



**UiT** The Arctic University of Norway

## **Establishment of Marine Protection Areas in the Central Arctic Ocean**

Interplay between the Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and the Central Arctic Ocean Fisheries Agreement

Sukeerti Kendapady Ganesh

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## **ABSTRACT**

Ocean biodiversity has been increasingly degraded due to anthropogenic activities. High sea fishing is identified as a significant contributor to biodiversity degradation in areas beyond national jurisdiction. Marine Protected Areas is used as an area based management tool to prevent degradation of marine biodiversity from multiple activities such as shipping, mining and fishing. But establishing MPAs in areas beyond national jurisdiction has been hindered by lack of clear legal basis under UNCLOS an issue which has been addressed under the newly adopted BBNJ agreement. The research examines how and to what extent the new agreement will impact fishing, and how this can be realized without undermining the fisheries regime. This study investigates this by choosing Central Arctic Ocean Fisheries Agreement as an example. The research identifies that the two agreements overlap in a number of conservation objectives and can cooperate to establish Marine Protected Areas in the Central Arctic Ocean. It finds BBNJ agreement will serve as a platform for cross sectoral management of human activities in MPAs although several challenges remain. The study highlights the potential of CAOFA in effectively protecting marine biodiversity in the Arctic.

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# Table of Contents

List of abbreviations.....	3
1 Introduction.....	4
1.1 Background.....	4
1.2 Purpose and Scope.....	10
1.3 Research Question:.....	11
1.4 Methodology.....	11
1.5 Use of Sources.....	12
1.6 Structure of Thesis.....	12
2 CENTRAL ARCTIC OCEAN FISHERIES AGREEMENT.....	13
2.1 Overview of the CAOFA:.....	13
2.2 Historical Background – Lessons from the past?.....	14
2.2.1 Geographical background:.....	14
2.2.2 Collapse of fish stocks:.....	15
2.3 OSLO Declaration:.....	17
2.4 Arctic and Non-Arctic Parties.....	18
2.5 CAOFA and its relation to UNCLOS and UNFSA:.....	20
2.6 Objectives of the CAOFA:.....	21
2.7 Legal nature of CAOFA – an RFMO or RFMA?.....	22
3 Establishment of Marine Protected Areas under BBNJ.....	24
3.1 Introduction:.....	24
3.2 Background of Negotiation:.....	25
3.3 Relationship between BBNJ and other relevant IFBs – the ‘not undermining’ principle:.....	26
3.4 Moving away from undermining to identifying synergies:.....	28
3.5 Defining Area Based Management Tool and Marine Protected Area:.....	29
3.6 Procedure for establishment of MPA under BBNJ:.....	31

3.6.1	Identification and Proposal: .....	31
3.6.2	Publicity and Preliminary Review: .....	33
3.6.3	Consultation and Assessment of Proposals:.....	34
3.6.4	Establishment of ABMT including MPA: .....	38
3.6.5	Decision Making .....	39
4	Interplay between CAOFA and BBNJ .....	41
4.1	Introduction: .....	41
4.2	Areas of Synergies within BBNJ and CAOFA:.....	43
4.2.1	Conservation objectives and sustainable use: .....	43
4.2.2	Precautionary Approach:.....	43
4.2.3	Scientific Research and Monitoring:.....	44
4.2.4	Ecosystem Approach:.....	46
4.2.5	Indigenous and local community knowledge:.....	49
4.3	MPAs in the Central Arctic Ocean:.....	50
4.3.1	Proposal:.....	50
4.3.2	Consultation: .....	52
4.3.3	Establishment of MPA in the CAO:.....	54
4.4	Conclusion.....	55

## List of abbreviations

ABNJ	Areas Beyond National Jurisdiction
ABMT	Area-Based Management Tools
BBNJ	Biodiversity Beyond National Jurisdiction
CAFF	Conservation of Arctic Flora and Fauna
CAO	Central Arctic Ocean
CAOFA	Central Arctic Ocean Fisheries Agreement
CBD	Convention on Biological Diversity
COP	Conference of the Parties
EEZ	Exclusive Economic Zone
JPSRM	Joint Program of Scientific Research and Monitoring
IFBs	Relevant legal instruments and frameworks and relevant global, regional, sub-regional and sectoral bodies.
MPA	Marine Protected Areas
OSPAR	Marine Environment of the North-East Atlantic
PAME	Protection of Arctic Marine Environment Working Group
PREPCOM	Preparatory Committee
RFMO	Regional Fisheries Management Organization
RSA/Ps	Regional Sea Agreements/Programs
STB	Scientific and Technical Body
UNCLOS	The United Nations Convention on the Law of the Sea
UN	United Nations
UNGA	United Nations General Assembly
VCLT	Vienna Convention on the Law of Treaties

# 1 Introduction

## 1.1 Background

Oceans cover 70% of the Earth's surface and play a major role in regulating the Climate. 90% of atmospheric heat and 30% of all CO<sub>2</sub> emissions released into the atmosphere is absorbed by the ocean resulting in ocean acidification which negatively impacts marine organisms<sup>1</sup> by hindering the calcification of organisms such as phytoplankton, mollusks, crustaceans which form the bottom of food chain. An increase in acidification has a harmful effect on the fish species during the larvae stage, which could potentially lead to the population decline of commercially important stocks<sup>2</sup>. A meta-analysis conducted on a broad range of marine organisms reveals that ocean acidification results in decreased survival, calcification, growth, development and abundance.<sup>3</sup> The World Wildlife Fund report indicates that in 1,234 species of marine vertebrates, the size of it has declined by 49% during the period from 1970 to 2012 with overexploitation being the main driver.<sup>4</sup> The warming waters cause imbalances in the marine world displacing the marine organisms from their natural habitat in search of more favorable temperatures, which is generally in poleward direction, but the situation at poles is no better, as the effects of ocean acidification at poles is amplified as the rate at which CO<sub>2</sub> is absorbed in the water decreases with warmer temperatures, which means the polar regions is acidifying faster than regions in other latitudes. The inward migration of species in poles means that the native species would have to compete with species from lower latitude which is likely to reduce both regional and global biodiversity.<sup>5</sup>

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<sup>1</sup> "The Decline of Marine Biodiversity." Ocean & Climate Platform, January 8, 2021. <https://ocean-climate.org/en/presentation-of-the-ocean-and-climate-scientific-items/marine-biodiversity/>.

<sup>2</sup> The study was conducted on two Atlantic Cod stocks. Stiasny, Martina H., Felix H. Mittermayer, Michael Sswat, Rüdiger Voss, Fredrik Jutfelt, Melissa Chierici, Velmurugu Puvanendran, Atle Mortensen, Thorsten B. Reusch, and Catriona Clemmesen. "Ocean Acidification Effects on Atlantic Cod Larval Survival and Recruitment to the Fished Population." *PLOS ONE* 11, no. 8 (August 23, 2016): 1-2. <https://doi.org/10.1371/journal.pone.0155448>.

<sup>3</sup> Kroeker, Kristy J., Rebecca L. Kordas, Ryan Crim, Iris E. Hendriks, Laura Ramajo, Gerald S. Singh, Carlos M. Duarte, and Jean-Pierre Gattuso. "Impacts of Ocean Acidification on Marine Organisms: Quantifying Sensitivities and Interaction with Warming." *Global Change Biology* 19, no. 6 (February 21, 2013): 1184–96. <https://doi.org/10.1111/gcb.12179>.

<sup>4</sup> Luypaert, Thomas, James G. Hagen, Morgan L. McCarthy, and Meenakshi Poti. "Chapter 4 Status of Marine Biodiversity in the Anthropocene." In *YOUMARES 9 - The Oceans: Our Research, Our Future*, S. Jungblut, V. Liebich, and M. Bode-Dalby, 65 57-85. Cham: Springer. [https://doi.org/10.1007/978-3-030-20389-4\\_4](https://doi.org/10.1007/978-3-030-20389-4_4). 65

<sup>5</sup> Fitt, Robert N., and Lesley T. Lancaster. "Range Shifting Species Reduce Phylogenetic Diversity in High Latitude Communities via Competition." *Journal of Animal Ecology* 86, no. 3 (February 19, 2017): 543, 543–55. <https://doi.org/10.1111/1365-2656.12655>.

Apart from playing a major role in regulating climate, humans derive many ecosystem services from the ocean. Fishing is the primary source of protein for more than one billion people, estimated value for capture fishing is 141 billion USD employing 58.5 million people.<sup>6</sup> Ocean plays an important role in waste processing, shoreline protection and recreational opportunities.<sup>7</sup> But the state of fisheries is rather concerning. Food and Agricultural Organization (FAO) provides an alarming report, highlighting that 35.4% of global fish stocks are overfished<sup>8</sup> while high sea and straddling fish stocks are twice likely to be overfished compared to coastal fish stocks.<sup>9</sup> Fishing is one of the major anthropogenic stressors that affect the marine ecosystems<sup>10</sup>. Unsustainable fishing practices has the potential to negatively impact the ecosystem services that we derive from the ocean, thus it is necessary to manage it by taking appropriate measures.

Marine Protected Areas (MPA) is identified as one of the key management tools for conservation of marine ecosystems which benefits both ecosystems and fisheries.<sup>11</sup> Several studies have been conducted to observe the impacts MPAs have on marine environment and biodiversity. MPAs have a positive impact on the density, biomass, size of organisms and increase in diversity of fish species<sup>12</sup>. MPA has proven to be a useful tool to reduce habitat destruction and modification<sup>13</sup> and thereby help in conservation of biodiversity. The FAO Committee of Fisheries (COFI) noted that the MPAs have potential benefits for fisheries management tool<sup>14</sup> and it has led to increasing the population and biomass of fish. Thus can be

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<sup>6</sup> FAO. 2022. *The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation*. Rome: FAO. Pg 1. <https://doi.org/10.4060/cc0461en>.

<sup>7</sup> Luyppaert, Thomas "Status of Marine Biodiversity in the Anthropocene." 58.

<sup>8</sup> FAO. 2022. *The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation*. Rome: FAO. 1. <https://doi.org/10.4060/cc0461en>.

<sup>9</sup> Qu, Yunfeng, and Ruiyang Liu. "A Sustainable Approach towards Fisheries Management: Incorporating the High-Seas Fisheries Issues into the BBNJ Agreement." *Fishes* 7, no. 6 (December 14, 2022): 6. <https://doi.org/10.3390/fishes7060389>.

<sup>10</sup> Butt, Nathalie, Benjamin S. Halpern, Casey C. O'Hara, A. Louise Allcock, Beth Polidoro, Samantha Sherman, Maria Byrne, et al. "A Trait-based Framework for Assessing the Vulnerability of Marine Species to Human Impacts." *Ecosphere* 13, no. 2 (February 6, 2022): 1–17. <https://doi.org/10.1002/ecs2.3919>.

<sup>11</sup> Villasante, Sebastian, Gillian B. Ainsworth, Pablo Pita, Andrea Belgrano, Nathan Bennett, and Ussif Rashid Sumaila. "The Role of Marine Protected Areas (Mpas) in Providing Ecosystem Services to Improve Ocean and Human Health." *Oceans and Human Health*, 2023, 23. <https://doi.org/10.1016/b978-0-323-95227-9.00013-0>.

<sup>12</sup> Luyppaert, Thomas "Status of Marine Biodiversity in the Anthropocene." 72.

<sup>13</sup> Ibid., 63

<sup>14</sup> Charles, Anthony, and Jessica Sanders. "Issues Arising on the Interface of MPAs and Fisheries Management." CORE, January 1, 2007. [https://core.ac.uk/display/75777349?utm\\_source=pdf&utm\\_medium=banner&utm\\_campaign=pdf-decoration-v1](https://core.ac.uk/display/75777349?utm_source=pdf&utm_medium=banner&utm_campaign=pdf-decoration-v1).



used as a tool MPAs to benefit marine biodiversity conservation and fisheries management.<sup>15</sup> But establishment of MPAs faces quiet a few challenges, especially in ABNJ. Only 1.44 percent of the High Seas is covered by MPAs, compared to 18.3 percent of EEZ.<sup>16</sup> High Sea MPAs are also established only in presence of treaty-based regime such as Convention on Conservation of Antarctic Marine Living Resources (CCAMLR) and The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR). Most of ABNJ is not covered by such a regime-based mechanism to address conservation of biodiversity. Even the existing high sea MPAs regimes, are criticized as they do not have sufficient mandate to comprehensively address all activities in the High Seas, nor there is sufficient cooperation amongst sectors to cooperate. This might be one of the reason why OSPAR MPAs network is criticized as ‘Paper parks’ as it lacks the mandate to address fishing and maritime transport.<sup>17</sup> CCAMLR’s mandate is limited to regulating marine living resources.<sup>18</sup> This is because the efforts to protect the marine environment are subject to limitation under UNCLOS.<sup>19</sup> The following section provides a brief view of how conservation of marine living resources and protection of marine environment is dealt under Law of Sea Convention.

United Nations Convention on the Law of the Sea (UNCLOS)<sup>20</sup> provides a basic legal framework for conservation and management of marine living resources, which includes fishing. One of the key features of UNCLOS is the adoption of maritime zones<sup>21</sup>. The coastal states exercise their jurisdiction over territorial sea and contiguous zone, Exclusive Economic

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<sup>15</sup> Weigel, Jean-Yves, Kathryn Olivia Mannle, Nathan James Bennett, Eleanor Carter, Lena Westlund, Valerie Burgener, Zachary Hoffman, et al. “Marine Protected Areas and Fisheries: Bridging The Divide.” *Aquatic Conservation: Marine and Freshwater Ecosystems* 24, no. S2 (November 2014): 199. <https://doi.org/10.1002/aqc.2514>.

<sup>16</sup> UNEP-WCMC and IUCN (2024), Protected Planet: The World Database on Protected Areas (WDPA) and World Database on Other Effective Area-based Conservation Measures (WD-OECM) [Online], February 2024, Cambridge, UK: UNEP-WCMC and IUCN. Available at: [www.protectedplanet.net](http://www.protectedplanet.net) [https://www.protectedplanet.net/en/global\\_statistics\\_download](https://www.protectedplanet.net/en/global_statistics_download)

<sup>17</sup> Matz-Lück, Nele, and Johannes Fuchs. “The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?” *Marine Policy* 49 (December 26, 2013): 155. <https://doi.org/10.1016/j.marpol.2013.12.001>.

<sup>18</sup> Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, 1329 U.N.T.S. 47.

<sup>19</sup> Matz-Lück, “The Impact of OSPAR on Protected Area Management Beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?” 155.

<sup>20</sup> *United Nations Convention on the Law of the Sea*, Dec. 10, 1982, 1833 U.N.T.S. 397. (hereinafter referred as UNCLOS)

<sup>21</sup> Bastiaan Klerk, “Creating Synergies Between Global and Regional MPA Regimes in Areas Beyond National Jurisdiction” (Master’s thesis in Law of the Sea, UiT The Arctic University of Norway, September 2020),6, <https://hdl.handle.net/10037/20067>

Zone (EEZ), and Continental Shelf<sup>22</sup>. Majority of fishing occurs in EEZ and the High Seas. The coastal states have exclusive right to fish within its EEZ, which can extend up to 200 nautical miles<sup>23</sup> and freedom of fishing is applied in the High Seas<sup>24</sup>. The coastal states right to exploit the resources is balanced by the duty to take conservation and management measures<sup>25</sup>. The coastal state must determine its total allowable catch based on the best scientific evidence available to it, to ensure stocks are not endangered by over-exploitation<sup>26</sup>. The stocks must also be maintained at Maximum Sustainable Yield taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.<sup>27</sup>

For stocks that are shared within EEZ or stocks occurring in EEZ and High Seas, the States have an additional requirement to coordinate the measures for conservation of the stocks.<sup>28</sup> Similarly, states fishing for highly migratory species are required to cooperate for conserving and ensuring optimal utilization of the stocks.<sup>29</sup> The duty to cooperate has been further strengthened through United Nations Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Migratory Fish Stocks (UNFSA)<sup>30</sup>. As an implementing agreement, it strengthens various provisions under UNCLOS and provides a higher level of obligation for parties to cooperate in regulating fisheries<sup>31</sup> by introducing concepts such as Precautionary Approach, Ecosystem Approach to fisheries and an explicit reference to protection of biodiversity in marine environment.<sup>32</sup>

The general duty to protect and preserve the marine environment is elaborated under Part XII of UNCLOS which is applicable to all maritime zones.<sup>33</sup> Article 192 codifies customary

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<sup>22</sup> Part II, V and VI UNCLOS.

<sup>23</sup> Article 57 UNCLOS

<sup>24</sup> Article 87 1 (c) & (e), Article 116 to 118 UNCLOS

<sup>25</sup> Article 56(1)(a) UNCLOS

<sup>26</sup> Article 61 UNCLOS

<sup>27</sup> Article 61 3,4 UNCLOS

<sup>28</sup> Article 63 UNCLOS

<sup>29</sup> Article 64 UNCLOS

<sup>30</sup> 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, Aug. 4, 1995, 2167 U.N.T.S. 88. (hereinafter referred as UNFSA)

<sup>31</sup> Sato, Chie. "The Necessity of a Global Legal Framework for Protection of Marine Biodiversity in Areas beyond National Jurisdiction." *Max Planck Yearbook of United Nations Law Online* 25, no. 1 (December 23, 2022): 594. [https://doi.org/10.1163/18757413\\_02501016](https://doi.org/10.1163/18757413_02501016).

