to categorize an EIA under Article 28(2) as a form of transboundary EIA.", ibid 95. In this connection, see Antonio Graceffo, 'China and Russia Arctic Policy Convergence? Shifting Geopolitics in the North' (*Geopolitical Monitor*, 14 October 2024) <https://www.geopoliticalmonitor.com/china-and-russia-arctic-policy-convergence-shifting-geopolitics-in-the-north/>.
[1028] See comments on self-contained regimes as lex specialis, Banaszewska (n 213) 21–22.
[1029] Gardiner (n 727) 216–224. In virtue of Article 31(3.b) VCLT, it has been considered that "[w]hat subsequent practice comprises will vary according to the subject matter of the treaty in issue. The essence of it is what can be shown to have been done systematically or repeatedly in implementation and application of a treaty […]. When searching for practice relating to interpretation of a particular treaty provision, the defining test is that the practice must establish the agreement of the parties. This dictates that relevant evidence is that which shows the 'concordant' conduct of the parties, that is that they have done essentially the same thing expressly in pursuance of the treaty or, if the conduct is unilateral, that it reveals the agreement of the other party or parties.", ibid 226–227. In this regard, the legislative practice of limited access IFBs might become an element of interpretation of the recommendations or decisions, and even of the BBNJ Agreement. Individual such as those representing 'the private sector' have great chances of becoming interpreters of BBNJ measures in light of the 'transparency' promoted by the BBNJ Agreement and their authorized participation in the *consultation stages*. This would end up equating the status of the 'private actor' with that of the State party, which, in legal terms, would be innovative. In traditional legal reasoning, it has been assumed that contracting parties cannot be equated with individual interpreters, Berner (n 666) 876.
[1030] Scanlon (n 241) 410–411.

interpretations applicable to State parties.[1031] In this connection, it is expected that Article 22(2) would be interpreted in accordance with the context and would be available for 'stakeholders' to interpret as they see fit. The *versatility* with which Article 22(2) may be construed allows 'stakeholders' to interpret the provision in a manner that, for example, seals and solidifies the *sectoral* mandates of relevant IFBs from the initiation till the end of the time-bound procedures regulated under Part III. In a different later moment, this would allow State parties participating in IFBs addressed by a decision to cooperate with the BBNJ Agreement by applying the measures of the sectoral and regional IFBs with competence in the geographically defined area.[1032]

Third, the fact that the system allows being oriented according to the interests and willingness of 'stakeholders', including a certain group of States non-parties to the BBNJ Agreement, appears promising to achieve universal *uniformity and coherence* in the context of this new high seas treaty law. The *continuous adaptability* referred to above would become a task of 'stakeholders' like the regional and sectoral 'relevant IFBs' which may guide the commitment assumed by State parties and, thus, the COP. States that become parties to the BBNJ Agreement indirectly consent to an undetermined set of norms and agree to become directly obligated by the 'Relevant IFB Measures', that is, measures that may be adopted and implemented without their formal consent. The so-called 'establishment' of an 'ABMT' or an 'MPA' does not necessarily imply the substantial full participation of the COP in the whole *making* of those measures or implementation, but is mainly defined by the inexorable role of the COP in the *taking* of the respective decisions. This would basically signify a conferral of powers of parties acting through the COP. 'Relevant IFB Measures' would include those of competent relevant IFBs to which State parties may not have access or lack substantive participation. Therefore, it may be argued that Part III relies on the conferral of powers from State parties to relevant IFBs such as RFMOs together with IMO (and practically to all the other cooperative 'stakeholders' engaged in this matter). 'Stakeholders' might be considered the ones *making* the rules referred to in the decisions that the COP would be ultimately *taking*. In this view, notwithstanding formal aspects, it may be argued that 'stakeholders' are the ones *practically* entitled to authorize commercial navigation.

6. Remarks

Following the structure utilized to assess the UNFSA, the chapter focused on some of the main characteristics and procedural pathways offered by the BBNJ Agreement, particularly in Part III and Part IV. It has schematized the freestanding status with respect to the LOSC, how dependent the BBNJ Agreement is on 'stakeholders' pointing out how international cooperation is particularly defined in this treaty, and the core role that regional 'relevant IFBs' such as

[1031] BBNJ Agreement art 22(2).
[1032] See discussion on Article 22(2) in Chapter 1.

RFMOs may play during the *consultation stage* following time-bound procedures under Part III. Additionally, attention has been devoted to the decentralized normative-making technique, which concerns a series of procedural mechanisms that stimulate participation of relevant IFB by allowing them to gain a weight over substantial issues and giving them a procedural solid status. At the same time, the chapter has assessed legal strategies, looking forward to procedural efficiency and practicality in the pursuit of substantial results for the making of 'Measures' such as those applicable through Part III.

The legal architecture and the international cooperation as defined by the BBNJ Agreement may not evolve based on the legal fiction of the equality of all States.[1033] Consequently, higher environmental standards fixed for achieving the objectives of Part III and, especially, Part IV, may provide the basis to suggest that the freedom of navigation of all States (as conceived in custom or the LOSC) does not fit the BBNJ Agreement. Simultaneously, the right of States to navigate the high seas as may be conceived in the BBNJ Agreement does not seem to fit in with the legal context of the LOSC. On such a basis, there may be grounds to sustain the possibility that the BBNJ Agreement can eventually derogate the freedom of navigation (as conceived in the law of the sea) to reconfigure its content according to its environmental purpose. Simultaneously, this would have connotations on the prescriptive jurisdiction States parties have over vessels flying the flag of State parties. Indeed, State parties would have to enact legislation consistent with the 'Measures such as' those comprehensible in the BBNJ Agreement. Part III is clear about that State parties may follow "more stringent measures with respect to its nationals and vessels or with regard to activities under its jurisdiction or control in addition to those adopted under this Part, in accordance with international law and in support of the objectives of the Agreement" and that they "shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted *consistently* with the *decisions* adopted".[1034] It would be up to its later developments to understand how international law is qualified by the BBNJ Agreement.[1035] Some comments may be made as to recommendations, decisions, and the situation of small island developing States or least developed countries.

Recommendations are going to be the first significant step for constituting the foundations of the BBNJ system. It would be expected that RFMO members, or those applying RFMO measures under the UNFSA, would promote the designation of IMO measures consistent with RFMO measures through Part III. This would be important in making recommendations.[1036] More precisely, in an area covered by the spatial scope of the RFMO,

[1033] Lewis (n 87) 39.
[1034] BBNJ Agreement art 25(1) and 25(2).
[1035] ibid 25(2).
[1036] "It stands to reason that we can understand [Article 22(1.c) on recommendations] as opening a scenario where a measure adopted by the COP will not be effective in an area of competence of an IFB, and thus the COP may—though it does not have to—promote the adoption of a corresponding measure by the relevant IFB. *If we take the example of the North-East Atlantic, the establishment of an MPA in the high seas pursuant to the objectives of the BBNJ Agreement would be effectively delegated to relevant regional bodies—such as OSPAR and the North-East Fisheries Management Commission—and to sectoral global bodies such as the IMO and the International Seabed Authority (ISA) with global competence with respect to shipping and mineral extraction in the Area*. In effect, this would lead to the unfortunate situation of relying primarily on the status quo (…)", De Lucia (n 35) 12.

where there are no IMO measures, State parties applying measures of the regional body may propose recommending the IMO to designate a ‘Relevant IFB Measure’ consistent with those of the RFMO. *Consistency* would be an important criterion to ensure that the activity can be conducted consistently with ‘the prevention of significant adverse impacts on the marine environment’ and particularly, when cooperating for adopting sectoral and regional EIAs with thresholds and factors equivalent to those allowed by Part IV.[1037] Indeed, “[c]omprehensive management of [areas beyond national jurisdiction] is (…) only possible through cross-sectoral cooperation and *agreement* and requires broad participation to be effective.”[1038] The need to agree regards a *political* component, preceding the initiation of procedures regulated by Part III. This should not be understated in light of the BBNJ Agreement. An initiative evolving through these steps might permit, for instance, IMO measures achieved in this manner to be taken into account as a basis for a proposal to initiate procedures under Part III and the respective non-regular consultations with the COP. It has been stressed that inter alia closed areas for fisheries through RFMOs and PSSAs “will persist and may even proliferate following the adoption of the BBNJ Agreement.”[1039] Indeed, all legal materials achieved through political agreement, subject to the pressing *collaboration,* may be embodied in the content of the proposal for achieving a decision of the COP. The pressure would increase in cases where IMO is recommended to undertake ‘emergency measures’ under Article 24 in Part III.

To date, “[t]he International Maritime Organization (IMO) has the monopoly to establish the rules and standards applicable for navigation.”[1040]. In this respect, “[t]he development of rules and standards concerning the safety of navigation as well as the protection of the marine environment against harmful impacts from shipping are developed under the auspices of the IMO. The IMO develops a network of rules and standards that have to be implemented by the flag States, in the exclusive economic zones and the territorial sea by the coastal States concerned and by port States”[1041]. In the context of the BBNJ Agreement, differently, the IMO has no monopoly to establish rules and standards. When the IMO competencies over a certain area require protection overlap with those of a regional IFB, like an RFMO, the IMO would not be able to directly apply recommended measures without reaching an agreement with that regional IFB.

The BBNJ Agreement, worth noting, allows and favors such contexts without the necessary participation of the COP. In relation to the BBNJ Agreement, Bodansky asserted that “[c]*ombine and conquer*. That was the strategy of those seeking to develop an international

[1037] BBNJ Agreement arts 30 and 34(2). State parties would be obligated to (cooperate to) “[e]nsure that activities covered by this Part are assessed and conducted to *prevent*, mitigate and manage *significant adverse impacts* for the purpose of protecting and preserving *the marine environment*”, ibid 27(b) (emphasis added).

[1038] Roberts (n 416) 236. Immediately after he adds, “[t]o this end, *better alignment of conservation goals and approaches between the various regimes* that govern the high seas is needed to achieve biodiversity conservation and sustainable use of marine resources.”, ibid (emphasis added). Robert’s view, later to the adoption of the BBNJ Agreement, appears to implicitly align with the conclusion that the BBNJ Agreement sets up a decentralized regime, see Klerk (n 226) 17.

[1039] Klerk (n 226) 12. ‘Particularly Sensitive Sea Areas’ (*International Maritime Organization*) <https://www.imo.org/en/ourwork/environment/pages/pssas.aspx> accessed 4 May 2025.

