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Fragmentation Revisited

A Critical Analysis of the Effects of Introducing the BBNJ Agreement into the Ocean Governance Landscape

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Abstract

A prevalent concern in the literature surrounding the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement) is the relationship between fragmentation and governance effectiveness. This paper provides a nuanced perspective on the BBNJ Agreement's role in ocean governance by combining legal analysis with fragmentation theory. Defining 'fragmentation' in relation to institutions, norms and actors, this paper argues that increased fragmentation caused by the BBNJ Agreement is not forcibly problematic. The Agreement may enhance governance effectiveness, by contributing to synergistic or cooperative fragmentation. However, in absence of wide-spread ratification, there also is a high risk to introduce conflicting norms into the ocean governance landscape. Serious efforts towards ratification and coherent implementation of norms of the Agreement are therefore needed for an effective protection of biodiversity in the ABNJ.

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biodiversity beyond national jurisdiction (BBNJ) – fragmentation theory – area-based management tools (ABMTs) – marine protected areas (MPAs) – ocean governance

1 Introduction

Marine biodiversity is under threat due to a wide range of anthropogenic stressors, including, but not limited to, fishing, shipping, and climate change.[1] Improving this situation is among the objectives of the June 2023 Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (hereinafter referred to as BBNJ Agreement).[2] The Agreement is a legally binding instrument in the form of an implementing agreement to the United Nations Convention of the Law of the Sea (UNCLOS).[3] It aims to ensure the conservation and sustainable use of biodiversity in Areas Beyond National Jurisdiction (ABNJ),[4] focusing on four areas: Marine Genetic Resources, Measures such as Area-based Management Tools, Environmental Impact Assessments, and Capacity Building and Technology Transfer.[5]

In 2022, the EU established the high ambition coalition for an effective BBNJ Agreement.[6] Its members, including several Nordic countries,[7] aimed to work towards "ambitious, effective, inclusive, fair, balanced and future-proofed BBNJ

1 Ben Lascelles et al., "Migratory Marine Species: Their Status, Threats and Conservation Management Needs," *Aquatic Conservation: Marine and Freshwater Ecosystems* 24, no. S2 (2014), pp. 114–116; Bethan C. O'Leary et al., "Options for Managing Human Threats to High Seas Biodiversity," *Ocean & Coastal Management* 187 (2020): 105110, pp. 2–4; Siddharth S. Yadav and Kristina M. Gjerde, "The Ocean, Climate Change and Resilience: Making Ocean Areas beyond National Jurisdiction More Resilient to Climate Change and Other Anthropogenic Activities," *Marine Policy* 122 (2020): 104184, pp. 2–3.

2 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, 19 June 2023 [BBNJ Agreement].

3 United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 396 [UNCLOS].

4 BBNJ Agreement, *supra* note 2, Article 2.

5 Elizabeth Mendenhall, Rachel Tiller, and Elizabeth Nyman, "The Ship Has Reached the Shore: The Final Session of the 'Biodiversity Beyond National Jurisdiction' Negotiations," *Marine Policy* 155 (2023): 105686.

6 European Union, *A High Ambition Coalition on Biodiversity beyond National Jurisdiction Protecting the Ocean: Time for Action* (Ref. Ares(2022)107868 – 07/01/2022).

7 In the following, we refer to the Nordic states as Denmark, Finland, Faroe Islands, Greenland, Iceland, Norway, Sweden and Åland in accordance with the definition of the Nordic Council.

Treaty".[8] The Nordic states have been very vocal about their support for the BBNJ Agreement both during the negotiation processes and after. In signing the treaty, Sweden's then minister for climate and environment, for example, described the Agreement as "pioneering", highlighting Sweden's pivotal role in the process.[9] Acting upon the BBNJ Agreement is also part of Nordic cooperation under the Nordic Council of Ministers and the Nordic Council,[10] and has been highlighted by Nordic states' representatives in other fora, such as the meeting of the Preparatory Committee for the Fourth International Conference on Small Island Developing States (SIDS4).[11] While the Nordic states have not always been aligned politically during the BBNJ treaty negotiations,[12] they have since the adoption of the Agreement united to promote its swift and effective implementation.[13]

One of the points of interest that has been highlighted across the literature regarding the effectiveness of the Agreement is the issue of fragmentation.[14]

8 European Union, *supra* note 6, p. 2.

9 Regeringen och Regeringskansliet, "Tobias Billström Signs High Seas Treaty", 20 September 2023, <www.government.se/press-releases/2023/09/tobias-billstrom-signs-high-seas-treaty>, visited 19 February 2025.

10 Nordic Council, "About the Nordic Working Group for Oceans and Coastal Areas" <www.norden.org/en/information/about-nordic-working-group-oceans-and-coastal-areas>, visited 19 February 2025.

11 *Nordic statement at the second session of the Preparatory Committee for the Fourth International Conference on Small Island Developing States* (*SIDS4*), 1 April 2024, <estatements.unmeetings.org/estatements/14.0487/20240401100000000/BNwAk9g1Bakq/FtX6Cv1RsnMb_en.pdf>, visited 19 February 2025.

12 *See e.g.* IISD, "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, (2019a), p. 5; IISD, "Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019," *Earth Negotiations Bulletin* 25 no. 218, April 8, (2019b), p. 5.

13 *See e.g., supra* note 9; Nordic Council, "'Our commitment to co-operation on climate and environmental issues extends far beyond our own borders" <www.norden.org/en/news/our-commitment-co-operation-climate-and-environmental-issues-extends-far-beyond-our-own,> visited 19 February 2025; Government of Iceland, *BBNJ PrepCom Iceland general statement*, 24 June 2024, <www.stjornarradid.is/efst-a-baugi/frettir/stok-frett/2024/06/24/BBNJ-PrepCom-Iceland-general-statement/>, visited 19 February 2025.

14 Rakhyun E. Kim, "The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance," *Marine Policy* 165 (2024): 106190; Sarah Lothian, "The BBNJ Agreement: Through the Prism of Deep-Sea Vulnerable Marine Ecosystems," *Ocean Development & International Law* 54, no. 4 (2023): 469–99; Bastiaan E. Klerk, "From Undermining to Strengthening: Implications of the Forthcoming Agreement on Biodiversity beyond National Jurisdiction for MPA Governance in the North-East Atlantic," *The International Journal of Marine and Coastal Law* 38, no. 1 (2023): 107–39; Daniel Bodansky, "Four Treaties

The concept describes how policy areas (such as conservation of the marine environment) consist of a "patchwork" of international institutions that differ in their scope, constituencies and subject matter.[15] The BBNJ Agreement is introduced into an "already crowded institutional landscape" and will apply to the ABNJ alongside a wide range of bodies and actions of (state and non-state) actors.[16] Each of these bodies possesses distinct competences and jurisdiction to address drivers of ocean biodiversity loss. Fragmentation in relation to the BBNJ Agreement is therefore a topic of debate, which is especially pertinent in relation to the Nordic countries' engagement with the Agreement. This is both due to their ambitions regarding an effective implementation of the Agreement and the fact that they are directly involved in high seas biodiversity governance through membership in several organisations relevant to biodiversity in the ABNJ.[17]

While the issue of fragmentation has been brought up by several authors, a nuanced analysis of the BBNJ Agreement from the perspective of fragmentation theory is lacking. This nuanced perspective is important, as scholars have yet to reach consensus on whether fragmentation contributes to, or inhibits institutions from effectively solving the problems which they were created to deal with.[18] Research on global environmental governance more generally shows that fragmentation can obstruct effective governance in some cases,[19] but can, in other cases, also catalyse effectiveness by enabling experimentation in different fora, allowing actors to test and implement creative solutions.[20]

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in One: The Biodiversity Beyond National Jurisdiction Agreement," *American Journal of International Law* 118, no. 2 (2024): 299–323; Jianye Tang, "Form Follows Function: An Initial Evaluation of the BBNJ Agreement's Achievements Regarding the 'Not Undermining' Proviso," *Marine Policy* 159 (2024): 105952; Marta Abegón-Novella, "Making Sense of the Agreement on Biodiversity Beyond National Jurisdiction: The Road Ahead," *Environmental Policy and Law* 53, no. 5–6 (2023): 439–58.