<sup>32</sup> Article 5 c and 5g UNFSA. Ecosystem approach is not explicitly mentioned under UNFSA, but it is rather inferred from the general principles and its management measures.

<sup>33</sup> Article 192 to 234 UNCLOS

international law where States have a general obligation to protect the marine environment with focuses on addressing marine pollution. Article 194(5) is of particular relevance for MPAs, as it explicitly addresses the duty of states to protect rare and fragile ecosystems, habitat of depleted, threatened, or endangered species and other forms of marine life. But nowhere does UNCLOS refer to MPAs. This is understandable, as UNCLOS is a ‘Constitution of the Ocean’ and it is quiet impossible to address everything in detail. Although the UNCLOS and UNFSA have provided for development of a basic framework for conservation of living resources, the zonal or sectoral approach to managing living resources is not conducive towards addressing the cumulative impacts of the activities on marine ecosystem<sup>34</sup>. Maritime zones were designed without consideration to geographic or ecological specification, which hinders effective marine protection.<sup>35</sup>

In order to address the governance gap concerning the conservation and sustainable use of marine biodiversity in ABNJ, the United Nations General Assembly passed a resolution in 2015<sup>36</sup> to develop a legally binding instrument on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. Nearly after a decade 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 agreement<sup>37</sup> (hereinafter referred as BBNJ), was concluded in 2023.

The objective of the BBNJ agreement is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. One of the key tools is by establishing areas-based management measures in the High Seas. MPAs are one form of Area Based Measures, that seeks to address the cumulative impacts of the human activities in a comprehensive manner. The Central Arctic Ocean is an interesting area to be studied in this context. Firstly, due to climate change, the Arctic region is warming as much as four times

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<sup>34</sup> Sato, ““The Necessity of a Global Legal Framework for Protection of Marine Biodiversity in Areas beyond National Jurisdiction.” 591.

<sup>35</sup> Rebay , Anna von. “Setting the Scene .” Chapter 4. In *The Designation of Marine Protected Areas*, 1st ed., 22. Springer Cham, n.d. <https://doi.org/10.1007/978-3-031-29175-3>.

<sup>36</sup> G.A. Res. 69/292, U.N. Doc. A/RES/69/292 (June 19, 2015)

<sup>37</sup> Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction UN Doc A/CONF.232/2023/4\* (19 June 2023) (hereinafter referred as BBNJ Agreement).

faster than the globe<sup>38</sup> a phenomenon referred to as arctic amplification, thus threatening the vulnerable Arctic ecosystem. The effect of warming Arctic is not limited to the Arctic region but has an impact on the global climate such as atmospheric circulation, cryosphere, and carbon cycle<sup>39</sup>. The reduction in sea ice has witnessed increase in human activities in the region. Natural resource extraction has led to increase in Arctic shipping by 37 percent in the last 10 years<sup>40</sup>. Arctic region is also known for its vast oil resources<sup>41</sup>. The gradual increase in human activities in the Arctic would affect the highly sensitive arctic ecosystem and compromise the delivery of ecosystem that we derive.<sup>42</sup>

The eight Arctic states have established the Arctic Council a high-level intergovernmental forum which promotes cooperation, coordination and interaction among the Arctic States, Arctic Indigenous Peoples and other Arctic inhabitants mainly focusing on addressing issues relating to sustainable development and environmental protection in the Arctic<sup>43</sup>. Considerable work relating to understanding the Arctic ecosystem has been done by Arctic Council mainly through its working groups in relation to MPAs. The Arctic Council has called for creation of pan arctic MPA network to conserve Arctic Marine Biodiversity and ecosystem functions<sup>44</sup>. But one of the clear limitations of the Arctic Council is lack of the Council's ability to take binding decisions as it is not an Intergovernmental Organization and therefore it does not have the mandate to establish MPAs.<sup>45</sup> With exception of Arctic Council, Arctic States have

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<sup>38</sup> Rantanen, Mika, Alexey Yu. Karpechko, Antti Lipponen, Kalle Nordling, Otto Hyvärinen, Kimmo Ruosteenoja, Timo Vihma, and Ari Laaksonen. "The Arctic Has Warmed Nearly Four Times Faster than the Globe since 1979." *Communications Earth & Environment* 3, no. 1 (August 11, 2022): 1 <https://doi.org/10.1038/s43247-022-00498-3>.

<sup>39</sup> Yamanouchi, Takashi, and Kumiko Takata. "Rapid Change of the Arctic Climate System and Its Global Influences - Overview of Grene Arctic Climate Change Research Project (2011–2016)." *Polar Science* 25 (September 25, 2020). <https://doi.org/10.1016/j.polar.2020.100548>.

<sup>40</sup> "Arctic Shipping Update: 37% Increase in Ships in the Arctic over 10 Years." Arctic Council, January 31, 2024. <https://arctic-council.org/news/increase-in-arctic-shipping/>.

<sup>41</sup> Cowling, James. "Arctic Oil Exploration: Potential Riches and Problems." BBC News, August 31, 2011. <https://www.bbc.com/news/business-14728856>.

<sup>42</sup> Townhill, Bryony L., Efstathios Reppas-Chrysovitinos, Roxana Sühling, Crispin J. Halsall, Elena Mengo, Tina Sanders, Kirsten Dähnke, Odile Crabeck, Jan Kaiser, and Silvana N. Birchenough. "Pollution in the Arctic Ocean: An Overview of Multiple Pressures and Implications for Ecosystem Services." *Ambio* 51, no. 2 (December 7, 2021): 471, 471–83. <https://doi.org/10.1007/s13280-021-01657-0>.

<sup>43</sup> "About the Arctic Council." Arctic Council. Accessed May 13, 2024. <https://arctic-council.org/about/>.

<sup>44</sup> Protection of the Arctic Marine Environment (PAME). "Framework for a Pan-Arctic Network of Marine Protected Areas." Arctic Council, April 1, 2015. <https://oarchive.arctic-council.org/items/542f295a-31b1-4cd9-9a59-af78239d999f>.

<sup>45</sup> Bryony L. Townhill, "Pollution in the Arctic Ocean: An Overview of Multiple Pressures and Implications for Ecosystem Services," 472.

cooperated through bilateral or multilateral agreements to manage fish stocks that are shared.<sup>46</sup> NEAFC is another RFMO that has competence to regulate fishing in north east Atlantic region which includes some parts of the Central Arctic Ocean. Although NEAFC is an RFMO, it has undertaken area-based measures to protect the vulnerable ecosystems in areas beyond national jurisdiction.<sup>47</sup> But the most relevant area-based management tool in the Arctic Ocean is the moratorium by Central Arctic Ocean Fisheries Agreement<sup>48</sup> which prevents unregulated fishing in the high sea portion of the Central Arctic Ocean for an initial period of 16 years.<sup>49</sup> CAOFA and BBNJ overlap in terms of geographic scope and thus interaction between the agreements is unavoidable when establishing MPAs in the CAO. Understanding the nature of the agreements in terms of its objectives and identifying synergies would help in establishment of MPAs benefiting the marine biodiversity conservation.

## 1.2 Purpose and Scope

The legal framework for the establishment of the MPA is fragmented, as seen above. The BBNJ agreement is an attempt to fill in these legal spaces by providing the legal basis for establishing an ecologically coherent network of MPAs in the including the high sea. While the text has been concluded, it is necessary to start planning to take measures to further the objectives of the agreement. With fisheries management being one of the most debated topics in ABNJ, the research will provide some initial thoughts on the role the RFMO/RFMA might play in designating the MPAs in the high seas. The Conference of the Parties (COP) has the authority to establish area-based management tools including Marine Protected Areas (MPAs). In doing so, the COP must respect the authority of relevant laws and frameworks and must not undermine the relevant legal instruments and frameworks<sup>50</sup>. During the establishment of MPAs under the BBNJ agreement, all relevant IFBs in the region would be involved. But the scope of the thesis is limited to analyzing the interaction between the BBNJ and fisheries, especially in

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<sup>46</sup> The bilateral agreement between Norway and Russia is a good example of regional cooperation.

<sup>47</sup> "Map of NEAFC Regulatory Area Showing Existing Fishing Areas and All Closures." Map of NEAFC Regulatory Area Showing Existing Fishing Areas and All Closures | North-East Atlantic Fisheries Commission. Accessed May 23, 2024. <https://www.neafc.org/page/closures>.

<sup>48</sup> Agreement to prevent unregulated High Seas fisheries In the central Arctic Ocean. Opened for signature 3<sup>rd</sup> October 2018. [Agreement to prevent unregulated high seas fisheries in the central Arctic Ocean \(dfo-mpo.gc.ca\)](https://www.dfo-mpo.gc.ca/agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean)

<sup>49</sup> David Balton, "What Will the BBNJ Agreement Mean for the Arctic Fisheries Agreement?," *Marine Policy* 142 (August 2022): 103745, <https://doi.org/10.1016/j.marpol.2019.103745>, Section 4.

<sup>50</sup> Article 22 BBNJ agreement

regard to Central Arctic Ocean Fisheries Agreement. The thesis will identify area in which the parties can cooperate in terms of MPAs in the CAO and the limitations is also discussed.

BBNJ also addresses issues relating to marine genetic resources and environmental impact assessments that will have an impact on the CAOFA, but it is beyond the scope of the thesis, as the topics are specific enough to be researched on their own.

### **1.3 Research Question:**

The primary research question of the thesis is to analyze the role of the Central Arctic Ocean Fisheries Agreement (CAOFA) in the process of adopting a Marine Protected Area (MPA) in the Central Arctic Ocean. The research aims to examine the process of establishing MPAs under BBNJ agreement, and how the BBNJ agreement can achieve its objectives without undermining the IFBs. The following sub questions are examined in order to answer the main research question.

- How does the BBNJ agreement define the relationship with the IFBs?
- What are the procedural steps for establishing an MPA under the BBNJ agreement?
- What would the role of CAOFA be in the process of establishing the MPA in the CAO?

### **1.4 Methodology**

The thesis is a study of regime interaction between the Conservation of Biodiversity and Fisheries Management in the Arctic by analyzing the agreements applicable, Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction and Central Arctic Ocean Fisheries Agreement. The core of the study is to understand how MPAs can be established in the Central Arctic Ocean without undermining the existing relevant legal instruments and frameworks and relevant global, regional, sub-regional bodies, in this case, it is CAOFA. Legal doctrinal method is used as it helps in systematic and a coherent analysis of the legal documents and treaties, providing a clear method of examining the law in a systematic way by ‘resolving internal inconsistencies among seemingly contradictory materials’<sup>51</sup>

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<sup>51</sup> Jan M. Smits, “What Is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research,” *SSRN Electronic Journal*, 2015, 1–17, <https://doi.org/10.2139/ssrn.2644088>, 6.

## **1.5 Use of Sources**

The research follows the “formal” source of international law as identified under Article 38 of the International Court of Justice Statute.<sup>52</sup> International conventions are primary source of international law and act a foundation for the research of the thesis. In this regard, relevant provisions of UNCLOS and UNFSA will be used. But the main scope of study is the interplay between BBNJ and CAOFA, which evidently points towards using the two agreements as sources. Some modalities of the BBNJ agreement would further be elaborated after the institutional arrangements of the agreement such as Conference of Parties (COP) and Scientific and Technical Body has been established. Therefore, during this period between adoption of the agreement and entering into force, secondary sources are of immense value. BBNJ negotiations during Intergovernmental Conference (IGC), along with the scholarly debates form a major part of secondary source that has been used in the thesis.

## **1.6 Structure of Thesis**

The thesis would be structured as follows. Chapter 2 provides an overview of CAOFA and the purpose and scope of the agreement. The background of the agreement is examined, along with the precautionary approach that had been adopted by the parties. The characteristics of COAFA would later be useful to identify points of convergence between CAOFA and BBNJ. Chapter 3 provides a brief description on the procedure to establish MPAs under the BBNJ agreement. It analyses the different stages of establishment of MPA i.e. Proposals, consultations, and establishment of MPA by the BBNJ COP. The principle of ‘not undermining’ which forms the basis of relationship between BBNJ and the relevant IFBs is also discussed and analyzed. The role of IFBs during the establishment procedure is also discussed. Chapter 4 is the last chapter where areas of synergies between CAOFA and BBNJ are identified. It also discusses the role COAFA would play during establishment of MPAs.

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<sup>52</sup> Antônio Augusto Cançado Trindade, “Statute of the International Court of Justice,” United Nations Audiovisual Library of International Law , accessed May 10, 2024, [https://legal.un.org/avl/pdf/ha/sicj/sicj\\_e.pdf](https://legal.un.org/avl/pdf/ha/sicj/sicj_e.pdf), 5.

## 2 CENTRAL ARCTIC OCEAN FISHERIES AGREEMENT

### 2.1 Overview of the CAOFA:

A number of global, bilateral and multilateral regional treaties as well as relevant customary international law govern the conservation and management of marine living resources in the Central Arctic Ocean.<sup>53</sup> Regarding fisheries and the protection of marine environment, UNCLOS and UNFSA play a major role. Section 2 Part VII of UNCLOS addresses the conservation and management of living resources in the high seas, specifically Article 116 to 119. This is further elaborated under UNFSA. The agreement seeks to manage straddling/highly migratory fish stocks through regional fisheries management organizations or associations. The agreement embodies principles such as precautionary approach, best available scientific evidence<sup>54</sup>, sustainable use of fishing resources<sup>55</sup> and a general principle to protect biodiversity in the marine environment<sup>56</sup>. The adoption of the UNFSA was a response to the crisis surrounding the management of transboundary fish stocks<sup>57</sup>. Similarly, the CAOFA was initiated to manage migratory and transboundary fish stocks in the CAO, as a precaution measure<sup>58</sup>. Historically, the ice coverage throughout most of the year precluded commercial-scale fishing. However, the recent retreat of sea ice has unveiled new fishing grounds, prompting concerns over the potential overexploitation. In order to prevent similar problems due to unsustainable fishing, the establishment of the Central Arctic Ocean Fisheries Agreement (CAOFA) has been necessitated, aiming to ensure the sustainable management of these newly accessible marine resources.<sup>59</sup>

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<sup>53</sup> Valentin J. Schatz, Alexander Proelss, and Nengye Liu, "The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis," *The International Journal of Marine and Coastal Law* 34, no. 2 (April 29, 2019): 195–244, <https://doi.org/10.1163/15718085-23342015>, 201. also see 1. Erik J. Molenaar, "Status and Reform of International Arctic Fisheries Law," *Arctic Marine Governance*, October 2, 2013, 103–25, [https://doi.org/10.1007/978-3-642-38595-7\\_5](https://doi.org/10.1007/978-3-642-38595-7_5), Section 3.3 and 3.4.

<sup>54</sup> Article 5(c) and Article 6 of UNFSA

<sup>55</sup> Article 5(1) of UNFSA

<sup>56</sup> Article 5(g) of UNFSA

<sup>57</sup> "The United Nations Fish Stocks Agreement (UNFSA)," WWF, 2011, [http://awsassets.panda.org/downloads/unfsa\\_revised.pdf](http://awsassets.panda.org/downloads/unfsa_revised.pdf).

<sup>58</sup> Molenaar, Erik J. "The CAOFA Agreement: Key Issues of International Fisheries Law." *New Knowledge and Changing Circumstances in the Law of the Sea*, August 28, 2020, 446.

[https://doi.org/10.1163/9789004437753\\_024](https://doi.org/10.1163/9789004437753_024).

<sup>59</sup>*Ibid.*, 447.



## 2.2 Historical Background – Lessons from the past?

### 2.2.1 Geographical background:

The Central Arctic Ocean is the largest high sea portion of the Arctic which is completely enclosed by the Exclusive Economic Zone of 5 Arctic states – Canada, Russia, Norway, Denmark (in respect of Greenland) and the United States. It covers roughly an area 2.8 million square kilometers<sup>60</sup>. There other high sea pockets exist in the marine Arctic Ocean, which are ‘Banana Loophole’ in the Norwegian Sea, the ‘Donut hole’ in the Central Bering Sea and ‘Loophole’ in the Barents Sea<sup>61</sup>. For the purpose of the thesis, CAO only refers to the high seas in the CAO that is surrounded by waters within which Canada, the Kingdom of Denmark in respect of Greenland, the Kingdom of Norway, the Russian Federation and the United States of America exercise fisheries jurisdiction<sup>62</sup>. Even though the other high sea pockets are part of ABNJ, it is excluded from the scope of CAOFA. While some legal arrangements exist for regulating fishing in the smaller high sea pockets<sup>63</sup>, the Central Arctic Ocean has remained ice-covered for much of the year, thus excluding any human activity. But with warming trends and nearly 40 percent reduction of sea ice during summer, coupled with expansion of sub-arctic fish species and temperate towards poles, it is likely that fishing will occur in the medium to long term.<sup>64</sup>

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<sup>60</sup> “Landmark High Seas Treaty Agreed—and What That Means for the Arctic,” WWF Arctic, December 7, 2023, <https://www.arcticwwf.org/newsroom/news/landmark-high-seas-treaty-agreed-and-what-that-means-for-the-arctic/>.