[1040] Wolfrum (n 141) art 210.

[1041] ibid.

regime to address marine biological diversity found in areas beyond national jurisdiction areas that constitute half of the world's surface and a much greater proportion of its habitable volume."[1042] Drawing on his words, it may be expected that the same rationale follows the making of agreements to combine regulations and adopt a variety of 'Relevant IFB Measures' in each of the high seas regions.

Part III allows the evolution of a *procedural* tactic that may enable the unfolding of a wide *procedural* strategy through the BBNJ Agreement and other *collaborative*, later *contributive* IFBs. International cooperation as defined by Part III and Part IV entails a great level of pressure on States. After the IMO *collaborates* and follows the recommendation by the COP, in future procedures, the same States may go further and propose the adoption of a multi-sectoral or cross-sectoral decision and the subsequent establishment of 'ABMTs' and 'MPAs' containing RFMO measures and *inter alia* the measures adopted by the IMO after following the recommendations. This would also require *political* commitment.

Second, decisions would entail the consolidation of the BBNJ system in the immense areas beyond national jurisdiction, in a variety of areas requiring protection in terms of the treaty. The triggering of the conflict clause in Article 29(4) through the *determination* of a State party would turn regional and sectoral 'Relevant IFB Measures' into the law applicable in an area under protection for all State parties. Such 'Relevant IFB Measures' would later be envisaged within 'ABMTs' or, more restrictively, within 'MPAs', decided by the COP. 'Relevant IFB Measures' would remain the applicable law in the area under protection even after being *optimized* by the procedures under Part III, and, subsequently, State parties would be obligated to ensure that activities under their jurisdiction or control that take place under the scope of that 'Relevant IFB Measures' are conducted 'consistently' with the decisions adopted by the COP.[1043] After the procedure, establishing that 'ABMT' or 'MPA' concludes, State parties willing to undertake an activity, like navigation, in that geographically defined area would have to make the *determination* required in Article 34(2) in accordance with that regional and sectoral 'Relevant IFB Measures'.[1044] The fact that the State party's determination needs the backup, or an earlier determination issued by the 'relevant IFB' with regional and sectoral competence, means that the authorization to develop an activity would substantially depend on those IFBs with competences over the 'ABMTs' or 'MPA'. In this case, the authorization would be conditioned by a regional IFB like an RFMO, and, mostly, on a sectoral IFB, like the IMO. The COP and flag State with jurisdiction might be then described as formal vehicles through which the regional and sectoral law embodied in a given 'ABMT' or 'MPA'

[1042] Bodansky (n 18) 299 (emphasis added).
[1043] BBNJ Agreement art 25(1).
[1044] Part III establishes that "Parties shall ensure that activities under their jurisdiction or control that take place in [ABNJ] are *conducted consistently* with the decisions adopted under [Part III]", ibid (emphasis added). Part IV requires that the determination of a Party *determines* or refers that the "activity can be *conducted in a manner consistent* with the prevention of significant adverse impacts on the marine environment", ibid 34(2) (emphasis added). Following Part III in conjunction with Part IV, the *consistency* required to conduct an activity would have to be clarified by taking into account the decisions adopted by the COP. This might imply considering the 'Measures' envisaged in Part III that are referred within those decisions. 'Relevant IFB Measures', for example, may define what does the term "the prevention of significant adverse impacts on the marine environment" means within a geographically defined area, ibid.

may be addressed to its recipients. In the case of shipping, the exercise of navigation is likely to depend (immediately) on the approval of the IMO.

This possible situation might become evident after the *modernization* of the IMO triggered by recommendations directed to it, which could achieve a mandate on 'marine biological diversity' and competence over a certain region or area requiring protection in terms of the BBNJ Agreement. This may suggest that the IMO could become *the* sectoral IFB that may prevent some State parties from navigating if not supportive of how those States aim at exercising navigation and, particularly, does not back up its *determination*.[1045] It might be the IMO and not the State party that gives content to the notion of "significant adverse impacts on the marine environment" in Article 38(2) and the one that verifies that EIAs and regulations and standards described in Article 29(4.b) have been complied with. In this view, a decision to authorize navigation within an area under the protection of Part III could not be issued if a State party lacks the external support of IMO to *determine* "it has made all reasonable efforts to ensure that the activity can be conducted in a manner consistent with the prevention of significant adverse impacts on the marine environment."[1046] Flag State parties complying with the 'Measures' implemented by IMO could make the respective *determination* under Article 34(2) and be authorized to navigate in a certain region of the high seas. Accordingly, Part III indicates that "Nothing in this Agreement shall prevent a Party from adopting more stringent measures with respect to its nationals and vessels or with regard to activities under its jurisdiction or control in addition to those adopted under this Part, in accordance with international law and in support of the objectives of the Agreement."[1047] A flag State party may thus incorporate stringent IMO measures into its domestic law and apply them to vessels flying under its flag. Other State parties that may not be capable of complying with such stringent IMO measures in a given area might be affected by some of the restrictions those measures imply.

Lastly, there is the situation of small island developing States or least developed countries. Article 25(3) in Part III very clearly sets out that the "implementation of the measures adopted under [Part III] should not impose a disproportionate burden on Parties that are small island developing States or least developed countries, directly or indirectly." This provision would be of special interest for some of the IMO members as well as for the owners, insurance companies, and other persons of the private sector. According to the Review of Maritime Transport (2023) "Panama, Liberia and the Marshall Islands [constitute] the world's three leading fags of registration"[1048]. The comprehensiveness of the term 'disproportionate

[1045] BBNJ Agreement art 29(4).
[1046] ibid 34(2).
[1047] ibid 25(2) (emphasis added).
[1048] UNCTAD Secretariat, 'Review of Maritime Transport, 2023' (United Nations Conference on Trade and Development 2023) UNCTAD/RMT/2023 xxv <https://unctad.org/system/files/official-document/rmt2023_en.pdf> accessed 30 March 2024. "Under international law, all vessels are required to be registered in a recognized ship registry and sail under the flag of their country of registration. In accordance with Article 91 [LOSC], there must be a 'genuine link' between a vessel and its country of registration. Despite efforts to define what constitutes a "genuine link," there is no precise and globally accepted definition of this concept that clearly determines the relationship between ship owners and the country of registration. While some states employ a 'closed registry' policy, permitting the registration only of vessels owned by their nationals, many states use what is known as an 'open registry' policy.

burden' would define how rigorous or how flexible 'ABMTs' and 'MPAs' may turn out to be for these flag States if they decide to become parties to the BBNJ Agreement.[1049] In its *modernization*, IMO members may define the term 'disproportionate burden' and to what extent Part III may restrict the activity of vessels flying the flag of major flag States falling within the description. If flexibility is achieved, the exceptions given by Part III may work as a new stimulus (this time, under the BBNJ Agreement) for shipping owners to register their vessels and make them navigate under these flags. In this mindset, it might be expected that Article 25(3) becomes an important element when 'stakeholders' in the shipping sector collaborate with the proponent in the development of a proposal and, moreover, an instrumental *procedural* factor when requesting a decision authorizing navigation.[1050] Though this may give the legal impression that the freedom to navigate as conceived in the law of the sea may persist, in practical (and also legal) terms, that impression appears rather weak. In this regard, 'stakeholders' would be the ones supporting the exercise of navigation in the treaty terms and not the States per se. This is a significant contrast with the LOSC. However flexible 'Measures' implemented by IMO may be, notice that these would anyway apply to those State parties *not* comprised in the categories described in the provision.[1051]

While recognizing its different nature, it has been commented "[l]ike most [multilateral environmental agreements], the BBNJ Agreement is intended to be a dynamic treaty that will evolve over time in response to new information and changing politics."[1052] Indeed, world politics, as always, has conditioned and shaped international law and, especially, legal developments relating to activities in the ocean.

An open registry imposes few if any nationality requirements and thus permits foreign-owned vessels to register and sail under their flag.", Nizan Feldman, 'Rallying around the "Flag of Convenience": Merchant Fleet Flags and Sanctions Effectiveness' (2022) 143 Marine Policy 105129, 2. "Today, shipowners are largely located in developed countries, although China and Singapore feature among the top 10 ship owning countries. This distinction in the shipping industry underscores the complexities associated with regulating the sector's environmental impact, as demonstrated by the ongoing greenhouse gas (GHG) emission reduction negotiating process at IMO.", UNCTAD Secretariat 32.

[1049] BBNJ Agreement art 25(3).

[1050] ibid 34(2).

[1051] ibid 25(3).

[1052] Bodansky (n 18) 323.

CHAPTER 5

POTENTIAL CHALLENGES FOR THE RESOLUTION OF LEGAL CONFLICTS AFTER THE OVERLAP OF THE BBNJ AGREEMENT AND THE LOSC

1. Introduction

This chapter provides suggestions for harmonizing the BBNJ Agreement and the LOSC. To this end, the chapter focuses on two possible scenarios. First, it considers how a systemic interpretation of the relevant provisions of the LOSC under the BBNJ Agreement might be undertaken, taking into account the situation of States that may become parties to both treaties. Noting that harmonization may be possible through judicial reasoning, the chapter focuses on the role that ITLOS may play in this regard. Later, the chapter assesses the situation of States that might be reluctant to ratify the BBNJ Agreement and suggests possible ways in which these States might be persuaded to contribute to harmonization. In doing so, the chapter highlights the potential position of States that support the treaty and reflects on the role the IMO may play.

2. Two Possible Scenarios

Here, two scenarios of legal fragmentation are assessed, notwithstanding many unpredictable scenarios that may give rise to more specific conflicts after the possible entry into force of the BBNJ Agreement. In the context of consultations (including when determining the activation of the clause in Article 29(4)), legal harmonization in a specific high-sea area may be achievable after situations where States parties to *both* the BBNJ Agreement and the LOSC express discomfort with navigation-restrictive measures resulting from RFMO norms or the agreement between RFMOs and the IMO *arising from* the former. This would set up the basis to advocate for requesting an advisory opinion from the ITLOS to determine the balance between the freedom of navigation and the environmental goals of the treaty.[1053] After this, State parties acting through the COP may ask the ITLOS to clarify the level of cooperation needed with, for instance, limited-access RFMOs, and to what extent they are required to implement the necessary legislative, administrative, and policy measures to fulfill agreements in which they did not (fully) participate and the BBNJ Agreement.[1054] The systemic interpretation of the provisions of the LOSC in light of the BBNJ Agreement by the ITLOS may significantly help address fragmentation with the earlier treaty in force. States that are not parties to the treaty, but are, however, granted the procedural mechanisms to participate in decision-making and consultations with State parties, may also have an interest in resolving this fragmentation.[1055] Given the openness of the BBNJ Agreement to them, full universal participation in the treaty appears to be unlikely.