15 Frank Biermann et al., "The Fragmentation of Global Governance Architectures: A Framework for Analysis," *Global Environmental Politics* 9, no. 4 (2009) p. 16.

16 Kim, *supra* note 14, p. 1.

17 *See e.g.* Table 1 for an overview of relevant bodies.

18 Biermann et al., *supra* note 15; Keith Carlisle and Rebecca L. Gruby, "Polycentric Systems of Governance: A Theoretical Model for the Commons," *Policy Studies Journal* 47, no. 4 (2019): 927–52; Olav S. Stokke, "The Interplay of International Regimes: Putting Effectiveness Theory to Work," FNI Report No. 14/2001, 2001, <www.files.ethz.ch/isn/100208/01-14-oss.pdf>, visited 19 February 2025.

19 Biermann et al., *supra* note 15; Kal Raustiala and David G. Victor, "The Regime Complex for Plant Genetic Resources," *International Organization* 58, no. 2 (2004): 277–309.

20 Thomas Gehring and Benjamin Faude, "A Theory of Emerging Order within Institutional Complexes: How Competition among Regulatory International Institutions Leads to Institutional Adaptation and Division of Labor," *The Review of International Organizations* 9, no. 4 (2014): 471–98; Elinor Ostrom, "Polycentric Systems for Coping with Collective Action and Global Environmental Change," *Global Environmental Change* 20, no. 4 (2010): 550–57.

Against this background, this paper aims to provide an analysis of the possible effects of the BBNJ Agreement on the presently fragmented governance of biodiversity in the ABNJ. The paper first introduces the concept of fragmentation as a theory to describe the relationship between different institutions, actors and norms in a given issue area (in this case, the protection of biodiversity in the ABNJ). Taking the starting point that fragmentation, to a certain extent, is unavoidable, the paper introduces different types of fragmentation and their potential implications for governance effectiveness.[21] This theoretical introduction is followed by a brief introduction to the regulatory landscape concerning biodiversity in the ABNJ. The core of the analysis considers the provisions of the Agreement, and the possible effects that the Agreement can have on the fragmentation of ocean governance in relation to biodiversity. The paper concludes with practical recommendations for further steps to enhance effectiveness from a fragmentation perspective.

2 Introducing Fragmentation as an Analytical Framework for Governance Effectiveness

The relationship between the BBNJ Agreement and existing instruments, frameworks, and bodies (IFBs) governing various activities in the ABNJ has received increased interest over the past years.[22] Discussions have especially focused on the Agreement's Part III (Area-based Management Tools including Marine Protected Areas), which is the section of the Agreement with by far the most references to other IFBs.[23] Many of the studies in the field analyse how the Agreement's text should be interpreted, and how this will affect existing efforts to protect the marine environment in the ABNJ.[24] The two

21 Biermann et al., *supra* note 15, pp. 17–18, 31.

22 *See e.g.,* Andrew Friedman, "Beyond 'Not Undermining': Possibilities for Global Cooperation to Improve Environmental Protection in Areas beyond National Jurisdiction," *ICES Journal of Marine Science* 76, no. 2 (2019): 452–56; 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 (2018): 405–16; Kim, *supra* note 14.

23 Tang, *supra* note 14, p. 3.

24 *See e.g.,* Wen Duan, "Area-Based Management Tools under the BBNJ Agreement: Ambition or Illusion?," *Review of European, Comparative & International Environmental Law* 33, no. 1 (2024): 1–10; Christine Gaebel et al., "Institutionalising Science and Knowledge under the Agreement for the Conservation and Sustainable Use of Marine Biodiversity of Areas beyond National Jurisdiction (BBNJ): Stakeholder Perspectives on a Fit-for-Purpose Scientific and Technical Body," *Marine Policy* 161 (2024): 105998; Rui Jiang and Ping Guo, "Sustainable Management of Marine Protected Areas in the High Seas: From

dominant approaches taken to analyse the BBNJ Agreement's effects on the existing governance landscape are the perspectives of Regime Complexity[25] and Polycentric Governance.[26] Kim argued that the Agreement could orchestrate existing IFBs and further similar norms between them.[27] Langlet and Vadrot highlight the connection with knowledge from other international organisations in the Agreement's drafting progress.[28] Gjerde and Yadav identify ways through which the BBNJ Agreement contributes to integrated global and regional action in the ABNJ.[29] Dalaker analyses the Agreement from the perspective of polycentric governance, demonstrating that the Draft Agreement could not satisfy all criteria for polycentric governance.[30]

Fragmentation can be characterised as the third dominant concept used to characterise interactions between different regimes alongside Regime Complexity and Polycentric Governance.[31] Each concept concentrates on related, but different structural features within governance, and in the words of Kim, "[a]ll three concepts have merit in describing and explaining the structural intricacies of global governance."[32]

Regional Treaties to a Global New Agreement on Biodiversity in Areas beyond National Jurisdiction," *Sustainability* 15, no. 15 (2023): 11575; Pascale Ricard, "The Advent of the 2023 'BBNJ' Agreement: A Preliminary Legal Analysis," *Environmental Policy and Law* 53, no. 5–6 (2024): 427–37; Abegón-Novella, *supra* note 14; Lothian, *supra* note 14; Tang, *supra* note 14.

25 Kim, *supra* note 14; Arne Langlet and Alice Vadrot, "Expert Authority Politics in the Marine Biodiversity Complex," *Global Environmental Politics* 24, no. 2 (2024): 98–121.

26 Kristina M. Gjerde and Siddharth S. Yadav, "Polycentricity and Regional Ocean Governance: Implications for the Emerging UN Agreement on Marine Biodiversity Beyond National Jurisdiction," *Frontiers in Marine Science* 8 (2021): 704748; Kristine E. Dalaker, "Imagining a Polycentric Approach to Institutional Governance for Marine Areas beyond National Jurisdiction", in *International Law and Marine Areas beyond National Jurisdiction* ed. Vito De Lucia et al., (Leiden: Brill Nijhoff, 2022), pp. 353–391.

27 Kim, *supra* note 14.

28 Langlet and Vadrot, *supra* note 25.

29 Gjerde and Yadav, *supra* note 26.

30 Dalaker, *supra* note 26.

31 Rakhyun E. Kim, "Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach," *International Studies Review* 22, no. 4 (2020): 903–931; Frank Biermann and Rakhyun E. Kim (eds.), *Architectures of Earth System Governance: Institutional Complexity and Structural Transformation* (Cambridge: Cambridge University Press, 2020); Gjerde and Yadav, *supra* note 26; Arne Langlet and Alice B. M. Vadrot, "Not 'Undermining' Who? Unpacking the Emerging BBNJ Regime Complex," *Marine Policy* 147 (2023): 105372; Robin Mahon and Lucia Fanning, "Regional Ocean Governance: Integrating and Coordinating Mechanisms for Polycentric Systems," *Marine Policy* 107 (2019a): 103589; Sebastian Oberthür and Olav S. Stokke, *Managing Institutional Complexity: Regime Interplay and Global Environmental Change* (The MIT Press, 2011).

32 Kim, *supra* note 31, p. 904.

Although they take different approaches, several studies on the BBNJ Agreement refer to fragmentation explicitly. By some, fragmentation is variously referred to as "problematic",[33] and something to "combat"[34] or "overcome",[35] which leaves the impression that fragmentation may hinder effective ocean governance.[36] However, the effect of the Agreement on the fragmentation of the ocean governance landscape from the perspective of fragmentation theory, and the potential implications for the effectiveness of ocean governance, is still open for analysis.

Fragmentation, as conceptualised by Biermann et al., focuses on the fragmentation of institutions, norms and actors in a given issue area. This perspective therefore includes but is not limited to the fragmentation of legal norms.[37] In 2006, the International Law Commission's Report on Fragmentation in International Law addressed the concept of fragmentation resulting from "the emergence of specialised and (relatively) autonomous rules or rule complexes, legal institutions and spheres of legal practice".[38] Noting the emergence of different branches of international law and potential tensions that can arise from their interaction, the report provides an overview of different rules that can solve norm-conflicts between different instruments, detailing their application and limitations.[39] However, the report fails to address "international institutions and governance structures" that can contribute to fragmentation in a certain area.[40] To give a coherent perspective of the impact of the BBNJ Agreement on the ocean governance landscape, these institutions and governance structures need to be considered, as they can have an impact on governance effectiveness. The work of Biermann et al. provide a framework for doing this, focusing on three different types of fragmentation.

