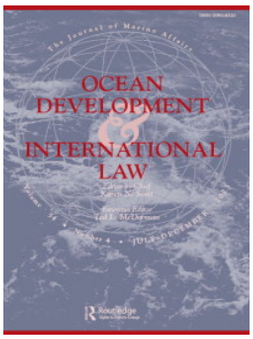

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Vito De Lucia

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After the Dust Settles: Selected Considerations about the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction with Respect to ABMTs and MPAs

Vito De Lucia

Faculty of Law and Norwegian Centre for the Law of the Sea, UiT Arctic University of Norway, Tromsø, Norway

ABSTRACT

The recent adoption of a new agreement on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction has been welcomed as a historic achievement that will herald a new era of marine conservation and global ocean governance. This article aims to raise and discuss some questions, as the dust settles, and to analyze selected aspects of the text of the new Agreement, with particular respect to Part III of the BBNJ agreement, dedicated to area-based management tools (ABMTs), including marine protected areas (MPAs), which are arguably crucial for the operationalization of the Agreement but remain ambiguous or underarticulated, and may thus reduce its effectiveness and ambition. These questions concern the relationship with other relevant instruments, frameworks, and bodies (IFBs); relatedly, the issue of recognition of area-based measures adopted under other IFBs; and the so-called opt-out question, that is, the right to make objections to an ABMT and/or MPA adopted under the BBNJ agreement.

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Introduction

On Saturday, 4 March 2023, at around 9 p.m., Rena Lee, President of the Intergovernmental Conference tasked since 2018 to negotiate a new treaty on the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction (BBNJ), announced that "the ship [has] reached the shore."[1] Immediately after, as all those still present in conference room 2, located in the basement of the UN building in New York, "erupted in applause," President Lee "buried her face in

CONTACT Vito De Lucia vito.delucia@uit.no Norwegian Centre for the Law of the Sea, UiT Norges arktiske universitet, Tromsø, Norway.

[1] Earth Negotiations Bulletin, "Summary of the Resumed Fifth 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: 20 February–4 March 2023" vol. 25 n. 250, [hereinafter, ENB 5.2], 17.

This article has been corrected with minor changes. These changes do not impact the academic content of the article.

her hands, exhausted" and in tears.[2] This marked the conclusion of 20 years of negotiations[3] that led to the adoption of a new global Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement).[4] The BBNJ Agreement was adopted by the intergovernmental conference at its 5th session in June 2023, and was opened for signature on 20 September 2023.

At the outset, the very fact that an agreement had been reached and a text adopted, despite the significant distance on some key positions that had characterized the negotiations since the PREPCOM, is clearly a positive outcome, at least on the face of it. Delegations, the media, and policy and academic commentators have in this respect emphasized how the BBNJ agreement represents a "historic achievement,"[5] a "true victory,"[6] a veritable "triumph"[7] for international multilateralism, particularly in times of geopolitical tensions and open conflicts. The BBNJ Agreement thus "heralds a new era of global ocean governance,"[8] with its adoption being "groundbreaking."[9] The BBNJ Agreement is thus widely considered to be a new beginning with respect to the conservation of marine biodiversity in areas beyond national jurisdiction. However, as the dust begins to settle, it is time to raise questions and offer initial reflections and analysis on a complex text with many unresolved issues.

Where is this new beginning going to lead us? Will it make a difference? Does the text deliver on its high ambition, or did we lose an opportunity with this text? This article explores some of these questions, and others that will emerge only during an analysis of selected aspects of the text, with particular respect to Part III of the BBNJ Agreement, dedicated to Area-Based Management Tools (ABMTs), including Marine Protected Areas (MPAs). ABMTs are arguably crucial for the effective operationalization of the Agreement.[10] In addition, MPAs are a key tool under the Convention on

[2] J. Marlow, "The Inside Story of the U.N. High Seas Treaty" 9 March 2023, *The New Yorker* at: https://www.newyorker.com/news/daily-comment/the-inside-story-of-the-un-high-seas-treaty (accessed 15 March 2024).

[3] See, e.g., E. Mendenhall, R. Tiller, and E. Nyman, "The Ship Has Reached the Shore: The Final Session of the 'Biodiversity Beyond National Jurisdiction' Negotiations" (2023) 155 *Marine Policy* Article 105686.

[4] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction, adopted 19 June 2023, C.N.203.2023. TREATIES-XXI.10 of 20 July 2023 [hereinafter, BBNJ Agreement].

[5] For example, the European Union (EU), at: https://oceans-and-fisheries.ec.europa.eu/news/historic-achievement-treaty-high-seas-adopted-2023-06-19_en (accessed 15 March 2024). Among academic commentators, see, e.g., Mendenhall, Tiller, and Nyman, note 3, 1, as the "paper explores the multilateralism that led to a finalized BBNJ agreement."

[6] Belize, speaking on behalf of the Caribbean Community (CARICOM) at a UN General Assembly session: The representative of Belize, speaking on behalf of the Caribbean Community (CARICOM) at: https://press.un.org/en/2023/ga12520.doc.htm (accessed 15 March 2024).

[7] The Sustainable Development Goals Knowledge Hub, "In a 'Triumph for Multilateralism', Governments Adopt High Seas Treaty," 28 June 2023, *International Institute for Sustainable Development* at: https://sdg.iisd.org/news/in-a-triumph-for-multilateralism-governments-adopt-high-seas-treaty (accessed 15 March 2024).

[8] P. Rodgers Kalas, "The High Seas Treaty heralds a new era of global ocean governance," *Frontiers, Policy Outlook* at: https://policylabs.frontiersin.org/content/policy-outlook-peggy-kalas-the-high-seas-treaty-heralds-a-new-era-of-global-ocean-governance (accessed 15 March 2024).

[9] Carbon Credits, "United Nations Adopts Groundbreaking High Seas Treaty to Protect the Environment" 19 June 2023, *Carbon Credits* at: https://carboncredits.com/united-nations-adopt-groundbreaking-high-seas-treaty-to-protect-the-environment (accessed 15 March 2024).

[10] During the early stages of the BBNJ "process," MPAs, in particular, were singled out as the key element to address owing to existing gaps in the legal framework and their role for the conservation of vulnerable high seas ecosystems. See, e.g., Report of the Open-ended Informal Consultative Process on Oceans and the Law of the Sea, 26 June 2003, UN Doc. A/58/95, esp. [98ss], with regard to the "law of the sea track" and Report of the First Meeting of the Ad Hoc Open Ended Working Group on Protected Areas, 20 February 2006, UNEP/CBD/COP/8/8* with regard

Biological Diversity (CBD)[11] and, as part of the Kunming-Montreal Global Biodiversity Framework,[12] an action plan was adopted that aims to promote "coherence, complementarity and cooperation between the CBD, other biodiversity related conventions and other relevant multilateral agreements and international institutions,"[13] including, now, the BBNJ Agreement. However, the text of the Agreement with respect to ABMTs and MPAs is ambiguous or underarticulated, and this may reduce the effectiveness and ambition of the Agreement. Issues that are examined here in this context include the relationship between the Agreement and other relevant instruments, frameworks, and bodies (abbreviated as IFBs)—specifically, the issue of recognition of area-based measures adopted under IFBs and the so-called opt-out question, that is, the right to make objections to an ABMT and/or MPAs adopted under the BBNJ Agreement.

A Global Legal Basis for Marine Protected Areas

From the perspective of marine environmental protection, one of the principal achievements of the BBNJ Agreement is the establishment of a global legal basis[14] for adopting MPAs in areas beyond national jurisdiction.[15] While regional[16] or sectoral[17] area-based tools and mechanisms have existed for a good while, albeit not always sufficiently operationalized, the BBNJ Agreement provides a *global* and *cross-sectoral* legal basis that enables the designation of MPAs in all marine areas beyond national jurisdiction and across all sectors of human activities.[18] Additionally, the BBNJ Agreement offers a definition of MPAs, something that to date has been missing in international law.

to the "biodiversity track." For a discussion on this double track early on in the BBNJ process see A. Oude Elferink, "Finding a Home for BBNJ—The CBD, the LOSC, and the General Assembly. Complementary Alternatives?" in V. De Lucia, A. Oude Elferink and L. Nguyen (eds), *International Law and Marine Areas beyond National Jurisdiction. Reflections on Justice, Space, Knowledge and Power* (Brill, 2022) 174.

[11] Convention on Biological Diversity, adopted 5 June 1992, entered into force 29 December 1993, 1760 UNTS 79 [hereinafter, CBD].

