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ARTICLE

Cold Cooperation: Reconciling the Biodiversity Beyond National Jurisdiction Agreement and the Antarctic Treaty System

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Abstract

This article explores the intersection of, and relationship between, the Biodiversity Beyond National Jurisdiction (BBNJ) Agreement and the Antarctic Treaty System (ATS). It examines the status of the Southern Ocean as an 'area beyond national jurisdiction' before analysing the application of the 'not undermine' principle to the ATS as developed in Article 5 BBNJ Agreement. The article examines the implications of the BBNJ Agreement in relation to environmental impact assessments, area-based protection, marine genetic resources and dispute resolution within the ATS. It argues that the thus far defensive approach of the Antarctic Treaty parties to the BBNJ Agreement is neither sustainable nor in the long-term interests of either agreement. It argues for positive engagement between the two regimes for the ultimate benefit of Southern Ocean governance.

Keywords: public international law; law of the sea; Polar law; Antarctic Treaty System; BBNJ Agreement; not undermine principle; complementarity; area-based protection; marine genetic resources; dispute resolution

1. Introduction

The Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement)[1] was adopted on 19 June 2023 and, as of August 2025, has 53 States Parties and 139 signatories.[2] The objective of the BBNJ Agreement:

> is to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective

[1] Agreement under the United Nations (UN) 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, not yet in force) (BBNJ Agreement) ch XXI.10.

[2] UN, *UN Treaty Collection* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en>. The BBNJ Agreement requires 60 ratifications to enter into force (art 68(1)).

implementation of the relevant provisions of the Convention [on the Law of the Sea] and further international cooperation and coordination.[3]

While the BBNJ Agreement is the newest global instrument to comprehensively regulate activities taking place beyond national jurisdiction, the regime established by the Antarctic Treaty[4] is arguably one of the oldest. The purpose of this article is to provide a critical assessment of the relationship between, and intersection of, the BBNJ Agreement and key constituent instruments of the Antarctic Treaty System (ATS): the Antarctic Treaty, the Convention for the Conservation of Antarctic Marine Living Resources (CAMLR Convention)[5] and the Protocol on Environmental Protection to the Antarctic Treaty (Protocol).[6]

Modalities for managing the relationship between the BBNJ Agreement and other global, regional, subregional and sectoral frameworks and bodies (International Framework Bodies, or IFBs) that possess an existing mandate for regulating activities taking place in areas beyond national jurisdiction (ABNJ) were subject to extensive discussion throughout—and indeed prior to—the negotiations.[7] The commitment that the BBNJ Agreement would 'not undermine' IFBs was first explicitly articulated in UN General Assembly Resolution 69/292,[8] and has since been incorporated as a foundational principle of the BBNJ Agreement in Article 5 and has been developed in more detail in relation to IFBs with responsibility for area-based protection and environmental impact assessment in Parts III and IV of the Agreement respectively. In contrast to other IFBs which actively participated in the BBNJ negotiations (such as the International Maritime Organisation (IMO) and the International Seabed Authority), there was no engagement from the ATS or components thereof, and the BBNJ Agreement makes no direct reference to the Antarctic or the Southern Ocean.

After having outlined the key elements of the BBNJ Agreement in Section 2, and giving a summary of the ATS and its operation (Section 3), the article proceeds to discuss the application of the BBNJ Agreement to the area subject to the jurisdiction of the ATS. This is complex owing to the disputed sovereign status of the continent of Antarctica and the concomitant uncertainty relating to the legal status of the Southern Ocean south of 60° South Latitude. This issue is the subject of discussion in Section 4 of this article. Following an analysis of the relationship between the BBNJ Agreement and the ATS (Section 5), this article identifies four substantive areas of intersection between the two regimes: environmental impact assessment; area-based management tools; marine genetic resources; and dispute resolution and liability for environmental

[3] BBNJ Agreement (n 1) art 2.

[4] Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

[5] Convention for the Conservation of Antarctic Marine Living Resources (adopted 20 May 1980, entered into force 7 April 1982) 1239 UNTS 47 (CAMLR Convention).

[6] Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 30 ILM 1461 (Protocol).

[7] For analysis of the term 'not undermine' during the BBNJ Agreement negotiations, see A Friedman, 'Beyond "Not Undermining": Possibilities for Global Cooperation to Improve Environmental Protection in Areas beyond National Jurisdiction' (2019) 76 ICES Journal of Marine Science 452; 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.