33 Tang, *supra* note 14, p. 6.

34 Klerk, *supra* note 14, pp. 126–136.

35 Lothian, *supra* note 14, p. 489; Jiang and Guo, *supra* note 24, p. 8.

36 *See also* Lucia Fanning and Robin Mahon, "Governance of the Global Ocean Commons: Hopelessly Fragmented or Fixable?," *Coastal Management* 48, no. 6 (2020): 527–33 who have previously noted similar language surrounding fragmentation.

37 Biermann et al., *supra* note 15, pp. 16–19.

38 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (UN Doc A/CN.4/L.682), para. 8.

39 Harro van Asselt, "Managing the fragmentation of international climate law" in *Climate Change and the Law,* ed. Erkki J. Hollo et al., (Berlin, Springer, 2013), pp. 332–333.

40 Harro van Asselt, Francesco Sindico and Michael A. Mehling, "Global climate change and the fragmentation of international law," *Law & Policy* 30, no. 4 (2008), p. 427.

2.1 *Different Types of Fragmentation*

According to Biermann et al.[41] there are three "ideal"[42] types of fragmentation: 'synergistic', 'cooperative' and 'conflictive' fragmentation.[43] Which type is present is assessed across three dimensions: the degree of institutional integration, the degree of norm conflict between the different regimes, and the constellation of actors involved.[44] Each type has different effects on governance.

Synergistic fragmentation is characterised by well-integrated norms, goals, and objectives across institutions. Typically, it involves a single core institution supported by most actors and integrated closely into related institutions with a high level of norm alignment.[45] The regulation of ozone, whereby the Vienna Convention on the Protection of the Ozone Layer and the Montreal Protocol govern all related institutions and arrangements, has been put forward as a rare example of synergistic fragmentation with high governance effectiveness.[46]

In situations of *cooperative fragmentation,* the integration of institutions and norms is much less pervasive, and not all actors participate coherently in the same fora. However, institutions do cooperate with each other. This cooperation helps to avoid norm conflicts and thereby furthers effective governance.[47] An advantage of cooperative fragmentation (when norms are

41 Biermann et al., *supra* note 15, pp. 14–40.

42 José O. V. Gomar, "Environmental policy integration among multilateral environmental agreements: The case of biodiversity." *International Environmental Agreements: Politics, Law and Economics* 16 (2016): p. 527.

43 Biermann et al., *supra* note 15, pp. 19–21.

44 *Ibid.,* p. 19.

45 *Ibid.* The fact that synergistic fragmentation includes the integration of norms may give rise to the assumption that synergistic fragmentation is in fact the same as institutional integration. However, in our view, Biermann et al.'s concept of fragmentation is broader than institutional integration alone (also including norms and actors). *See e.g.,* Biermann et al., *supra* note 15, p. 22, whereby the authors demonstrate that the climate regime has strong traits of synergistic fragmentation in terms of institutional integration, but also traits of cooperative fragmentation because some actors are not party to all instruments in the agreement. *See also* Marjanneke J. Vijge, et al. "Governance through global goals." in Biermann & Kim (eds.), *supra* note 31, pp. 266–268. Due to this broader focus, the term 'synergistic fragmentation' will be used as meaning the integration between institutions, but also the actors and norms involved.

46 Biermann et al., *supra* note 15, pp. 19–21; Yulia Yamineva and Kati Kulovesi, "Keeping the Arctic White: The Legal and Governance Landscape for Reducing Short-Lived Climate Pollutants in the Arctic Region," *Transnational Environmental Law* 7, no. 2 (2018), pp. 221–224.

47 Biermann et al., *supra* note 15, pp. 19–20.

not conflicting) are lower entry costs for new actors, allowing for the inclusion of more and different actors through the different fora.[48] Different yet cooperating institutions may further create redundancy: When one institution ceases functioning or applies ineffective measures, others can fill in the gaps.[49] However, as opposed to synergistic fragmentation where there is only one authority, cooperative fragmentation opens doors to 'forum shopping' when norms do conflict.[50] 'Forum shopping' refers to situations where different institutional forums share or compete for jurisdiction, and actors exploit differences in e.g. rules, standards or enforcement. From a legal perspective, forum shopping is often observed in relation to dispute resolution where states choose the forum they consider most beneficial to the outcome to their case.[51] More broadly, forum shopping occurs when states strategically engage in the forum(s) that best suits their interests on a particular issue.[52] Forum shopping may act to legitimise either less or more ambitious goals, norms, and measures on environmental protection, with corresponding effects for governance.[53] A practical example are attempts to list certain fish species under CITES to address insufficient protection under fisheries management rules.[54] If successful, this can enhance effective protection while if unsuccessful, this may lead to less ambitious protection and a degradation of the stocks concerned.

The final type of fragmentation is *conflictive fragmentation.* When conflictive fragmentation is present, norms and goals are conflicting or opposed between institutions, and different actors support different, unintegrated institutions according to their political goals.[55] This regulatory conflict may further enhance the likelihood of forum shopping, furthering less ambitious goals and measures. However, competing norms in environmental governance may also be beneficial as "competition between regimes can produce productive

48 *Ibid.,* pp. 28–30.

49 Aynsley Kellow, "Multi-Level and Multi-Arena Governance: The Limits of Integration and the Possibilities of Forum Shopping," *International Environmental Agreements: Politics, Law and Economics* 12, no. 4 (2012), pp. 332–333.

50 *Ibid.,* pp. 333–340; Biermann et al., *supra* note 15, p. 22.

51 *See e.g.* Elizabeth Nyman and Rachel Tiller. "'Is there a court that rules them all'? Ocean disputes, forum shopping and the future of Svalbard," *Marine Policy* 113 (2020): 103742.

52 Kellow, *supra* note 49, p. 333; Langlet and Vadrot, *supra* note 25, p. 102; Raustiala and Victor, *supra* note 19, p. 299.

53 Kellow, *supra* note 49, p. 334; Langlet and Vadrot, *supra* note 25, p. 102.

54 Erik J. Molenaar and Richard Caddell. "International fisheries law: achievements, limitations and challenges" in *Strengthening International Fisheries Law in an Era of Changing Oceans* ed. Richard Caddell and Erik J. Molenaar (Oxford: Hart Publishing, 2019), p. 7.

55 Biermann et al., *supra* note 15, pp. 19 and 21.

experimentation," creating new opportunities and innovative solutions.[56] Having many disparate institutions working on the same or similar problems will likely lead to differences in approaches and measures between them, which can contribute to finding the most effective solutions to address an environmental issue.[57] Such experimentalism may improve governance if experiences are effectively disseminated.[58] A risk of this process, however, is that the solutions found will only be implemented by a small number of states in the respective regime and may be rejected by the rest.[59]

While the effects of fragmentation are case-specific, Biermann et al. argue that an increase in cooperation and a strengthening of synergistic fragmentation is generally advantageous for the effectiveness of governance, while an increase in conflictive fragmentation often reduces the performance of the governance system.[60] Scott is somewhat more critical. In her view, an increase of synergies may not always be advantageous.[61] States and other participating actors may be weary of becoming subject to the obligations of a regime to which they are not a party.[62] If increased synergy is the result of the integration of norms and institutions without consent of all the relevant actors, this harbours the risk that an objecting state "may withdraw from the cooperative regime altogether".[63] Moreover, enhanced cooperation of a regime or treaty body with another may be perceived as 'overstepping' or acting *ultra vires* (acting outside its prescribed competences), leading to conflict within the regime.[64] This can occur when the cooperation either expands the geographical scope or subject matter of a previous arrangement. A practical example are discussions during the negotiations for a memorandum of understanding between parties

56 Christine Overdevest and Jonathan Zeitlin, "Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector," *Regulation & Governance* 8, no. 1 (2014), pp. 23–26.