[12] CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity, 15/4. Kunming-Montreal Global Biodiversity Framework" 19 December 2022, CBD/COP/DEC/15/4.

[13] Ibid, Annex I, Section B, para 6, p. 5.

[14] Regional and/or sectoral legal basis for the designation of MPAs already exists in a number of regions (such as the North-East Atlantic, via OSPAR and the North-East Atlantic Fisheries Commission [NEAFC]) or sectors (shipping via the International Maritime Organization [IMO], mineral extraction via the International Seabed Authority [ISA], etc.). The CBD, which is also a global instrument, has also started a process to explore options for the adoption of marine protected areas but is, however, subject to a double set of limitations, respectively, Art 4 and Art 22(2), in relation to its competence in areas beyond national jurisdiction. See A. Oude Elfrink, "Protecting the Environment of ABNJ through Marine Protected Areas and Area-Based Management Tools. Is the Glass Half Empty or Half Full and Whose Glass Is It Anyway?" in De Lucia, Elferink and Nguyen, note 10, 205.

[15] For an overview of the process see, e.g., Elferink, note 10; but see also a recent publication that considers that the obligation to designate marine protected areas in the high seas is already provided for in Article 192 of the United Nations Convention on the Law of the Sea (UNCLOS): A. von Rebay, *The Designation of Marine Protected Areas. A Legal Obligation* (Springer, 2023).

[16] For example, MPAs can be adopted under regional regimes such as the OSPAR Convention, for which the competence *ratione loci* is limited to the North East Atlantic (and OSPAR has also a limitation *ratione materiae*, as it can only regulate marine pollution).

[17] For example, particularly sensitive sea areas (PSSAs) under the IMO.

[18] Arguments could be made in relation to the competence to adopt MPAs in marine areas beyond national jurisdiction (ABNJ) under the CBD, though usually it is considered that the freedoms of the high seas under UNCLOS would trump any restrictions adopted under the CBD, in light of Article 22(2) of the CBD. Recently, however, an argument has been proposed that Article 192 of UNCLOS already includes a legal basis for adopting MPAs in the high seas; see A. von Rebay, note 15. It is also useful to refer to A. Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change" (2005) 54 *International and Comparative Law Quarterly* 563, which discusses mechanisms available for changes under UNCLOS. Indeed, Boyle's article explores a number of tools and techniques

An MPA, for the purposes of the BBNJ Agreement, "means 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."[19] Prior to this definition, the reference point for an MPA had usually been the IUCN definition: "A protected area is a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long term conservation of nature with associated ecosystem services and cultural values."[20]

It is useful to note that there are two key differences between the definition of an MPA and the definition of ABMTs, which is also set out in Article 1 of the Agreement.[21] The focus of the definition of an ABMT is on individual human activities (one or several), indicating a sectoral focus or scope. Additionally, the goal of an ABMT is aligned with achieving "particular conservation and sustainable use objectives." By contrast, the definition of an MPA focuses on long-term biological diversity conservation objectives, and only subsidiarily "may allow" sustainable use (that is, human activities) insofar as they are compatible with the achievement of conservation objectives. There is thus a clear and significant distinction in scope and objectives of generic ABMTs in contrast to specific MPAs.

Part III of the BBNJ Agreement commences with Article 17, which sets out the specific objectives of this part in letters (a) through (e). As one can readily understand by reviewing the different paragraphs, the scope is rather broad, including, simultaneously, the conservation and sustainable use of marine biodiversity (a), cooperation and coordination with IFBs (b), a set of more detailed environmental objectives ("protect, preserve, restore and maintain"), referring also to climate change and ocean acidification, as well as the aim of enhancing the "productivity and health" of marine ecosystems (c), "food security and other socioeconomic objectives, including the protection of cultural values" (d), and, finally, (e) focuses on the objective of "supporting" a range of states[22] "through capacity-building and the development and transfer of marine technology in developing, implementing, monitoring, managing and enforcing area-based management tools, including marine protected areas."

Part III then sets out rules for submitting a proposal for an ABMT or an MPA (Article 19), including their publicity and review (Article 20), for conducting consultations and assessments on such proposals (Article 21), for the establishments of ABMTs and MPAs (Article 2), for decision making (Article 23), for emergency measures (Article 24), for implementation (Article 25), and for monitoring and review (Article 26).

Each article is quite detailed, and a full analysis of Part III of the Agreement exceeds the scope and intentions of this article. It is noteworthy to emphasize, however, that

available to maintain UNCLOS current and adaptive, exploring at the same time the boundaries of the opportunities such tools opened to the interpreter in order to avoid what he calls the "premature obsolescence" of treaties (p. 567), particularly in light of the difficulties of formal amendments.

[19] BBNJ Agreement, Art 1(9).

[20] N. Dudley and S. Stolton (eds), *Defining Protected Areas: An International Conference in Almeria, Spain* (IUCN, 2008), 125.

[21] BBNJ Agreement, Art 1(1).

[22] "Least developed countries, landlocked developing countries, geographically disadvantaged States, small island developing States, coastal African States, archipelagic States and developing middle-income countries, taking into account the special circumstances of small island developing States," BBNJ Agreement, Art 17(e).

proposals submitted by state parties, individually or jointly, must include, according to Article 19(4), a detailed set of information, ranging from the necessary geographic description of the area to manage (a), to information on the identification criteria (b), a map of human activities in the area, including uses by Indigenous peoples (c) a management plan (f), temporal aspects (g), consultations undertaken (h), and scientific and traditional knowledge (j).[23]

For the purposes of this article, there are three issues that I wish to focus on that relate directly to the future effectiveness of this part of the BBNJ Agreement: the relationship between the Agreement and relevant IFBs; the issue of the recognition of area-based measures adopted under IFBs; and the so-called opt-out question, that is, the right to make objections to an ABMT and/or MPA adopted under the BBNJ Agreement. I discuss each issue in turn in the next three sections.

Relationship with Other Relevant IFBs: Giving Operational Meaning to the Principle of Not Undermining in Part III of the BBNJ Agreement

The mandate given to the Intergovernmental Conference (IGC) by the UN General Assembly in 2017 included a crucial delimitation, in that both the "BBNJ process and its results should not undermine existing relevant legal instruments and frameworks," as well as "relevant global, regional and sectoral bodies."[24] The question of the meaning of the expression "not undermining," however, vexed the BBNJ negotiations from early discussions in the Ad Hoc Working Group, where the concept first emerged—alongside several others of a similar character—in order to "break a deadlock"[25] in the negotiations, and with the particular aim of offering safeguards to fishing nations such that the new biodiversity treaty would not impinge on the competence and mandates of existing regional fisheries management organizations.[26] Indeed, during the BBNJ Working Groups (WG), the question of the relationship between a potential new global instrument and existing instruments, bodies, and institutions became a key element of the discussion from the very beginning. Indeed, several delegations were consistently against ("not supportive" of)[27] "proposals involving the creation of new institutions."[28] This lack of support eventually turned into a consistent emphasis on how "the existing legal framework was sufficient to address the conservation and sustainable use of

[23] This list is not exhaustive. For the full list with full details see the BBNJ Agreement, Art 19(4).

[24] UNGA Res. *International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction*, UN Doc A/RES/72/249 (24 December 2017) [7].

[25] V. De Lucia, "Reflecting on the Meaning of 'Not Undermining' Ahead of IGC-2," 21 March 2019, *The Blog of the Norwegian Centre for the Law of the Sea* at: https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2 (accessed 15 March 2024).

[26] See V. De Lucia, "Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From 'Not Undermine' to Ecosystem-Based Governance" (2019) 8 *European Society of International Law: ESIL Reflections* 1; and especially, V. De Lucia and P. Nickels, "Reflecting on the Role of the Arctic Council Vis-à-Vis a Future International Legally Binding Instrument on Biodiversity in Areas Beyond National Jurisdiction" (2020) 11 *Arctic Review of Law and Policy* 189.

[27] United Nations General Assembly, "Letter dated 16 March 2010 from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly," 17 March 2010, UN Doc. A/65/68 (17 March 2010), [44].