Second, strengthening fragmentation, there may be States reluctant to consent to the treaty that decide not to participate in consultations at all. They may have no interest in the ITLOS harmonizing the provisions of the LOSC following the scope of the BBNJ Agreement. This may lead to a scenario in which the commercial vessels that fly the flag of a party to the LOSC, non-party to the BBNJ Agreement, navigate in the high seas together with others flying the flag of a State party to the BBNJ Agreement. Following the *pacta tertiis nec nocent nec prosunt* principle, the former vessels might have the possibility to navigate through the areas protected by the BBNJ Agreement without being obligated to comply with the standards and regulations agreed by regional and sectoral bodies or mechanisms applying thereto. In these circumstances, the political will of States (or the lack of it) to legally interpret the LOSC with flexibility appears decisive to resolve fragmentation concerning the LOSC and the BBNJ Agreement. Harmonization, however, might become inevitable if the majority of State parties to the LOSC ratify the BBNJ Agreement and States not consenting to the BBNJ Agreement remain in the minority. In this scenario, for instance, after external measures of the IMO adopted under the BBNJ Agreement gain *general acceptance*, these States may be compelled to adopt a flexible, more open interpretation of the LOSC.[1056] The persuasiveness of States supporting the systemic interpretation of the LOSC following the BBNJ Agreement and, possibly, the mandate assigned to the IMO suggests potential pathways to overcome fragmentation between the two treaties.

[1053] BBNJ Agreement art 47(7).
[1054] ibid 25(6) and 53.
[1055] ibid 21(2.a).
[1056] LOSC art 94(5) and 211(2). Literature indicates that the term 'GAIRs' is not clear and need to be further defined, Jakobsen (n 52) 57.

2.1. Systemic Interpretation of the Provisions of the LOSC under the BBNJ Agreement

2.1.1. Harmonization by Way of Judicial Reasoning

The judicial decisions might play an important role in resolving possible conflicts of law relating to the right of States to freely navigate and surpass the problem of it being envisaged under two parallel different treaty contexts, meaning the high seas as regulated by the LOSC and the one provided by the BBNJ Agreement. This is relevant for the first scenario above illustrated.[1057] In this situation, regulations under IFB measures and each of the 'MPAs' and the 'ABMTs' may be confirmed after the States parties, during the time-bound consultations, decide to submit to the ITLOS a legal question on a proposal's conformity with the BBNJ Agreement. The ITLOS could issue an advisory opinion even as a matter of urgency.[1058] The advisory opinion concerning the proposal may well provide the basis for constructing ulterior judicial reasoning in the context of dispute settlement.[1059]

Young's words seem to have been premonitory of the BBNJ Agreement.[1060] In 2003, when discussing legal strategies and analysing the benefits the CBD *or* the LOSC might represent as a basis for a future international instrument for establishing *MPAs* on the high seas, Young pointed out that "international dispute resolution mechanisms cannot, of course, be used as mechanisms for *declaring* [MPAs]; however, they may serve a more important purpose in *confirming* them. It is possible that, once an [MPA] has been declared, a party might seek to enforce [MPA] limitations against another Party in one of these venues. In that case, the relevant tribunal will, in essence, determine the validity of [MPAs] as 'measures' under Part XII."[1061]

The content of the general obligation to protect and preserve the marine environment in Article 192 LOSC is detailed in the subsequent provisions of Part XII LOSC, including Article 194(5), which refers to measures "necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life". Article 194(5) states that these measures shall be taken "in accordance with

---

1057 BBNJ Agreement art 47(7).

1058 ibid. It is to be noted that it is still unclear how the possible *urgency* in requesting an advisory opinion could relate to *emergency* measures the COP might adopt, taking into account *inter alia* the precautionary approach. If requested, the ITLOS advisory opinion might also contribute to confirming an ABMT established for replacing the emergency measure, ibid 24(4).

1059 BBNJ Agreement art 60(5).

1060 Young (n 161) 6–8.

1061 ibid 8. At its outset, the publication clarifies "[t]his paper was prepared by Tomme R. Young, Senior Legal Officer, IUCN Environmental Law Centre, *with significant input from Kristina M. Gjerde* and a team of reviewers.", ibid 1 emphasis added. Curiously, years later, Gjerde would focus on analyzing the support for a new implementing agreement under the LOSC, Kristina M Gjerde, 'Challenges to Protecting the Marine Environment beyond National Jurisdiction' (2012) 27 The International Journal of Marine and Coastal Law 839, 842–846.

this Part". The relevant international tribunal, in turn, may *confirm* the rules for area-based management implemented in areas protected by the BBNJ Agreement by interpreting that they have to be considered as 'measures' under Article 194(5) LOSC implemented beyond national jurisdiction. In doing so, the judicial institution would be contributing to resolving problematic legal parallelisms between the BBNJ Agreement and the LOSC concerning State parties to both the LOSC and the BBNJ Agreement. Focusing on selected provisions and not on the LOSC as *a whole* would certainly ease the task of the tribunal.

In this relation, it is not clear how the ITLOS may find it useful to refer to the case law of Annex VII Arbitral Tribunals that allegedly endorses a systemic (or more ecological) interpretation of the provisions of the LOSC. It has been argued that the *Chagos MPA Arbitration*[1062] and *South China Sea Arbitration*[1063] might be relevant to interpret the relationship between 'MPAs' for the conservation of biological diversity and the conservation measures that may be adopted under the LOSC, through Article 194(5).[1064] In the *Chagos MPA Arbitration,* the Tribunal held that "Article 194 is accordingly not limited to measures aimed strictly at controlling pollution and extends to measures focused primarily on conservation and the preservation of ecosystems. As repeatedly justified by the United Kingdom, the MPA is such a measure."[1065] However, the award later clarifies that "the Tribunal has taken no view on the substantive quality or nature of the MPA or on the importance of environmental protection. The Tribunal's concern has been with the manner in which the MPA was established, rather than its substance."[1066]. In the *South China Sea Arbitration*, the Tribunal borrowed the definition of 'ecosystem' from Article 2 CBD while examining Article 194(5) LOSC, but without expressly resolving the relationship between the CBD and the LOSC. It pointed out that "An 'ecosystem' is not defined in the [LOSC], but internationally accepted definitions include that in Article 2 of the CBD"[1067]. Against this background, it is worth noting that the jurisprudence of the ITLOS to date appears *conservative* and not fully open to the systemic interpretation of the LOSC. Its standpoint, however, may shift after it starts functioning as a tribunal for the BBNJ Agreement.

2.1.2. Insights on The Conservative Reasoning of the ITLOS

[1062] *Chagos Marine Protected Area Arbitration* [2015] Arbitral Tribunal constituted under Annex VII LOSC Case Nº 2011-03, Permanent Court of Arbitration (PCA).
[1063] *The South China Sea Arbitration* [2016] Arbitral Tribunal constituted under Annex VII LOSC Case Nº 2013-19, PCA.
[1064] Beatriz De Sousa Fernandes, 'Imposing an International Environmental Jurisdiction: How Developments on Marine Protected Areas Are Fostering a New Legal Order for the Conservation of Areas beyond National Jurisdiction' in Patrick Chaumette (ed), *Transforming the ocean law by requirement of the marine environment conservation* (Université de Nantes : Marcial Pons 2019) 213–214.
[1065] *Chagos Marine Protected Area Arbitration* (n 1062) para 538.
[1066] ibid 544.
[1067] *The South China Sea Arbitration* (n 1063) para 945.

In the 2024 Advisory Opinion of the ITLOS (*Climate Change Advisory Opinion*), awareness was shown about legal mechanisms external to the text of the LOSC. On that occasion, views of States were somewhat divergent as to the ITLOS exercising its consultative functions. ITLOS notices that "[a] *large majority* of the participants in the proceedings recognized that anthropogenic GHG emissions meet the definition of 'pollution of the marine environment' under article 1, paragraph 1, subparagraph 4, of the Convention. On the other hand, *some participants* argued that GHG emissions should not be considered 'pollution of the marine environment' and that to include them within the ambit of 'pollution of the marine environment' would be tantamount to the Tribunal exercising legislative functions."[1068] This aspect suggests that some States may be reluctant to the idea of the ITLOS carrying out legal harmonization through judicial reasoning. Arguably, the ITLOS kept a conservative approach when referring to the BBNJ Agreement and to the UNFSA.

In its advisory opinion, in paragraph 439, the ITLOS "observes that the term 'marine protected area' is not found in the Convention."[1069] And, at the end of the opinion in paragraph 440, the ITLOS "notes that Part XII of the Convention does not preclude States from adopting more rigorous measures to protect and preserve the marine environment than provided for therein. *However, such measures must be consistent with the* [*LOSC*] *and other rules of international law*."[1070] Immediately after, in the same paragraph, the ITLOS "notes that the recently adopted BBNJ Agreement expresses the need for a global framework under the [LOSC] to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and provides for the use of area-based management tools, including MPAs."[1071] The advisory opinion ends there. The fact that the ITLOS has drafted paragraph 440 in such a manner should not lead to oversimplification. Indeed, the awareness about the BBNJ Agreement is included at the bottom of the opinion without any in-depth examination. The ITLOS appears to hold a conservative view on how the LOSC should be interpreted. It has not endorsed any idea of subordination of the BBNJ Agreement with respect to the LOSC, nor has it explained how these treaties would relate to each other.

A closer look at the structure of the paragraphs suggests that the ITLOS characterized the BBNJ Agreement in the same manner it noted the CBD. In paragraph 439, after highlighting that the LOSC does not include the term 'marine protected area', the ITLOS "notes that Article 2 of the CBD defines '[p]rotected area' as a 'geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.' The contrast made by ITLOS between the LOSC and the CBD in paragraph 439 clarifies the reading of the text that comes immediately after in paragraph 440. Accordingly, paragraph 440 appears to imply the idea that the relationship between the LOSC and the BBNJ Agreement would have to be regarded as the relationship between the LOSC and the CBD. ITLOS utilized the term 'notes' in both cases. Upon this reasoning, it may be understood that ITLOS was trying to create a contrast also in paragraph 440. Interestingly, the second phrase in paragraph 440, preceding the reference to the BBNJ Agreement, makes it clear that '*measures must be consistent with the*

[1068] *COSIS* (n 300) para 160.
[1069] ibid 439.
[1070] ibid 440 (emphasis added).
[1071] ibid.