57 The ITLOS Advisory Opinion on Climate Change, which highlighted the possibility to address climate change as part of the obligation to protect the marine environment in Article 192 UNCLOS is a possible example. *See Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law*, 21 May 2024, ITLOS, Advisory Opinion <www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf>, visited 19 February 2025.

58 Andrew Jordan et al., "Governing Climate Change Polycentrically: Setting the Scene," in *Governing Climate Change: Polycentricity in Action?*, ed. Andrew Jordan et al. (Cambridge: Cambridge University Press, 2018), pp. 16–17; Ostrom*, supra* note 20, pp. 552–556.

59 Biermann et al.*, supra* note 15, pp. 25–26.

60 *Ibid.,* pp. 31–32.

61 Karen N. Scott, "Managing Fragmentation Through Governance: International Environmental Law in a Globalized World" in *International Law in the New Age of Globalization,* ed. Andrew Byrnes et al., (Leiden: Brill Nijhoff, 2013): 207–238.

62 *Ibid.,* p. 234.

63 *Ibid.,* p. 233.

64 *Ibid.*

to the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Agreement on the Conservation of Albatrosses and Petrels, where parties were in disagreement over whether or not expanding the regulatory scope of the CCAMLR Commission to non-Antarctic species could be considered as outside of the ambit of the original Convention.[65]

The concept of fragmentation as set out by Biermann et al. forms the evaluative framework to assess the BBNJ Agreement's effects on the existing fragmentation of the ocean governance landscape in relation to the protection of biodiversity.[66] The following paragraphs first provide a brief overview of the status quo before the Agreement using Biermann et al.'s fragmentation framework, before turning to the analysis.

3 Fragmentation of Biodiversity Governance in the ABNJ

The governance of the high seas is fragmented in several regards.[67] Consequently, the protection of biodiversity in the ABNJ also shows fragmentation of institutions, actors and norms. The UNCLOS sets out the general obligation to protect the marine environment in Article 192[68] which entails the obligation to take positive measures.[69] This entails both the obligation to protect and preserve the marine environment, which can, but does not have to be, fulfilled using Marine Protected Areas (MPAs).[70] Due to a lack of a general system for MPAs, the protection of biodiversity through MPAs is highly dependent on the regulation of activities that are harmful to marine biodiversity, such as shipping, fishing and the exploitation of deep-sea mineral resources. All these threats are regulated in the UNCLOS and have been addressed in further detail in different instruments, according to the different sectors (and accordingly, threats to marine biodiversity). Table 1 shows the various institutions and

65 *Ibid.*

66 Biermann et al., *supra* note 15, pp. 14–40.

67 *See e.g.* Catherine Blanchard, "Fragmentation in High Seas Fisheries: Preliminary Reflections on a Global Oceans Governance Approach," *Marine Policy* 84 (2017): 327–32; Robin Warner et al., "Regional Governance for Fisheries and Biodiversity," in *Governance of Marine Fisheries and Biodiversity Conservation*, ed. Serge Garcia et al., (England: John Wiley & Sons, 2014), 211–224; Yoshifumi Tanaka, "Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic beyond National Jurisdiction," *Ocean Development & International Law* 55, no. 1–2 (2024): 85–114; Bodansky, *supra* note 14.

68 UNCLOS, *supra* note 3, Article 192.

69 Anna Von Rebay, *The Designation of Marine Protected Areas: A Legal Obligation* (Cham: Springer Nature Switzerland, 2023), pp. 148–152.

70 *Ibid.,* pp. 171–172.

TABLE 1 Bodies competent to establish area-based management tools for some sector or activity in areas beyond national jurisdiction. Regional bodies are gathered into one category.

Sector	Body	Measure	Legal basis	Jurisdiction	ABNJ ABMTs
Shipping (routing, pollution)	International Maritime Organisation	Particularly Sensitive Sea Areas	Res.A.982(24)[71]	Global	0
Shipping (pollution)		MARPOL Special Area	MARPOL Art. 15(j)[72], Annexes I, II, IV, V, VI,[73]	Global	2[74]
Seabed (mining)	International Seabed Authority	Areas of Particular Environmental Interest	UNCLOS Art. 145, 162(2)(o)(ii)[75]	Global	13[76]

71 Revised Guidelines for the Identification and Designation of particularly sensitive sea areas, IMO Resolution A.982(24), 1 December 2005.

72 International Convention for the Prevention of Pollution from Ships, as modified by the Protocol 1978 relating thereto, 17 February 1978, MARPOL 1973/1978 [MARPOL].

73 *See also* 2013 Guidelines for the designation of special areas under MARPOL, IMO Resolution A.1087(28), 4 December 2013.

74 Two special areas partly contain areas beyond national jurisdiction: Antarctica (south of latitude 60°S) and Mediterranean Sea; *see* IMO, *IMO Prepcom 1 Policy Brief* (n.d.)., <www.un.org/depts/los/biodiversity/prepcom_files/IMO_Policy_Brief_BBNJ_PrepCom_1.pdf> visited 19 February 2025.

75 *See also* Michael Lodge et al., "Seabed Mining: International Seabed Authority Environmental Management Plan for the Clarion–Clipperton Zone. A Partnership Approach," *Marine Policy* 49 (2014), p. 67.

76 Decision of the Council of the International Seabed Authority relating to the review of the environmental management plan for the Clarion-Clipperton Zone, ISBA 26/C/58, 10 December 2021.

TABLE 1 Bodies competent to establish area-based management tools for some sector or activity in areas beyond national jurisdiction. Regional bodies are gathered into one category. (*cont.*)

Sector	Body	Measure	Legal basis	Jurisdiction	ABNJ ABMTs
Fishing	Regional Fishery Management Organisations[77]	Fishery Closures & Protected Areas	Conventions e.g. CCAMLR[78], NEAFC[79]	Regional	15 (CCAMLR: 2[80], NEAFC: 13[81])
Environment[82]	Regional Seas Organisations	Marine Protected Areas	Conventions, e.g. OSPAR[83]	Regional	11[84]

77 Here includes the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), a conservation organisation which has attributes of an RFMO. *See* CCAMLR, Report of the Twenty-First Meeting of the Commission (2002), para. 15.2 <meetings.ccamlr.org/system/files/e-cc-xxi.pdf>, visited 19 February 2025.

78 *See* General Framework for the establishment of CCAMLR Marine Protected Areas, CCAMLR Conservation Measure 91-04 (2011).

79 Convention on future multilateral cooperation in north-east Atlantic fisheries, 18 November 1980, 1285 UNTS 129 [NEAFC convention], Article 5.

80 Protection of the South Orkney Islands southern shelf, CCAMLR Conservation Measure 91-03 (2009); Ross Sea region marine protected area, CCAMLR Conservation Measure 91-05 (2016).

81 NEAFC Recommendation 19:2014 on area management measures for the protection of vulnerable marine ecosystems in the NEAFC Regulatory Area, as amended by Recommendation 09:2015, 1 January 2015.

82 OSPAR (Convention for the Protection of the Marine Environment of the North-East Atlantic, 22 September 1992, 2354 UNTS 67 [OSPAR Convention]) for example regulates marine biodiversity not covered by fishery management, land- and offshore-based pollution, dumping, etc.

83 *See also* OSPAR Regulatory Regime for Establishing MPAs in ABNJ, Annex 6, Ref. §6.13c, Meeting of the OSPAR Commission, 22–26 June 2009.

84 Janos Hennicke et al., "Report and Assessment of the Status of the OSPAR Network of Marine Protected Areas in 2021" OSPAR's Quality Status Report 2023 (2022), p. 20 <oap.ospar.org/en/ospar-assessments/committee-assessments/biodiversity-committee/status-ospar-network-marine-protected-areas/assessment-reports-mpa/mpa-2021/>, visited 19 February 2025.

instruments relevant for establishing area-based management tools to protect marine biodiversity in the ABNJ.

According to the typology of Biermann et al., different degrees of fragmentation usually coexist within and between sub-divisions of the institutional landscape, such as sectors or global/regional/sub-regional levels.[85] This is also the case for the protection of biodiversity in the ABNJ.