[28] Ibid, [44]. These same delegations, by contrast, supported instead an update of the mandate of regional fisheries management organizations (RFMOs) and better coordination with regional seas organizations.

marine biodiversity beyond areas of national jurisdiction,"[29] or, later in the negotiations, the need to be careful not to infringe "on the regulatory scope of existing agreements or duplicating ongoing efforts."[30]

Interestingly, however, the term "undermine" did not make it into the reports of the BBNJ WG until 2014, and its introduction was arguably a maneuver to break a deadlock over the relationship between a new global instrument and existing regional and, particularly, sectoral arrangements (with the fisheries framework being a key concern).[31] Even more interestingly, perhaps, "undermine" surfaced together with other terms, which captured a related yet distinct concern of several delegations. Section A of the Appendix to the letter from the co-chairs of the BBNJ WG to the president of the General Assembly, under the heading "relationship to other instruments," sets out some of the suggested language proposed by delegations, indicating that a new global instrument "should not undermine, duplicate or change existing instruments."[32] The list included also other formulations, capturing similar concerns. For example, a new global instrument should "Respect and complement the existing mandates of relevant organizations and avoid duplications" or should not "subordinate existing instruments."[33] Some delegations also emphasized that "Decision-making for regional and sectoral activities should remain with the relevant regional and sectoral organizations."[34]

Yet even though the term "undermine" was adopted, it remains very ambiguous,[35] and while there have been several attempts at elucidating a precise meaning of the term,[36] significant ambiguities remain[37] as to both its scope and its implications.[38] Indeed, even at IGC5 2.0, in 2023, "many delegations" observed that it would be necessary to "further clarify" the meaning of the expression not to undermine, "and for a common definition to be agreed upon as implementation begins."[39] One delegate made it very clear in this respect that the "sooner we clarify this notorious 'not-undermining provision' the better for the Ocean and for all of us."[40]

[29] United Nations General Assembly, "Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly," UN Doc. A/66/119 (30 June 2011).

[30] United Nations General Assembly, "Letter dated 8 June 2012 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly," UN Doc. A/67/95 (13 June 2012), [29].

[31] UN Doc. A/65/68, note 31, [44].

[32] United Nations General Assembly, "Letter dated 25 July 2014 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly," UN Doc. A/69/177 23 (July 2014) Appendix, Section A, p. 24.

[33] Ibid.

[34] Ibid.

[35] Z. Scanlon, "The art of 'Not Undermining': Possibilities Within Existing Architecture to Improve Environmental Protections in Areas Beyond National Jurisdiction" (2018) 75 *ICES Journal of Marine Science* 405.

[36] See, e.g., ibid; G. Wright, J. Rochette, E. Druel, and K. Gjerde, "The Long and Winding Road Continues: Towards a New Agreement on High Seas Governance," Study No 01/16, IDDRI, Paris, France, 2015.

[37] Here, ambiguity is intended to mean that a term, expression, or concept is susceptible to a plurality of interpretations, so that its semantic field is open-ended; see, e.g., R. Guastini, "Interpretare, Costruire, Argomentare" (2015) 2 *Osservatorio sulle fonti* 1.

[38] For a more detailed discussion of the semantic scope of the term and for a more detailed drafting history, see, e.g., Scanlon, note 35; De Lucia, note 25; De Lucia and Nickels, note 26.

[39] Earth Negotiations Bulletin, "Summary of the Further Resumed Fifth Session of the Intergovernmental Conference to Adopt an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–20 June 2023," vol 25, no. 252, 10 (hereinafter ENB 5.3).

[40] ENB 5.3, p. 10.

Such ambiguities have been further compounded by the opposing views delegations put forth during the negotiations. Iceland, for example, having consistently preferred to leave regulatory competence to regional IFBs, suggested textual formulations that explicitly excluded fisheries management from the competence of the BBNJ Agreement, lest it undermine RFMOs.[41] Other delegations, by contrast, expressed views whereby the BBNJ bodies would have regulatory power greatly circumscribing the operational meaning of the obligation not to undermine IFBs.[42] It is impossible to find a coherent articulation of the meaning of the expression "not undermine" in the submissions of the delegations, as observed by Tang, Chen and Zhang,[43] and it is clear that delegations did not put forth any "special meaning" of the term within the meaning of Article 31(4) of the Vienna Convention on the Law of Treaties (VCLT).[44]

In the final text of the BBNJ Agreement the principle of not undermining is explicitly mentioned not only in Part I, under General Provisions, in such a way that it orients the entire BBNJ agreement, but also in Part III, in ways that operationalize the phrase in very concrete terms.

Article 5, dedicated to the "Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies," sets out in paragraph 2 that the BBNJ Agreement "shall be interpreted and applied in a manner that does not undermine relevant" IFBs.[45] There is a double obligation here, to both *interpret* and *apply* the BBNJ Agreement in a way that will not undermine relevant IFBs. This double obligation is directed not only to parties, but also to any other relevant body (the BBNJ bodies themselves, dispute resolution bodies, etc.) that may find themselves in the position either to interpret the provisions of the BBNJ Agreement or to apply them.

Additionally, however, and this reflects the long-standing debates during both PREPCOM and IGC, Article 5(2) balances this focus on not undermining by adding that the BBNJ Agreement shall simultaneously be interpreted in a manner that "promotes coherence and coordination" with IFBs.[46] This is a crucial aspect, as it speaks to the imagined role of the BBNJ Agreement as an instrument that, precisely through fostering coherence and through taking an important coordinating role, would at least attempt to address issues of fragmentation[47] in the international law of the sea and international environmental law more broadly. Indeed, as had already emerged during PREPCOM, one particular way to approach the question of not undermining is to

[41] United Nations, "Textual Proposals Submitted by Delegations by 20 February 2020 for Consideration at the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (The Conference), in Response to the Invitation by the President of the Conference, in her Note of 18 November 2019," A/CONF.232/2020/3 (15 April 2020), 57.

[42] Y. Tang, W. Chen and Y. Zhang, "International Cooperation and Coordination in the Global Legislation of High Seas ABMTs Including MPAs: Taking OSPAR Practice as Reference" (2021) 133 *Marine Policy* Article 104767.

[43] Ibid, 6.

[44] Vienna Convention on the Law of Treaties, adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 332 [hereinafter, VCLT], which sets out that "A special meaning shall be given to a term if it is established that the parties so intended," VCLT, Art 31(4).

[45] BBNJ Agreement, Art 5(2).

[46] Ibid.

[47] See International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission," UN Doc. A/CN.4/L.702 (18 July 2006).

focus on mutual supportiveness among IFBs and between IFBs and the BBNJ Agreement, and on the idea of due regard, with the only caveat that due regard is, as it were, due to relevant IFBs *on condition* that existing instruments and institutions "are [also] supportive of and do not run counter to the objectives of the Convention and this instrument."[48]

And if early on some commentators pointed to the need not to overestimate the role of the principle of not undermining, particularly in relation to the impact that it would have on the institutional architecture of the BBNJ Agreement,[49] we are today in a position to assess the ways in which it has been actually integrated in the text of the BBNJ Agreement, and how it may be operationalized during its implementation.

With regard to the operationalization of the principle of not undermining in Part III, the key provisions are all contained in Article 22, which sets out the framework for the establishment of ABMTs, including MPAs. The key general rule is set out in Article 22(2), which establishes that "In taking decisions under this article, the Conference of the Parties (COP) shall respect the competences of, and not undermine" IFBs. The COP thus shall *both* "respect the competence of" and "not undermine" IFBs.[50] One immediate question is whether this is a hendiadys, or whether these are *distinct* obligations.[51] On the face of it, we can outline a distinction between the two by way of emphasizing how "respecting the competence" indicates an obligation to not directly encroach on the competence of relevant IFBs, by, for example, establishing an ABMT or MPA in an area and for a sector subject to the regulatory competence of one such IFB. The meaning of not undermining, on the other hand, remains ambiguous, as discussed briefly above.

The notion that the expression of not undermining refers to a distinct obligation is also supported by how the two expressions have been treated at times distinctly during the negotiations.[52] The drafting history of Article 5 shows that for a long time the two expressions were treated differently and separately, with one but not the other

[48] United Nations, "Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction," UN Doc A/CONF.232/2019/6 (17 May 2019) Art 4(3).

[49] A. Oude Elferink, "Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction" (2019) 28 *Review of European, Comparative and International Environmental Law* 237.

[50] For a discussion of the drafting history of this distinction and the potential implications of this distinction for the meaning and normative scope of the not undermining notion, see De Lucia and Nickels, note 26.

[51] A question that has been raised in relation to other pairs of concepts in international law, such as "object and purpose" of a treaty (V. Crnic-Grotic, "Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties" (1997) 7 *Asian Yearbook of International Law* 141), "conservation and sustainable use" of biological diversity (V. De Lucia, "Regime Interaction through Concepts. The BBNJ Process as a Critical Juncture in the Relation Between the Convention on Biological Diversity and the Convention on the Law of the Sea" in N. Matz-Luck, Ø. Jensen and E. Johansen (eds), *The Law of the Sea. Normative Context and Interactions with Other Legal Regimes* (Routledge, 2022) 44), and even "protection and preservation" of the marine environment (for which the distinction was recently clarified by the arbitral panel in the the *South China Sea Arbitration (The Republic of the Philippines v. The People's Republic of China),* Award on Merits of 12 July 2016, PCA Case No. 2013-19, [941]).