Convention and other rules of international law'. The possible view that the ITLOS assumed a non-conservative position on the basis that it utilized systemic reasoning further strengthens the view that the BBNJ Agreement should be regarded as a treaty concerning a different subject matter.

It stems from this assessment that the wording in paragraph 440 hardly endorses any argument sustaining that *inter alia* the ITLOS implicitly construed Article 5(1) BBNJ Agreement or that it endorses it. A closer look at the wording employed by the ITLOS, and how paragraphs 439 and 440 were designed, appears to discourage such interpretations. The wording instead appears to strengthen the view that the ITLOS interprets the LOSC *as it is*. Moreover, paragraph 440 should be read in the comprehensive context of the advisory opinion. For instance, paragraph 206, contains a solid statement in which ITLOS more clearly and in a much more solid tone stressed "[w]hile article 194, paragraph 1, of the Convention leaves it to each State to determine what measures are necessary to prevent, reduce and control marine pollution, *this does not mean that such measures are whatever measures States deem necessary to that end. Rather, necessary measures should be determined objectively*. Many participants in the proceedings emphasized the importance of objectively determining those measures."[1072]

Also in 2024, the ITLOS stated inter alia that "[t]he [UNFSA] establishes an enhanced framework for the conservation and management of straddling and highly migratory fish stocks that is relevant to climate-driven shifts in the distribution of fish stocks."[1073] The interpretation of such a reference appears uncertain. In paragraph 388 of the Advisory Opinion, however, ITLOS listed a series of instruments of international environmental law, grouping the UNFSA with the CBD. It referred that "the Tribunal has addressed the relevance of international instruments on climate change, (…) to the questions before it (…). *Other agreements*, such as the [UNFSA] and the CBD, may *also* provide relevant guidance, as indicated further below."[1074] (emphasis added). Though not accurately ascertaining the nature of the UNFSA, ITLOS has persisted in considering it separately from the LOSC.

Judge Paik's view on the judicial reasoning of ITLOS may shed further light on this issue. In this respect, it is worth noting that in 2015, when the ITLOS assessed a key notion as IUU fishing, Judge Paik observed that "in the 1990s and onwards, a steady stream of treaties and other legal instruments have been adopted in response to growing international concern over IUU fishing. They include several global and regional fisheries treaties, a number of bilateral fisheries access agreements, a series of soft law instruments mostly adopted under the auspices of Food and Agriculture Organization (hereinafter "the FAO") and a range of fisheries-related resolutions adopted by international organizations including the General Assembly of the United Nations."[1075] He referred to these developments as "the post-UNCLOS

[1072] ibid 206 (emphasis added). Article 194(1) LOSC reads "States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection".
[1073] ibid 425.
[1074] ibid 388.
[1075] Separate Opinion of Judge Paik *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion* [2015] ITLOS Case No. 21, ITLOS 4 [5].

normative developments *as a whole*"[1076]. It may be argued that the latter expression is comprehensive of the UNFSA. He also underlined that "there is no clear provision in the Convention that specifically addresses flag State obligations concerning IUU fishing"[1077], and related this notion to instruments that "are not legally binding"[1078]. While distinguishing the LOSC from all these 1990s legal developments, Judge Paik made it understandable that the ITLOS had interpreted the LOSC by not considering all those other developments.[1079]

Paik's appreciation of the judicial view of the ITLOS may serve to clarify the *conservative* judicial reasoning that has characterized this body and the challenge for judicial reasoning that the UNFSA or the BBNJ Agreement may represent. After the entry into force of the BBNJ Agreement, the primary function of the ITLOS is likely to be that of harmonizing the law of regulatory areas within the scope of the BBNJ COP decisions, including those in areas beyond national jurisdiction where the BBNJ Agreement and the LOSC overlap. Harmonizing international law after the BBNJ Agreement would present a whole new chapter for the ITLOS and its judges, who would see themselves in the obligation to adapt their legal mindset to a whole new and different legal system. The degree of difficulty for the judges stems from the conservative positions they seem to have adopted so far. In the context of the BBNJ Agreement, the ITLOS would appear to be transformed into an international tribunal with competencies on international environmental law, that comprises elements traditionally regarded by the law of the sea.

2.1.3. Challenges for the ITLOS functioning under the BBNJ Agreement

In a situation in which the ITLOS exercises its (consultative) jurisdiction as a tribunal of the BBNJ Agreement, addressing the legal weight of Article 5(1) BBNJ Agreement to clarify the relationship between the two treaties seems to be unavoidable and necessary for systemic reasoning. It provides: "[t]his Agreement shall be interpreted and applied in the context of and in a manner *consistent* with the [LOSC]. Nothing in this Agreement shall prejudice the rights, jurisdiction, and duties of States under the [LOSC], including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles."[1080]

Article 5(1) was presumably drafted following a strategy consisting of seeking a 'mutually supportive' interpretation of the BBNJ Agreement and the LOSC, and it may be considered an 'open-ended conflict clause'. In this respect, the International Law Commission (ILC) has studied the problem of fragmentation in international law and considered that the drafting of certain treaty clauses corresponds to how negotiators appeal to "each other's sense of accommodation and willingness to envisage 'mutually supportive' roles for their instruments."[1081]

[1076] Separate Opinion of Judge Paik ibid.
[1077] Separate Opinion of Judge Paik ibid.
[1078] Separate Opinion of Judge Paik ibid.
[1079] Separate Opinion of Judge Paik ibid.
[1080] BBNJ Agreement art 5(1) emphasis added.
[1081] ILC Study Group (n 676) para 277.

The ILC, however, clarified that "[t]he weakness of the strategy of seeking a 'mutually supportive' interpretation lies in its open-endedness. By concluding this type of conflict clause, States parties transfer their competence to decide on what should be done if conflicts arise to those who apply the law. This may work well if the two treaties are part of the same regime. But if the conflict is between treaties across two regimes, then the solution works only if the law-applier is an impartial third party that approaches the conflicting instruments from beyond the regimes of which the treaties are part. It might happen, however, that the law-applier will be a body, or an administrator closely linked to one or other of the (conflicting) regimes. *In such a case, an open-ended conflict clause will come to support the primacy of the treaty that is part of the law-applier's regime*."[1082]

This might pose a dilemma for judges who would arguably have to orient their legal reasoning to, first, determine how activities like commercial navigation may be undertaken and regulated in the high seas and, second, decide whether environmental restrictions agreed with RFMOs or other regional mechanisms after the BBNJ Agreement prevail over freedoms enshrined in the LOSC. Chances are that the exercise of advisory functions and systemic reasoning carried out after the request of State parties favour environmental regulations over freedoms such as navigation, making restrictions predominant. It is worth recalling that "[w]hat ultimately makes a difference is not the manner of interpretation but the competence of the one who interprets."[1083] In this respect, judges of the ITLOS would not be exercising a competence given by the LOSC but arising from the BBNJ Agreement.

The competence given to the ITLOS to decide over fragmentation issues concerning the LOSC appears decisive in clarifying and determining not whether but *how* parties to the LOSC and the BBNJ Agreement may become bound by agreements and measures included in proposals. The treaty points out that "[a] request for an advisory opinion shall not be sought on a matter within the competences of other *global, regional, subregional or sectoral bodies*"[1084]. The scope of the decision to request an advisory opinion is limited to matters within the competence of the COP.[1085] The fact that a request would be made by way of a decision suggests that cooperation and coordination with IFBs and other modalities circumscribing the competence of the COP may influence the drafting of the request.[1086] In this context, cooperation and coordination with IFBs may enhance the possibilities for the sought harmonization in high seas law and resolve legal conflicts relating to activities and freedoms in the relevant areas under protection.

2.2. A Systemic Interpretation of the LOSC without Ratifying the BBNJ Agreement

[1082] ibid 280.
[1083] Jean-Marc Sorel and Valérie Boré Eveno, 'Article 31' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: a Commentary*, vol I (Oxford University Press 2011) 837.
[1084] BBNJ Agreement art 47(7) (emphasis added).
[1085] ibid.
[1086] ibid 47(5) and 48(1).

2.2.1. The (Non) Willingness of States for Prioritizing Environmental Protection

The feasibility of an evolutive interpretation of the LOSC relies on the political willingness of States. Awareness has been shown about the fact that "due to the global character of the [LOSC] one should be cautious to interpret the treaty in an evolutionary manner, that is with a view to newer international norms and policy considerations."[1087] This observation might elucidate the obstacle to legally harmonizing the regulation of commercial navigation in specific areas beyond national jurisdiction; divergence might be expected from those States that may view that their status in international law is challenged by the BBNJ Agreement. A systemic interpretation by State parties to the LOSC and the subsequent application of it by considering the BBNJ Agreement, appears challenging given their different scope *ratione materiae* and, more particularly, the *mare clausum* paradigms followed by the latter treaty. In consistency with the current global momentum in international affairs, consensus for a potential systemic interpretation of the LOSC seems unlikely.[1088]

There is awareness of the fact that seeing the LOSC as a *framework* must not lead to directly attributing characteristics more proper to framework treaties of international environmental law and, subsequently, equating their normative nature.[1089] The *constitutional* status and the preference for stability characterizing the LOSC seem to discourage the broad use of the evolutionary approach for interpreting its provisions or its terms their adaptation to deal with current challenges in a way that the environment may prevail over the freedom of navigation. In this connection, a systemic interpretation of the LOSC in light of the BBNJ Agreement may reset historical tensions between the freedom of navigation and environmental legal restrictions are not new. Years ago, it was acknowledged that "[f]reedom of navigation will undoubtedly be impacted by stricter environmental regulations. It is a matter of balancing the interests involved on each side to determine how extensive the impact will be. One must ask whether so-called traditional freedom of navigation has a stronger foundation in international law than do the responsibilities of states to protect their marine environments."[1090]

Environmental matters are addressed in Part XII, which provides rules for the protection and preservation of the marine environment. Following Part XII, States have the general obligation to cooperate in the protection and preservation of the marine environment.[1091] More particularly, States are obligated to cooperate in the prevention, reduction, and control of marine pollution and may do so by acting through the competent international organization,