First, the governance of activities in the deep sea shows traits of *synergistic fragmentation.* An example of this is the regulation of the Area. The central governing authority in ocean governance is the UNCLOS, to which 168 states are full parties. Part XI UNCLOS sets out the foundation for exploring the deep sea, including the obligation to protect the marine environment in Article 145.[86] In the parts of the seabed that are beyond national jurisdiction, the obligation to realise that protection rests on the International Seabed Authority (ISA), the organ through which states administer and control activities in the Area.[87] The ISA has developed several regulations for the exploration of the deep sea (polymetallic nodules, polymetallic sulphides, and ferromanganese crusts) and guidance for environmental impact assessments.[88] While this presents fragmentation away from the UNCLOS, all UNCLOS parties are *ipso facto* parties to the ISA, which means that both are closely integrated, thereby presenting synergistic fragmentation.

Second, the governance of activities within sectors, and thereby also the protection of the marine environment shows traits of *cooperative fragmentation*. An example of this is the fisheries sector. UNCLOS sets out the freedom and rights to fish on the high seas.[89] This freedom, however, is limited. States have the obligation to conserve the living resources of the sea[90] and the habitats of endangered species.[91] Furthermore, they are under the obligation

85 Biermann et al., *supra* note 15, p. 21.

86 UNCLOS, *supra* note 3, Article 145.

87 *Ibid.*, Article 157 (1).

88 *See* ISA, *Recommendations for the guidance of contractors for the assessment of the possible environmental impacts arising from exploration for marine minerals in the Area*, ISBA/25/LTC/6.

89 UNCLOS, *supra* note 3, Article 118.

90 UNCLOS, *supra* note 3, Article 192. *See also Southern Bluefin Tuna* (*New Zealand* v *Japan*), 27 August 1999, ITLOS, Provisional Measures, para. 70, <www.itlos.org/fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf>, visited 19 February 2025; *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission* (*SRFC*), 2 April 2015, ITLOS, Advisory Opinion, para. 216, <www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion_published/2015_21-advop-E.pdf>, visited 19 February 2025.

91 UNCLOS, *supra* note 3, Article 194 (5). Although Article 194 addresses marine environmental pollution, it has been established by the PCA in the South China Sea Arbitration that

to cooperate through regional and subregional fisheries management organisations (RFMOs) following Article 118 UNCLOS. For straddling and migratory fish stocks, the obligation is additionally expanded upon in the 1995 United Nations Fish Stocks Agreement (UNFSA).[92] Articles 5 and 6 UNFSA set out several obligations related to the marine environment when engaging in fisheries of straddling and migratory fish stocks. These include the obligation to take a precautionary approach,[93] to assess the impacts of fishing on other species,[94] and to take measures to protect species in the same ecosystem as targeted species.[95] Lastly, the FAO has a role in ocean governance through its responsible fisheries code-of-conduct[96] and measures to combat illegal, unreported, and unregulated fishing, which may indirectly contribute to the protection of biodiversity in the ABNJ.[97]

This variety of instruments, provisions, and actors that all can impact the protection of biodiversity in the fisheries sector can cause fragmentation in several regards. First, RFMOs have mandates to adopt legally binding measures on fishing and are usually supported by scientific advice from regional fisheries advisory bodies.[98] Decisions by regional organisations competent to regulate fishing in the ABNJ have resulted in the establishment of at least 15 high seas MPAs which to various degrees close areas to fishing and other harmful activities.[99] However, not all RFMOs contain guidelines on marine environmental protection. RFMOs established pre-UNFSA, for example, often lack environmental standards in their constituting conventions.[100]

Article 194(5) applies to the entirety of part XII, and thus also to Article 192, and not only to pollution. *See South China Sea Arbitration* (*Philippines* v *China*), 12 July 2016, PCA, Award, para. 945, <pcacases.com/web/sendAttach/2086>, visited 19 February 2025.

92 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, 4 August 1995, 2167 UNTS 3 [UNFSA].

93 *Ibid.,* Articles 5(c) and 6.

94 *Ibid.,* Article 5 (d).

95 *Ibid.,* Article 5 (e).

96 Food and Agriculture Organization of the United Nations, Code of Conduct for Responsible Fisheries. Rome, 31 October 1995.

97 *e.g.* the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal Unreported and Unregulated Fishing, 22 November 2009, 3161 UNTS no. 54133 [PSMA].

98 Terje Løbach et al., "Regional Fisheries Management Organizations and Advisory Bodies. Activities and Developments, 2000–2017," FAO Fisheries and Aquaculture Technical Paper (FAO, 2020), p. 5, <doi.org/10.4060/ca7843en>, visited 19 February 2025.

99 *See* Table 1; Elizabeth M. De Santo, "Implementation Challenges of Area-Based Management Tools (ABMTs) for Biodiversity beyond National Jurisdiction (BBNJ)," *Marine Policy* 97 (2018), pp. 35–36.

100 Warner et al., *supra* note 67, p. 212.

Consequently, taking measures to protect biodiversity requires consent by all parties. Although all UNCLOS parties are subject to the obligation to protect the marine environment in Article 192, this is an obligation of conduct, not of result.[101] As the due diligence nature of Article 192 does not require parties to take specific measures through RFMOs, consent may be challenging to achieve. The possibilities to protect biodiversity in the ABNJ through MPAs thus differ significantly, depending on the RFMO in question.[102]

Moreover, measures implemented by RFMOs are, in principle, not binding on non-members. The principle of sovereignty bars the imposition of obligations on non-consenting states.[103] While the UNFSA obliges states to ensure that vessels flying their flags comply with measures imposed by RFMOs even if a state is not party to the RFMO in question,[104] the UNFSA has limited parties.[105] States not party to UNFSA are thus in principle not subject to the rules and regulations established under its auspices, beyond the general duty to cooperate that Article 118 UNCLOS sets forth. This poses difficulties for ensuring compliance by third parties to conservation measures, especially when measures such as MPAs contradict the freedom to fish on the high seas. RFMOs generally seek to accomplish their goals by granting privileges to cooperating vessels (e.g. port & market access) and withholding such privileges from vessels suspected of engaging in illegal fishing.[106] However, the lack of effectiveness of these measures has raised some doubts as to the effectiveness of cooperation between RFMOs and other agreements, such as the Port States Measurements Agreement.[107]

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101 ITLOS Advisory Opinion on Climate Change, *supra* note 57, para. 400.

102 Warner et al., *supra* note 67, p. 212.

103 Mercedes Rosello, "Cooperation and Unregulated Fishing: Interactions between Customary International Law, and the European Union IUU Fishing Regulation," *Marine Policy* 84 (2017), pp. 308–309; Andrew Serdy, "Pacta Tertiis and Regional Fisheries Management Mechanisms: The IUU Fishing Concept as an Illegitimate Short-Cut to a Legitimate Goal1," *Ocean Development & International Law* 48, no. 3–4 (2017), pp. 345–351.

104 UNFSA, *supra* note 92, Articles 5, 8, 10, 17 and 18. *See also* Erik J. Molenaar, "Regional Fisheries Management Organizations," in *Global Challenges and the Law of the Sea*, ed. Marta C. Ribeiro et al., (Cham: Springer International Publishing, 2020), pp. 99–101.

105 At the time of writing, UNFSA has 93 ratifications compared to 170 for UNCLOS. Overview available at <www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>, visited 19 February 2025.

106 Molenaar, *supra* note 104, p. 99.

107 *See e.g.* David J. Agnew et al., "Estimating the Worldwide Extent of Illegal Fishing," *PLOS ONE* 4, no. 2 (2009): e4570; Gilles Hosch et al., "IUU Safe Havens or PSMA Ports: A Global Assessment of Port State Performance and Risk," *Marine Policy* 155 (2023): 105751.

RFMOs additionally vary in terms of the measures they take to protect the marine environment,[108] and in terms of their monitoring of illicit fishing operations.[109] This causes the so-called balloon effect, where in cases of sterner measures being taken by an RFMO, "operators engaged in illicit activities … simply move to the jurisdiction of another RFMO" with fewer restrictions.[110] The balloon effect carries similar practical implications as forum shopping, which has been highlighted as a common issue of cooperative fragmentation. In both cases, gaps between institutions limit the effectiveness of measures, allowing actors to choose an area or institution that is most suitable for their activities due to lack of regulatory standards. These several examples show that, while institutions in the fisheries sector can and do cooperate, a significant amount of fragmentation between the institutions themselves and the actors involved in them remains. The due diligence obligations to protect the marine environment and cooperate are insufficient to close this gap.