[52] Taking a different view, the High Seas Alliance observed that "the phrase 'respects the competences of' is an unnecessary and unhelpful addition to 'does not undermine.' The relevant and functional test, 'does not undermine' is best understood in the sense of does not undermine "the effectiveness of" the bodies etc (IFBs) and particularly the effectiveness of their measures. An additional test of 'respecting' the 'competence' of the IFB is an unhelpful test examining not the functioning or measures of IFB but of its competence, whether or not the competence is implemented, and 'respecting' the competence suggests a deference to any such competence whether or not necessary or warranted. This would not build bridges but rather fences between the BBNJ agreement and the IFBs." A/CONF.232/2022/INF.5, 41.

often bracketed, thus indicating their distinct function and histories.[53] And while Article 5 contains a general, treaty-wide obligation, another example relates specifically to Part III of the Agreement. During IGC5.1, in what was at that point Article 19 and is now Article 22, the expression "not undermine" had been on one occasion struck out of the text, while "respect of" remained in the text summarizing the small-group negotiations.[54]

The distinct function and obligation of the two expressions, however, does not help in relation to circumscribing their respective meaning. With regard to the expression "respect of," one of the key issues is to emphasize how the competence of IFBs is not exclusive, as both regional and global IFBs have a delimited competence *ratione materiae* or, and sometimes also, *ratione loci*. Respect for the competence of an IFB therefore needs to be understood with regard to the limited competence of the IFB. To take one example, respecting the competence of the International Maritime Organization (IMO) means that shipping shall be regulated by the IMO at a global level, while respecting the competence of the North-East Atlantic Fisheries Commission means respecting its competence to regulate fisheries in the North-East Atlantic.[55] Additionally, the competence of each IFB is relevant only for parties to that individual IFB. In fact, precisely in cases with delimited competence *ratione materiae* and *ratione personae*, the BBNJ Agreement could actually complement and strengthen, rather than undermine, relevant IFBs,[56] while also respecting the competence of relevant IFBs.

Further questions relate to the efficacy and validity of measures adopted under the BBNJ Agreement if they overlap with the competence of relevant IFBs. This issue may be solved by the rules set out in Article 22(1)(c) of the Agreement, but such rules entail a complex process (which, however, the COP may, and thus also may not, initiate) aimed at cooperating and coordinating with relevant IFBs, which I discuss in more detail below. Additionally, it may be useful to recall how the International Court of Justice, in *Certain Expenses*, found that when an "Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of [its] stated

[53] See, e.g., United Nations, "Revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," 18 November 2019, A/CONF.232/2020/3 for IGC4, in what was then Article 4, and "Textual proposals submitted by delegations by 25 July 2022, for consideration at the fifth session of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the Conference), in response to the invitation by the President of the Conference in her Note of 1 June 2022(A/CONF.232/2022/5) Article-by-article compilation," UN Doc. A/CONF.232/2022/INF.5 (1 August 2022) for IGC5.1. In both cases the expression in brackets was "respect the competence of." For earlier discussions and for the contrasting positions of delegations see De Lucia and Nickels, note 26.

[54] United Nations, "Compilation of outcomes of small group work submitted after the issuance of the Refreshed draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (UN Doc. A/CONF.232/2022/CRP.12) and Ending point of the Facilitators-led discussions held on 26 August 2022 on measures such as area-based management tools, including marine protected areas, and on environmental impact assessments," UN Doc. A/CONF.232/2023/INF.2 (1 February 2023) 59.

[55] Prevalence in this case also rests on the basis of the criterium of speciality for both cases; see, e.g., D. Banaszewska, "Lex Specialis," *Max Planck Encyclopedia of Public International Law* (online, 2015).

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

purposes, the presumption is that such action is not *ultra vires*."[57] Such presumption may apply also to the action of the BBNJ bodies analogically, and thus the burden of demonstrating that a decision taken by the BBNJ COP has not respected the competence of (and/or has undermined) relevant IFBs may fall on the IFBs themselves.

A necessary second step is identifying the meaning of the expression "not undermining" in order to further distinguish it from the obligation to respect the competence of other IFBs. Here, some early reflections might be useful.[58]

The typical initial way to try to unravel the ambiguities of a term or expression is to look at the ordinary meaning of the words. By reference to the Oxford Dictionary,[59] the first meaning of the verb "to undermine" refers to the risks related to rock erosion and, subsequently, of mining operations. Metaphorically transposed, the meaning of the verb interestingly becomes that of "lessen the effectiveness, power, or ability of" something (an individual, a practice, an institution, etc.), as already noted by Scanlon.[60] What is more interesting, however, is that the meaning refers "especially" to a manner of undermining that is "gradual or insidious."[61] To undermine, then, at a first approximation and based on the natural meaning of the word as presented in the Oxford Dictionary, indicates a detrimental effect that thwarts the effectiveness of a body or institution, and it does so in a specific manner that renders its authority gradually weaker or less effective.[62] Undermining, in other words, is not the result of a direct and punctual conflict of competence, but rather is a surreptitious, gradually insidious effect. This has perhaps useful implications. For example, it can be understood to imply that the undermining effects in question are effects that result from a slow and scattered accumulation of "undermining practices," rather than of a singular, formal encroachment on legal competence. The latter would indeed be covered by the other obligation to "respect the competence of" relevant IFBs. The combination of the two obligations, which can be seen as distinct but also complementary, risks, however, further reducing the operational capacity of the BBNJ Agreement, as the latter shall *both* respect the competence of *and* not undermine relevant IFBs.

Another useful point to discuss, however, is that effectiveness may refer to particular measures, rather than to the operation of an IFB as such. This interpretation is reasonable in light of two considerations: first, the fact that the reference to the competence of IFBs is covered by the obligation to "respect the competence," and thus the obligation to not undermine cannot reasonably refer to competence without duplication of functions of two expressions that, we have seen, must be treated as entailing distinct obligations; and second, the existence of similar provisions included in the Fish Stocks

[57] *Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962*, ICJ Reports 1962, 151.

[58] Here I draw on, and further elaborate, reflections shared in De Lucia, note 25.

[59] Oxford Dictionary, "undermine" at: https://en.oxforddictionaries.com/definition/undermine (accessed 15 March 2024).

[60] Ibid.

[61] Ibid.

[62] Oxford Learner's Dictionary, https://www.oxfordlearnersdictionaries.com/definition/english/undermine (accessed 15 March 2024). See also Scanlon, note 35.

Agreement (FSA).[63] As already noted in existing literature,[64] the FSA already provides for obligations on "not undermining," the meaning of which is clearer therein than in the BBNJ Agreement. All FSA provisions that include the obligation to not undermine relate it to conservation and management measures. These obligations target specifically the *effectiveness* of conservation and management *measures*,[65] in a way that parallels, and complements, the principle of compatibility.[66] The goal, thus, is the effective implementation of the FSA, and that entails obligations of relevant states—in their different capacity as flag states, port states, and so on—to not undermine such a goal. Given the different circumstances, goals, and operational scope, the meaning of the expression "not undermine" in the FSA can only offer *some* help for the interpretation of the meaning of "not undermine" in the BBNJ context. However, it does provide resources for an interpretation that, again, puts complementarity, compatibility, and effective implementation at the center,[67] something that is a useful approach for moving forward on the implementation of the BBNJ Agreement, if and when it enters into force, and for framing the operations of BBNJ bodies with regard to the relationship with other IFBs.[68] Furthermore, in Article 23(6) of the BBNJ Agreement, which is discussed in the fifth section of this article, a specific obligation to not undermine, in the context of making objections to COP decisions relating to ABMTs or MPAs, is explicitly linked to the effectiveness of measures, and thus offers additional support to the circumscription of the normative scope of the obligation to not undermine the effectiveness of measures.

This interpretation focusing on effectiveness of measures, as opposed to competence, is also consistent with two provisions of the BBNJ Agreement that explicitly stipulate that the focus of "not undermining" is the effectiveness of measures. One is Article 22(5), which sets out that "decisions and recommendations adopted by the Conference of the Parties in accordance with this Part shall not undermine the effectiveness of measures adopted in respect of areas within national jurisdiction," reproducing in effect the language and conceptual approach of the FSA.[69] The second is Article 23(6), whereby a party making an objection to a decision of the COP (discussed in detail in the next section) "shall not adopt measures nor take actions that would undermine the effectiveness of the decision."[70] Both these provisions offer additional support to the circumscription of the normative scope of the obligation to not undermine the effectiveness of measures.