[1087] Jakobsen (n 52) 294.
[1088] Dean Cheng, 'Sea Power and the Chinese State: China's Maritime Ambitions' [2011] Backgrounder 1, 9–12; Frédéric Lasserre and Alexandra Cyr, 'Geopolitics and Shipping Development in the Arctic' (2022) 36 Ocean Yearbook Online 416; Goldenziel (n 886) 1155–1156; State Institution National Antarctic Scientific Center, Ministry of Education and Science of Ukraine, Kyiv, 01601, Ukraine and others, 'Russian Aggression Against Ukraine: A New Challenge Facing Antarctic Governance' (2022) 20 Ukrainian Antarctic Journal 246–248 <http://uaj.uac.gov.ua/index.php/uaj/article/view/710> accessed 28 March 2024; Nong Hong, 'China and the United States in the South Pacific Ocean: Will Strategic Competition or Practical Cooperation Drive the Future Development' (2023) 8 Asia-Pacific Journal of Ocean Law and Policy 94, 119–127; Graceffo (n 1027).
[1089] Boyle (n 77) 41.
[1090] Weinstein (n 84) 169.
[1091] LOSC art 192.

i.e., the IMO.[1092] In this context, Part XII complements other parts of the treaty, including Part VII concerning the high seas regime, and, in doing so, should not challenge the equal status of States nor their rights to exercise their freedoms within that maritime zone. By reading Part XII and Part VII LOSC in conjunction, it may be stated that international cooperation mandated by Part XII must be carried out taking into consideration that "the high seas are open to all States" and that "freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas".[1093]

It has been argued that "[i]f one accepts the ecosystem-based interpretation of UNCLOS, then freedom of navigation is certainly no more important than the environment. In fact, under this ecosystem model, states have a binding obligation to protect the environment. This is not an interpretation favoured by the United States."[1094] In addition, "[i]f, on the other hand, UNCLOS is interpreted to favour marine nations and their navigational interests, then changes must be made to existing international law to protect the stability and integrity of UNCLOS and the marine environment. Protecting the environment has become so important that, if it cannot occur within an existing framework, nations will act unilaterally, bilaterally, and globally. Such agreements need to be made and will be made. This would undermine UNCLOS, or any other existing framework that accords a lower priority to environmental protection."[1095] Following this, it may be reflected that leveling the LOSC with international environmental law to interpret it systemically would make the LOSC into something less *solid* and not as *constitutional*.[1096] Maintaining, for instance, that the 'conservation' and 'sustainable use' of 'marine biological diversity' in spaces beyond national jurisdiction are goals contained in the obligation to protect and preserve the marine environment in the LOSC might mean over-dimensioning the scope of the specific provision in Article 192 LOSC while losing sight of the whole treaty context and affect the balance of interests it safeguards.

2.2.2. Persuasion Oriented Towards Reinterpreting the LOSC and Legal Mechanisms Supporting Systemic Interpretation through the IMO

The reluctance to ratify the BBNJ Agreement might be seen as a difficulty to overcome by States supporting the new treaty system. To date, the flag State remains the main player in implementing and enforcing international rules and standards for the oceans.[1097] At the same time, by flying its flag, the vessel lets others on the high seas know the State it is protected by.[1098] It is to be expected that the consolidation of the system sought by the BBNJ Agreement might find obstacles in the reluctance of some States to consent to the treaty that decide not to

[1092] BBNJ Agreement arts 210, 211(1) and 212.
[1093] LOSC art 87.
[1094] Weinstein (n 84) 169.
[1095] ibid 169–170. At the time, Weinstein argued that "[s]hould this happen, the United States essentially loses the navigation and overflight protections that were so imperative in UNCLOS.", ibid.
[1096] Wolfrum and Matz-Lück (n 76) 136.
[1097] König (n 806) para 60.
[1098] ibid 2.

participate in consultations at all (collaboration and contributions included). The reluctance may find an explanation in *inter alia* the fact that the LOSC enshrines the principle of jurisdiction of the flag State, a corollary of the freedom to navigate that defines the status of ships in the high seas.[1099] In addition, following the LOSC, the jurisdiction of a flag State over its vessels constitutes the main way in which order on the high seas is maintained.[1100] States supporting the BBNJ Agreement, therefore, may engage in *persuading r*eluctant States to interpret conflict clauses in the LOSC flexibly and encourage them to interpret the LOSC with that same flexibility. This strategy may circumvent difficulties in obtaining a solemn ratification of the BBNJ Agreement.

The provisions of the LOSC find complement in external rules incorporated into the *constitutional regime* on the condition that those rules meet the requirements established in the saving or conflict clauses given by the treaty. Article 197 and Article 237(2), Part XII LOSC contain such types of clauses. Article 197 LOSC regards the cooperation on a global or regional basis, and Article 237 LOSC concerns obligations under other conventions on the protection and preservation of the marine environment. The rules of the LOSC and external rules meeting the thresholds in these provisions can provide content to the general obligation to "protect and preserve the marine environment" in Article 192 LOSC. Arguably, these clauses aim to shield the fragile balance of interests underlying LOSC and to safeguard the constitutional role of this treaty on the law of the sea. If the thresholds established by the LOSC are not met, the normative in the LOSC prevails over the norm originating in a legal context different from it.

However, a flag State can consent to limit its prescriptive or enforcement jurisdiction over the vessel by submitting it to others' jurisdiction and, subsequently, restrict its freedom to navigate.[1101] The potential conflict between the LOSC and the BBNJ Agreement in relation to restricting navigation within 'MPAs' established under the latter may be resolved when States are willing to accept an evolutionary interpretation that facilitates supporting the *idea* of an amendment of the earlier treaty.[1102] For enabling a systemic interpretation of the LOSC Articles 197 and 297 LOSC should be interpreted as setting thresholds of *consistency* instead of *compatibility* while emphasizing the view that 'Part XII LOSC' may be viewed as a framework with some degree of autonomy concerning other parts of the treaty.[1103] The systemic

[1099] BBNJ Agreement art 92(1).
[1100] Guilfoyle (n 808) 693.
[1101] Under the LOSC, for instance, the flag State consents to limiting its jurisdiction within the EEZ of coastal States. "Foreign ships may be hindered by artificial islands or installations used by the coastal State to explore and exploit its natural resources, such as oil and gas or wind energy. The coastal State may establish safety zones around such installations, which have to be respected and complied with by all ships." König (n 806) para 43. See LOSC art 60(4-6).
[1102] Jakobsen (n 52) 287–292.
[1103] ibid 275–278. The reading of conflict clauses in Articles 197 and 237 (Part XII LOSC) should not disregard the possibility of interpreting them as requiring a *compatibility* threshold similar to Article 311 LOSC (general clause). Though Articles 197 and 237 LOSC in the English text of the LOSC appear to establish an inferior and more flexible threshold based on *consistency* with the LOSC, the Spanish and French texts of the LOSC expressly refer to *compatibility* with the LOSC. The French text uses the expression "compatibles avec la Convention" while the Spanish text refers to "compatibles con esta Convención". For the sake of coherence with the *constitutional* role generally attributed to the LOSC and considering that the English, French, and Spanish texts are equally authentic, this work takes the aforementioned statement on these conflict clauses as a necessary premise for interpreting the

interpretation of the LOSC may lead to expressing consent to limit the prescriptive or enforcement jurisdiction of the flag State without the necessity to ratify the BBNJ Agreement. Otherwise, without consent, the actions of other States may have a substantial impact on the flag State's rights and, consequently, on freedom of navigation.[1104]

States supporting the BBNJ Agreement may find that there are more efficient legal ways to obtain the consent of States parties to the LOSC, reluctant to consent to the BBNJ Agreement. The BBNJ Agreement involves the conferral of powers regarding navigation rules that extend beyond the relationship between the state parties and the IMO. Accordingly, the BBNJ Agreement may *respect* and *not undermine* the IMO's *sectoral* mandate, and the IMO's measures would have to be consistent with those of RFMOs or other IFBs and adhere to the environmental thresholds established in the recently adopted treaty. The fact that IMO has mandates in both the BBNJ Agreement and the LOSC may be key in this regard.

The BBNJ Agreement deviates from the mechanisms used in the LOSC, particularly those related to the LOSC's relationship with external rules "established through the competent international organization or general diplomatic conference."[1105] The mechanism under Article 29(4) BBNJ Agreement is an example of the alternative clauses the BBNJ Agreement provides, setting it apart from the LOSC. Through it, the BBNJ Agreement would have the capacity to greatly influence the adoption of IMO measures and the performance of this body. On this basis, it could be argued that IMO measures under the latter treaty *could* be imported as external rules into the LOSC context.

Importing IMO external rules of this kind into the LOSC would depend on the consent of its State parties, including those reluctant to endorse the BBNJ Agreement. There may be other options that would allow supporters of the BBNJ Agreement to avoid dealing with reluctant states *directly*. In this mindset, if a majority of State parties to the LOSC become parties to the BBNJ Agreement, the importation of rules under the BBNJ Agreement into the context of the LOSC would be more likely to prosper. Rather than solely *political* persuasiveness to overcome reluctance, achieving the consent of a majority of State parties to

---

relationship between the LOSC and norms external to it, LOSC art 320. Omitting references to texts in languages other than English and failing to consider the salient ambiguity in the English text might result in misleading legal constructions of the LOSC, *The South China Sea Arbitration* (n 1063) para 215. For instance, interpretations focusing on the English text only might result in an argumentative basis for sustaining the less rigorous or flexible threshold of the clauses in Articles 197 and 237 Part XII LOSC because these provisions do not include any references to "compatibility" as such. Then, building upon the existence of a relationship based on the *lex specialis* maxim, the alleged *consistency* threshold in provisions such as Articles 197 and 237 Part XII LOSC might be prioritized over the apparent more rigorous *compatibility* threshold imposed by the general clause in Article 311 LOSC. Notwithstanding how interesting this viewpoint could be, it might derive into a misconceived idea of a certain degree of autonomy of Part XII LOSC from the whole juridical architecture of the LOSC and, therefore, result in possible inconsistencies with the prime interpretative imperative that the LOSC must be understood as *a single and indivisible instrument* and as *a package of closely interrelated compromise decisions*, Caminos and Molitor (n 621) 877. This reasoning generally could support a systemic or evolutive interpretation of provisions of the LOSC, especially Part XII. This, however, would disregard the fact that the "LOSC is not a 'framework treaty' in the sense applied to a number of environmental treaties", Boyle (n 77) 41. Differently from the LOSC, environmental legal frameworks arguably support systemic or evolutive interpretation, Remiro Brotóns (n 967) 380.