Lastly, the relevant governance framework shows traits of *conflictive* fragmentation. The sectoral and variously regional/global approach to ocean governance prevents a simple implementation of MPAs across all sectors.[111] Instead, organisations governing various sectors each implement tools within their competence. For example, initiatives taken by e.g. Regional Seas Conventions, such as the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), to which several Nordic states are member, exclude actions against shipping or fishing, as competences for regulating these areas lie within different organisations that focus specifically on fisheries management.[112] This means that measures, such as MPAs, can be taken under OSPAR but fail to protect biodiversity from the most damaging activities.[113]

Such conflicts can be mitigated by enhancing institutional cooperation, which could benefit the protection of biodiversity. For example, OSPAR cooperates with RFMOs, such as the North-East Atlantic Fisheries Commission

108 Friedman, *supra* note 22; Scanlon, *supra* note 22.

109 Kim, *supra* note 14, p. 5.

110 Robert Blasiak, "Balloon Effects Reshaping Global Fisheries," *Marine Policy* 57 (2015): 18–20; Kim, *supra* note 14, p. 5.

111 Ellen Hey, "The OSPAR NEAFC Collective Arrangement and Ocean Governance: Regional Seas Organisations as the Setters of Conservation Standards in ABNJ?," *The International Journal of Marine and Coastal Law* 37, no. 4 (2022), pp. 632–633; Lothian, *supra* note 14, pp. 487–491.

112 OSPAR Convention, *supra* note 82.

113 Erik J. Molenaar and Alex G. O. Elferink, "Marine Protected Areas in Areas beyond National Jurisdiction The Pioneering Efforts under the OSPAR Convention," *Utrecht Law Review* 5, no. 1 (2009), p. 14.

(NEAFC)[114] resulting in partial overlap between OSPAR MPAs and NEAFC bottom-fisheries closures, to enhance the health of benthic ecosystems.[115] However, this cooperation only applies to bottom-fisheries, meaning that other types of fisheries in OSPAR MPAs are still possible.

The example of OSPAR highlights the possibility of moving from conflictive to more cooperative fragmentation which can benefit the protection of biodiversity. However, this progress has been "neither comprehensive nor consistent".[116] For example, attempts to include the International Maritime Organisation and ISA in some of the established high seas MPAs have been unsuccessful.[117] Conflictive fragmentation between sectors therefore prevails, causing concern in the literature.[118]

These examples show that the existing ocean governance landscape in the ABNJ displays various degrees of fragmentation, depending on the area of interest and/or potential risk factor to the protection of biodiversity. This gives rise to the question of how the BBNJ Agreement will affect this fragmented governance landscape and what the possible consequences are for governance effectiveness.

4 The BBNJ Agreement's Effect on the Existing Fragmented Governance Landscape

The BBNJ Agreement aims to enhance stewardship of the marine environment and contribute to the conservation of the inherent value of biological diversity in the ABNJ through coherent and cooperative action to address the impacts of climate change, pollution, and unsustainable use.[119] One of the ways to achieve this aim is the establishment of new MPAs and other area-based management tools (ABMTs) on the high seas,[120] alongside cooperation with other relevant frameworks, bodies and instruments[121] such as those reviewed in Table 1.[122]

114 Established by the NEAFC Convention, *supra* note 79. Contracting parties include Denmark, Iceland, Norway and the European Union.

115 de Santo, *supra* note 99, p. 38.

116 Friedman, *supra* note 22, p. 453.

117 Hey, *supra* note 111, pp. 632–633.

118 *See e.g.,* Kristina M. Gjerde et al., "Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction", *IUCN Environmental Policy and Law Papers online – Marine Series No. 1* (2008), pp. vii–viii, <portals.iucn.org/library/node/9351>, visited 19 February 2025.

119 BBNJ Agreement, *supra* note 2, Preamble.

120 *Ibid.,* Articles 17 (a) and 22 (1) (a).

121 *Ibid.,* Article 22(4).

122 Duan, *supra* note 24, p. 7.

Decisions on adoption of existing or new ABMTs are left to the Conference of the Parties (COP) with input from the Scientific and Technical Body.[123] The COP in principle takes decisions by consensus, but if consensus cannot be reached, the COP may take decisions by three-quarter majority.[124]

At first glance, the introduction of several new institutions under the umbrella of the BBNJ Agreement may give the impression of further inflating the number of institutions responsible for governing ocean biodiversity, and thereby further fragmenting the governance landscape. However, as shown in the following subsections, these institutions interact with each other and the existing landscape in several ways which allows for both synergistic and conflictive fragmentation.

There are several mechanisms for interaction between the BBNJ Agreement and other instruments already concerned with the protection of biodiversity in the ABNJ. Article 22 of the Agreement contains the legal basis for COP decisions on ABMTs. According to Article 22 (1) (b), the COP may take decisions on measures compatible with those adopted by other relevant frameworks and instruments. According to Article 22 (1) (c), the COP may additionally make recommendations to other relevant bodies, whenever proposed measures fall under their competence. The COP is also tasked with enhancing cooperation and arranging consultations with *and* among relevant legal instruments and frameworks.[125] The aim to promote cooperation and coordination with and amongst IFBS is also reflected in arts. 8 (1-2), 17 (b) and 47 (6) (c). Article 25 furthermore requires state parties to promote the BBNJ Agreement's objectives in other fora and instruments to which they are party, and to encourage non-party states to adopt measures that support the work of the Agreement.[126]

The BBNJ Agreement is likely to interact with a vast number of existing ABMTs, such as measures to protect the marine environment established under regional seas conventions, RFMOs or even the Antarctic Treaty System.[127] The mechanisms of interaction described above may, at first glance, provide opportunity for conflict between the measures taken under the BBNJ Agreement and measures taken under other frameworks. The Vienna Convention on the Law of Treaties (VCLT) provides rules for dealing with conflicts in such cases.[128] Following Article 30 (3) VCLT, if all parties to a treaty

123 BBNJ Agreement, *supra* note 2, Articles 21 and 22.
124 *Ibid.*, Article 23 (1)-(2).
125 *Ibid.,* Article 22 (3).
126 *Ibid.,* Articles 25 (4) & (5).
127 See e.g. Li Jingchang, "Harmonization between the BBNJ Agreement and the Antarctic Treaty System." *China Oceans Law Rev* 2018 no. 2 (2018): 189–223.
128 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 [VCLT].

are parties to another treaty on the same subject, the later treaty supersedes the earlier one. Whenever the BBNJ Agreement's provisions spatially overlap with another agreement, there is the possibility of applying the BBNJ Agreement as *lex posterior*. Considering ABMTs, for example, it could be argued that the BBNJ Agreement as the later treaty could supersede provisions on establishing MPAs under other treaties. However, as the International Law Commission also points out in their report on fragmentation, the relationship between *lex specialis* and *lex posterior* could complicate matters.[129] Arguably, a regional seas convention could be considered *lex specialis* in the sense of Article 30 (2) VCLT, as it has been specifically made for that area and fulfilling its obligations would contribute to the general obligations under the BBNJ Agreement to protect biodiversity in the ABNJ.[130] In such cases, the rules of Article 30 VCLT may fail to address the norm conflict between the BBNJ Agreement and other instruments. Furthermore, the rules of *lex posterior* and *lex specialis* have several general shortcomings[131] when it comes to dealing with norm conflicts between treaties with different parties, or between treaties that deal with different subject matters.[132] These are especially relevant in relation to ocean governance. The previous section has shown that ocean governance is highly sectoral, which may mean that establishing whether or not an issue covers the same 'subject matter' is not always possible. Different and varying memberships (e.g. in different RFMOs) may further complicate the matter.

This shows the limits of Article 30 VCLT. However, there are certain provisions in the BBNJ Agreement that offer a solution to this problem. The Agreement's text specifies that decisions on ABMT should "not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies".[133] This 'not-undermine provision' is highly relevant from a legal point of view, as it avoids the issues inherent to dealing with norm-conflict according to Article 30 VCLT. The not-undermine provision gives primacy to other IFBs independent of their time of conclusion or their subject matter.