<sup>61</sup> Erik J. Molenaar, “Status and Reform of International Arctic Fisheries Law,” *Arctic Marine Governance*, October 2, 2013, 103–25, [https://doi.org/10.1007/978-3-642-38595-7\\_5](https://doi.org/10.1007/978-3-642-38595-7_5), Section 1.

<sup>62</sup> Article 1 (a) of CAOFA.

<sup>63</sup> Bilateral agreement by Joint Russian Norwegian Fisheries Commission in Barents sea and Norwegian sea including the loophole, the 1999 “Loophole agreement” between Iceland, Norway and Russia, NEAFC which covers banana loophole and 8% of CAO.

<sup>64</sup> Rayfuse, Rosemary. “Regulating Fisheries in the Central Arctic Ocean: Much Ado about Nothing?” *Arctic Marine Resource Governance and Development*, 2018, 35–51. [https://doi.org/10.1007/978-3-319-67365-3\\_3](https://doi.org/10.1007/978-3-319-67365-3_3).



Figure 1. The Map shows Central Arctic Ocean High Seas surrounded by the Exclusive Economic Zones of the Arctic 5. Image from ArcticPortal.org.<sup>65</sup>

### 2.2.2 Collapse of fish stocks:

The creation of a legally binding instrument for preventing unregulated fishing is one of the main objectives of CAOFA. It could be regarded as precautionary approach in the truest sense. Precautionary approach does not usually call for a moratorium on the fishing activity. This is rather an exception. Fisheries moratorium have usually been used as an aftermath to fish stock decline. So, what prompted the Arctic 5 to initiate a moratorium when commercial fishing is yet to occur in the CAO? The primary reason for moratorium to fishing could be attributed to

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<sup>65</sup> Image accessed on 25<sup>th</sup> May, 2024. <https://arcticportal.org/maps/download/maps-arctic-council-member-states-and-observers/3282-exclusive-economic-zones-of-the-arctic> .

the past incidents of fish stock collapse in the high sea pockets of the Arctic Ocean. In 1980s, the Alaskan Pollock Fishery, regarded as North America's most abundant natural fishery, accounted for 40 percent of total US fish landings. A moratorium was introduced in 1993 to prevent the collapse of the stocks in the Aleutian Basin of the "Donut Hole", but it was too late for the stocks to recover. From 2.7 million tons of catches in 1987 it has dropped to mere 815 thousand tons in 2009, a 69% decline. Overfishing is one of the primary causes for stock collapse in Pollock.<sup>66</sup> In the early 1990s, another collapse occurred in the Barents Sea "Loophole". During this period, Iceland targeted Northeast Arctic Cod and Haddock in the Loophole which is straddling a shared stock occurring in EEZ and High Seas. The shift in fishing focus was induced by a decline in cod stock within Iceland's EEZ, due to changes in water temperature and salinity. Subsequently, the cod stocks increased in the Barents Sea, including the Loophole area, which falls outside the EEZ of the Coastal States. This was of particular concern to the Joint Norwegian-Russian Fisheries Commission, as the excessive fishing by Iceland threatened the well-being of cod stock, which was already fully exploited<sup>67</sup>. In order to prevent Iceland from fishing in the Loophole, Norway and Russia offered access to fishing in their fisheries zones with some reciprocal access to Norway and Russia in the EEZ between Iceland<sup>68</sup>. Concerns over the collapse of stock led to the creation of the Barents Sea Loophole Agreement<sup>69</sup> where reciprocal fishing access in the EEZ between Iceland, Norway and Russia was negotiated.<sup>70</sup> The agreement does not explicitly prohibit Iceland from fishing in the Loophole, as this would mean that Norway and Russia have unilaterally enforced fishing measures beyond their EEZ, but rather it is implied that high sea fishing is prohibited.<sup>71</sup>

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<sup>66</sup> 1. Kevin M. Bailey, "An Empty Donut Hole: The Great Collapse of a North American Fishery," *Ecology and Society* 16, no. 2 (2011): 1–13, <https://doi.org/10.5751/es-04124-160228>, 1.

<sup>67</sup> 1. *The International Journal of Marine and Coastal Law* 14, no. 4 (December 1, 1999): 467–90, <https://doi.org/10.1163/15718089920492546>, 471.

<sup>68</sup> *Ibid.*, 471–472.

<sup>69</sup> Agreement between the Government of Iceland, The Government of Norway and the Government of Russian Federation Concerning Certain Aspects of Cooperation in the Area of Fisheries. 1999 1999-05-15 [Agreement between the Government of Iceland, the Government of Norway and the Government of the Russian Federation concerning Certain Aspects of Co-operation in the Area of Fisheries - The Faculty of Law \(uio.no\)](https://www.uio.no/fakultet-for-rett/hjortnes/utgivelser/1999-05-15-agreement-between-the-government-of-iceland-the-government-of-norway-and-the-government-of-the-russian-federation-concerning-certain-aspects-of-co-operation-in-the-area-of-fisheries-the-faculty-of-law-uio-no)

<sup>70</sup> Churchill, "The Barents Sea Loophole Agreement: A 'Coastal State' Solution to a Straddling Stock Problem," 473.

<sup>71</sup> Olav Schram Stokke, "The Loophole of the Barents Sea Fisheries Regime." in Olav Schram Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes*, (Oxford, 2001; online edn, Oxford Academic, 22 Mar. 2012), 273–93. <https://doi.org/10.1093/acprof:oso/9780198299493.003.0010>.

United States, following a precautionary approach, implemented a moratorium on commercial fisheries in the Chukchi and Beaufort Seas.<sup>72</sup> This moratorium will remain in effect until sufficient data is collected to understand the impacts on target species and the broader ecosystem. In 2012, 2000 scientist from around the world have come forward and signed a letter to undertake a precautionary approach in the CAO and to develop rules for fishing to prevent a ‘potential ecological catastrophe’. The letter recommended the 5 Arctic coastal states to essentially take the lead in devolving a precautionary international fisheries management accord, starting with a catch level of zero until sufficient research can assess the impact of fisheries on the Arctic ecosystem and set a robust management, monitoring and enforcement system before commercial fishing is undertaken.<sup>73</sup> It can be observed from the above incidents that a similar situation might arise in the CAO, where the warming temperature causes fish stocks to migrate to High Sea portion of the CAO, thereby making it accessible to new fishers, where there is a threat of fish stock collapse, if it not managed effectively.

Secondly, it is comparatively less complicated for the states to come to an agreement before the States have commenced commercial fishing in the CAO. Thirdly, absence of high sea regime for managing the marine living resources in the high seas would impact the exploitation and conservation of the marine living resources within the EEZ, especially when the stocks move freely across the EEZ and the high seas. The collapse of fish stock due to unregulated fishing is of particular concern, as it impacts not only the ecosystem but also negatively impact the fishing arrangement in the EEZ of the Coastal States.<sup>74</sup>

### **2.3 OSLO Declaration<sup>75</sup>:**

All the past incidences along with obligations under international law such as UNCLOS and UNFSA to co-operate in the conservation and management of fishing resources in the high seas,

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<sup>72</sup> “Alaska to Study Fishing in Protected Arctic Waters.” The Maritime Executive, April 16, 2023.

<https://maritime-executive.com/article/alaska-to-study-fishing-potential-in-chukchi-and-beaufort-seas>.

<sup>73</sup> The Pew Charitable Trusts, “More than 2,000 Scientists Worldwide Urge Protection of Central Arctic Ocean Fisheries,” The Pew Charitable Trusts, April 22, 2012, <https://www.pewtrusts.org/en/about/news-room/press-releases-and-statements/2012/04/22/more-than-2000-scientists-worldwide-urge-protection-of-central-arctic-ocean-fisheries>.

<sup>74</sup> Peter Harrison et al., “Polar Perspectives No. 2: How Non-Government Actors Helped the Arctic Fisheries Agreement,” Wilson Center, accessed May 29, 2024, 3. <https://diplomacy21-adelphi.wilsoncenter.org/publication/polar-perspectives-no-2-how-non-government-actors-helped-arctic-fisheries-agreement>.

<sup>75</sup> Declaration concerning the prevention of unregulated high seas fishing in the central arctic ocean 16<sup>th</sup> July, 2015 available at:

led to the Arctic 5 gathering in Oslo to adopt interim measures to prevent unregulated fishing in the CAO. The declaration restricts the coastal states to authorize vessels to conduct commercial fishing ‘only in accordance with one or more RFMO/A to manage fisheries based on recognized international standards’. The declaration foresees to establishment of a joint program to engage in scientific research to improve the understanding of arctic ecosystems and to promote co-operation with the relevant scientific bodies, including but not limited to the International Council for the Exploration of the Sea (ICES) and the North Pacific Marine Science Organization (PICES). For the purpose of compliance with the above interim measures and in accordance with relevant international law, The Arctic 5 will undertake monitoring, control, and surveillance activities in the area.<sup>76</sup> Oslo declaration also acknowledges the interest of other states in preventing unregulated fishing thereby laying the groundwork for Arctic 5 plus 5 negotiations for CAOFA.

#### **2.4 Arctic and Non-Arctic Parties.**

The initial stage for CAOFA was developed by 5 Arctic Coastal whose EEZ encompasses the Central Arctic Ocean. Due to the proximity, the Arctic 5 are in better position to engage in fishing in the CAO region and the poleward migration of fish species would mean that they have to pass through the EEZ of the Arctic 5 to reach the CAO region. Since CAO is high seas, it was important to involve major fishing states that were capable of distant water fishing, and they have expressed their interest in participating in the agreement. They would also fulfill the ‘real interest’ required to participate in a RFMO or RFMA as specified under Article 8(3) of UNFSA<sup>77</sup>. This led to Arctic 5's decision to invite other interested states which is Iceland, Japan, South Korea, China and European Union<sup>78</sup>. The participation of plus 5 other than Arctic 5 is

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<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiYkfjw37OGAxXnHRAIHWmaDfoQFnoECCQQAQ&url=https%3A%2F%2Fwww.regjeringen.no%2Fglobalassets%2Fdepartementene%2Fd%2Fvedlegg%2Ffolkerett%2Fdeclaration-on-arctic-fisheries-16-july-2015.pdf&usg=AOvVaw31aKbF7Ksg9ECNSMbgAXOT&opi=89978449>

<sup>76</sup> Ibid., 2.

<sup>77</sup> Schatz, Valentin J., Alexander Proelss, and Nengye Liu. "The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Critical Analysis", *The International Journal of Marine and Coastal Law* 34, 2 (2019): 195-244, doi: <https://doi.org/10.1163/15718085-23342015>, 208.

<sup>78</sup> Joji Morishita, "The Arctic Five-plus-Five Process on Central Arctic Ocean Fisheries Negotiations," *Emerging Legal Orders in the Arctic*, April 11, 2019, 109–31, <https://doi.org/10.4324/9780429461170-8>, 109.

important as it ensures consistency within the broader framework of International Fisheries Regime.<sup>79</sup>

While the Arctic 5 initially laid the groundwork for CAOFA with the Oslo Declaration, they no longer take the lead role. The 5 Coastal states participate on an equal footing with the other parties to the agreement. Decisions under the agreement will be based on consensus, thereby dissolving priority status of the Arctic 5.<sup>80</sup> But it must be born in mind that the Arctic 5 played a crucial role in selecting the additional ‘plus 5’ participants for the CAOFA. Given the geographical context, where the Central Arctic Ocean is bordered by the Exclusive Economic Zones (EEZs) of the Arctic coastal states, the regulatory measures implemented by the Arctic 5 within their maritime zones could significantly impact the fish stocks in the CAO. Therefore, it is pertinent that the Coastal States regulate commercial fishing within their maritime zones in accordance with ‘recognized international standards’. Failure to do so, especially when the availability of knowledge about the fish species is limited, including overfishing within the areas under national jurisdiction, by one or more Coastal States might have repercussions for the sustainability of fish stocks and overall biodiversity in the CAO.<sup>81</sup> The preamble to CAOFA recognizes the special responsibilities and special interests of the arctic coastal States regarding the conservation and sustainable management of fish stocks in the CAO<sup>82</sup>.

Thirdly, the involvement of the ‘plus 5’ signatories who currently possess the capacity to conduct scientific research and engage in distant water fishing would be beneficial in interest of Arctic ecosystem compared to the limited research that can be undertaken by one or only few of the Arctic States over the entire Arctic Ocean.<sup>83</sup> Thus, the arctic 5 plus 5 participation makes CAOFA compliant with UNFSA where parties with real interest can become members of such organization.<sup>84</sup>

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<sup>79</sup> Liu, Dan. "The 2015 Oslo Declaration on Arctic High Seas Fisheries: The Starting Point Towards Future Fisheries Management in the Central Arctic Ocean." *Arctic Yearbook* (2017): 1-28.

[21 The 2015 Oslo Declaration on Arctic High Seas Fisheries.pdf \(arcticyearbook.com\).](#)

<sup>80</sup> Molenaar, Erik J. "Chapter 22 The CAOF Agreement: Key Issues of International Fisheries Law". In *New Knowledge and Changing Circumstances in the Law of the Sea*, (Leiden, The Netherlands: Brill | Nijhoff, 2020) doi: [https://doi.org/10.1163/9789004437753\\_024](https://doi.org/10.1163/9789004437753_024)

<sup>81</sup> Rayfuse, Rosemary. "Regulating Fisheries in the Central Arctic Ocean: Much Ado About Nothing?". In *Arctic Marine Resource Governance and Development. Springer Polar Sciences.*, 35–51. Springer, Cham, 13AD.

<sup>82</sup> Preambular para 4 CAOFA

<sup>83</sup> Page 128, Morishita "The Arctic Five-plus-Five Process on Central Arctic Ocean Fisheries Negotiations Reflecting the Interests of Arctic and Non-Arctic Actors." 128.

<sup>84</sup> Article 8(3) UNFSA

## **2.5 CAOFA and its relation to UNCLOS and UNFSA:**

The foundation for Fisheries management in the Arctic was laid by UNCLOS, which provides for the legal framework governing fisheries in ocean. The rules applicable to the other oceans and seas also apply in the CAO. In regard to fishing in Areas Beyond National Jurisdiction i.e. in the CAO, the conservation and management of living resources is set out under Article 116 to 119. The freedom to fish in the high seas is subject to the duty to conserve and cooperate with other states in the conservation and management of the living resources<sup>85</sup>. For this purpose, UNCLOS foresees the establishment of subregional or regional fisheries management organisations. Cooperation with coastal states becomes essential when the stocks concerned occur in the EEZ and in areas beyond and adjacent to the EEZ<sup>86</sup> and when the stocks are highly migratory<sup>87</sup>. The measures must be based on the best scientific evidence available and must restore or maintain the harvested species at maximum sustainable yields<sup>88</sup>

The general principles provided in UNCLOS are only helpful to an extent, as they lack precision and support that is necessary for fisheries management especially for straddling fish stocks and highly migratory fish stocks. This led to developing an implementing agreement for the conservation and management of straddling and highly migratory fish stocks i.e. UNFSA. The agreement develops on the principles laid in UNCLOS by strengthening the States obligation to cooperate through RFMOs and incorporates the principle of precautionary approach<sup>89</sup>. Even though the agreement refers to Straddling and highly migratory fish stocks, the agreement is only applicable for management of stocks in ABNJ.<sup>90</sup> But, it is well understood that managing living resources that move across manmade boundaries requires taking measures that are compatible with conservation measures taken under the fisheries maritime zones of the Coastal States.<sup>91</sup> This is especially true for CAO as most of the fish stocks would essentially have to pass through the maritime zones of the coastal States before entering the COA. The status of stocks target or non-target or associated of dependent species are of concern, the States shall review the status and efficacy of measures through enhanced monitoring and revise the measures accordingly. An eco-system approach is implicit in UNFSA through the general

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<sup>85</sup> Article 117 and 118 UNCLOS.

<sup>86</sup> Article 63(2) UNCLOS

<sup>87</sup> Article 64 UNCLOS.

<sup>88</sup> Article 119 (1)(a) UNCLOS

<sup>89</sup> Article 6 UNFSA.