[63] 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 and Highly Migratory Fish Stocks, adopted 4 August 1995, entered into force 11 December 2001, 2167 UNTS 3 [hereinafter, FSA]. Indeed, one of the early questions related to whether not undermining referred to the competence or mandate of a particular IFB, or whether it referred to the effectiveness of its operation (i.e. of the measures it may take), in line in this second case with the way the notion is understood in the FSA; see, e.g., De Lucia and Nickels, note 26.

[64] For example, Scanlon, note 35.

[65] FSA, Art 7(2), but see also Arts 16(2), 18(1), 18(3)(h), 20(4), 20(7), 23(3,) and 33(2).

[66] Both the principle of compatibility and the obligation to not undermine are contained in FSA, Art 7.

[67] As already argued, if briefly, in De Lucia, note 25.

[68] The IUCN had also submitted textual proposals that would on the one hand shift focus from not undermining to coherence and coordination, and, on the other, link not undermining with the effectiveness of measures adopted by IFBs; see, e.g., UN Doc. A/CONF.232/2022/INF.5, 32.

[69] BBNJ Agreement, Art 22(5).

[70] BBNJ Agreement, Art 23(6). This rule is, however, mitigated insofar as it does not apply when "such measures or actions are essential for the exercise of rights and duties of the objecting Party in accordance with the Convention."

Additionally, this interpretation, besides offering further support to the "distinct meaning" argument proposed so far, also supports an understanding of the BBNJ Agreement that is consistent with the larger framework of law of the sea under UNCLOS, as both the FSA and the BBNJ Agreement are implementing agreements of UNCLOS, and it would stand to reason to interpret key provisions under both agreements in a manner that is consistent with one another.

However, the two obligations, to respect the competence of and to not undermine, can also be read as complementary. I have already alluded to one way to do that, relating to a continuum of limitations that together they impose on the operational scope of the BBNJ Agreement, insofar as the first addresses direct conflict of, or overlapping, competence, while the other addresses practices and decisions that, while not directly encroaching on the competence of an IFB, may nevertheless undermine its operational effectiveness. Further, if the obligation to not undermine is referred to in the context of effectiveness of measures, the complementarity with the obligation to respect the competence of would even more clearly establish a continuum of limitations for the BBNJ Agreement's operational scope, spanning both general formal competence and specific measures.

Moving forward in the analysis of Article 22, and the ways in which it articulates, albeit ambiguously, the operational meaning of the obligation to not undermine, Article 22(1)(c) sets out some more specific rules with regard to the ways in which the COP may or may not relate to other IFBs. Indeed, the COP "may, where proposed measures are within the competences of other" IFBs, "make recommendations," both to parties to the BBNJ Agreement and to such IFBs, "to promote the adoption of relevant measures through such" IFBs, "in accordance with their respective mandates." This is a first modality to ensure the BBNJ Agreement does not undermine relevant IFBs, by way of effectively relinquishing competence to adopt measures, and rather to "promote" relevant measures to be adopted by one or several relevant IFBs. It stands to reason that we can understand this provision as opening a scenario where a measure adopted by the COP will not be effective in an area of competence of an IFB, and thus the COP may—though it does not have to—promote the adoption of a corresponding measure by the relevant IFB. If we take the example of the North-East Atlantic, the establishment of an MPA in the high seas pursuant to the objectives of the BBNJ Agreement would be effectively delegated to relevant regional bodies—such as OSPAR and the North-East Fisheries Management Commission—and to sectoral global bodies such as the IMO and the International Seabed Authority (ISA) with global competence with respect to shipping and mineral extraction in the Area. In effect, this would lead to the unfortunate situation of relying primarily on the status quo, which has not worked well to date in terms of coordination, if the Collective Arrangement is any indication.[71] This would at the same time limit significantly the role of the BBNJ Agreement, to little more than a "promoter" or stimulus toward action on the part of these other relevant IFBs. It would have, in other words, a subsidiary role in practice,

[71] See, e.g., E. Hey, "The OSPAR NEAFC Collective Arrangement and Ocean Governance: Regional Seas Organisations as the Setters of Conservation Standards in ABNJ?" (2022) 37 *International Journal of Marine and Coastal Law* 610. The Collective Arrangement is a formal agreement between legally competent authorities managing human activities in areas beyond national jurisdiction in the North-East Atlantic. For further details see OSPAR Agreement 2014-09 (Update 2018 Annex 2, 2021 Annex 1b, 2023 Annex 1a and 1b).

only in effect competent to establish ABMTs and MPAs where no other IFBs operate, thus contravening the idea, expressed for example by South Africa during IGC4, that the BBNJ Agreement, "to achieve its potential, needs to have priority when it comes to the conservation and sustainable use of biodiversity in ABNJ" vis-à-vis other relevant IFBs.[72]

However, there is scope for a coordinating role for the BBNJ Agreement that may bypass or reduce the limitations outlined thus far. Article 22(3) sets out that the COP "shall make arrangements for regular consultations to enhance cooperation and coordination with and among" IFBs "as well as coordination with regard to related measures adopted under such instruments and frameworks and by such bodies." This is a duty for the COP ("shall") and at the same time represents an opportunity for shifting focus from "respecting the competence of" and "not undermining"—and thus a potentially antagonistic relation with relevant IFBs—to a relationship of cooperation, with the COP able to take a central coordinating role. Importantly, the COP shall make arrangements for consultation in relation to two distinct modalities. The first is coordination *with* relevant IFBs, while the second is coordination that the COP shall foster *among* IFBs. This latter modality is crucial, as it may carve a central role for the BBNJ Agreement for the coordination of all relevant IFBs in a particular region.

Another way, however, in which the very existence of the BBNJ Agreement may foster cooperation and even act as a stimulus for IFBs to proactively align their practice with the general objectives of the BBNJ Agreement—instead of focusing on taking a defensive stance—may be drawn from the example of how the International Commission for the Conservation of Atlantic Tunas (ICCAT) has reacted to development in the Convention on the International Trade of Endangered Species of Wild Fauna and Flora (CITES).[73] ICCAT on at least two occasions has adopted decisions relating to or prompted by action taken under CITES. In the first case, ICCAT adopted a resolution dealing with the modalities of cooperation with CITES, which is recognized as the relevant framework for the regulation of "international trade in threatened and endangered species, including marine species."[74] This cooperation entails on the one hand that, under Article XV of CITES, CITES bodies are required to consult other IFBs that have competence with respect to species for which a proposal has been submitted by a party to CITES. This is also reflected in the ICCAT resolution, which establishes that ICCAT shall be consulted "fully" as regards any proposal relevant for ICCAT.[75] Additionally, ICCAT is committed to providing CITES with reports on the status of bluefin tuna populations[76] A second, more recent, example illustrates how ICCAT has acted proactively by adopting a recommendation on a conservation measure for sharks,

[72] United Nations, "Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (the Conference), in Response to the Invitation by the President of the Conference in her Note of 18 November 2019," UN Doc. A/CONF.232/2020/3 (15 April 2020), 41.

[73] Convention on International Trade in Endangered Species of Wild Fauna and Flora, adopted 3 March 1973, entered into force 1 July 1975, 993 UNTS 243 (CITES).

[74] Resolution by ICCAT on *Cooperation with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, 93-08 Misc.

[75] Ibid.

[76] Ibid.

following "the proposal to add porbeagle shark to Appendix II of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)."[77]

This example may offer a useful template for how the BBNJ Agreement and relevant IFBs may cooperate and also illustrates how the BBNJ Agreement might take up a central role of coordination. However, it also risks offering a template for how the operational scope of the BBNJ Agreement may be reduced to that of providing guidance upon which relevant IFBs need to act, something that would defeat the high ambition of the BBNJ Agreement as a global framework coordinating and setting ambitious standards for conservation in marine areas beyond national jurisdiction.

In conclusion, the terms of the question remain yet unclear, and ultimately much will be left to the actual practice of the COP and of relevant IFBs on the two questions discussed in this section, that is, the meaning and content of the obligation to "respect the competence of" and of the obligation to "not undermine." However, we can with a certain degree of certainty point to the distinct obligations entailed by the two expressions, and to a circumscribed normative scope of "not undermining" that relates to the effectiveness of measures and may relate to not punctual events, but to continuous practice.