The exact scope of the 'not-undermine provision' has, however, been a major source of scholarly debate and research both before, during and after BBNJ negotiations.[134] The final Agreement text can be seen as a compromise

129 International Law Commission, *supra* note 38, para. 233.
130 ITLOS Advisory Opinion on Climate Change, *supra* note 57, para. 222–224.
131 Seline Trevisanut et al., "Introduction: Regime Interaction in Ocean Governance." in *Regime Interaction in Ocean Governance* ed. Seline Trevisanut et al., (Leiden: Brill Nijhoff, 2020) 1–21.
132 *See e.g.* International Law Commission, *supra* note 38, para. 243.
133 BBNJ Agreement, *supra* note 2, Articles 5 (2), 22 (2).
134 Friedman, *supra* note 22; Scanlon, *supra* note 22; Tang, *supra* note 14.

between the two dominating interpretations going into negotiations: 1) not undermining the *mandate* or *authority* of existing IFBs, and 2) not undermining the *effectiveness* or *objectives* of institutions, which would in theory allow the BBNJ-system to expand upon measures taken by other bodies to protect the marine environment and implement existing agreements more effectively.[135] Negotiations did not settle which of the two underlying interpretations applies to the Agreement as it stands today.[136] Even in the Nordic context, opinions are split. During the negotiations, Iceland and Norway argued for a continued regional approach to ABNJ governance.[137] They referred to the expertise and competence of existing organisations such as RFMOs and other International Organisations,[138] consistent with the first interpretation.[139] Meanwhile, the European Union, negotiating on behalf of the remaining Nordic states, emphasised increased coordination and cooperation from existing entities and general standards regarding area-based management tools, which seems more in line with the second approach.[140]

Keeping this in mind, the analysis below identifies four potential ways through which the BBNJ Agreement can affect the already existing fragmented governance of biodiversity protection in the ABNJ, either reducing conflictive fragmentation, or enhancing it.

4.1 *Reducing Conflictive Fragmentation by Enhancing Cooperation through the COP*

A first possible implication of the Agreement on the ocean governance landscape that is relevant is the possibility to reduce existing conflictive fragmentation in ocean governance by enhancing cooperation under the BBNJ Agreement. This targets both the dimension of institutional integration, as well as the cooperation of actors in Biermann et al.'s framework.[141] Article 22 (3) mandates the BBNJ COP to enhance cooperation with and among other IFBS through regular consultations on AMBTS, including MPAS. Such cooperation could take place in form of Memoranda of Understanding (MOUS) between

135 Duan, *supra* note 24, p. 6; Scanlon, *supra* note 22.

136 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* 55, no. 1–2 (2024), p. 121.

137 Langlet and Vadrot, *supra* note 25, p. 10; Rachel Tiller et al., "The once and future treaty: towards a new regime for biodiversity in areas beyond national jurisdiction", *Marine Policy* 99 (2019): 239–242.

138 Langlet and Vadrot, *supra* note 25, p. 10.

139 Friedman, *supra* note 22, pp. 452–453.

140 IISD (2019b), *supra* note 12, p.5.

141 Biermann et al., *supra* note 14, p. 19.

different RFMOs and the BBNJ institutions, connecting different RFMOs with the standards and protective measures created under the BBNJ Agreement's umbrella.[142] The BBNJ COP is also tasked with enhancing cooperation between different frameworks and bodies, which may contribute to addressing the limited cooperation between sectors on area-based management tools.

Cooperating with other IFBs may bring relevant institutions within the ambit of the BBNJ Agreement.[143] An example of this may be the new connections to the UNFCCC, as the Agreement also mentions climate change as a stressor to marine biodiversity.[144] This is further enhanced by the underlying ambitions of the BBNJ Agreement to promote an integrated approach to ocean management and an ecosystem approach, which will require cooperation with other instruments, bodies and frameworks.[145]

A fragmentation-related concern in this regard may be that the actions of the COP are perceived as *ultra vires* or stepping beyond the ambit of its powers.[146] The risk of this is especially high when it comes to the interaction of the COP with the fisheries sector, as some negotiating parties aimed to exclude fish as a commodity from the scope of the Agreement.[147] In relation to fisheries, where there is a high level of (cooperative) fragmentation between bodies as shown in section 3, there is thus a possibility that the BBNJ Agreement may enhance, and not reduce, conflict. However, as de Lucia points out,[148] the ICJ has found that the actions of international organisations are presumed to not be *ultra vires*, when they are appropriate to fulfil the respective organisation's purposes.[149] One of the central purposes of the BBNJ Agreement, as stated in its objectives, is furthering international cooperation and coordination.[150] Taking measures to further cooperation between different international bodies and instruments therefore falls within the Agreement's scope, making an *ultra vires* problem unlikely. Therefore, the BBNJ Agreement may contribute to enhancing

142 Bianca Haas et al., "Factors Influencing the Performance of Regional Fisheries Management Organizations," *Marine Policy* 113 (2020): 103787.

143 Tang, *supra* note 14, p. 4.

144 *See e.g.*, BBNJ Agreement, *supra* note 2, Annex I (f).

145 *Ibid.*, Article 7.

146 Scott, *supra* note 61, p. 233.

147 David Leary, "Agreeing to Disagree on What We Have or Have Not Agreed on: The Current State of Play of the BBNJ Negotiations on the Status of Marine Genetic Resources in Areas beyond National Jurisdiction," *Marine Policy* 99 (2019), p. 26.

148 De Lucia, *supra* note 136, pp. 123–124.

149 *Certain Expenses of the United Nations*, 20 July 1962, ICJ, Advisory Opinion, p. 151 (*in* de Lucia, *supra* note 136, p. 124).

150 BBNJ Agreement, *supra* note 2, Article 2.

cooperation, thereby reducing elements of conflictive fragmentation in ocean governance across several areas, including the fisheries sector.

4.2 *Reducing Conflictive Fragmentation through the STB*

Existing conflictive fragmentation such as that caused by regional and sectoral divisions, highlighted in section 3, may also be reduced through the work of the Scientific and Technical Body (STB), reducing fragmentation amongst institutions and actors The STB will be central to the workings of the BBNJ Agreement due to its involvement in decision-making processes, including advising the COP on scientific and technical matters,[151] devising guidance on proposals for MPAs and indicative criteria,[152] reviewing preliminary proposals for area-based management tools including MPAs,[153] and making recommendations for area-based management tools.[154]

Similarly to the COP, the STB could further promote cooperation with other mechanisms and instruments, for example through establishing consultations with and among other scientific advisory bodies.[155] In relation to environmental impact assessments under the BBNJ Agreement, it has been argued that a cooperation with the FAO may be necessary, to inform standard-setting procedures.[156] A similar argument could be applied to the setting of standards and criteria for MPAs, where the STB could cooperate with other regimes in standard-setting, thereby harmonising criteria for protected areas and reducing conflictive fragmentation. This could, for example, result in recommendations of congruent demarcations of protected areas or synergistic measures on harmful activities to otherwise independent organisations.[157]

Furthermore, the STB could serve as a testing ground for experiments, designing criteria and standards for the protection of biodiversity in ABNJ that can then be implemented in other bodies. Alongside reducing conflictive fragmentation, the STB may thus contribute to experimentalism, helping

151 *Ibid.,* Article 49 (3).
152 *Ibid.,* Article 19 (6).
153 *Ibid.,* Article 20.
154 *Ibid.,* Article 22 (1).
155 Gaebel et al., *supra* note 24, p. 5–9.
156 Lothian, *supra* note 14, p. 481.
157 The International Council for the Exploration of the Sea (ICES) has served such a role, supplying both OSPAR and NEAFC with scientific advice. *See* Stefan Ásmundsson and Emily Corcoran "on the Process of Forming a Cooperative Mechanism Between NEAFC and OSPAR – From the First Contact to a Formal Collective Arrangement" *UNEP Regional Seas Reports and Studies* no. 196 (2015) <www.ospar.org/documents?v=35111>, visited 19 February 2025.

to find innovative solutions to protect biodiversity in ABNJ, which can be incorporated elsewhere.