<sup>90</sup> Article 3 (1) UNFSA

<sup>91</sup> Article 7 UNFSA.

principles to adopt where necessary, conservation and management measures for ‘*species belonging to the same ecosystem or associated with or dependent upon the target stocks, with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened*’<sup>92</sup>. There is also explicit mention for the states to protect the biodiversity in the marine environment<sup>93</sup>. This ensures that the state parties take into consideration the transboundary impacts of their decisions<sup>94</sup>. CAOFA thus reflects and operationalizes the principles in UNCLOS and UNFSA especially in regard to precautionary approach, ecosystem-based management, sustainable use and cooperation in conservation and management of living resources in the high seas.<sup>95</sup>

## **2.6 Objectives of the CAOFA:**

The objective of COAFA is to ‘*prevent unregulated fishing in the high sea portion of the central Arctic Ocean through the application of precautionary conservation and management measures as a part of long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks*’.<sup>96</sup>

It can be divided into two components – first part refers to preventing unregulated fishing as part of long-term goal to safeguard marine ecosystems and to ensure conservation and sustainable use of fish stocks. The first part of the Article refers to unregulated fishing. However, it raises the question on what constitutes unregulated fishing. Does the term include all commercial fishing? The agreement only prevents commercial fishing if it is ‘unregulated’ and not commercial fishing in itself<sup>97</sup>. Two things are clear from the objective. One, it does not ban or impose a moratorium on commercial fishing per se. It only prevents unregulated fishing based on a precautionary approach due to lack of scientific information. This excludes fishing that is done in accordance with international law. Thus, fishing, commercial or exploratory can be conducted in the CAO if it is based on conservation and management measures adopted by the

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<sup>92</sup> Article 5 (e) UNFSA.

<sup>93</sup> Article 5 (d) UNFSA.

<sup>94</sup> Enright, S.R., and B. Boteler. “The Ecosystem Approach in International Marine Environmental Law and Governance.” In *Ecosystem-Based Management, Ecosystem Services and Aquatic Biodiversity*, ed. T. O’Higgins, M. Lago, and T. DeWitt, 333-352. Cham: Springer. 343 [https://doi.org/10.1007/978-3-030-45843-0\\_17](https://doi.org/10.1007/978-3-030-45843-0_17)

<sup>95</sup> Article 2 of the CAOFA and Preamble of CAOFA explicitly recognises the principles in UNCLOS, UNFSA and 1995 Code of Conduct for Responsible Fisheries.

<sup>96</sup> Article 2 CAOFA

<sup>97</sup> Schatz, Valentin, Alexander Proelss, and Nengye Liu. “The 2018 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean: A Primer.” Web log. *EJIL:Talk! Blog of the European Journal of International Law* (blog), October 26, 2018. <https://www.ejiltalk.org/the-2018-agreement-to-prevent-unregulated-high-seas-fisheries-in-the-central-arctic-ocean-a-primer/>.



RFMO/As<sup>98</sup>. For Example, Northeast Atlantic Fisheries Commission is an RFMO that has a small portion of its regulatory area overlapping with the high sea portion of CAO. Therefore, if NEAFC parties engage in commercial fishing, this would not be considered as unregulated and thus not prohibited.<sup>99</sup> But, if non-parties to NEAFC, engage in fishing activities in the CAO in violation of the rules and regulations of RFMO, it would be considered as IUU<sup>100</sup>. The agreement itself provides for the parties to conduct commercial fishing pursuant to interim measures that the parties may establish based on Article 5(1)(C)(ii).<sup>101</sup> Thus it reinstates the general international law to fish in the high sea. Since, the freedom of high sea fishing is applicable, the agreement cannot prohibit commercial fishing in total as long as it is in accordance with the rules and regulations of fisheries regime. Second part of the objective states ‘to ensure the conservation and sustainable use of fish stocks’ Lack of knowledge about CAO is one of the reasons why the agreement adopts precautionary approach. The initial duration of the agreement which is 16 years would provide sufficient time for the parties to engage in Scientific Research and Monitoring which another main goal of CAOFA.

## 2.7 Legal nature of CAOFA – an RFMO or RFMA?

There is no universal definition for RFMO and RFMA, nevertheless it is important to determine the status of CAOFA, as certain rights and obligations would follow based on its classification. Determining whether CAOFA is RFMO or RFMA is pertinent as RFMOs have the authority to issue binding decision to the parties. Setting quotas, setting requirements for fishing gear, fishing methods (bottom trawling), closed seasons all fall under the mandate of the RFMO whereas RFMA do not have such authority and have less institutional machinery<sup>102</sup>. For instance, CAOFA does not establish a Secretariat or an intergovernmental organization<sup>103</sup>. Since the relationship between the BBNJ and the relevant IFBs would be of ‘not undermining’, the wider the mandate and powers of the IFB, the lesser BBNJ agreement would need to fill in

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<sup>98</sup> Article 3(1)(a) CAOFA

<sup>99</sup> All NEAFC Parties are also parties to CAOFA, except for United Kingdom. But even if UK engages in commercial fishing in the CAO in accordance with NEAFC rules, this would be considered as regulated and thus in accordance with international law.

<sup>100</sup> David Dubay. "Chapter 17 Round Two for Arctic Fishing?". In *Marine Biodiversity of Areas beyond National Jurisdiction*, (Leiden, The Netherlands: Brill | Nijhoff, 2021) doi: [https://doi.org/10.1163/9789004422438\\_018](https://doi.org/10.1163/9789004422438_018)

<sup>101</sup> Article 3(1)b and Article 5(1)(C)(ii)

<sup>102</sup> Lunenburg, Peter. "Policy Brief 109, 31 March 2022." The South Centre, March 31, 2022. <https://www.southcentre.int/policy-brief-109-31-march-2022/>.

<sup>103</sup> Molenaar, Erik J. "The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous Peoples." *Marine Policy* 164 (April 29, 2024). <https://doi.org/10.1016/j.marpol.2024.106160>.

the gaps rather focusing more on being a platform where the IFBs and States can cooperate to ensure coherent measures.

The plain reading of the preamble supposes that it is '*premature under the circumstances to establish any additional regional or subregional fisheries management organization or arrangements*'. The agreement also states that the parties provide for 'effective transition' between this agreement and potential new agreement establishing an additional RFMO/A for managing fishing...'. It seems that the negotiators did not intend for the Agreement to be in the nature of RFMO/A but the overall nature of the agreement suggest otherwise.

Arguments are made in favor of CAOFA being as an RFMA as it fulfills the definition under Article 1(1)(d) of the Fish Stocks Agreement which defines RFMA as 'a cooperative mechanism established in accordance with the [LOS] Convention and this Agreement by two or more States for the purpose, *inter alia*, of establishing conservation and management measures in a subregion or region for one or more straddling fish stocks or highly migratory fish stocks'.

The objective of the agreement is to *prevent unregulated fishing* and not a complete ban on commercial fishing<sup>104</sup>. Article 3(1)(a) provides for interim measures where the Parties individually can authorize vessels under its jurisdiction to conduct commercial fishing provided, they are in accordance with conservation and management measures for sustainable management of fish stocks adopted by RFMO/A are in accordance of international rules and standards. This can be considered as 'conservation and management measures'. This is further expressed by the delegates during the end of negotiation stage of CAOFA, where the delegations agreed that commercial fishing could occur pursuant to Article 3(1)(b) where the parties can adopt interim conservation and management measures.<sup>105</sup> Another requirement for requirements to qualify for RFMO is establishment of an intergovernmental body for making decisions. Since CAOFA establishes a meeting of parties (MOP), it is considered to be a RFMA rather than RFMO.<sup>106</sup>

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<sup>104</sup> Article 2 CAOFA.

<sup>105</sup> Erik J. Molenaar. *Regional Fisheries Management Organizations*. In: Ribeiro, M., Loureiro Bastos, F., Henriksen, T. (eds) *Global Challenges and the Law of the Sea*. Springer, Cham. [https://doi.org/10.1007/978-3-030-42671-2\\_5](https://doi.org/10.1007/978-3-030-42671-2_5)

<sup>106</sup> Article 5 CAOFA

The status of the CAOFA would also determine if it is a ‘relevant body’ that must not be undermined when it comes to the potential establishment of MPAs under BBNJ in the CAO. As the regulation of high sea fisheries falls within the mandate of CAOFA, it falls under the category of a regional fisheries instrument and is relevant IFB that must not be undermined. The prevention of unregulated fishing in the CAO region is an area-based management tool as it obliges the parties to not authorize commercial fishing in the CAO<sup>107</sup>. While the initial moratorium prevents unregulated fishing, that would have a major impact on the marine biodiversity, questions remain whether it would contribute to the 30 by 30 goal is still unclear. If the BBNJ COP designates ABMT including MPA, parties to CAOFA are likely play a major role in feeding knowledge about the CAO and the measures that could be implemented, and once established and it would continue to have a role in implementing the measures through monitoring and observance. This prevents duplication of efforts under BBNJ or setting up a new regional organization. If BBNJ COP decides to prolong the moratorium while CAOFA parties, at some point, intend to commence commercial fishing through establishing RFMO or even under interim measures, what would likely be the interplay with CAOFA as BBNJ cannot ‘undermine’ the relevant IFBs? These questions will be examined in the next chapter.

### **3 Establishment of Marine Protected Areas under BBNJ**

#### **3.1 Introduction:**

The BBNJ agreement aims to provide a legal framework for the conservation and sustainable use of marine biological diversity in Areas Beyond National Jurisdiction. It addresses the legal gap in relation to the protection of the marine environment in areas beyond national jurisdiction by providing a legal basis for the States to take measures for the purpose of conservation of marine biodiversity. Marine Protected Areas as an area-based management tool is one among the four ‘package’ issues that is dealt with in the BBNJ. This chapter outlines the procedural steps for the establishment of MPAs in ABNJ and analyzes how the ‘not undermining’ principle is operationalized during this stage. Section 3.2 provides information on the issues that were

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<sup>107</sup> Balton, David. “What Will the BBNJ Agreement Mean for the Arctic Fisheries Agreement?” *Marine Policy* 142 (August 2022): 103745. <https://doi.org/10.1016/j.marpol.2019.103745>.

discussed during the negotiations, highlighting the various concerns of the relevant stakeholders. One of the primary concerns regarding BBNJ agreement is its integration within network of existing international and regional agreements that govern ABNJ. This is addressed in the Section 3.3 where the relationship between the existing instruments and BBNJ underpinned by the principle of 'to not undermine'. The next section addresses builds cooperation and coordination within and amongst instruments which helps to move away from the ambiguity of undermining. The second half of the chapter deals with difference between MPA and ABMT is discussed followed by the procedural aspect of designation of MPAs. While implementation, monitoring and review are equally important as the establishment of MPAs, the research primarily focuses on the initial stage of MPAs. Consequentially, monitoring and review procedures are examined only in brief.

### **3.2 Background of Negotiation:**

The official negotiations for the intergovernmental conference convened in September 2018 based on the UN General Assembly resolution 72/249, but the foundation for the agreement was laid more than a decade ago by the work of Ad-Hoc Informal Working Group. Based its recommendations a legal framework of the conservation and sustainable use of marine resources in ABNJ commenced which was address under four main issues which is marine genetic resources, including sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology which formed the 'BBNJ package'.<sup>108</sup>

This agreement seeks to address several regulatory and governance gaps in establishing and managing MPAs<sup>109</sup>. The question of whether the agreement should address fisheries was highly debated during the negotiation of the BBNJ agreement. Fishing and marine biodiversity are closely linked and the regulatory problems which exists within the fisheries regime would impact both fisheries and biodiversity in a negative way. Disagreement between countries on whether to include fisheries within the BBNJ agreement plagued the negotiations until the last Intergovernmental Conference, and lot of compelling arguments were made on this behalf. It is well known that among all activities that impact the marine biodiversity, fishing is the greatest

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<sup>108</sup> United Nations General Assembly. *Oceans and the Law of the Sea*, A/RES/66/231. December 24, 2011. (April 5, 2012). <https://undocs.org/A/RES/66/231>.

<sup>109</sup> Kristina M. Gjerde et al. (2008). *Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*. IUCN, Gland, Switzerland. x + 70. ISBN- 978-2-8317-1050-1

threat.<sup>110</sup> There are many instances of fish stock collapse<sup>111</sup>, and other issues within the fisheries regime such as IUU, difficulty in monitoring and reporting, by-catch, all of which will impact the marine biodiversity. As living resources are an integral part of ocean biodiversity, many authors argued to address the Fisheries within the agreement which would represent an integrated approach to ocean management.<sup>112</sup> Countries such as Iceland, Japan and Russia preferred addressing fishing within the existing framework for fisheries, particularly through RFMO/As. while the African Group, Indonesia, Jamaica, EU, Norway, US favored a comprehensive agreement which would incorporate high seas fisheries into the BBNJ agreement.<sup>113</sup> As pointed out by few delegates, fisheries has a separate legal regime governed by international and regional agreements such as UNCLOS, UNFSA and RFMOs. Reopening the issues and restructuring the fisheries regime is a highly time consuming and would have resulted in prolonging adopting the BBNJ agreement. It is also necessary to have wide participation which would help in the achieving the objectives of the agreement. Compared to UNCLOS, UNFSA has a smaller number of ratification as it included a higher standard for fishing and stricter compliance measures. Rather, a somewhat softer approach is preferred addressing it by not undermining the IFBs and strengthening and enhancing cooperation among relevant instruments<sup>114</sup>.

### **3.3 Relationship between BBNJ and other relevant IFBs – the ‘not undermining’ principle:**

Article 5 (2) of The BBNJ agreement stipulates that it should not undermine existing IFBs. The word ‘undermine’ is not defined under the BBNJ agreement nor does it have a specific meaning in law.<sup>115</sup> While attempts have been made to understand how the term undermine would be interpreted, there is a lack of consensus on what the term ‘not undermine’ entails. Rather, quiet

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<sup>110</sup> UNEP, *Ecosystems and Biodiversity in Deep Waters and High Seas*, UNEP Regional Seas Reports and Studies No. 178, at 6 (2006). <https://www.unep.org/resources/report/ecosystems-and-biodiversity-deep-waters-and-high-seas-0>

<sup>111</sup> See chapter 2

<sup>112</sup> Julien Rochette et al., “High Seas Fisheries: What Role for a New International Instrument?,” IDDRI, accessed May 4, 2024, <https://www.iddri.org/en/publications-and-events/study/high-seas-fisheries-what-role-new-international-instrument>, 9.

<sup>113</sup> Yunfeng Qu and Ruiyang Liu, “A Sustainable Approach towards Fisheries Management: Incorporating the High-Seas Fisheries Issues into the BBNJ Agreement,” *Fishes* 7, no. 6 (December 14, 2022): 389, <https://doi.org/10.3390/fishes7060389.v>

<sup>114</sup> Article 8 BBNJ agreement

<sup>115</sup> Wen Duan, “Area-based Management Tools under the BBNJ Agreement: Ambition or Illusion?,” *Review of European, Comparative & International Environmental Law* 33, no. 1 (January 21, 2024): 70–79, <https://doi.org/10.1111/reel.12531>.

a few authors observe that the term is ambiguous.<sup>116</sup> De Lucia suggest that the ambiguity may have been a strategic choice that helped to maneuver the deadlock over the relationship between BBNJ and existing regional and sectoral arrangements<sup>117</sup>

Few options could be explored on the meaning of ‘not undermining’, especially as the relationship between BBNJ and fisheries arrangements being a main concern<sup>118</sup>. Scanlon proposed two key interpretations of the term to not undermine<sup>119</sup>. One of the approaches is to not undermine *the authority or measures* of the IFBs, thus not interfering with the mandate of the relevant IFBs. It implies that the agreement will not overlap or duplicate the mandates of the existing IFBs<sup>120</sup>. This interpretation aligns with the regional approach to governance with already existing IFBs, and the BBNJ institutions serving a complimentary role. A strict implementation of the regional approach could limit the powers of the BBNJ in designation of MPAs, as it would have to rely on regional bodies to adopt measures. The second and more flexible approach is to not undermine the *effectiveness or objectives* of the IFBs, as it provides further opportunities for improving the implementation or effectiveness of the existing instruments. This is comparatively less restrictive for the BBNJ COP. as this would imply that as long as the measures are compatible and do not result in degrading the effectiveness, it would not result in undermining the IFBs.<sup>121</sup>

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<sup>116</sup> De Lucia , Vito. “Reflecting on the Meaning of ‘Not Undermining’ Ahead of IGC-2 ,” March 21, 2019. <https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/> . , also see Zoe Scanlon, “The Art of ‘Not Undermining’: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction,” *ICES Journal of Marine Science* 75, no. 1 (November 24, 2017): 405–16, <https://doi.org/10.1093/icesjms/fsx209>. and Ethan Beringen, Nengye Liu, and Michelle Lim, “Australia and the Pursuit of ‘Not Undermining’ Regional Bodies at the Biodiversity Beyond National Jurisdiction Negotiations,” *Marine Policy* 136 (February 2022): 104929, <https://doi.org/10.1016/j.marpol.2021.104929.v>

<sup>117</sup>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,” *Ocean Development & International Law*, April 6, 2024, 1–22, <https://doi.org/10.1080/00908320.2024.2333893>. . Also Mendenhall, Elizabeth, Elizabeth De Santo, Elizabeth Nyman, and Rachel Tiller. “A Soft Treaty, Hard to Reach: The Second Inter-Governmental Conference for Biodiversity Beyond National Jurisdiction.” *Marine Policy* 108 (October 2019): 103664. <https://doi.org/10.1016/j.marpol.2019.103664>.