Recognition under the BBNJ Agreement

A related issue pertains to so-called "recognition" under the BBNJ Agreement of ABMTs or MPAs adopted under other IFBs whose competence overlaps with that of the BBNJ Agreement. According to Article 22 of the BBNJ Agreement, dealing with the establishment of ABMTs including MPAs, the COP *may* "develop a mechanism" with regard to "existing area-based management tools, including marine protected areas adopted by relevant legal instruments and frameworks or relevant global, regional, subregional or sectoral bodies."[78] This soft language, however, does reflect the history of the negotiations on this specific point, which had been, by contrast, quite intense at times.[79]

The question of recognition, it is important to note, is linked to the broader question of coherence and coordination between ABMTs and MPAs adopted under IFBs competent to adopt such measures in areas beyond national jurisdiction, and with the objectives of the BBNJ Agreement. It is thus entangled with several other questions relating to long-standing debates on the institutional architecture and the decision-making framework to be adopted under the BBNJ Agreement, including the controversial issue of not undermining IFBs discussed in the previous section. The key question was whether ABMTs, including MPAs, established under IFBs should go through a process of formal recognition by a global BBNJ mechanism or body, and under which set of rules and standards. The key role of recognition as a pivotal mechanism in the relationship between the BBNJ Agreement and other IFBs was widely acknowledged by delegations as early as at IGC1, with Argentina, for example, observing that a process of recognition is a necessity given the actual existence of other relevant bodies and

[77] Supplemental Recommendation by ICCAT *Concerning Sharks*, 07/06, Byc. I am very grateful to my PhD student Ingrid Solstad Andreassen for having brought these decisions of ICCAT to my attention.

[78] BBNJ Agreement, Art 2(4).

[79] See, e.g., De Lucia, note 25.

institutions,[80] and the Russian Federation, by contrast, considering that there should not be a hierarchy with the BBNJ body at the apex, with "powers" of recognition of measures adopted by other bodies and institutions.[81] During IGC2, some delegations continued to support a strong role for a global BBNJ body with regard to recognition, with a view to ensuring coherence among measures across competent bodies, without, however, the creation of a mandatory process, or any consequences following the lack of recognition of regional or sectoral measures by the BBNJ mechanism or body.[82] Several developed countries delegations, however, "rejected outright the notion that measures adopted by [IFBs] would need to go through a process of recognition on the part of a BBNJ body,"[83] while others asserted that "a new treaty would need a carefully drafted and comprehensive provision to explain what recognition entails and to iron out all of its (potentially problematic) implications."[84] Developing countries, by contrast, had been somewhat in favor of a mandatory process of recognition by a BBNJ mechanism or body,[85] suggesting also that where measures adopted by IFBs were found to be incompatible with the BBNJ standards, a dialogue would need to be opened to fill the gap and bridge the conflict. However, in cases of dispute some developed countries wanted provisions to clarify that measures adopted by relevant existing bodies would prevail over the views of a global BBNJ body.[86]

At IGC3 the questions took a slightly different shape, and there was less emphasis on a formal process of recognition and more discussion of the idea that any measure taken by BBNJ bodies should "take into account" or, alternatively "recognize existing measures under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, as appropriate."[87]

Nevertheless, during IGC5 the issue of recognition remained on the table within the context of Article 19 of the draft text (now Article 22), on decision making with respect to ABMTs and MPAs. The difference in views is captured by the oscillations of successive drafts of the treaty text, as evident from both textual suggestions circulated during small-group negotiations,[88] and when comparing the text of the Further Revised Text (which in option II of Article 19 sets out a power to recognize "as appropriate, in accordance with the objectives and criteria laid down in this Part" ABMTs and MPAs established under relevant IFBs),[89] the text of the Refreshed Text

[80] Argentina, 7 September, 2018, personal annotation, on file with author.

[81] Russian Federation, 7 September, 2018, personal annotation, on file with author.

[82] New Zealand, 28 March 2019 personal annotation, on file with author.

[83] For example, Norway, Australia, Japan, Russia, and Iceland, De Lucia, note 25, 5.

[84] Singapore, ibid., 5.

[85] The like-minded Latin-American group, as well as the G77 and the African Group, ibid., 5.

[86] Singapore, ibid., 5.

[87] United Nations, "Draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," UN Doc. A/Conf/232/2019/6 (25 June 2019), Art 19.

[88] For example, ABMTs Small Group Discussions, 21 February 2023, Article 19 Decision-making, Small Group Led By EU (21 February 2023), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/abmts_small_groups_21_february_2023.pdf (accessed 15 March 2024) or ABMTs Small Group Discussions, 22 February 2023, Article 19 Decision-making, Small Group Led By EU (22 February 2023), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/abmts_small_groups_22_february_2023.pdf (accessed 15 March 2024).

[89] United Nations, "Further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, Advanced Unedited Version" (30 May 2022) Art 19, Option II, on file with author.

(where recognition was no longer included),[90] and the text of the Further Refreshed Text, prepared by the President in light of suggestions from delegations, where recognition made it back into the text in more articulate form:

> The Conference of the Parties may recognize, in accordance with the objectives, criteria and decision-making process laid down in this Part, area-based management tools, including marine protected areas, established under relevant regional, subregional and sectoral bodies, at the request of that body or of a Party authorized to act on its behalf, or Parties authorized to act on its behalf.[91]

It is useful to note, additionally, that recognition, in this latter draft text, is contingent on a request from a relevant IFB, rather than a process that can be initiated by the COP under the BBNJ Agreement. In the final text adopted in June 2023, recognition has finally taken the shape of a "possibility": a possibility in that the COP may develop a mechanism to deal with this thorny issue, subject to the restrictions under paragraphs 1 and 2 of Article 2. Paragraph 2 especially circumscribes the powers of the COP, as it sets out that the COP "shall respect the competences of, and not undermine, relevant" IFBs. In practice, this has meant that rather than finding an acceptable solution—perhaps an impossible achievement given the clearly contrasting positions of negotiating states—the landing zone has been found in removing the issue from the text and leaving an option that may (or may not) be pursued by the COP within well-defined boundaries. Ultimately, the nature and shape this mechanism may take remain unclear, as it does not necessarily entail a process of recognition driven by IFBs, and may take the form of a mere acknowledgment map or yet other forms the COP may devise. In the end, it will be up to the COP, as with respect to many other critical issues, to develop and operationalize the BBNJ Agreement, and it is likely that there will be heated discussions at the COP meetings on at least some of these outstanding issues.

Objections under the BBNJ Agreement

A third issue with potentially far-reaching implications pertains to the so-called "opt-out" option as set out in Article 23 of the BBNJ Agreement. Article 23 sets out the rules governing decision making with respect to the adoption of MPAs. The general rule is that decisions regarding the adoption of MPAs shall be taken by the COP, preferably by consensus[92] or otherwise by a three-fourths majority.[93] However, parties can make an objection to the decision while its entry into force is pending.[94] The objection must be presented in writing,[95] and may be made only on the basis of one (or more) of

[90] United Nations, "Refreshed draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," UN Doc. A/CONF.232/2022/CRP.12 (21 August 2022), Art 19.

[91] United Nations, "Further refreshed draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," UN Doc. A/CONF.232/2022/CRP.13 (26 August 2022), Art 19(2).

[92] BBNJ Agreement, Art 23(2).

[93] BBNJ Agreement, Art 23(2).

[94] BBNJ Agreement, Art 23(3). The latency period is of 120 days from the decision of the COP, as set out in Article 23(4).

[95] BBNJ Agreement, Art 23(5).

three reasons: The decision is "inconsistent" with the BBNJ Agreement, or with rights and obligations of the objecting party under UNCLOS[96]; the "decision unjustifiably discriminates in form or in fact against the objecting Party"[97]; and/or compliance with the decision cannot be "practicably" achieved "after making all reasonable efforts to do so."[98] The ideaof raising objections to measures taken by an international body is not unprecedented. For example, objections are permitted under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (SPRFC), pursuant to Article 17(2)(a), if a "decision unjustifiably discriminates in form or in fact against the member of the Commission or is inconsistent with the provisions of this Convention or other relevant international law."[99]

Before discussing in some detail each of the three possible grounds for an objection under the BBNJ Agreement, it is useful to review briefly the conditions on the "right of objection" under Article 23(5) of the Agreement. First, a party making an objection "shall," as far as practicable, adopt "alternative measures or approaches that are equivalent in effect" to the measures objected to. At the same time, the objecting party shall refrain from adopting measures or from taking actions "that would undermine" the effectiveness of the measure adopted under the BBNJ Agreement.[100] This provision seeks to balance the right of making objections with the need to ensure the integrity of measures adopted by BBNJ bodies through a principle of equivalence and through compatibility (a measure is compatible with another measure if it does not undermine it), resonating, the latter in particular, with the approach taken by the FSA.[101]

A second condition on the right to object is that the objecting party needs to report, at the time of notification of the objection and periodically thereafter, on the implementation of equivalent and compatible measures and approaches taken, for the purposes of the monitoring and review process regulated by Article 26.[102] Further, objections have a time limit, and need to be renewed by written notification every three years, and only "if the objecting Party considers it still necessary."[103] Failure to renew determines the automatic withdrawal of the objection.[104] Finally, objections (like the decisions of the COP they refer to) "shall be made publicly available" and "transmitted" to all states and all relevant IFBs,[105] with the implication that publicity may reduce what may otherwise be "frivolous" utilizations of the right to object.