4.3 *Reducing Conflictive Fragmentation and Enhancing Synergies Systematic Interpretation and Norm-Infusion*

The BBNJ Agreement may additionally contribute to reducing existing conflictive fragmentation through norm infusion. There are two main avenues for this: one legal, the other of more political nature.

Section 3 has highlighted conflictive fragmentation in relation to ABMTs across different sectors, and especially in relation to the spatial integration between activities in the water column (e.g. fisheries) and activities on the seabed (e.g. mining). The introduction of the BBNJ Agreement could here provide a possibility to enhance the protection of biodiversity in ABNJ ecosystems as a whole, even though measures taken under the Agreement should not undermine other IFBs. This is due to the application of systematic treaty interpretation, which ITLOS has recognised explicitly as a tool to deal with fragmentation.[158]

Following Article 31 (3) (c) VCLT, a treaty needs to be interpreted in light of the entire legal system that prevails at the time.[159] In relation to UNCLOS, Article 31 (3) (c) has been used as an argument to interpret UNCLOS in light of other obligations related to climate change[160] or the protection of biodiversity.[161] It would thus run counter to the general rules and practices of international law to not apply the BBNJ Agreement's provisions in other relevant contexts, such as in relation to the ISA's management of the Area. Although the BBNJ Agreement may not undermine other IFBs, their norms will likely need to be read in light of the objectives of the Agreement. Systematic treaty interpretation may thus integrate the Agreement's objectives (e.g. ecosystem approach or integrated approach to ocean management) into other areas. The fact that the BBNJ Agrement seemingly does away with the until now prevailing spatial distinction between the water column and the ocean floor under UNCLOS (as it refers to the ABNJ as a whole) supports this argument, requiring states to consider similar norms across the entire marine ecosystem.[162]

158 ITLOS Advisory Opinion on Climate Change, *supra* note 57, para. 136.

159 *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276* (*1970*), 21 June 1971, ICJ, para. 53.

160 ITLOS Advisory Opinion on Climate Change, *supra* note 57, para. 137.

161 South China Sea Arbitration, *supra* note 91, para. 176.

162 BBNJ Agreement art. 1 (2).

A second way to enhance synergies and reduce conflictive fragmentation lies in the more political components of the Agreement. According to Article 8 (2) of the BBNJ Agreement, state parties are required to promote the Agreement's objectives in other regimes. Likewise, Article 25 (4) provides a similar obligation specifically regarding the COP's decisions on ABMTs. Especially in cases of conflictive fragmentation, this may be a way to align norms and goals between regions and sectors, by creating overarching norms related to biodiversity and area-based management.[163] At the 2023 meeting of the Northwest Atlantic Fisheries Organization (NAFO), for example, Japan already highlighted BBNJ principles, such as the ecosystem approach, and a need for discussing these in the NAFO context.[164] The obligation of parties to promote norms of coherence and integration in other fora would not only lead to similar norms across the board but can contribute to a more coherent management of biodiversity in the ABNJ within the different instruments as well, as they begin incorporating similar approaches. The obligation to promote norms may go so far to expand the BBNJ Agreement beyond the context of biodiversity protection (e.g. the promotion of the Agreement by Nordic states at SIDS4).[165]

The normative authority established by the BBNJ Agreement has been identified as a primary strength of the Agreement.[166] Shared norms would reduce elements of conflictive fragmentation and promote synergies between different bodies. In this regard the BBNJ could function similarly to the UNFSA whose principles have, over time, been incorporated by several RFMOs run by UNFSA non-parties, despite not being legally binding upon them, which has enhanced coordination and synergy between them.[167]

While the Agreement raises several possibilities for norm-infusion, the effectiveness of this process will likely be affected by the number of ratifications by state parties. From a legal perspective, systematic treaty interpretation will only spread norms to other bodies if all parties to the body in question are parties to the BBNJ Agreement.[168] Furthermore, wide ratification of the BBNJ Agreement is required for the Agreement and associated decisions and recommendations to have a political impact across sectors. If such wide

163 *See also* Gjerde and Yadav, *supra* note 26, who identify a need for overarching norms in ocean governance.

164 NAFO, *Report of the NAFO Commission and its Subsidiary Bodies* (*STACTIC and STACFAD*) *44th Annual Meeting of NAFO 19–23 September 2022 Porto, Portugal,* NAFO/COM Doc. 22–27 <www.nafo.int/Portals/0/PDFs/COM/2022/comdoc22-27.pdf>, visited 19 February 2025.

165 *See supra* note 11.

166 Kim, *supra* note 14, p. 6.

167 Bodansky, *supra* note 14, p. 31.

168 VCLT, *supra* note 128, Article 31 (3) clearly states that the obligations need to be applicable between the parties in question.

ratification is lacking, the BBNJ Agreement runs the risk of creating an opposite effect, possibly enhancing conflict.

4.4 *Reducing Cooperative Fragmentation and Enhancing Conflictive Fragmentation*

If the BBNJ Agreement fails to achieve ratification by a significant enough number of states, the risk is high of introducing conflicting norms *within* sectors. This could occur if Article 8 forces a small minority of Agreement parties to advocate for conservation measures in fora where conservation objectives were previously absent. As Biermann et al. highlight, measures proposed by a small minority of states run high risk of rejection by the rest.[169] The BBNJ Agreement's norms and objectives thus risk explicit rejection in fora where Agreement parties are outnumbered by non-parties. Thus, Article 8 could function to introduce elements of norm-conflictive fragmentation in other fora, which furthermore risks reducing the performance of the system as a whole.[170] In absence of widespread ratification, the BBNJ Agreement's obligation to promote norms in other fora may undermine its objectives by increasing, and not reducing, conflict in ABNJ biodiversity governance.[171] This points to the importance of widespread ratification by states to leverage the potential for more synergistic fragmentation, and at the very least the careful consideration of whether the recommendations made by BBNJ-related institutions are suitable for promotion elsewhere.

5 Conclusion

The BBNJ Agreement introduces several institutions in an already congested governance landscape, and thereby in a naive sense increases fragmentation of biodiversity governance in the ABNJ. This is especially true for area-based management, where the COP adds to a long list of bodies competent to establish ABMTs. However, this paper aligns with the view that this fragmentation is not automatically cause for concern.[172] The degree of fragmentation present, and the way in which the BBNJ Agreement contributes to the different types

169 Biermann et al., *supra* note 15, pp. 25–29.

170 *Ibid.,* pp. 29–31.

171 *See* Scott, *supra* note 61, pp. 234–235, for an example of how the Antarctic treaty system's function and effectiveness may be premised on *not* acting on norms of environmental impact assessments – norms which the BBNJ Agreement would seek to promote.

172 For a similar argument, *see* Catherine Blanchard et al., "Socio-Ecological Resilience and the Law: Exploring the Adaptive Capacity of the BBNJ Agreement," *Marine Policy* 108 (2019): 103612, p. 5.

of fragmentation are decisive for whether the Agreement contributes to or hinders effective governance in the ABNJ.

The above analysis shows that the Agreement has the potential to enhance synergies across the ocean governance landscape. The COP, the STB and the work of individual states in other regimes can all potentially catalyse the establishment and cross-sectoral coordination of measures to protect biodiversity. Thereby, the Agreement can contribute to enhancing synergies, reducing conflict and encouraging cooperation, even if the governance of biodiversity in the ABNJ is fragmented as such. Moreover, the Agreement additionally allows for experimentation, the outcomes of which can be transported into different IFBS through norm infusion.

However, the effectiveness of the BBNJ Agreement hinges on a broad membership that can effectively promote its norms and objectives in different fora. The ratification of the Agreement has been slow: Two years after its adoption, the Agreement has only been ratified by a small number of the signatory states.[173] A smaller number of members creates the risk of enhancing norm conflicts, with the opposite result of what the BBNJ Agreement set out to achieve. States interested in an effective implementation of the Agreement must thus not only ratify the Agreement themselves, but also promote wider ratification amongst the signatory states to reap the potential benefits of the BBNJ Agreement's effects on the fragmented governance landscape.

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173 Overview available at <treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en>, visited 19 February 2025.