<sup>118</sup> De Lucia , Vito. “Reflecting on the Meaning of ‘Not Undermining’ Ahead of IGC-2.” The NCLOS Blog, March 21, 2019. <https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/>.

<sup>119</sup> Scanlon, Zoe. “The Art of ‘Not Undermining’: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction.” *ICES Journal of Marine Science* 75, no. 1 (November 24, 2017): 405–16. <https://doi.org/10.1093/icesjms/fsx209>.

<sup>120</sup> Wen Duan “Area-based Management Tools under the BBNJ Agreement: Ambition or Illusion?” *Review of European, Comparative & International Environmental Law* 33, no. 1 (January 21, 2024): 70–79. <https://doi.org/10.1111/reel.12531>.

<sup>121</sup> Scanlon, Zoe. “The Art of ‘Not Undermining’: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction.” *ICES Journal of Marine Science* 75, no. 1 (November 24, 2017): 405–16. <https://doi.org/10.1093/icesjms/fsx209>

It is necessary to understand ‘not undermining’ based on the object and purpose of the agreement. Article 5(2)<sup>122</sup> of the Agreement under part I enumerates that the agreement ‘*shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies*’. De Lucia regards it as ‘*double obligation*’. Firstly, the agreement must be interpreted in a manner that does not undermine IFBs. Interpretation refers to the process of determining the meaning of the text<sup>123</sup>. Secondly it refers to applying the agreement in a manner that does not undermine the IFBs. This is where the consequences of applying the agreement should also not undermine the IFBs. This ensures that not only must the agreement, or the entities responsible for the implementation refrain from acts that would directly undermine the IFBs, but it must also not engage in practices that would gradually result in undermining the IFBs.<sup>124</sup> The second part of Article 5(2) reads as ‘*that promotes coherence and coordination with those instruments, frameworks and bodies*’. This is discussed in the next section.

### **3.4 Moving away from undermining to identifying synergies:**

One of the pertinent reasons for adopting a comprehensive agreement to deal with biodiversity in areas beyond national jurisdiction is the lack of a global mechanism that covers wide geographical coverage and has the mandate to regulate activities not specific to one sector but across all sectors such as fishing, shipping and mining. Establishing MPA in the Arctic would mean that it is cross sectoral, encompassing all activities that impact the marine biodiversity. The only way a sector would not be addressed is when it does not have any impact on the biodiversity, which makes it redundant to address it in the first place. Nevertheless, the thesis aims to limit it to the fishing sector in the CAO. The agreement’s objectives cannot be achieved in isolation, it will interact with the IFBs when mandates overlap for which cooperation would be conducive to the general principles that the agreement is based on such as ecosystem approach and with other general principles and approaches that is listed in Article 7 such as integrated approach to ocean management. The aim is to operationalize the objectives of the agreement thorough cooperation with the IFBs. One of the main reasons why the existing IFBs were apprehensive of BBNJ is how the agreement might affect the rights, obligations but also

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<sup>122</sup> Article 5(1) BBNJ agreement

<sup>123</sup>“Article 19. Interpretation of Treaties.” *The American Journal of International Law* 29 (1935): 937–77. <https://doi.org/10.2307/2213686>. 938.

<sup>124</sup> 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,” *Ocean Development & International Law*, April 6, 2024, 1–22, <https://doi.org/10.1080/00908320.2024.2333893>.

their mandate which can be addressed by cooperating with the relevant IFBs. For the purpose of achieving the objectives, there is a general requirement to cooperate including *‘strengthening and enhancing cooperation with and enhancing cooperation among the relevant IFBs’*<sup>125</sup>. The process of establishment of area-based measures involves the relevant IFBs during the consultations stage but also when establishing the ABMT/MPA, the COP *‘shall make arrangements for regular consultations to enhance cooperation and coordination with and among the relevant IFBs’*<sup>126</sup> In both instances the COP is required to facilitate cooperation not only with the relevant IFBs but also among the relevant IFBs. This enables the BBNJ as a platform for cooperation amongst various IFBs when it concerns conservation and management of biodiversity in ABNJ. In case the proposed measures are within the competence of an existing IFBs, then COP may make recommendations to the Parties of the agreement and to global, regional and sectorial bodies to promote the adoption of relevant measures through such IFBs. The agreement seeks to balance it between not undermining on one hand and cooperating and coordinating on the other hand.

The importance of cooperating and working together with different IFBs has been of much discussion during the negotiations where one delegate aptly notes *‘We could achieve more or less the same objectives and express the same concerns if we frame the discourse positively, in terms of collaborations and synergies with existing bodies rather than trying to identify what to do so we don’t undermine them’*<sup>127</sup>. The details of the not undermining principle during the process of establishment of MPAs and identifying synergies with CAOFA and BBNJ would be examined in Chapter 4. The following section will discuss the procedure for establishing an ABMT/MPA.

### **3.5 Defining Area Based Management Tool and Marine Protected Area:**

MPAs lack a universally agreed definition but attempts have been made to provide a comprehensive definition in various international agreements. For instance, IUCN defines MPA as *‘Any area of intertidal or subtidal terrain, together with its overlying waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment’*. Similar definition is adopted by CBD COP

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<sup>125</sup> Article 5(2) BBNJ agreement

<sup>126</sup> Article 22(3) BBNJ agreement

<sup>127</sup> "Summary of the Second Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March - 5 April 2019." *Earth Negotiations Bulletin* 25, no. 195 (April 8, 2019). 1-19 <http://enb.iisd.org/oceans/bbnj/igc2/>. 18.



which defines and MPA as ‘*an area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings*’. Thus, MPA usually entails a higher protective status compared to the adjacent areas due to ecological, biological scientific or historical importance.<sup>128</sup>

The definition adopted for ABMT and MPA are:

*“Area-based management tool” means 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’*

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*’<sup>129</sup>.

ABMTs and MPAs share several key similarities. Both are spatially defined conservation tools with defined geographical boundaries to achieve specific conservation objectives. The procedure for establishing ABMT and MPA are identical, from initial proposal to monitoring and review. The agreement provides non-exhaustive criteria for identifying potential ABMTs, including MPAs, without differentiating between the two, in terms of these criteria or the measures required.

While all MPAs are a type of ABMT, not all ABMTs qualify as MPAs. The key distinction lies in their purpose and flexibility in allowing human activities. As seen from the definition, MPAs are established *for specific long term biodiversity conservation*, potentially excluding seasonal or temporary measures. In contrast, ABMTs can be established for a broader range of conservation objectives and sustainable use objectives. For example, fisheries management areas, would not normally qualify as MPA as they are established for achieving a different objective. While sustainable use is permitted under both ABMT and MPAs, ABMTs offer greater flexibility in terms of the restriction of human activities. As Molenaar notes, the term ‘one or several sectors’ is used in the ABMT definition but is absent in the MPA definition. This implies that while ABMTs can focus on one or multiple sectors, MPAs cannot be single-

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<sup>128</sup> Sarah Wolf and Bischoff Jan Asmus, “Marine Protected Areas,” *Max Planck Encyclopedia of Public International Law*, November 2013, 1–11, <https://doi.org/10.1093/law:epil/9780199231690/e2029>.

<sup>129</sup> Article 1(9) BBNJ agreement

sectoral; instead, they can be cross-sectoral or multi-sectoral undertaking a holistic approach, but this is not clarified within the MPA definition.<sup>130</sup> But it is reasonable to expect that MPAs or cross sectorial ABMTs is more likely to interact with higher number of IFBs compared to a AMBT which focuses specifically on one sector.

The definition of MPA also received some criticism from IUCN. It recommended to exclude ‘sustainable use objectives’ to ensure that it aligns with other international definitions used by IUCN, CBD and OSPAR. The IUCN guidelines for Applying Protected Area Management Category to MPAs also clarifies that commercial scale fishing cannot be considered as sustainable use for the purpose of MPA objectives.<sup>131</sup> Nevertheless, the BBNJ Agreement allows for a spectrum of protection within Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ), depending on the specific conservation objectives. At one end of the spectrum, MPAs can be designated as no-take zones where the extraction of living resources is strictly prohibited to ensure maximum protection. At the other end, sustainable use of resources can be permitted as long as it remains fully consistent with and supports the overall conservation goals of the protected area.

### **3.6 Procedure for establishment of MPA under BBNJ:**

#### **3.6.1 Identification and Proposal:**

The process for establishing an MPA begins with initiation of a proposal. Proposals can be initiated by states, who are parties to the agreement. Proposals can be initiated by states that are parties to the agreement, either individually or collectively as a group<sup>132</sup>. The term ‘party’ here refers to State parties and EU in the capacity of ‘regional economic integration organization’<sup>133</sup>. In preparing the proposal, the proponent must adhere to certain principles which includes the best available science and scientific information. The proposal must be based on precautionary approach and ecosystem approach and where available, it must also consider relevant traditional knowledge of indigenous people and local communities. Some of the key elements that the proposal must include as outlined under Article 19(4):

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<sup>130</sup> Erik J. Molenaar, “Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations,” *The International Journal of Marine and Coastal Law* 36, no. 1 (January 5, 2021): 5–58, <https://doi.org/10.1163/15718085-bja10042>. 40.

<sup>131</sup> Page 10 IUCN commentary on the further revised draft of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (A/CONF.232/2022/5). Accessed May 26, 2024. <https://www.iucn.org/sites/default/files/2022-08/igc5-iucn-commentary-on-bbnj-further-revised-draft.pdf>.

<sup>132</sup> Article 19(1) BBNJ agreement

<sup>133</sup> EU is the only recognised regional economic integration organisation at present.

The proponent must first identify an area<sup>134</sup> which it seeks to protect based on the indicative criteria in Annex I. To name a few, the indicative criteria includes aspects such as uniqueness, rarity, fragility, vulnerability including to climate change and ocean acidification, special importance of species, biological diversity and productivity, economic and social factors etc. The indicative criteria under Annex I may be further developed by the STB<sup>135</sup>. There is no minimum requirement for the number of indicative criteria an MPA must fulfill, but a site fulfilling more of the criteria might be preferred. Once a MPA site is identified, the proponent must collect information about the activities that are conducted in the area their impacts. The proponent should also include the description of the marine environment and biological diversity in the identified area. Based on the conservation objectives of the MPA, the proponent must specify the sustainable use objectives. Although the definition of MPA focuses on ‘long term conservation’, they can be established for a specific duration. When adopting an MPA time limit, it must align with the conservation objectives of the MPA. For example, Ross Sea MPA is established with a 35-year time limit. This duration is deemed insufficient for the conservation objectives of the MPA as it does not accommodate the life span of targeted species which often exceeds 35 years.<sup>136</sup>

The proposal must include comprehensive scientific information related to marine environment and biodiversity in the identified area. This requirement emphasizes the necessity for the proponents to be required to collaborate and consult with relevant stakeholders for the development of proposals which includes global, regional and subregional bodies, civil societies, scientific communities, private sector and indigenous and local communities<sup>137</sup>. The primary benefit of such collaboration and consultation is that it ensures the involvement of the concerned stakeholders early in the process and they have an opportunity to express their concerns in the initial stage of proposal. The proponent state will then have the opportunity to address the concerns of the relevant stakeholders and draft the proposal accordingly while gathering significant scientific information and activities that take place in the area.

As mentioned earlier, only the State parties can submit a proposal, thus non-party entities like IMO, RFMO/As, ISA and NGOs need to gain the support from at least one State who is willing

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<sup>134</sup> Area here refers to the geographical or special limits of the MPA

<sup>135</sup> Article 19(4)(b) BBNJ agreement

<sup>136</sup> Cassandra M. Brooks et al., “Reaching Consensus for Conserving the Global Commons: The Case of the Ross Sea, Antarctica,” *Conservation Letters* 13, no. 1 (September 20, 2019): 1–10, <https://doi.org/10.1111/conl.12676>, 9.

<sup>137</sup> Article 19(2) BBNJ agreement

to submit the proposal. This limits the capacity of non-party entities who can initiate a proposal, as they must gain the support of at least one State Party through which the proposal can be submitted. But this limitation is addressed by the mandatory requirement on the proponent to collaborate and consult with the relevant stakeholders, including non-parties, in the process of developing the proposals.<sup>138</sup>

Thus, the proposal establishes the basic foundation for an MPA. A proposal should therefore clearly outline the conservation objectives and where applicable, the objectives for sustainable use as well as the potential impact of the activities on the MPA and vice versa. The detailed information would provide the Secretariat with necessary information to identify the relevant stakeholders and facilitate consultations, which is further explored in the next section.

### **3.6.2 *Publicity and Preliminary Review:***

Once the proposals are submitted to Secretary, it undergoes a preliminary review from the Scientific and Technical Body (STB). The STB is one of the four principal organs of the BBNJ<sup>139</sup> agreement which consists of experts acting in the best interest of the Agreement. The experts are nominated and elected by the COP and shall be composed of scientific and technical experts, but also experts in relevant traditional knowledge of Indigenous peoples and local communities and equitable geographical representation. They are to advise the COP and perform their roles assigned under the agreement. The scientific and technical body assess the proposal to see whether the requirements under Article 19 are fulfilled and if the proposal is made pursuant to the indicative criteria. The review prepared by the STB is later conveyed to the proponent through the Secretariat. The proponent of the proposal is required to resubmit the proposal after taking into account the review made by the scientific and technical body. At each stage, the proposal, the review of the Scientific and Technical Body and the resubmitted proposal by the proponent is made publicly available before moving to the consultation process.<sup>140</sup> The dissemination of information at every phase guarantees transparency by ensuring the both the State and non-state parties have access to information and helps in fostering broad participation during the consultation stage.

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<sup>138</sup> Article 19(2) BBNJ agreement

<sup>139</sup> The other bodies are COP, Secretariat, and the Clearing House Mechanism

<sup>140</sup> Article 20 BBNJ agreement

### **3.6.3 Consultation and Assessment of Proposals:**

The consultation stage is where multiple parties as well as relevant stakeholders would engage by submitting their views before establishment of the ABMT/MPA. Consultations will be in transparent and inclusive manner. Stakeholders include States, IFBs, the scientific community, indigenous people, local communities<sup>141</sup>. The article does not provide an exhaustive list, thus it is possible that private sector can be consulted depending on whether the Secretariat deems it relevant based on the proposal, though it is possible that the draft proposal has sufficient information regarding the private sector<sup>142</sup>. The views and information submitted is again accessed by Scientific and Technical Body, as this time it would include information from all relevant stakeholders based on the revised proposal and submit its recommendations to the COP. The exact duration for the time allotted for consultations is not mentioned but the Scientific and Technical Body during the first meeting will elaborate as necessary which will later be considered and adopted by the BBNJ COP.

Wide participation will help in filling up the knowledge gap since information about ABNJ is comparatively limited. The Consultation will serve the COP as the platform to gather as much information as possible from relevant stakeholders which would later be used during decision making and establishing management measures.

The secretariat is responsible for facilitating consultations with:

- i) States in particular adjacent coastal states,
- ii) relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies
- iii) Indigenous peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders

#### **3.6.3.1 State Parties:**

States, in particular adjacent coastal states are invited to submit their views on the merits and geographical scope of the proposal, any other relevant scientific input, information regarding any existing measures or activities in the adjacent or related areas within national jurisdiction and beyond national jurisdiction, views on the potential implications of the proposal for areas within national jurisdiction, and any other relevant information<sup>143</sup>. Special consideration is

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<sup>141</sup> Article 21(1) BBNJ agreement

<sup>142</sup> Article 19(2) BBNJ agreement

<sup>143</sup> Article 21 (2)(a) BBNJ agreement

given to the adjacent coastal states due to the reason of geographical proximity and ecological connectivity. This is particularly relevant for CAOFA as CAO is surrounded by EEZ of Arctic 5. The measures sought to be taken under the agreement in the ABNJ, would have higher chance of interfering/impacting with the rights of Coastal States. And secondly, it is likely that the Coastal States have already undertaken area-based conservation measures under their EEZ. For example, most of the MPAs are established within the EEZ of the States.<sup>144</sup> The COP while establishing MPA must ensure that the measures do not undermine the effectiveness of measures adopted in AAWNJ.<sup>145</sup> Consulting with the adjacent coastal states would help in gathering the views and existing measures that has been undertaken and assess the potential impact of the proposed MPA. It also aligns with the principle of ecosystem approach that forms the guiding principle for BBNJ agreement.

Article 21(4) of the agreement provides for some additional requirements that the proponent must undertake if the proposed measure affects an area which is entirely surrounded by EEZ of the States<sup>146</sup> i.e. high sea pockets such as CAO. The proponents are required to undertake ‘targeted and proactive’ consultations including prior notification with such states.<sup>147</sup> What is meant by targeted or proactive consultation is not elaborated under the agreement. Nonetheless, the requirement to notify about the proposed MPA suggests that such adjacent States would need to be involved in the process from an early stage. The second requirement for the proponent to consider the views and comments of such states, and written responses addressing such views and comments, and when appropriate, the proponent is also required to revise the proposal accordingly. This points to a higher threshold compared to consultations with coastal states who must be consulted for reasons of adjacency. But in any case, this still does offer any priority to the Coastal States over other States in ABNJ, as UNCLOS does not prioritize any states due to proximity.<sup>148</sup>

Pacific Small Island Developing States (SIDS) referred to the principle of adjacency in terms of cooperation between coastal states and States and to accord specific consideration to adjacent

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<sup>144</sup> “Marine Protected Areas.” Protected Planet. Accessed May 31, 2024.