[96] BBNJ Agreement, Art 23(5)(a).

[97] BBNJ Agreement, Art 23(5)(b).

[98] BBNJ Agreement, Art 23(5)(c).

[99] Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted 14 November 2009, entered into force 24 August 2009, 2899 UNTS 211, Art 17(2)(c). I am very grateful to one of the anonymous reviewers, who made me aware of such precedent.

[100] BBNJ Agreement, Art 23(6).

[101] In particular, the FSA, Article 7(2), which sets out that "conservation and management measures for straddling fish stocks and highly migratory fish stocks for the high seas and areas under national jurisdiction shall be compatible." Article 7(2)(a) explicitly links compatibility with the need not to undermine the effectiveness of measures. See W. Burke, *The New International Law of Fisheries; UNCLOS 1982 and Beyond* (Clarendon Press, 1994), and A. Oude Elferink, "The Determination of Compatible Conservation and Management Measures for Straddling and Highly Migratory Fish Stocks" (2001) 5 *Max Planck Yearbook of United Nations Law Online* 551.

[102] BBNJ Agreement, Art 23(7).

[103] BBNJ Agreement, Art 23(8).

[104] BBNJ Agreement, Art 23(9).

[105] BBNJ Agreement, Art 23(10).

But what is the effect of the objection? It very simply suspends the binding nature of the measure adopted by the COP for the objecting party.[106] It is, in other words, potentially a *big deal*, especially in the hypothetical scenario that multiple parties, all of which are crucial with respect to the geographical coverage or sectoral scope of the measure, object to the same decision. The key questions, however, relate to the legitimate grounds for making an objection.

Having reviewed general restrictions to and conditions on the use of the right to object, as well as the effects of an objection, we next discuss the grounds that justify making an objection.

With regard to the first of the three available grounds under Article 23 of the BBNJ Agreement, it is probably useful to distinguish between its two components. The first component refers to a decision that is considered inconsistent with the BBNJ Agreement itself. This component offers an internal control mechanism to individual parties in addition to the broader and collective consideration of draft decisions during the process of negotiation by the COP. It is on this basis that objections on three separate occasions have been made against decisions of the SPRFC.[107] Objecting parties have raised issues related to the interpretation and application of provisions of the SPRFC or even to the rules of procedure of the SPRFMO (South Pacific Regional Fisheries Management Organisation).[108] It is reasonable to expect similar objections in the context of the BBNJ Agreement with respect to decisions on ABMTs and/or MPAs, especially perhaps in cases of measures adjacent to areas within the jurisdiction of one or more parties to the BBNJ Agreement, where both substantive and procedural aspects of a decision may be problematized.

The second component refers more broadly to a decision inconsistent with rights and obligations of the objecting party under UNCLOS. One immediate question is whether high seas freedoms may be invoked under this provision in order to raise an objection, and under what conditions a decision may be considered to be inconsistent with such rights and obligations. This in turn may depend entirely on the specific details submitted with the management plan associated with the decision, rather than with the decision in and of itself. Here, some questions may need to be linked to, and understood against, the background of Articles 237 and 311 of UNCLOS. In relation to Article 237, which sets out the specialized rules with regard to treaties relevant to the subject matter of Part XII of the Convention, and thus to the protection and preservation of the marine environment, it is useful to highlight at the outset that its paragraph 1 requires that while Part XII is "without prejudice" to rules agreed under treaties that are relevant *ratione materiae* and that have been "concluded previously," the same applies to subsequent treaties related to the protection and preservation of the marine environment *to the extent that* they are "concluded in furtherance

[106] BBNJ Agreement, Art 23(4).

[107] While there is no space for a detailed analysis, the reader is directed to the relevant review panel decisions in relation to the three instances when objections have been raised by parties to SPRFC: in 2023, by Russia (and China, which, however, withdrew its objection), in 2013 by Russia, and in 2018 by Ecuador.

[108] See, e.g., *In Proceedings Conducted by The Review Panel Established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with Regard to the Objection by the Republic of Ecuador to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation* (CMM 01-2018), Findings and Recommendations of the 2018 Review Panel, PCA Case No. 2018-13.

of the general principles set forth" in UNCLOS. It is reasonable to consider that such general principles would refer, in the first instance, to those laid out in Part XII, and thus primarily Article 192 and secondarily Article 194, and especially to paragraph 5. In this respect, the BBNJ Agreement, and the measures adopted under its Part III, would be prima facie "in furtherance" of such principles.

However, as Article 237(1) explicitly refers to the "protection and preservation of the marine environment," generic reference to the "general principles set forth" in UNCLOS may be understood to refer to the broader framework of the entire Convention. In this case, it would be precisely principles such as the freedoms of the high seas that may be the relevant points of reference that new treaties should be "in furtherance of." Simultaneously, Article 237(2) sets out that "specific obligations assumed […] under special conventions […] should be carried out in a manner consistent with the general principles and objectives of UNCLOS." This principle of consistency must also be read against the broader context of Article 311—in relation to which, however, Article 237 is *lex specialis*—as Article 311 establishes a general principle of compatibility, according to which the "without prejudice" clause functions only insofar as other treaties are "compatible" with UNCLOS, and to the extent that the rights arising from such other treaties "do not affect the enjoyment" of the rights or the performance of the obligations that other state parties—that is, states not party to these other treaties—have under UNCLOS. This is a key passage. The BBNJ Agreement, as an implementing agreement of UNCLOS, is presumed to be consistent and compatible with UNCLOS, and to have been adopted in furtherance of its general principles and objectives. This is especially the case for Part XII of UNCLOS, with specific regard to Parts III and IV of the BBNJ Agreement, respectively dedicated to ABMTs, including MPAs, and to Environmental Impact Assessments (EIAs).

Parties to the BBNJ Agreement then, to the extent that their rights under the BBNJ Agreement are compatible with UNCLOS, will not see their rights "altered" by UNCLOS. However, UNCLOS prevails in the case of states party to UNCLOS concluding other treaties that seek to modify UNCLOS's rules *inter se*, where those treaties include derogations that are "incompatible with the effective execution of the object and purpose" of UNCLOS, or where they may negatively affect the "application of the basic principles" of UNCLOS,[109] or where they affect the exercise of rights or the performance of obligations of parties to UNCLOS but not parties to these other treaties.[110] This latter case is not relevant in the context of the right to objection under discussion, as only parties to the BBNJ Agreement can make objections. The first and second rules, however, are very relevant. Without proceeding to a more comprehensive analysis of these provisions, or examination of how they should be read and understood within the framework of the "principle" of systemic integration,[111] it is sufficient to point out that there is ample scope to bring an objection within the remit of this criterion, to the extent that certain "basic principles" of UNCLOS may be invoked, such as the high seas freedoms. Of course, high seas freedoms are increasingly regulated and were never understood to be absolute, as they have always been subject to the principle of

[109] UNCLOS, Art 311(3).
[110] UNCLOS, Art 311(4).
[111] International Law Commission, note 51, 84.

due regard.[112] Part XII, in particular, sets limitations on high seas freedoms that are necessary and proportional to the protection and preservation of the marine environment and provides the context to understand decisions taken under the BBNJ Agreement that may limit, to some extent, high seas freedoms in furtherance of both special and general objectives of UNCLOS. Questions, however, remain, and a reality test will only be available if and when the COP has to decide on an objection.

It is also worth mentioning that during the negotiations of Article 23 of the BBNJ Agreement, initial suggestions advocated for an additional inclusion, expanding the grounds of objection to include inconsistency with rights and duties arising under "other relevant rules of international law."[113] This addition, understandably, however, would have excessively enlarged the scope of the grounds for objection.