[1104] König (n 806) 44.

[1105] LOSC art 211(2).

the LOSC and promoting the broad implementation of IMO measures designed following the BBNJ Agreement would arguably become the key task for supporters of the BBNJ Agreement that desire the future harmonization of both treaties. The consent of the minority of State non-parties to the BBNJ Agreement (parties to the LOSC) would be more easily obtained under a situation of this kind, and their reluctance to act according to the measures achieved under the recent treaty would be weakened. Considered as external rules that may be imported into the context of the LOSC by a majority of States, parties to both treaties, IMO measures under the BBNJ Agreement would more probably become binding on reluctant States in the minority. In this respect, it is noticeable that the treaty aims at having an impact on customary law, beyond treaty law.[1106] This latter pathway would more practically and efficiently overcome the issue of parallelism between the LOSC and the BBNJ Agreement.

3. Final Remarks

The challenges presented by the BBNJ Agreement and its subsequent interpretation and application by States would be decisive in regulating high seas navigation and protecting the 'marine biological diversity'. States would be the ones defining whether the BBNJ Agreement and the normative shift it promotes from classic international law of the sea is justified or whether they may engage in a better implementation of the existing international law for achieving the same goal without jeopardizing their equality and the freedoms of all of them in the high seas.

If the treaty enters into force, the role that judicial institutions such as ITLOS could play would be fundamental to the transition to a new era of high seas law. Persuasion towards the general systemic interpretation of the LOSC in light of the BBNJ Agreement would become an important task for achieving the harmonization of the two treaties. More practically and efficiently, the IMO, assigned an explicit mandate under the BBNJ Agreement and given a key role under the LOSC, could contribute to resolving problems of potential parallelism between the two treaties.

After discussing the BBNJ Agreement and its impact on high seas law, it is possible to open new debates about its importance and its consequences on navigation. Given that the LOSC and the BBNJ Agreement apply to areas beyond national jurisdiction, a spatial overlap between the two treaties is predictable. The high seas are meant to be covered by both treaties.

[1106] "The denunciation shall not in any way affect the duty of any Party to fulfil any obligation embodied in this Agreement to which it would be subject *under international law independently of this Agreement*.", BBNJ Agreement art 73(2) (emphasis added). This provisions may become relevant since it relates to the making of a potential *customary* obligation to establish MPAs and other ABMTs. Duan explains that "the conservation/management measures associated with MPAs in [areas beyond national jurisdiction] adopted under a treaty regime may also have legal effects on third States through those general obligations under customary international law, which is also subject to the necessity of those measures and the economic/technical capacity of the third States (…). As to whether there is a direct customary obligation to establish MPAs in ABNJ, due to insufficient State practice of the establishment and management of MPAs in [areas beyond national jurisdiction], such an obligation has not emerged as yet.", Duan (n 125) 341.

Even though it is well-established that the freedom of navigation does not consist of absolute freedom, the possibility of it or the equality of all States at its foundations being restricted continues attracting interest, and even international concern.[1107]

[1107] Weinstein (n 84) 169.

CONCLUSION

This work has examined the BBNJ Agreement by highlighting its non-legal subordination to the LOSC; the conferral of powers to regulate high seas activities to IFBs it endorses, with particular attention to RFMOs among all regional bodies and mechanisms; the complementarity with post-LOSC universal treaties like the UNFSA, and the affinity of both with the subject matter under CBD; the geographical overlap with the LOSC over the high seas; and the new mandates given to the IMO and the ITLOS. Along the chapters, this thesis has confirmed the hypothesis that the BBNJ Agreement constitutes a freestanding environmental legal framework with the potential to, first, fragment the international law of the high seas into different legally binding regulatory areas under 'MPAs' and 'ABMTs', based on 'Relevant IFB Measures', comprised in regions of that vast maritime zone and, subsequently, reconfigure the freedom of navigation in a manner different from that envisaged in the LOSC. In this context, some conclusions follow after the problems submitted earlier.

First, it has been ascertained that the BBNJ Agreement, embedded in contemporary international environmental law, is not dependent on the LOSC and that it has to be understood separately and as representing a shift of paradigm on ocean affairs towards a binding regionalization of the high seas. Subsequently, because of being two different treaty contexts regarding different aims, the work has provided legal foundations to consider that, in conventional terms, the freedom of navigation as understood in the LOSC must not be equated with the freedom of navigation implied in the BBNJ Agreement. Based on a procedural legal mindset, the process for consultations and contributions carried out through the procedural rules in Parts III and IV may allow visualizing how the BBNJ Agreement provides positive connotations to legal fragmentation while providing a subsequent mechanism for later harmonization, potentially establishing a fragmentation or legal parallelism with the LOSC.

Second, the conferral of powers of States parties to IFBs, including RFMOs and IMO, would have a determinant impact on a freedom such as high seas navigation. Lessons learned from the UNFSA, outlined here to a limited extent, confirm that the BBNJ Agreement and the system it aims at developing could make objectives prevail over the equality of all States and, subsequently, it would be expected for it to affect and restrict the right of States to navigate in areas beyond national jurisdiction. Mainly because of the rank given to 'Relevant IFB Measures' agreed by circumventing the consent of State parties or without consulting the COP, and the international cooperation by collaboration and contributions as understood by Part III and Part IV, the operationalization of the BBNJ Agreement is likely to result in State parties having an international status below RFMO members or nonparties to the treaty. The status of State parties may even fall below all the others falling in the 'stakeholders' label, depending on how they may be empowered by the treaty. This expectation impacts how deliberations may be carried out by State parties when being consulted through the COP. Considering the legal verticality constituted by the treaty, it may be said that proceedings for the contributions under Part III would be *more about procedure than substance*. Indeed, Part III provides the mechanisms necessary to recognize or semi-automatically recognize the legal practice under 'Relevant IFB Measures' by means of *collaboration* and *contributions* with binding legal effects on all State parties. If the BBNJ Agreement is considered to be composed of *frameworks*, Part III arguably represents *the framework of frameworks* to grant IFBs the necessary powers to regulate high seas activities like navigation.[1108] In this context, decisions and recommendations may embody measures (agreements) where the participation of all State parties is not necessary. After being embodied in decisions and recommendations, those agreements and the activities regulated under them would become binding on State parties. The fact that decisions and recommendations of the COP could embody 'Relevant IFB Measures' (agreements) and, simultaneously, decisions and recommendations may be interpreted as agreements subsequent to the BBNJ Agreement allows sustaining that the conferral of powers from State parties to relevant IFBs, like RFMOs and the IMO, would have to be understood by following the rule of interpretation contained in Article 31(3.a) VCLT.

Recommendations from the COP to the IMO may impact the making of regulations and standards over a high seas region and compel this sectoral body and its members to conclude agreements consistent with the measures of regional mechanisms like RFMOs (previously adopted). IMO regulations and standards aimed at applying in the high seas would not be developed by IMO alone, but with the necessary consent of States acting through RFMOs. Subsequent RFMO measures and IMO measures may become the political and legal sources for State parties to take later decisions through the COP by way of consultations.

In relation to this, the BBNJ Agreement commands that State parties are obligated to take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of the treaty and not discharged from the obligation to cooperate in the application of measures of IFBs in which they do not participate or do not have access.[1109] More particularly, after the taking of decisions, State parties would be obliged to "ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted"[1110]. The collaboration of States acting through RFMOs and the IMO would set a legal basis for States parties to comply with these and other treaty-based obligations.

Third, the complementarity of the BBNJ Agreement with the UNFSA has allowed for assessing the nature of both universal treaties and reflecting on the evolution of international law applying to the oceans. This work has studied some of the salient features of the BBNJ Agreement and considered the views of scholars regarding the UNFSA, the latter being *mutatis mutandis* useful to appreciate the BBNJ Agreement. The conclusion of the BBNJ Agreement and reassessing those views in this new era may allow visualizing a linear progressive evolution in universal treaties departing from the CBD, continuing and evolving with the UNFSA, and, lately, consolidating with the BBNJ Agreement (which engages the former two in its implementation). In varying degrees, generally speaking, they all revolve around the *idea* of 'biological diversity' or 'marine biological diversity', and they all provide tools endorsing the regionalization of the ocean. In varying degrees, they are also all somehow related to aspects

[1108] Bodansky (n 18) 299.
[1109] BBNJ Agreement art 25(6) and 53.
[1110] ibid 25(1).

of the law of the sea. In this linear evolution, the UNFSA and the BBNJ Agreement would seem to have been drafted with the appearance of being closely linked with the LOSC. This apparent strong link with the LOSC (which is expressly referred to in their respective titles and many of their provisions) is levelled (and even overshadowed) by distinctive and prominent components *imported* from international environmental law. A goal-oriented set-up provides them with strong dynamism, making teleological reasoning for its interpretation appropriate. Against this backdrop, the UNFSA, with its limited scope *ratione materiae*, may be better pictured as an *instrument of transition* before the arrival of the BBNJ Agreement, which possesses a much broader and comprehensive scope. This would seem to suggest that, mainly because the basis of the UNFSA is deeply connected with the notion of 'biological diversity', at the core of the CBD, the relationship between the UNFSA and the LOSC would also have to be encompassed within the greater subject matter of the problematic relationship between the LOSC and international agreements concerning global environmental problems, as it happens with the BBNJ Agreement.[1111]

As pointed out when assessing the nature of the BBNJ Agreement, notwithstanding their relationship with marine environmental issues, international environmental law and the law of the sea are acknowledged as two different branches of international law.[1112] Under this viewpoint, appreciating the UNFSA in the said linear evolution may lead to understanding that the notorious emphasis put by it on the regulation of certain fishing activities should be no deterrent at the time of ascertaining its true nature. In this reasoning, like the CBD and the BBNJ Agreement, the UNFSA might also have to be considered as having an aim *essentially different* from that of the LOSC and as having a diverse scope *ratione materiae* (notwithstanding how eye-catching the vocabulary employed in its drafting and connected with LOSC-related issues may be). Though the objective of the treaty recognizing weight to a subject matter traditionally related to international fisheries law may dissimulate the nature of the treaty, the overarching attention given to 'biodiversity' may appear to confirm it. Moreover, in this logic, as with the CBD and the BBNJ Agreement, the UNFSA should not be seen as a successive treaty to the LOSC nor properly subordinate to it or *under it*. [1113] Asserting the UNFSA is a successive treaty to the LOSC would indirectly imply a view over the LOSC *as it ought to be*. If the UNFSA is featured as an instrument not strictly appertaining to the law of the sea and detached from the LOSC, is easier to comprehend why the rights of States to freely fish and freely navigate the high seas under this treaty, regarding namely fishing vessels, are to be envisaged *separately* from the freedom of fishing and the freedom of navigation under the LOSC. The same observations apply to the BBNJ Agreement and the idea of 'marine biological diversity' not considered in the text of the LOSC.