<https://www.protectedplanet.net/en/thematic-areas/marine-protected-areas>.

<sup>145</sup> Article 22 (5) BBNJ agreement

<sup>146</sup> Central Arctic Ocean is an ideal example, including other high sea pockets in the Arctic such as the donut hole, the banana loophole and Barents sea loophole.

<sup>147</sup> Article 21(4)(a) BBNJ agreement

<sup>148</sup> Joanna Mossop and Clive Schofield, *Adjacency and Due Regard: The Role of Coastal States in the BBNJ Treaty*, August 27, 2020, <https://doi.org/10.26686/wgtn.12885311>. 1.

coastal states for conservation and management measures undertaken in the ABNJ<sup>149</sup>. The supported their claims based on the issue of compatibility which is found in UNFSA. Few states even suggested to require prior consent of the coastal states which was evidently not included in the agreement as this could imply the adjacent coastal states might have a greater interest or greater rights than other states. The divide between the international community is evident during the negotiations, as the adjacency clause was excluded in the second draft and then reintroduced in the final draft.

Despite the confusion surrounding special consideration given to the coastal states, it is necessary in the interest of the objectives of the agreement to engage specifically with adjacent states due to interconnectivity of the ecosystems. This is particularly important if the goal is to establish MPAs for conservation of migratory species.<sup>150</sup> Therefore, if the measures affect an area which is entirely surrounded by EEZ the interest of such coastal states are represented twice. Once during the consultations facilitated by the Secretary and for a second time with the proponent.

### 3.6.3.2 Relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies

Consultation shall be facilitated with bodies of relevant global, regional, subregional and sectoral bodies who shall be notified and invited by the Secretariat to submit their views and information on the merits of the proposal, any other relevant scientific input, information regarding any existing measures adopted by that instrument, framework or body for the relevant area or for adjacent areas; Views regarding any aspects of the measures and other elements for a draft management plan identified in the proposal that fall within the competence of that body; Views regarding any relevant additional measures that fall within the competence of that instrument, framework or body and any other relevant information.<sup>151</sup> While not all IFBs would be invited for consultations it can be expected that depending on the proposed measures for the MPA and its geographical location, the relevant IFBs would be identified by the Secretariat and invited to make their submissions. Even non-parties to the IFB are not discharged from the duty

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<sup>149</sup> PSIDS Submission to the Second Meeting of the Preparatory Committee for the 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 (BBNJ PrepCom) August 2016

[https://www.un.org/depts/los/biodiversity/prepcom\\_files/rolling\\_comp/PSIDS\\_second.pdf](https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/PSIDS_second.pdf)

<sup>150</sup> Joanna Mossop and Clive Schofield, *Adjacency and Due Regard: The Role of Coastal States in the BBNJ Treaty*, August 27, 2020, <https://doi.org/10.26686/wgtn.12885311>. 3.

<sup>151</sup> Article 21(2)(b) BBNJ agreement

to co-operate for MPAs<sup>152</sup>. This is because BBNJ agreement builds upon the general duty of States to Protect and Preserve the marine environment.<sup>153</sup> In regions where overlaps are unavoidable, as in the case of CAO, consultation would serve as the primary means to avoid undermining the existing IFBs.<sup>154</sup> For example: if an ABMT consist of measure specifically for conservation of pelagic living organisms with area closure to fishing in the defined area, sectors such as shipping or mining might not be considered as relevant and may not be invited to make their submissions. But generally, the consultations shall be inclusive and open to *all relevant stakeholders*, pointing towards a low threshold for engaging in consultations<sup>155</sup>. The information and views expressed by the relevant IFBs would be assessed by the Scientific and Technical Body and the COP while making decisions. This is the apt space for the IFBs to submit their views or information that would help in decision making stage where it could establish measures without undermining the IFBs but does not necessarily point towards adopting their views. The STB has a major role of considering and comparing all the information and the information gathered on its own and provide recommendation to the COP, where the final decision is made.

### 3.6.3.3 Indigenous peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders

General information on the views and merits of the proposal and relevant scientific input is sought but specifically information regarding the traditional knowledge of indigenous people and local communities.

#### *Conclusion:*

After gathering views and information from relevant stakeholders during consultations, the proponent shall consider the contributions made and must resubmit the proposal after making revision, provide responses based if any substantive contribution is not reflected in the proposal.<sup>156</sup> This operationalizes the duty of due regard under Article 87 of UNCLOS. The duty of due regard in general refers that *'freedoms shall be exercised by all States with due regard*

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<sup>152</sup> Article 25(6) of the BBNJ agreement. *Also see* 1. Rakhyun E. Kim, "The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance," *Marine Policy* 165 (May 10, 2024), Section 3.2 <https://doi.org/10.1016/j.marpol.2024.106190>.

<sup>153</sup> Add reference Article 192 of UNCLOS

<sup>154</sup> Rakhyun "The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance." *Marine Policy* Section 3.1

<sup>155</sup> Article 21(1) BBNJ agreement

<sup>156</sup> Article 21(5) BBNJ agreement



*for the interests of other States in their exercise of the freedom of the high seas*<sup>157</sup>. This implies that the States while exercising the high sea freedom must take into account the interest of other States. Thus, the duty of due regard imposes a reasonable restriction on all States that enjoy their high sea freedom.<sup>158</sup> As noted in Chagos MPA Arbitration, the duty of due regard, in most cases, involve some consultation with the right-holding state<sup>159</sup>.

#### **3.6.4 Establishment of ABMT including MPA:**

The COP will decide on the measures for the establishment of ABMT including MPA. The decision will be taken based on the final proposal, the draft management plan, the contributions and input received during the consultation stage and the scientific advice and recommendations of the STB. The STB assessment and recommendations would have a substantive role during decision making and establishment of the MPAs. Since the STB is involved in shaping the MPA through assessing and making reviews based on the overall purpose of the agreement and based on experts knowledge in scientific field but traditional indigenous knowledge local communities and in best interest of the agreement, it would be hard to refute the recommendations if the STB considers it a necessary requirement. Also, as independent body making the decisions composing of experts from all relevant areas<sup>160</sup> it would have a higher value compared to the scientific advice or opinion that is submitted by a State or IFBs during the consultations. Thus, the recommendation of STB is not merely a technical requirement but a integral part in decision making process of MPA process. The agreement gives power to COP to take decision on measures which are compatible with the measures which are previously adopted by the relevant IFBs. This helps in addressing the geographical gap where no legal regime is competent to take ABMT/MPA for the purpose of conservation or sustainable use. But in case the IFBs which have competences to undertake measures in the proposed management area, instead of adopting measures, the COP would make recommendations to the parties to the agreement and relevant IFBs to adopt relevant measures through those IFBs in accordance with their mandates<sup>161</sup>.

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<sup>157</sup> Article 87 (2) of UNCLOS

<sup>158</sup> Wen Duan , "Chapter 4 Do the Establishment and Management of MPA s in ABNJ under Existing Treaty Regimes Have Legal Effects on Third States?," in *Publications on Ocean Development*, vol. 98 (Koninklijke Brill NV, Leiden, The Netherlands, n.d.), 129–202, 134.

<sup>159</sup> Chagos Marine Protected Area Arbitration (Mauritius v. UK), Award, 18 March 2015, para. 540

<sup>160</sup> Article 49 BBNJ agreement

<sup>161</sup> Article 22(1)(c) BBNJ agreement

Here it is necessary to make some observations. Firstly, in order to fill the gap in competence of legal regime in establishment of MPA, this agreement will provide mandate and legal basis to establish MPAs and take management measures as per objectives of the agreement. Secondly, COP has powers to take measures alongside the measures undertaken by relevant IFBs, provided they are compatible. The measures will be taken in coordination and cooperation with the IFBs which will ensure the compatibility and the information submitted during the consultations would help the COP to have adequate information to take measures thereby ensuring that the measures do not undermine the relevant IFBs. Thirdly, regional approach is preferred when it comes to taking measures that fall within the mandate of the existing IFBs. In such case, the COP may make recommendations to the Parties to the agreement to global regional and sectoral bodies for the purpose of adoption of relevant measures that fall the competence of the IFBs. Recommendations is considered comparatively weak when it comes to implementation, as the relevant IFB can choose to abide by the recommendation, but equally has the right to refuse to take any measures pursuant to the recommendations. This is simply because recommendations are not binding. If the IFB follows a consensus-based decision making like CCAMLR or CAOFA<sup>162</sup> where objection of even one party would prevent the IFB from adopting decision making the recommendation futile. The reason for lack of reaching a consensus may be due to the fact that some parties to the IFB are not parties to the BBNJ and thus would not like to be bound by such decisions. Therefore, the duty of COP does not end after establishment of MPAs, but rather it is a continuous process which required the parties to cooperate with the IFBs. Coordinating will help in keeping track of related measures that are adopted by the IFBs and would help in better implementation of measures.

### **3.6.5 Decision Making**

#### **3.6.5.1 Consensus-based or majority?.**

Generally, the decisions and recommendations for MPAs shall be taken on consensus<sup>163</sup>. But consensus-based decision has some drawbacks. It provides parties with veto power, thus even a single party can block a decision despite the majority agreeing on the matter. It might also result in unnecessary delays in establishing the MPA as in order to gain consensus of the objecting party, the MPA objectives might have to be compromised<sup>164</sup>. Thus, the agreement

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<sup>162</sup> Article 6 of CAOFA and Article 12(1) of CCAMLR

<sup>163</sup> Article 23(1) BBNJ agreement

<sup>164</sup> Danielle Smith and Julia Jabour, "MPAs in ABNJ: Lessons from Two High Seas Regimes," *ICES Journal of Marine Science* 75, no. 1 (October 11, 2017): 417–25, <https://doi.org/10.1093/icesjms/fsx189>. 419-420

provides for an alternative. If all efforts to reach consensus is exhausted and 2/3<sup>rd</sup> of the parties present and voting agree in favor of this, decision can be taken by 3/4<sup>th</sup> majority thus preventing few or even one state from establishing and MPA when the majority of BBNJ parties agree on the matter.<sup>165</sup>

#### 3.6.5.2 Objection:

The decision becomes binding on the parties after a period of 120 days<sup>166</sup>. Within this period the states can choose to opt out of the binding nature of the decision by objecting to it. Objection to the MPA measures can only be made on the three following grounds.

- i) if a state party feels that such decision is inconsistent with the agreement or the the objecting Party in accordance with the Convention; or
- ii) the decision unjustifiably discriminates the State either in form or fact against the objecting Party; or
- iii) the party cannot practically comply with the decision at the time of the objection after making all reasonable efforts to do so.

The State Party can file a written statement to the Secretariat based on the above listed grounds. The objection procedure grants some room for flexibility and could be seen as a compromise between taking decision based on consensus and majority. This grants an opportunity to the State to be not bound by the decision. The opt-out procedure was a necessary compromise to the majority-based decision making instead of a consensus based decision making<sup>167</sup>. It seeks to balance out the interest of the parties when the decision gives rise to any one or more of the three conditions, but it does not entirely relieve the objecting party from the general obligation of the agreement or act in a manner which would go against the spirit of the decision. The article explicitly states that '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

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<sup>165</sup> Article 23(2) BBNJ agreement

<sup>166</sup> Article 23(3) BBNJ agreement

<sup>167</sup> Kachelriess, D. 2023. "The High Seas Biodiversity Treaty: An Introduction to 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." In *IUCN*, ed M. Epps and C. Chazot, vi+33. IUCN. 18. [iucn-bbni-treaty-policy-brief.pdf](#)

Convention'<sup>168</sup>. Almost all delegates agreed that the opt-out procedure to be a last resort with some noting that the threat of opt out would ensure that all concerns are taken into account.<sup>169</sup> The objecting state is not relieved from taking measures pursuant to the conservation objectives of the MPA. To the extent practicable the objecting state must adopt alternative measures or approaches that achieve an effect equivalent to that of the MPA measures. The state must notify about the alternative measures undertaken at the subsequent COP meeting. Though the alternative measures are not subject to special review by the STB, the measures adopted by the objecting parties will form part of the review and monitoring procedure for MPA<sup>170</sup>. However, this provision does not allow the COP or the Secretariat to challenge the validity of the reasons provided by the objecting state party. Instead, the reasons for the objections are made public, potentially impacting the States reputation. The public disclosure might act as a deterrent, similar to 'naming and shaming' approach under the Paris Agreement<sup>171</sup>. The objecting state is free to withdraw the objection at any time and the decision would become binding after a period of 90 days. But usually, the objection is valid for a duration of three years. Should the objecting party find it necessary to extend the measures beyond this timeframe, a written notification to the Secretariat must be made for the objection to continue. If no notification is submitted, the decision automatically becomes binding, after 120 days following the three-year period.

## 4 Interplay between CAOFA and BBNJ

### 4.1 Introduction:

This chapter will identify the basis on which CAOFA and BBNJ would interact in the process of establishment of MPAs in the CAO. The regime of fisheries and biodiversity conservation potentially compete with each other as they stem from different ideologies where the former is primarily based on exploitation of resources driven by the need to ensure a stable food supply while generating economic activity and the latter relates to the protection of the marine biodiversity for the current and future generation, long-term sustainable use and increasingly for the sake of conserving biodiversity in itself (ecocentrism). For example, conflict may arise

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<sup>168</sup> Article 23(6) BBNJ agreement

<sup>169</sup> "BBNJ IGC-5.2 Highlights: Tuesday, 28 February 2023." *Earth Negotiations Bulletin* 25, no. 247 (March 1, 2023). Accessed 25<sup>th</sup> May, 2024. <http://bit.ly/bbnj5res>.

<sup>170</sup> Article 23(7) BBNJ agreement

<sup>171</sup> Astrid Dannenberg et al., "Naming and Shaming as a Strategy for Enforcing the Paris Agreement: The Role of Political Institutions and Public Concern," *Proceedings of the National Academy of Sciences* 120, no. 40 (September 25, 2023): 1–10, <https://doi.org/10.1073/pnas.2305075120>. 1.

in the interpretation of sustainable use. In fisheries management, sustainable fishing typically has its basis in achieving the Maximum Sustainable Yield (MSY) which can conflict with the goals of ecosystem-based management that considers multiple species. This single-species approach often fails to account for the complexities of entire ecosystems, making it challenging to achieve MSY for all species within a fishery<sup>172</sup>. Furthermore, Regional Fisheries Management Organizations (RFMOs) tend to prioritize economic benefits in their quota allocations, which can overshadow conservation interests<sup>173</sup>.

On the other hand, the BBNJ regime defines sustainable use as the utilization of resources in a manner that maintains biodiversity ensuring inter-generational equity. In contrast, the RFMOs sometimes prioritize the maximum sustainable yield of the harvested species which limits the application of ecosystem-based management and thus biodiversity conservation.<sup>174</sup> Thus, BBNJ can help in streamlining the application of these principles and seek to harmonize the concepts to further enhance conservation of biodiversity in ABNJ.

By identifying the areas where these two agreements can interact, and potentially synergize, the protection of marine biodiversity can be enhanced in line with the objectives of the BBNJ. Additionally, the impact of fishing on ecosystems can be reduced, thereby safeguarding healthy marine ecosystems and ensuring the conservation and sustainable use of fish stocks<sup>175</sup> as outlined in the objectives of CAOFA. Fisheries regime has long been influenced by multilateral instruments concerning the protection of the marine environment<sup>176</sup>. The analysis identifies areas where the competing interest between fisheries management and biodiversity conservation can be balanced to some extent through cooperation. Studying the areas of synergies can be useful for understanding the interaction between BBNJ and other RFMO/As in the High Seas. The identified areas provide the basis for the two agreements to cooperate and help in advancing coherent measures. CAOFA and BBNJ would act as part of international and regional agreements that are applied in ABNJ, where UNCLOS provides for a general duty to

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<sup>172</sup> M.N. Maunder, "Maximum Sustainable Yield," *Encyclopedia of Ecology*, August 6, 2008, 2292–96, <https://doi.org/10.1016/b978-008045405-4.00522-x>, 2295

<sup>173</sup> Jeff A. Ardron et al., "The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?," *Marine Policy* 49 (November 2014): 98–108, <https://doi.org/10.1016/j.marpol.2014.02.011>, 105.

<sup>174</sup> Article 1(13) of BBNJ agreement

<sup>175</sup> Article 2 CAOFA

<sup>176</sup> Richard Caddell, "International Fisheries Law and Interactions with Global Regimes and Processes," *Strengthening International Fisheries Law in an Era of Changing Oceans*, 2019, 133–64, <https://doi.org/10.5040/9781509923373.ch-007>, 133.

protect and preserve the marine environment<sup>177</sup>. However, some frictions do exist which is discussed at the end of the chapter. This is followed by suggestions on some possible options for BBNJ COP and CAOFA to better integrate these needs.