[8] UNGA Res 69/292 (19 June 2015) UN Doc A/Res/69/292, para 3.

harm (Section 6). As will be demonstrated, the BBNJ Agreement has different implications in each area—both positive and negative—for the ATS as well as risks and opportunities in terms of the development of both regimes and the more general protection of the Southern Ocean.

In an article published in 2021, Marcus Haward identified four types of engagement that characterise the relationship between the ATS and other organisations and regimes: competence; competition; complementarity; and congruence.[9] Competence refers to the ATS's assertion of primacy with respect to the governance or regulation of an activity. Competition reflects a situation where different regimes assert competing interests in relation to jurisdiction or norms, in contrast to complementarity, under which the ATS may refer or even defer to another regime in order to support its work. Finally, congruence would see the ATS incorporate measures from another regime into its own management framework. This typology provides an extremely useful analytical framework from which the current and future relationship between the ATS and the BBNJ Agreement will be examined.

As will be discussed in Section 5, to date, the Antarctic Treaty Consultative Meeting (ATCM) and CAMLR Convention Commission (CCAMLR) have adopted a 'competence' approach in relation to the BBNJ Agreement: asserting the primacy of the ATS with respect to regulating activities associated with, or impacting upon, Antarctic biodiversity. This article argues that this approach is neither geopolitically sustainable nor likely to protect the fundamental values and principles under both regimes in the longer-term. Rather, it is advocated that the ATS actively and positively engage with the BBNJ Agreement and its institutions in a manner that is at least 'complementary', as understood by Haward's typology. Although this would require a pivot from the rhetoric of the ATCM over the last decade or so in respect of the BBNJ Agreement, this approach would, in fact, be consistent with how the ATS has engaged more generally with the law of the sea over the last five decades in order to achieve the 'reinforcement of desirable norms' rather than 'conflictive or duplicative efforts' in this field.[10]

2. The BBNJ Agreement

The BBNJ Agreement is the third agreement to be adopted under the auspices of the United Nations Convention on the Law of the Sea (UNCLOS).[11] Its objective is to ensure the conservation and sustainable use of marine biodiversity in ABNJ, to support

[9] M Haward, 'Biodiversity in Areas Beyond National Jurisdiction (BBNJ): The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the United Nations BBNJ Agreement' (2021) 11 The Polar Journal 303, 307–08.

[10] C Joyner, 'The Antarctic Treaty System and the Law of the Sea—Competing Regimes in the Southern Ocean' (1995) 10 International Journal of Marine and Coastal Law 301, 331.

[11] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). The other two Agreements comprise the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea (adopted 28 July 1994, entered into force 16 November 1994) 1836 UNTS 3; and the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3.

the effective implementation of UNCLOS in this respect and to facilitate cooperation and coordination between relevant organisations, bodies and frameworks in relation to activities taking place beyond national jurisdiction.[12] Described by Daniel Bodansky as 'four treaties in one',[13] the BBNJ Agreement: establishes a regime for regulating access to and benefit sharing of marine genetic resources (MGRs) (Part II); provides for area-based management tools (ABMTs) beyond national jurisdiction including marine protected areas (MPAs) (Part III); establishes rules and principles for the environmental impact assessment (EIA) of activities taking place in ABNJ or within the marine jurisdiction of States Parties that may cause substantial pollution or significant and harmful changes to ABNJ (Part IV); and provides for capacity building and the transfer of technology (Part V). In addition, the BBNJ Agreement sets out general principles and approaches to guide activities in ABNJ (Article 7) as well as establishing a relatively complex set of treaty institutions to support the implementation of the BBNJ Agreement as well as compliance and dispute resolution mechanisms.[14] Although its scope of application is confined to ABNJ[15]—which is defined as the high seas and the Area[16]—the BBNJ Agreement imposes limited obligations on States Parties in respect of activities taking place in marine areas within their jurisdiction where those activities risk causing substantial pollution or significant harm to biodiversity beyond national jurisdiction.[17]

A fundamental issue on which much time and effort was expended during the negotiations was the relationship between the BBNJ Agreement and the multitude of global and regional institutions and regimes already governing activities taking place in ABNJ.[18] This has been addressed in general terms in Article 5(2) BBNJ Agreement, which sets out that '[t]his Agreement shall be interpreted and applied in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies that promotes coherence and coordination with those instruments, frameworks and bodies'.[19] The term 'not undermine' is deliberately ambiguous and, during the negotiations, different delegations attached

[12] BBNJ Agreement (n 1) preamble, art 2. On the role and implications of the BBNJ Agreement preamble, see S Lothian, 'The BBNJ Preamble: More than Just Window Dressing' (2023) 153 Marine Policy 105642.