Given the aforementioned, it might be sustained that a tendency to move away from the original LOSC framework has unfolded in these last decades, not by utilizing amending procedures but through *normative shifts* toward a different international law for governing the oceans.[1114] Indeed, this linear evolution, developed in parallel to the LOSC in force, seems to

---

[1111] Wolfrum and Matz-Lück (n 76) 15.
[1112] Ricard (n 170) 250.
[1113] Fitzmaurice and Elias (n 184) 333.
[1114] "Articles 312 to 316 of UNCLOS set out mechanisms for amending UNCLOS, but they have never been used", Whomersley (n 46) 72.

pursue the full implementation of a functional-regional approach and the idea of *mare clausum* while leaving behind the traditional functional-zonal approach and the paradigm of *mare liberum*. Therefore, in light of the linear evolution just drawn, arguing that the UNFSA or the BBNJ Agreement *amend*, *modify*, *clarify*, or *implement* (etc.) the LOSC would not appear legally accurate. The complementarity between the two treaties and, above all, the holistic approach to the ocean they promote may support the view that they are *international environmental law frameworks that deal with matters that historically belonged to the branch of international law of the sea*. On this basis, it may be presumed that, as time goes on, a new branch of international law for the oceans will gradually form and seek consolidation in the near future. The nuances included in this description are endorsed by the difficulties of scholars not able to classify the UNFSA as a treaty belonging to the law of the seas strictly.[1115]

In this context, fourth, the geographical overlap between the BBNJ Agreement and the LOSC over the high seas would have to be understood as a legal fragmentation regarding the adoption and implementation of measures over the same spatial scope. All this combined endorses the presumption that the freedom of navigation is going to be restricted more broadly, through the implementation of a new legal framework for *inter alia* high seas commercial navigation. Given this view has been further confirmed here, Article 87 (1.a) LOSC, and simultaneously, Article 7(c) BBNJ Agreement might be seen as provisions of parallel systems from separate conventional contexts that pursue different objectives. In contrast with the law of the sea, following environmental goals, the BBNJ Agreement does not appear to give fundamental importance to the equality of all States for navigating the high seas. Both treaties, however, relate to the exercise of navigation. Given how its scope *ratione materiae* relates to the subject matter of the CBD, the relationship between the BBNJ Agreement and the LOSC is unclear and would not be solved by focusing on the treaty norms that provide for the resolution of conflicts, drafted after those in the UNFSA.[1116]

Lastly, the new judicial functions of the ITLOS in the context of the BBNJ Agreement allow presuming that it may play a key role in harmonizing the legal fragmentation with the LOSC over the high seas. The IMO, also provided with a new mandate under the BBNJ Agreement, may also contribute to solving such fragmentation. The fact that the IMO is given an instrumental role within the LOSC and the BBNJ Agreement simultaneously may eventually allow the development of a relationship between these treaties. The ITLOS may have a key role in interpreting and applying the law in that context.

[1115] Boyle (n 77) 58; Proelss (n 78) 190.
[1116] BBNJ Agreement art 5(1); UNFSA art 4; Wolfrum and Matz-Lück (n 76) 125.

BIBLIOGRAPHY

Affolder N, 'Non-State Actors' in Elisa Morgera and Jona Razzaque (eds), *Biodiversity and Nature Protection Law* (Edward Elgar Publishing 2017)

Auld K and others, 'The Collective Effort of the United Nations Specialised Agencies to Tackle the Global Problem of Illegal, Unreported and Unregulated (IUU) Fishing' (2023) 243 Ocean & Coastal Management 106720

Banaszewska DM, 'Lex Specialis', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2015) <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024

Berner K, 'Authentic Interpretation in Public International Law' [2016] ZaöRV 845

Birnie PW, Boyle AE and Redgwell C, *International Law and the Environment* (3rd ed, Oxford University Press 2009)

Bodansky D, 'Non Liquet', *Max Planck Encyclopedia of Public International* (on line, Oxford University Press 2006) <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024

——, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement' (2024) 118 American Journal of International Law 299

Boyle A, 'Further Development of the 1982 Convention on the Law of the Sea: Mechanisms for Change' in David Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea* (Oxford University Press 2006)

Boyle AE, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 International and Comparative Law Quarterly 901

Boyle AE and Chinkin C, *The Making of International Law* (Oxford University Press 2007)

Brunnée J, 'International Environmental Law: Of Sovereignty, Complexity, and Grotian Moments' (2022) 43 Grotiana 3

Caminos H and Molitor MR, 'Progressive Development of International Law and the Package Deal' (1985) 79 The American Journal of International Law 871

Charney J, 'Is International Law Threatened by Multiple International Tribunals?', *Recueil des cours*, vol 271 (1998)

Cheng D, 'Sea Power and the Chinese State: China's Maritime Ambitions' [2011] Backgrounder 1

Chircop A, 'The International Maritime Organization', *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015)

——, 'The Use of IMO Instruments for Marine Conservation on the High Seas' in Robert C Beckman and others (eds), *High Seas Governance: Gaps and Challenges* (Brill Nijhoff 2019)

Churchill RR, Lowe AV and Sander A, *The Law of the Sea* (4th ed, Manchester University Press 2022)

Davison A, 'Unity in Biodiversity: Reinventing Nation and Nature in Australia' (2010) 29 Social Alternatives 7

De Lucia V, *The 'Ecosystem Approach' in International Environmental Law: Genealogy and Biopolitics* (Routledge 2019)

——, '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 & International Law 1

De Sousa Fernandes B, 'Imposing an International Environmental Jurisdiction: How Developments on Marine Protected Areas Are Fostering a New Legal Order for the Conservation of Areas beyond National Jurisdiction' in Patrick Chaumette (ed), *Transforming the ocean law by requirement of the marine environment conservation* (Université de Nantes : Marcial Pons 2019)

Dervovic M and Heinrich K, 'Law-Science Nexus in International Law-Making: Perspectives from Arctic Fisheries Governance' (2023) 92 Nordic Journal of International Law 599

Duan W, *The International Legal Regime Relating to Marine Protected Areas in Areas beyond National Jurisdiction: Identifying and Addressing Gaps* (Brill | Nijhoff 2022) <https://brill.com/view/title/62423> accessed 21 August 2023

Duan W and Shen L, 'The Role of Environmental Impact Assessments in the Establishment and Management of Marine Protected Areas under the UNCLOS and the BBNJ Agreement' (2024) 33 Review of European, Comparative & International Environmental Law 303

Farnelli GM, 'Introduzione: Il Traguardo Dell'Accordo BBNJ' in Gian Maria Farnelli and Silvia Catalano (eds), *Biodiversità e mare: il traguardo dell'Accordo BBNJ* (Dipartimento di Scienze giuridiche della Università di Bologna 2024)

Feldman N, 'Rallying around the "Flag of Convenience": Merchant Fleet Flags and Sanctions Effectiveness' (2022) 143 Marine Policy 105129

Fisher DE, 'Legal and Paralegal Rules for Biodiversity Conservation: A Sequence of Conceptual, Linguistic, and Legal Challenges' in Michael I Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity Conservation, Law + Livelihoods: Bridging the North–South Divide* (Cambridge University Press 2008)

Fitzmaurice M and Elias O, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing 2005)

Franckx E, 'Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea' (2000) 8 Tulane Journal of International and Comparative Law 49

Frank V, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publishers 2007)

Freestone D, 'Fisheries, High Seas', *Max Planck Encyclopedia of Public International Law* (On line, Oxford University Press 2009) <https://opil.ouplaw.com/home/mpil> accessed 14 July 2022

Friedman A, 'Beyond "Not Undermining": Possibilities for Global Cooperation to Improve Environmental Protection in Areas beyond National Jurisdiction' (2019) 76 ICES Journal of Marine Science 452

Friedman S, 'The Interaction of the BBNJ Agreement and the Legal Regime of the Area, and Its Influence on the Implementation of the BBNJ Agreement' (2024) 167 Marine Policy 106235

Gardiner RK, *Treaty Interpretation* (2nd ed, Oxford University Press 2017)

Gavouneli M, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff Publishers 2007)

Gjerde KM, 'Challenges to Protecting the Marine Environment beyond National Jurisdiction' (2012) 27 The International Journal of Marine and Coastal Law 839

Goldenziel JI, 'Law as a Battlefield: The U.S., China, and the Global Escalation of Lawfare' (2021) 106 Cornell Law Review 1085

Guilfoyle D, 'Article 87 . Freedom of the High Seas' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017)

——, 'Article 91. Nationality of Ships' in Alexander Proelß (ed), *United Nations Convention on the Law of the Sea* (Nomos Verlagsgesellschaft mbH & Co KG 2017)

Harrison J, 'Implementing Agreements', *Making the Law of the Sea: A Study in the Development of International Law* (Cambridge University Press 2011)

Hayashi M, 'The 1995 Agreement on the Conservation and Management of Straddling and Highly Migratory Fish Stocks: Significance for the Law of the Sea Convention' (1995) 29 Ocean & Coastal Management 51

Hong N, 'China and the United States in the South Pacific Ocean: Will Strategic Competition or Practical Cooperation Drive the Future Development' (2023) 8 Asia-Pacific Journal of Ocean Law and Policy 94

Hyvarinen J, Wall E and Lutchman I, 'The United Nations and Fisheries in 1998' (1998) 29 Ocean Development & International Law 323

ILC Study Group, 'Report of the Study Group of the International Law Commission "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Finalized by Mr. Martti Koskenniemi' (International Law Commission 2006) Document A/CN.4/L.682 and Add.1

Jakobsen IU, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill Nijhoff 2016)

Johnson TF and others, 'Revealing Uncertainty in the Status of Biodiversity Change' [2024] Nature 1

Kaikkonen L and others, 'Improving Impact Assessments to Reduce Impacts of Deep-Sea Fisheries on Vulnerable Marine Ecosystems' (2024) 167 Marine Policy 106281