## **4.2 Areas of Synergies within BBNJ and CAOFA:**

CAOFA and BBNJ align on certain objectives and approaches which can serve as a basis for furthering the objectives of both the instruments. This section identifies the areas in which both agreements synergize. The following section will analyze the similarities within the agreement. Based on the synergies identified, the second part of the chapter focuses on the procedure for the establishment of the MPAs in the CAO.

### ***4.2.1 Conservation objectives and sustainable use:***

Article 2 of CAOFA clearly states its objective as ‘is to prevent unregulated fishing in the high seas portion of the central Arctic Ocean through the application of precautionary conservation and management measures as part of a long-term strategy to safeguard healthy marine ecosystems and to ensure the conservation and sustainable use of fish stocks’. This aligns with the objective of the BBNJ agreement which emphasizes long term conservation for the present and future generations<sup>178</sup>. The agreement further elaborates on the objectives under Part III under area-based management measures. Sustainable use of resources is not completely excluded under ABMT or MPAs. As long as the use of resources is in accordance with the objectives of the agreement, sustainable use is possible even in MPAs. If fishing activities in the CAO region is conducted in a manner which does not lead to a long-term decline of biological diversity, which is undertaken by COAFA, the activity in itself does not conflict with the conserving biodiversity. Moreover, the agreement specifies certain preconditions that must be fulfilled before which commercial fishing can commence in the CAO.

### ***4.2.2 Precautionary Approach:***

CAOFA adopts a precautionary approach by preventing unregulated fishing for a fixed period which allows sufficient time to establish a scientific research body to gather information on whether harvesting fish stocks is viable, considering the impact on the marine ecosystem. The moratorium on unregulated fishing helps preserve the fragile arctic ecosystem while providing time to conduct scientific research to understand the impact of fishing in CAO and to improve

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<sup>177</sup> Article 192 UNCLOS

<sup>178</sup> Article 2 BBNJ agreement

the general understanding of the living marine resources in and the ecosystem. Precautionary Approach is widely accepted and applied in international law. States involved in the management and exploitation of Straddling and Highly Migratory Fish Stocks are required to apply a precautionary approach<sup>179</sup>.

Similarly, precautionary approach is reflected in the BBNJ agreement where it serves as a guiding principle for the parties to achieve the objective. The gradual increase in the reduction of ice cover in the CAO provides new opportunities to conduct and analyze scientific data which can help determine the possibility of potential commercial fishing in the future. In this context, the parties to the BBNJ and CAOFA can cooperate to undertake measures that are compatible to ensure sustainable use of resources does not result in undermining the conservation of biodiversity in the CAO. Precautionary Approach would serve as a basis for the States to ensure that the exploitation of resources is sustainable and also prevent the States from undertaking an activity before sufficient scientific data is obtained to analyze the impact of the activity on the ecosystem.<sup>180</sup>

#### **4.2.3 Scientific Research and Monitoring:**

CAOFA foresees to establish a Joint Program of Scientific Research and Monitoring (JSPRM) within two years agreement taking effect. Based on data collected by the JSPRM, the MOP will decide based on the scientific information gathered whether a sustainable commercial fishing is viable in the CAO. The decision must be based on relevant fisheries management, ecosystem considerations and potential adverse impacts of fishing on the ecosystems with precautionary approach also being taken into account. Only based on the scientific information, the MOP determine whether to commence negotiations for a RFMO/A to manage fishing in the CAO. Thus, CAOFA would serve as a repository where information about the arctic ecosystem can provide valuable information for additional MPAs or ABMT in the CAO.

The JSPRM would also include and consider the work of other relevant scientific bodies and programs<sup>181</sup>. While the agreement does not specify which bodies it considers relevant, the International Council for the Exploration of the Sea (ICES) and North Pacific Marine Science

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<sup>179</sup> Article 6 UNFSA

<sup>180</sup> 1. Alexander N. Vylegzhanin, Oran R. Young, and Paul Arthur Berkman, "The Central Arctic Ocean Fisheries Agreement as an Element in the Evolving Arctic Ocean Governance Complex," *Marine Policy* 118 (August 2020): 1–23, <https://doi.org/10.1016/j.marpol.2020.104001>, 10.

<sup>181</sup> Article 4(4) of CAOFA

Organization (PICES) are mentioned under the OSLO declaration<sup>182</sup>. Additionally, the research done by the working groups of the Arctic Council<sup>183</sup>, OSPAR, and NEAFC could act as a foundation for the research and monitoring program to enhance the knowledge about the CAO.<sup>184</sup> The integration from various scientific research bodies is crucial for a comprehensive understanding of the region. The data would be of valuable use for guiding future fisheries in the EEZ of the Arctic Coastal States<sup>185</sup>. The second CAOFA COP focused on establishing the rules and subsidiary bodies, but JSPRM has not been established yet. The 3<sup>rd</sup> CAOFA COP expected to happen in June 2024 is supposed to establish interim measures for exploratory fishing for which the scientific work from JSPRM is required.<sup>186</sup> While there has been some delay in establishing the JSPRM, which can be attributed to the Russian invasion of Ukraine, hindering the cooperation in soft law forums such as the Arctic Council, fisheries remains as an exception to this extreme situation.<sup>187</sup> Russia has participated actively in CAOFA<sup>188</sup> and engaged in bilateral talks for managing the Northeast Arctic Cod in the Barents Sea<sup>189</sup>.

The Scientific and Technical Body is an independent organ established by the BBNJ COP. The STB would be performing various functions that are assigned to it as per the agreement. As seen in Chapter 3, STB plays a crucial role in shaping the process of MPAs and applying its expertise in the best interest of the agreement. It would serve as a centralized hub where information is disseminated by experts from various fields. OSPAR and CCAMLR, the only other Regional Sea Programs through which MPAs have been established in the high sea is

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<sup>182</sup> Declaration concerning the prevention of unregulated high seas fishing in the central arctic ocean

<sup>183</sup> PAME and CAFF and AMAP

<sup>184</sup> Article 4(4) CAOFA.

<sup>185</sup> Evan T. Bloom, "Comments on the Significance of the Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean," Wilson Center, November 22, 2022, <https://www.wilsoncenter.org/publication/comments-significance-agreement-prevent-unregulated-high-seas-fisheries-central-arctic>.

<sup>186</sup> "Promising Outcomes from the Recent Cao Fisheries Agreement Meeting," WWF Arctic, December 7, 2023, <https://www.arcticwwf.org/newsroom/news/promising-outcomes-from-the-recent-cao-fisheries-agreement-meeting/>.

<sup>187</sup> Loon, Karen van. "Arctic Cooperation Remains a Conundrum." Egmont Institute, May 16, 2023. <https://www.egmontinstitute.be/arctic-cooperation-remains-a-conundrum/>.

<sup>188</sup> "Arctic Ocean Fisheries Agreement on Fragile Ground as Global Tensions Mount." SeafoodSource, March 10, 2023. <https://www.seafoodsource.com/national-fisherman/arctic-ocean-fisheries-agreement-on-fragile-ground-as-global-tensions-mount>.

<sup>189</sup> Edvardsen, Astri. "Norway and Russia Reached a Fisheries Agreement for 2024." High North News, October 24, 2023. <https://www.highnorthnews.com/en/norway-and-russia-reached-fisheries-agreement-2024>.



criticized for not including other social scientists<sup>190</sup>. In this sense, the STB of BBNJ has considerably improved by taking into account the need for multidisciplinary expertise, specifically for traditional knowledge of indigenous people and local communities<sup>191</sup>. This would help in designing effective MPAs. The requirement to use and apply the best available science and scientific information for the conservation of living resources under UNCLOS<sup>192</sup> is to some extent limited by the following term ‘available to it’. Once the STB is established along with the clearing house mechanism, the States and IFBs would have the capacity to access a wealth of information on ABMT/MPAs that have been established and implemented under the agreement<sup>193</sup>. This could reduce the potential costs in scientific research and increase the standard of conservation and management measures taken by the IFBs as well as under the BBNJ agreement. Thus, both CAOFA and BBNJ stand to benefit by engaging in meaningful scientific cooperation which is cross-sectoral and cross-regional thereby filling the gaps and providing a comprehensive and integrated picture of the state of the Arctic.<sup>194</sup>

#### **4.2.4 Ecosystem Approach:**

CAOFA and BBNJ agreements share a common basis of adopting an ecosystem-based approach, although the explicitness of the approach varies between the agreements. CAOFA primarily aims to prevent unregulated commercial fishing as part of a long-term strategy to *safeguard healthy marine ecosystems*. Ecosystem approach is evident from its objective and the provisions for scientific research activities<sup>195</sup>, commercial fishing or exploratory fishing<sup>196</sup>. For example, if a party authorizes commercial fishing, it needs to be based on conservation and management measures for sustainably managing fish stocks established by an RFMO/A, and for exploratory fishing, interim measures will be determined by the parties and it will be limited in duration, scope, and scale to *minimize the impacts on fish stocks and ecosystems*. Thus, any kind of fishing activity in the CAO must be conducted in a way that does not undermine the objectives of the agreement. JPSRM serves not only to assess commercial fishing but also to

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<sup>190</sup> Elizabeth M. De Santo, “Implementation Challenges of Area-Based Management Tools (ABMTs) for Biodiversity Beyond National Jurisdiction (BBNJ),” *Marine Policy* 97 (November 2018): 34–43, <https://doi.org/10.1016/j.marpol.2018.08.034>.

<sup>191</sup> Article 49(2) BBNJ agreement.

<sup>192</sup> Article 61, 119, 234 UNCLOS

<sup>193</sup> Article 51(3)(a)(ii) BBNJ agreement

<sup>194</sup> Kristine Dalaker Kraabel, “Institutional Arrangements in a BBNJ Treaty: Implications for Arctic Marine Science,” *Marine Policy* 142 (January 9, 2020), <https://doi.org/10.1016/j.marpol.2019.103807>.

<sup>195</sup> Article 3(4) CAOFA

<sup>196</sup> Articles 3(1)(a) CAOFA

enhance the understanding of the ecosystem and the impact of fishing on the ecosystems and the impact of fishing on the ecosystem. If JPSRM data points towards the feasibility of conducting commercial fishing, the agreement foresees the creation of RFMO/A(s). The decision to commence negotiations must be based on the research of JPSRM and other relevant sources, considering relevant fisheries management measures and ecosystem considerations<sup>197</sup>.

Whereas BBNJ explicitly refers to the ecosystem approach as a guiding principle for the parties<sup>198</sup>. BBNJ agreement has sought to address the patchwork of governance relating to environment protection in the high sea and it would act as a platform that enables cross-sectoral cooperation amongst various IFBs thereby basing governance based on ecosystem boundaries. Inclusion of ecosystem approach is a major improvement as it significantly supports the need for moving away from traditional form of governance which is based on maritime boundaries as seen in UNCLOS.<sup>199</sup> This is addressed by providing an opportunity to the States (especially coastal states) during consultation to submit their views and any information on the measures or activities in adjacent or related areas that falls within national jurisdiction as well as measures taken by the states in ABNJ<sup>200</sup>. The relevant IFBs would also be consulted in a similar sense. Following a principle of non-regression, the decision and recommendations for MPAs adopted by the COP shall not undermine the effectiveness of the decisions adopted in areas within national jurisdiction<sup>201</sup>.

CAOFA addresses compatibility by referring to the obligations under the UNFSA<sup>202</sup> and Code of Conduct for Responsible Fisheries<sup>203</sup> where ecosystem approach has been adopted as a general principle of fisheries management<sup>204</sup>. One of the key feature of ecosystem approach is that it is based on a holistic view of the ecosystem, instead of a species or sector-based approach that is followed by RFMO/As. The issue of compatibility between different jurisdictions (AWNJ and ABNJ) is thus a critical aspect of Ecosystem Approach that is addressed through

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<sup>197</sup> Article 5(c) BBNJ agreement

<sup>198</sup> Article 7(f) BBNJ agreement

<sup>199</sup> Tanya Wagenaar, "A Principled Approach for BBNJ: An Idea Whose Time Has Come," *Review of European, Comparative & International Environmental Law* 31, no. 3 (November 2022): 399–410, <https://doi.org/10.1111/reel.12479>.

<sup>200</sup> Article 21(2)(i) and Article 21(2) (iii) of BBNJ agreement

<sup>201</sup> Article 22 (5) of the BBNJ agreement

<sup>202</sup> Article 7 of the UNFSA

<sup>203</sup> Preambular paragraph 6 CAOFA

<sup>204</sup> Peter Gullestad et al., "Towards Ecosystem-Based Fisheries Management in Norway – Practical Tools for Keeping Track of Relevant Issues and Prioritising Management Efforts," *Marine Policy* 77 (December 28, 2016): 104–10, <https://doi.org/10.1016/j.marpol.2016.11.032>. 1-2.

compatibility measures between coastal States and high sea fishing states that engage in fishing for straddling or highly migratory fish stocks. Given that CAO is enclosed by the EEZ of the Arctic 5 Coastal States it is highly likely that the stocks from EEZ would also occur in CAO due to poleward migration of fishes<sup>205</sup>. The coastal states have integrated ecosystem approach in their fisheries management policies with considerations to ecosystem, especially in Arctic region. For Example, Norway, Canada has integrated ecosystem approach as part of their management measures of fisheries and have increasingly considered wider cross-sectorial management of multiple human activities and taking efforts to harmonize the policies with MPAs<sup>206</sup>. Denmark in its Strategy for Arctic has affirmed to develop and exploit the living resources based on ecosystem measures on the basis of scientific advice<sup>207</sup>. A similar policy measure is undertaken by the US in pursuance of its national goal to conserve 30 percent of land and water by 2030 and work to halt biodiversity loss and manage natural resources by applying a ecosystem approach.<sup>208</sup> US also stresses on international co-operation in the Arctic through bilateral and multilateral partnerships with Arctic Council acting as a principle multilateral forum for cooperation.<sup>209</sup> The working group under Arctic Council, PAME has mapped 18 Large Marine Ecosystem. It was used for evaluating environmental sensitivities and identify threats from shipping can similarly be used to apply Ecosystem Approach for fishing activities undertaken in the Arctic.<sup>210</sup> It can be concluded that the Arctic 5 generally adopt precautionary and ecosystem approach to manage living resources and continue to co-operate through Arctic Council and through bilateral or multilateral partnerships. As both agreements adopt ecosystem approach, it provides a basis for parties to co-operate and complement in this

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<sup>205</sup> 1. Rosemary Rayfuse, "The Role of Law in the Regulation of Fishing Activities in the Central Arctic Ocean," *Marine Policy* 110 (November 25, 2019): 1–6, <https://doi.org/10.1016/j.marpol.2019.103562>, 1-2. also see Per Fauchald et al., "Poleward Shifts in Marine Fisheries under Arctic Warming," *Environmental Research Letters* 16, no. 7 (July 1, 2021): 1–12, <https://doi.org/10.1088/1748-9326/ac1010>, 1-2.

<sup>206</sup> Peter Gullestad et al., "Towards Ecosystem-Based Fisheries Management in Norway – Practical Tools for Keeping Track of Relevant Issues and Prioritising Management Efforts," *Marine Policy* 77 (March 28, 2016): 104–10, <https://doi.org/10.1016/j.marpol.2016.11.032>, and Sainsbury, K, P Gullestad, and J Rice. "The Use of National Frameworks for Sustainable Development of Marine Fisheries and Conservation, Ecosystem-Based Management and Integrated Ocean Management." In *Governance of Marine Fisheries and Biodiversity Conservation*, 301–16. Chichester, UK: John Wiley & Sons, Ltd, 2014. 309-311

<sup>207</sup> Ministry of Foreign Affairs of Denmark, *Denmark, Greenland and the Faroe Islands: Kingdom of Denmark Strategy for the Arctic 2011–2020*, at 32 (2011), <http://library.arcticportal.org/id/eprint/1890>.

<sup>208</sup> White House, *National Strategy for the Arctic Region*, at 11 (October 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/National-Strategy-for-the-Arctic-Region.pdf>.

<sup>209</sup> *Ibid.*, 14.

<sup>210</sup> PAME Protection of the Arctic Marine Environment *Large Marine Ecosystems (LMEs) of the Arctic area Revision of the Arctic LME map* at 15th of May 2013 Second Edition [LME\\_revised.pdf \(pame.is\)](http://www.pame.is)

context and it is more likely for the CAOFA parties to take measure based on the recommendations of the BBNJ for a proposed MPA/ABMT.