This first ground for objection is perhaps the one that raises the most challenging questions, so I only briefly discuss, owing to reasons of space, the other two grounds, to which perhaps future research can devote more attention. The second ground for objection relates to cases where a "decision unjustifiably discriminates in form or in fact against the objecting Party." Here, the two key terms are "unjustifiably" and, even more so, "discriminates." It is not intuitive as to what could be construed as discriminating with respect to a decision to adopt an ABMT or an MPA under the rules of the BBNJ Agreement. The key, however, is to determine what would constitute an "unjustifiable" discrimination. This formulation, it must be noted, reproduces verbatim a formulation contained in Article 17(2)(c) of the SPRFC,[114] as well as the formulation in Article 119(3) of UNCLOS, which also relates to conservation measures in the high seas.[115] Albeit both related to fisheries, and particularly to the issue of quota allocation and of rights of participation in fishing activities, both provisions may offer relevant indications for interpretation in the different context of the BBNJ Agreement. In this sense, the review panel adjudicating an objection raised by Ecuador in 2018 against a decision by SPRFMO has explicitly discussed the meaning of unjustifiable discrimination, with specific regard to the two distinct types of discrimination contemplated: "in form" and "in fact" discrimination. As the SPRFMO review panel found, the double formulation includes "not only direct discrimination (including discrimination as regards procedure), but also measures which, although […] not overtly discriminatory, have an effect, substantive result, or outcome that is discriminatory."[116] All three objections raised under the SPRFC raised issues of unjustifiable discrimination in form and in

[112] On which, see, e.g., D. Anderson, "Freedoms of the High Seas in the Modern Law of the Sea" in D. Freestone, Richard Barnes and David Ong (eds), *The Law of the Sea. Progress and Prospects* (Oxford University Press, 2006), 327; J. Gaunce, "On the Interpretation of the General Duty of 'Due Regard'" (2018) 32 *Ocean Yearbook* 27; T. Treves, "Due Regard Obligations under the 1982 UN Convention on the Law of the Sea: The Laying of Cables and Activities in the Area" (2019) 34 *International Journal of Marine and Coastal Law* 167.

[113] ABMTs Small Group Discussions, 21 February 2023, Article 19 bis, Small Group Led By Australia (21 February 2023), https://www.un.org/bbnj/sites/www.un.org.bbnj/files/abmts_small_groups_21_february_2023.pdf (accessed 15 March 2024).

[114] Which sets out that "The only admissible grounds for an objection are that the decision unjustifiably discriminates in form or in fact against the member of the Commission, or is inconsistent with the provisions of this Convention or other relevant international law as reflected in the 1982 Convention or the 1995 Agreement."

[115] Article 119(3) sets out that "States concerned shall ensure that conservation measures and their implementation do not discriminate in form or in fact against the fishermen of any State." This followed calls for the inclusion of provisions ensuring the "equitable allocation" (formulation proposed by the United States), or a prohibition to discriminate "in form and in substance" (formulation proposed by the Soviet Union) "against fishermen of any State fishing in those areas." See R. Rayfuse, "Article 119" in A. Proelss (eds) *United Nations Convention on the Law of the Sea. A Commentary* (Beck, 2017), 830, 835.

[116] Findings and Recommendations of the 2018 Review Panel, PCA Case No. 2018-13, note 116, [99].

fact, and they all related, in practice, to issues of allocation of fishing quotas.[117] Given the different context, how discrimination may play out in a BBNJ context isn't clear at the outset, but it is conceivable to imagine situations where discrimination may be invoked with respect to measures taken under the BBNJ Agreement that have differential impact on the exercise of rights of parties that may have jurisdiction—and thus economic interests—on areas adjacent to areas in ABNJ where MPAs may have been adopted, or whose rights in the high seas may be curtailed or limited by the adopted measures in ways that are not (perceived as) equitable.

The third and final basis for an objection is of a more practical nature, as it allows a party to make an objection when compliance with a decision cannot be "practicably" achieved "after making all reasonable efforts to do so."[118] It seems reasonable, as it were, to consider that the meaning of "reasonable efforts" rests on a due diligence test,[119] which means its content is "variable"[120] and may also be subject to the usual qualifiers such as capabilities,[121] appropriateness,[122] and technical or economic capacity.[123] Expressions such as "reasonable efforts" aim to "define how an obligation must be performed, its nature and intensity,"[124] and are often considered interchangeable with due diligence, as due diligence itself "generally requires" a state to prove, by way of taking appropriate measures, that it has made reasonable efforts to achieve a particular objective,[125] which in this case is compliance with a decision adopted by the COP of the BBNJ Agreement.

A further consideration is in order. Given that an objection must be made *prior* to the entry into force of a decision, there seems to be a shortcut in that the objection based on this criterion must show that reasonable efforts to achieve compliance have been made, but *prior* to the entry into force of the decision, as once a decision has entered into force no objection can be made. Logically, this means that the temporal scope for establishing both that a party cannot "practically comply" with a decision

[117] Russia, for example, objected against Conservation Measure CMM 01-2023 of SPRFMO, on the allocation of fishing quotas, on the basis of having been unjustifiably discriminated against (by not having been allocated quotas, to which Russia argued was entitled on several grounds), in form and in fact, on several grounds, including by the failure to seek consent prior to the allocation of quotas (the same issue was raised in the same objection as an inconsistency with SPRFC), and contravention of the principle of compatibility enshrined in Article 21 of SPRFC. *In Proceedings Conducted by The Review Panel Established under Article 17 and Annex II of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean with Regard to the Objection by the Russian Federation to a Decision of the Commission of the South Pacific Regional Fisheries Management Organisation (CMM 01-2023)* Findings and Recommendations of the Review Panel 1 July 2023, PCA Case No. 2023-33, 30. An analysis of the objections raised and decided under SPRFC is not possible here for reasons of space.

[118] BBNJ Agreement, Art 23(5)(c).

[119] The International Law Commission, for example, has considered that "due diligence is manifested in reasonable efforts by a State to…." International Law Commission Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, commentary to Art 3, [10].

[120] As considered in *Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011*, ITLOS Reports 2011, p. 10, [117].

[121] Paris Agreement to the United Nations Framework Convention on Climate Change, adopted 12 December 2015, entered into force 4 November 2016, 3156 UNTS 79, Art 5(1); or United Nations Framework Convention on Climate Change, adopted 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107, Art 2(2).

[122] CBD, Arts 6, 7, 8, 9, and 10.

[123] Ibid; indeed the full formulation of all of those articles is "as far as possible and as appropriate."

[124] M. Fontaine and F. de Ly, "Best Efforts, Reasonable Care, Due Diligence and General Trade Standards in International Contracts" in M. Fontaine and F. de Ly, *Drafting International Contracts* (Brill, 2006), 188.

[125] L. Duvic-Paoli, *The Prevention Principle in International Environmental Law* (Cambridge University Press, 2018), 199.

and that it has made all "reasonable efforts" is limited to 120 days (that is, 4 months), which is the time it takes for a decision to enter into force after its adoption.

Conclusion

This article has offered an analysis of selected key provisions of the newly adopted BBNJ Agreement, which is potentially a game-changing legal framework for the conservation of marine biological diversity in areas beyond national jurisdiction, and one widely acclaimed as a historic achievement and a triumph of multilateralism in times of geopolitical tensions and open conflicts. The article has focused in particular on Part III of the Agreement, dedicated to ABMTs, including MPAs, given the crucial role of MPAs as an important initial impetus for the negotiations, as one of the key gaps identified early on in the process, owing to the lack of a global legal basis for adopting area-based measures, and especially MPAs, in the high seas. The substantive analysis of the article has focused on three themes that are arguably crucial with respect to the effective implementation of the BBNJ Agreement: the relationship between the BBNJ agreement and other relevant IFBs, including how and how well or clearly Part III of the Agreement has given operational meaning to the (in)famous notion of not undermining; the issue of recognition of measures adopted under relevant IFBs, an issue related to the question of not undermining; and the right to object to decisions adopted by the COP of the BBNJ Agreement in relation to ABMTs and MPAs. While the issues raised for each of the themes are varied, there are perhaps two common threads that can be drawn out by way of conclusion. The first is that there is significant potential for a practical reduction of the capacity of the BBNJ Agreement to engender real change in a complex and at times parochial regulatory landscape, with many potential conflicts of competence with IFBs that by and large have demonstrated that they will not see their competence encroached on by the new BBNJ Agreement. Second, as many formulations of BBNJ Agreement obligations remain open to multiple interpretations, much of the actual, operational shape of the BBNJ Agreement will be left to the way the COP executes its mandate and to how it will interpret and implement key provisions and how it will fill the operational space if and when the Agreement enters into force. The adoption of the BBNJ Agreement, indeed, is only the beginning.

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ORCID

Vito De Lucia http://orcid.org/0000-0002-8099-0029