Kim HJ, 'The Return to a *Mare Clausum* Through Regional Fisheries Management Organizations?' (2013) 44 Ocean Development & International Law 205

Klabbers J, *An Introduction to International Organizations Law* (4th edition, Cambridge University Press 2022)

Klerk BE, 'From Undermining to Strengthening: Implications of the Forthcoming Agreement on Biodiversity beyond National Jurisdiction for MPA Governance in the North-East Atlantic' (2023) 38 The International Journal of Marine and Coastal Law 107

Klerk BE, 'A Sheep in Wolf's Clothing? Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement' [2024] Ocean Development & International Law 1

Klerk BE, Heinrich K and Primicerio R, 'Beyond Equilibrium Thinking: Dynamic Area-Based Management Tools in a Changing Ocean' (2024) 11 Frontiers in Marine Science 1418435

König D, 'Flag of Ships', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2009) <https://opil.ouplaw.com/home/mpil> accessed 30 March 2024

Krabbe N, 'High Seas Marine Protected Areas: Impact on Shipping and the IMO' in Abhinayan Basu Bal and others (eds), *Regulation of Risk* (Brill | Nijhoff 2022)

Lampo G, 'Jurisdiction Beyond Territorial Sovereignty: Defining the Scope of Exclusive Flag-State Jurisdiction Under Art. 92 UNCLOS' (2022) 82 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law 195

Lanzoni N, 'The Authority of ICJ Advisory Opinions as Precedents: The Mauritius/Maldives Case' [2022] The Italian Review of International and Comparative Law 296

Lasserre F and Cyr A, 'Geopolitics and Shipping Development in the Arctic' (2022) 36 Ocean Yearbook Online 416

Lewis R, *Legal Fictions in International Law* (Edward Elgar publishing 2021)

Mansi AR, 'The System of Inspection of the Commission for the Conservation of Antarctic Marine Living Resources' in Lilian Del Castillo (ed), *Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea* (Brill | Nijhoff 2015)

Matz-Lück N, 'Treaties, Conflict Clauses', *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2006) <https://opil.ouplaw.com/home/mpil> accessed 12 August 2024

——, 'Framework Agreements', *Max Planck Encyclopedia of Public International Law* (On line, Oxford University Press 2011) <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022

McDorman TL, 'A Few Words on the "Cross-Cutting Issue" - The Relationship between a BBNJ Convention and Existing, Relevant Instruments and Frameworks and Relevant Global, Regional and Sectoral Bodies' in Myron H Nordquist and Ronán Long (eds), *Marine Biodiversity of Areas beyond National Jurisdiction*, vol 24 (Brill Nihoff 2021)

Millicay F, 'Marine Biodiversity of Areas Beyond National Jurisdiction: Securing a Sound Law of the Sea Instrument' in David Joseph Attard, David M Ong and Dino Kritsiotis (eds), *UN and Global Ocean Governance* (Oxford University Press 2018)

Molenaar EJ, 'The Concept of "Real Interest" and Other Aspects of Co-Operation through Regional Fisheries Management Mechanisms' (2000) 15 The International Journal of Marine and Coastal Law 475

——, 'Participation, Allocation and Unregulated Fishing: The Practice of Regional Fisheries Management Organisations' (2003) 18 International Journal of Marine and Coastal Law 457

Molenaar EJ, 'Regional Fisheries Management Organizations' in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds), *Global Challenges and the Law of the Sea* (Springer International Publishing 2020)

Murphy SD, 'Durability, Flexibility and Plasticity in the UN Convention on the Law of the Sea' [2024] The International Journal of Marine and Coastal Law 1

Musto C and Papastavridis E, ‘Tackling Illegal, Unreported and Unregulated Fishing Through Port State Measures’ (2021) 22 Melbourne Journal of International Law 1

Oude Elferink AG, *The Impact of Article 7(2) of the Fish Stocks Agreement on the Formulation of Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks* (FAO 1999)

Oxman BH, ‘The Duty to Respect Generally Accepted International Standards’ (1991) 24 New York University Journal of International Law and Politics 109

Papastavridis E, ‘Implementation, Enforcement and Dispute Settlement of the BBNJ’, *Analysing the Biodiversity Beyond National Jurisdiction Treaty* (British Institute of International and Comparative Law 2023) <https://www.biicl.org/publications/analysing-the-biodiversity-beyond-national-jurisdiction-treaty>

Pauwelyn J, ‘Fragmentation of International Law’, *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2006)

Pavid K, ‘What Is the Anthropocene and Why Does It Matter?’ (*Natural History Museum*) <https://www.nhm.ac.uk/discover/what-is-the-anthropocene.html> accessed 14 August 2024

Peters A, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’ (2017) 15 International Journal of Constitutional Law 671

Proelss A, ‘Fisheries’, *Research Handbook on International Law and Natural Resources* (Edward Elgar Publishing 2016)

Rayfuse R, ‘Regional Fisheries Management Organizations’ in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015)

Remiro Brotóns A (ed), *Derecho internacional: curso general* (Tirant lo Blanch 2010)

Ricard P, ‘Les Aires Marines Protégées En Haute Mer et La Difficile Conciliation Entre Droit de La Mer et Droit de l’environnement’ in Patrick Chaumette (ed), *Transforming the ocean law by requirement of the marine environment conservation* (Université de Nantes - Marcial Pons 2019)

Roberts J, ‘Designating Particularly Sensitive Sea Areas in Areas Beyond National Jurisdiction’ (2024) 55 Ocean Development & International Law 234

Sadeleer N de, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press 2002)

Sands P and others, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018)

Sarooshi D, *International Organizations and Their Exercise of Sovereign Powers* (Oxford University Press 2005)

Scanlon Z, ‘The Art of “Not Undermining”: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction’ (2018) 75 ICES Journal of Marine Science 405

Scott KN, ‘Unconventional Law Making in the Law of the Sea and Area-Based Conservation Measures’ in Natalie Klein (ed), *Unconventional lawmaking in the law of the sea* (Oxford University Press 2022)

Scovazzi T, ‘The Evolution of International Law of the Sea: New Issues, New Challenges’, *Recueil des Cours*, vol 286 (2000)

Serdy A, ‘A Wrong Turning in International Fisheries Law: The Flawed Concept(s) of Illegal, Unreported and Unregulated Fishing’, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press 2016)

——, *The New Entrants Problem in International Fisheries Law* (Cambridge University Press 2016)

Sorel J-M and Boré Eveno V, ‘Article 31’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: a Commentary*, vol I (Oxford University Press 2011)

Stelder M, ‘A Sinking Empire’ (2023) 28 Angelaki 53

Sydnes AK, ‘Regional Fishery Organizations: How and Why Organizational Diversity Matters’ (2001) 32 Ocean Development & International Law 349

Takacs D, *The Idea of Biodiversity: Philosophies of Paradise* (Johns Hopkins University Press 1996)

——, ‘Whose Voices Count in Biodiversity Conservation? Ecological Democracy in Biodiversity Offsetting, REDD+, and Rewilding’ (2020) 22 Journal of Environmental Policy & Planning 43

Tanaka Y, *The International Law of the Sea* (4th edn, Cambridge University Press 2023)

——, ‘Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic beyond National Jurisdiction’ (2024) 55 Ocean Development & International Law 85

Tessnow-von Wysocki I and Vadrot ABM, ‘Governing a Divided Ocean: The Transformative Power of Ecological Connectivity in the BBNJ Negotiations’ (2022) 10 Politics and Governance

Tian H and Guo J, ‘The Potential Interactions Between the BBNJ Agreement and RFMOs in the Establishment of ABMTs: Implications for RFMOs’ (2025) 171 Marine Policy 106477

Treves T, ‘La pesca ilegal, no declarada y no reglamentada: Estado del pabellón, Estado costero y Estado del puerto’ in Jorge Pueyo Losa and Julio Jorge Urbina (eds), *La cooperación internacional en la ordenación de los mares y océanos* (Iustel 2009)

——, ‘Law of the Sea’, *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2011) <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022

Trygg Mat Tracking, ‘Combined IUU Vessel List’ (*Combined IUU Vessel List*, 30 March 2024) <https://www.iuu-vessels.org/>

Tuerk H, ‘The Waning Freedom of the Seas’ in Rafael Casado Raigón and Giuseppe Cataldi (eds), *L’évolution et l’état actuel du droit international de la mer: mélanges de droit de la mer offerts à Daniel Vignes* (Bruylant 2009)

Van Ittersum MJ, ‘Debating the Free Sea in London, Paris, The Hague and Venice: The Publication of John Selden’s Mare Clausum (1635) and Its Diplomatic Repercussions in Western Europe’ (2021) 47 History of European Ideas 1193

Verlaan P, ‘The Interface of Science and Law’ in Richard Barnes and Ronán Long (eds), *Frontiers in International Environmental Law: Oceans and Climate Challenges* (Brill | Nijhoff 2021)

Vezzani S, *Jurisdiction in International Fisheries Law: Evolving Trends and New Challenges* (Wolters Kluwer 2020)

Virzo R, ‘Fondamento Ed Esercizio Della Competenza Consultiva Del Tribunale Internazionale Del Diritto Del Mare: Considerazioni a Margine Del Parere Del 21 Maggio 2024’ (2024) 79 La comunità internazionale 603

Weinstein EB, ‘The Impact of Regulation of Transport of Hazardous Waste on Freedom of Navigation’ (1994) 9 International Journal of Marine and Coastal Law 135

Whomersley C, ‘How to Amend UNCLOS and Why It Has Never Been Done’ (2021) 9 The Korean Journal of International and Comparative Law 72

Wolf S and Asmus Bischoff J, ‘Marine Protected Areas’, *Max Planck Encyclopedia of Public International Law* (on line, Oxford University Press 2013) <https://opil.ouplaw.com/home/mpil> accessed 19 November 2022

Wolfrum R, ‘Solidarity and Community Interests: Driving Forces For the Interpretation and Development of International Law’, *Recueil des cours*, vol 416 (Koninklijke Brill NV 2021)

Wolfrum R and Matz-Lück N, *Conflicts in International Environmental Law* (Springer 2003)

Young TR, ‘Developing a Legal Strategy for High Seas Marine Protected Areas’ in Kristina M Gjerde and Charlotte Breide (eds), *Towards a strategy for high seas marine protected areas: proceedings of the IUCN, WCPA and WWF experts workshop on high seas marine protected areas, 15 - 17 January 2003, Malaga, Spain* (IUCN 2003)