#### ***4.2.5 Indigenous and local community knowledge:***

Both agreements recall the United Nations Declaration on the Rights of Indigenous People (UNDRIP)<sup>211</sup> and have sought to involve the indigenous communities by taking into account relevant traditional knowledge of indigenous people while making decisions. This acknowledges the right of indigenous people to self-determination and right to participate in decision-making matters which would affect their rights.<sup>212</sup> While BBNJ facilitates participation by seeking the views and information from the indigenous people during consultation stage on proposed measure for MPA/ABMTs, CAOFA ensures that the Parties must consider indigenous and local knowledge through the JPSRM<sup>213</sup>. The representatives of Arctic Indigenous People engaged in CAOFA negotiations were also from are permanent participants in the Arctic Council, where they have full consultation rights in negotiations and decisions<sup>214</sup>. CAOFA does not grant a similar status for Indigenous People, primarily because it is a legally binding instrument and the States are usually concerned over setting precedent, therefore they have rather offered them an opportunity to participate in the MOP as observers.<sup>215</sup> Nonetheless, CAOFA still provides an opportunity for the Arctic Indigenous community to participate in MOP in the capacity of an Observer.<sup>216</sup>

Moreover, the parallel membership of the Arctic Council States and CAOFA parties<sup>217</sup> could act as shared platform for Indigenous People, where they are better able to advocate for their interests and perspectives, along with sharing their knowledge on biodiversity and help in influencing the decisions. Engaging all relevant stakeholders, including indigenous

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<sup>211</sup> United Nations Declaration on the Rights of Indigenous Peoples (New York: United Nations, 2007) available at <https://undocs.org/A/RES/61/295> hereinafter referred as UNDRIP

<sup>212</sup> Article 3 and 18 of UNDRIP

<sup>213</sup> Article 4(4) of CAOFA reads as 'The Parties shall ensure that the Joint Program of Scientific Research and Monitoring takes into account the work of relevant scientific and technical organizations, bodies and programs, as well as indigenous and local knowledge.'

<sup>214</sup> Yefimenko, Alona. "A Seat at the Table." Arctic Council, May 3, 2021. <https://arctic-council.org/news/a-seat-at-the-table-how-arctic-indigenous-peoples-negotiated-their-permanent-participant-status/>.

<sup>215</sup> 1. Erik J. Molenaar, "The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous Peoples," *Marine Policy* 164 (April 29, 2024), <https://doi.org/10.1016/j.marpol.2024.106160>. Section 4.2

<sup>216</sup> They have not yet utilized this option rather preferring to participate in delegation of CAOFA parties where they can be directly involved and potentially influence the decision making of COP. See More at Ibid.,

<sup>217</sup> China, South Korea and Japan are the 3 parties to CAOFA but not a member of Arctic Council. All 8 Member States of Arctic Council are parties to COAFA (Sweden and Finland is represented by European Union)

communities, will be conducive towards the goal of improving the understanding of CAO ecosystem and help reduce friction during implementation of measures.

If commercial fishing is commenced in the CAO, this could impact the indigenous people in two ways. Firstly, it is highly unlikely for the indigenous people to engage in high sea fishing due lack of capacity to travel far distances from the shore and thus they do not benefit from the commercial fishing in CAO. Secondly, it may negatively impact the fishing quotas or measures within the EEZ due to by-catch and prey predator relationships, which could impact their livelihood and ensuring food security. Therefore, it is essential to conduct commercial fishing in a sustainable way taking into consideration the impact on ecosystems and indigenous people. But, while the specific needs and impacts of the indigenous people are addressed more concrete when it comes to exploratory fishing in CAOFA, but it is not an explicit requirement under the agreement, to consider their needs and impact when the decision to commence commercial fishing is made. Therefore, if the indigenous community are affected, their concerns can be voiced out during the BBNJ consultations, for a stricter measures to mitigate the impacts it might have on the ecosystems and biodiversity, which in a way could protect their interest and way of livelihood.<sup>218</sup>

### **4.3 MPAs in the Central Arctic Ocean:**

This section intends to describe how an MPA can be established in the Arctic once the BBNJ agreement enters into force and what would be the role of CAOFA and the parties to CAOFA during the designation of MPAs in the CAO. The role of CAOFA is analyzed in three stages of establishing MPAs - proposal, consultation, and establishment.

#### ***4.3.1 Proposal:***

The first step in establishment of the MPA is drafting a proposal. The contents of the proposal are discussed under previous chapters and therefore not repeated here. Rather, this section analyses the applicability of the proposal to CAO, especially what would be the potential role that CAOFA could play in such during the designation of MPAs. The first option would be where the CAOFA parties take a proactive stance by submitting a proposal for an MPA in the CAO. The CAOFA parties can be considered as the ideal proponents for submitting a proposal in the Arctic, as they have a long-standing basis for research cooperating through working

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<sup>218</sup> Molenaar, "The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous Peoples." Section 4.1

groups of Arctic Council, as well as JPSRM, which will undertake research to understand the information about the living marine resources and its ecosystems. If the research identifies areas that fulfill the indicative criteria, the CAOFA parties can choose to submit a proposal under the BBNJ agreement. It is not a new concept for regional fisheries bodies to undertake measures for the wider conservation objectives. For instance, NEAFC had closed areas for bottom trawling to protect vulnerable marine ecosystems and CCAMLR has adopted MPAs in the Southern Ocean based on VME<sup>219</sup>. As an RFMA, CAOFA can establish closed areas, but it will only be binding for CAOFA parties. In order to protect the ecosystems across sectors and bind a larger number of States, CAOFA can initiate the MPA process by submitting a proposal to the Secretariat. The proposal should include the draft management plan and sustainable use objectives that would be applicable. Since CAOFA parties would be the proponents, concerns regarding sustainable use of resources i.e. fishing would be discussed in the preliminary draft thus addressing one major activity in the MPA.

The second scenario would be when a proposal is initiated by any state party to BBNJ or by one or few of CAOFA parties but not all. In this case, the proponents are required to consult with relevant stakeholders and for fishing it would be CAOFA and the adjacent Coastal States. Proponents must prepare the proposal based on ecosystem approach and precautionary approach and based on best available scientific information. The proponents can seek to consult and collaborate with CAOFA as all the principles form part of CAOFA agreement and the JPSRM would act as a repository for increasing the knowledge of the CAO and the draft MPA management plan. Therefore, consultations with CAOFA at the preliminary stage would help in developing a detailed management plan for the MPA site. The specific objectives of the MPA will help in identifying the measures that would fall under the mandate of CAOFA and gathering the views of CAOFA on the sustainable use of resources within the MPA. Moreover, the research of JPSRM could provide additional information of the proposed MPA site. Additionally, if the MPA site is entirely surrounded by EEZ, the proponent is required to undertake ‘targeted and proactive consultations’ during the consultation stage, but gathering the views of the stakeholders would enable in more nuanced discussions during consultations. The proponent can choose to adopt the necessary changes or if the proponent and the

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<sup>219</sup> Elizabeth M. De Santo, “Implementation Challenges of Area-Based Management Tools (ABMTs) for Biodiversity Beyond National Jurisdiction (BBNJ),” *Marine Policy* 97 (November 2018): 34–43, <https://doi.org/10.1016/j.marpol.2018.08.034> Section 1.3 and Table 1.

stakeholders disagree, the information gathered can be submitted along with the proposal for further discussions during consultations. Also, the relevant stakeholders cannot simply choose to not respond to calls for consultation as there is a general duty to protect the marine environment as well as a corresponding duty to cooperate on global and regional basis for ‘formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment’ (Article 197) of UNCLOS. Due to the cross-sectoral or multi-sectoral nature of MPA, the proponent is also required consult with ISA and IMO for mining and shipping related activities and after careful consideration of the interest of various parties the proponent can make its submission to the Secretariat.

#### **4.3.2 Consultation:**

This is where the MPA takes a definitive shape, and the interests of various stakeholders are considered. While it is expected that the consultations will involve State Parties and relevant IFBs as required under UNCLOS to fulfill the duty of due regard, the BBNJ goes further than UNCLOS in involving a wide range of stakeholders. It includes non-state actors such as indigenous people, local community, civil society, and scientific community<sup>220</sup>. Therefore, all relevant stakeholders would be invited for consultations irrespective of whether they have ratified the BBNJ agreement<sup>221</sup>. As an RFMA with mandate to manage fishing, CAOFA would be invited to submit its view on the merits, any other relevant scientific information, existing measures in the proposed area as well as adjacent areas and views regarding the measures to be undertaken in the draft management plan that fall within the competence of COAFA.<sup>222</sup>

The main role of CAOFA during consultations would be to identify the proposed measures of the MPA, that fall within the competence of CAOFA. CAOFA is applicable to all fishes with the exclusion of marine mammals and sedentary species as described in Article 77 of UNCLOS<sup>223</sup>. A draft proposal with detailed and explicit measures with corresponding to objective of the MPA would be beneficial. This would enable the COAFA parties to clearly identify measures that they would be prepared to implement. Additionally, if CAOFA parties disagree with a specific measure, based on the scientific evidence a proposal can be made for

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<sup>220</sup> Article 21(1) BBNJ agreement

<sup>221</sup> Article 21 BBNJ agreement.

<sup>222</sup> Article 21(b)(iv) BBNJ agreement.

<sup>223</sup> Article 1(B) CAOFA.

alternative measure that is equally effective to achieve the MPA objectives. Thus any measures that directly relates to fisheries such as a ‘no take zone’ or prohibition of specific fishing methods such as long line and drift net fishing would fall under the competence of COAFA, and as per the not ‘undermining’ principle, the BBNJ COP can either take compatible measures or make recommendations but cannot take binding decisions. In a sense, this reflects the regional approach preferred by the Arctic States during the negotiation of BBNJ agreement. Optionally, the COP can promote the adoption of corresponding measures by CAOFA.<sup>224</sup> But if the MPA aims to protect the benthic habitat or seabed, this would not fall under CAOFA’s competence. Instead, it would be subject to jurisdiction of the coastal states. All arctic coastal states except for the US have made their submissions to the Commission on the Limits of the Continental Shelf (CLCS) for extending their continental shelf<sup>225</sup>. It is possible for the coastal state to volunteer to protect the seabed in their Extended Continental Shelf (ECS), much like how Portugal agreed to protect the Rainbow Hydrothermal Vent Field in its ECS. Portugal proceeded to nominate the MPA site under OSPAR which became part of OSPAR’s MPA network.<sup>226</sup>

The consultation is a suitable place for discussions and to consider various interests of the stakeholders. This not only includes ecological considerations but supporting food security and other socioeconomic considerations. As mentioned earlier, if the MPA measures significantly limit exploiting the living resources, and the objectives of the MPA can be achieved by following less stricter requirements or altering the geographical coverage of area, without seriously impacting the freedom of high sea fishing, CAOFA can submit its opinions and suggest some changes to the measures and use the data gathered under JPSRM to substantiate its arguments. Additionally, the STB would also submit its views and information on matter. The proponent is required to gather all the information along with the contributions made by the stakeholders, STB and revise the proposal accordingly and submit it to the STB. There is no requirement that all suggestions made by CAOFA be reflected in the revised proposal, but if

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<sup>224</sup> 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.” *Ocean Development & International Law*, April 6, 2024 1–22. <https://doi.org/10.1080/00908320.2024.2333893>, 12 .

<sup>225</sup> Baker, Betsy. “Polar Perspectives No. 3: Arctic Overlaps: The Surprising Story of Continental Shelf Diplomacy.” Wilson Center, November 2020. <https://www.wilsoncenter.org/publication/polar-perspectives-no-3-arctic-overlaps-surprising-story-continental-shelf-diplomacy>, 3.

<sup>226</sup> 1. Danielle Smith and Julia Jabour, “MPAs in ABNJ: Lessons from Two High Seas Regimes,” *ICES Journal of Marine Science* 75, no. 1 (October 11, 2017): 417–25, <https://doi.org/10.1093/icesjms/fsx189>.



any substantial information is not considered, the proponent should respond accordingly. It is important to note that consultations under BBNJ agreement aims to gather input from the relevant stakeholders, which differs from the MPA establishment processes under CCAMLR or OSPAR. In the latter frameworks, MPAs are a result of negotiations between parties aiming to reach for consensus. At times this results in undue delay in establishing the MPA and compromising the MPA goals<sup>227</sup>. This implies that MPAs would not be a result of compromise, but rather a result of thorough and inclusive decision-making process based on scientific evidence and the general principles of BBNJ agreement. The exact modality of consultation and assessment process will be further elaborated by the STB at its first meeting, which will perhaps shed more light on the process.<sup>228</sup>

#### ***4.3.3 Establishment of MPA in the CAO:***

The COP will decide based on the final proposal and the draft management plan. The recommendations of the STB will play a vital role in making the decision. Contributions made by CAOFA as well as the Arctic Coastal States and the scientific input received during the consultations will act as the basis for the COP's decision. Any fisheries measure would fall under CAOFA's mandate and as a result, COP can choose to make recommendations or take measures that are compatible with the measures of CAOFA. Since CAO has all three relevant regimes corresponding to fishing, shipping and mining, COP BBNJ can either adopt measures that are compatible with those adopted by the bodies or make recommendations to the competent bodies for adopting measures. Thus, the role of BBNJ would be to act as a platform for cooperation and coordination amongst these bodies to fulfill the general duty of the states for protection of marine environment under UNCLOS, which has been further elaborated under the objectives of the BBNJ agreement<sup>229</sup>. Even if parties agree to cooperate, it need not always result in adopting binding decisions that are compatible with the measures intended for MPA as the duty to cooperate is an obligation based on conduct and not result. Moreover, the effectiveness of the MPA might depend on the combined measures taken by the IFBs in taking compatible measures under their mandate. The role of BBNJ COP could be to identify specific

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<sup>227</sup> The parties to CCAMLR took four years to reach consensus for Ross Sea MPA and this was also only possible because it did not overlap with fishing areas. The MPA coverage was also significantly reduced by 40% and reduced the time limit from 50 to 35 years. For more info see Smith "MPAs in ABNJ: Lessons from Two High Seas Regimes." 3.

<sup>228</sup> Article 21(8) BBNJ agreement

<sup>229</sup> Duan "Area-based Management Tools under the BBNJ Agreement: Ambition or Illusion?" 318,319

regulation that needs to be undertaken by the CAOFA parties. When OSPAR faced with similar situation, where its mandate did not extend to fisheries and marine transport, it sought to address it through Collective Arrangement (CA), whose main aim is to become a ‘multilateral *forum* composed of all competent entities addressing the management of human activities’ in order to help in ecosystem-based approach to management of activities in the high sea. Despite the efforts of OSPAR to include ISA, IMO, and ICCAT, the Collective Agreement is only subscribed to by NEAFC.<sup>230</sup>

The BBNJs’ competence to take binding measures is somewhat limited to acting as a body to enhance cooperation and coordination. As implied from the ‘not undermining’ principle, there is no hierarchical relationship between BBNJ and other IFBs. Once BBNJ comes into force, the IFBs would have a global platform to address the cross-sectoral impact of the activities on marine biodiversity which it previously did not have, but it is still up to the IFB to make its choice whether to make use of the platform.<sup>231</sup> While parallel membership of all State Parties to CAOFA and BBNJ is not a necessary requirement for cooperation within the BBNJ agreement, it would nonetheless be beneficial for establishing MPAs.

#### **4.4 Conclusion**

The chapter has elucidated the complex interplay between the CAOFA and BBNJ frameworks in the establishment of MPAs in the Central Arctic Ocean. While both agreements aim to promote the sustainable use and conservation of marine resources, their approaches and underlying principles can sometimes diverge, particularly in the realms of fisheries management and biodiversity conservation. By identifying and analyzing areas of potential synergy, this discussion has highlighted how CAOFA and BBNJ can collaboratively enhance the protection of marine biodiversity while accommodating sustainable fishing practices. The integration of these frameworks underlines the necessity for a harmonized approach that respects both economic interests and ecological imperatives, paving the way for more effective governance of the Arctic's unique and vulnerable marine environments. The BBNJ agreement is a significant achievement for ocean biodiversity but fulfilling the objectives will require cooperation from all sectors and BBNJ will provide a global platform to address marine

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<sup>230</sup> “Collective Arrangement.” OSPAR Commission. Accessed May 13, 2024.

<https://www.ospar.org/about/international-cooperation/collective-arrangement>.

<sup>231</sup> B.E. Klerk, ‘A Wolf in Sheep’s Clothing: Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement’ (2024) [working title, on file with author].

biodiversity issues through implementing MPAs. MPAs cannot be a panacea to all of the biodiversity, nor can BBNJ be expected to solve the existing issues within the fisheries regime. Rather the focus must be on cooperating based in the overlapping objectives where both agreements can be mutually reinforcing. The initial duration for the BBNJ agreement to come into force would act as a sufficient time for the JPSRM to increase the knowledge about arctic ecosystems. Adequate scientific data about the arctic ecosystem could help in making decisions from the perspective of ecosystems rather than politicizing the establishment of MPA. Once MPAs are established, it is equally important that they are enforced sufficiently. Implementation of MPAs would mostly depend on the existing monitoring and compliance mechanisms with the IFBs. This must be utilized efficiently.

The thesis has provided a brief view of how CAOFA as an relevant IFB could interact and probably strengthen the BBNJ regime. Similar opportunities can be found within other RFMOs that operate in other regions of the ABNJ. The author believes that BBNJ has brought significant opportunities to the table for marine biodiversity and it is time to make use of the opportunities in the interest of marine environment.

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