[13] D Bodansky, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement' (2024) 118 AJIL 299.

[14] For a general introduction to, and overview of, the BBNJ Agreement (n 1), see M Abegón-Novella, 'Making Sense of the Agreement on Biodiversity Beyond National Jurisdiction: The Road Ahead' (2023) 53 EP&L 439; Bodansky ibid; KE Dalaker, 'A Commentary on the BBNJ Agreement Using the History of the Making of UNCLOS and Its Implementation Agreements' (2024) 38 OceanYB 125.

[15] BBNJ Agreement (n 1) art 3.

[16] ibid art 1(2). The 'Area' is the 'seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (UNCLOS art 1(1)) and is designated the common heritage of (hu)mankind under Part XI UNCLOS.

[17] Specifically, under art 28(2) BBNJ Agreement (n 1), States Parties must carry out an EIA in accordance with the BBNJ Agreement or with national processes in respect of activities in marine areas under their jurisdiction where those activities may cause substantial pollution of or significant and harmful changes to the marine environment in ABNJ.

[18] Around 52 international and regional organisations are thought to intersect with the BBNJ Agreement. See A Langlet and ABM Vadrot, 'Not "Undermining" Who? Unpacking the Emerging BBNJ Regime Complex' (2023) 147 Marine Policy 105372, 3.

[19] BBNJ Agreement (n 1) art 5(2) (emphasis added).

diverse meanings to it ranging from 'not interfering with, to not duplicating existing mandates, to not engaging in direct management at the global level, to not impairing the effectiveness of existing measures'.[20] De Lucia pertinently notes that Article 5 imposes a double obligation 'to interpret and apply the BBNJ Agreement in a way that does not undermine relevant IFBs'[21] and that this obligation applies to both States Parties and to BBNJ bodies (such as the Conference of Parties (COP)).[22] It therefore does not apply to IFBs directly but, rather, to States that are party to both the BBNJ Agreement and the relevant IFB.[23] The obligation is twofold: in addition to 'not undermining' the IFB, States Parties and BBNJ bodies must 'promote coherence and coordination with those instruments, frameworks and bodies'.[24] This obligation to cooperate is strengthened and developed in multiple places throughout the BBNJ Agreement. Importantly, and as will be discussed in Section 6, the BBNJ Agreement further refines the 'not undermine' obligation in the relation to ABMTs[25] and EIA.[26] As Daniel Bodansky has observed, however, these refinements have arguably ensured that the status quo, in terms of the balance of power between the BBNJ Agreement and the IFBs, has prevailed notwithstanding the ambiguous nature of Article 5.[27] These provisions will be subject to detailed discussion in Section 6 in the context of the relationship between the BBNJ Agreement and the instruments of the ATS.

3. The Antarctic Treaty System

The ATS is defined as comprising the 'Antarctic Treaty, the measures in effect under that Treaty, its associated separate instruments in force and the measures in effect under those instruments'.[28] In addition to the Antarctic Treaty, the principal instruments that comprise the ATS include the Convention for the Conservation of Antarctic Seals (CCAS),[29] the CAMLR Convention and the 1991 Environmental Protocol. 29 States are party to the Antarctic Treaty, the Protocol and the CAMLR Convention, with the

[20] Scanlon (n 7) 407. See further on the negotiating history and possible interpretations of 'not undermining': Friedman (n 7); BE 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; J Tang, 'Form Follows Function: An Initial Evaluation of the BBNJ Agreement's Achievements regarding the "Not Undermining" Proviso' (2024) 159 Marine Policy 105952.

[21] V De Lucia, 'After the Dust Settles: Selected Considerations about the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction with respect to ABMTs and MPAs' (2024) 55 ODIL 115, 121 (emphasis in original).

[22] ibid.

[23] Tang (n 20) 7.

[24] BBNJ Agreement (n 1) art 5(2).

[25] ibid art 23.

[26] ibid art 29.

[27] Bodansky (n 13) 320.

[28] Protocol (n 6) art 1(e). On the nature of the Antarctic Treaty System (ATS), see JM Barrett, 'The Antarctic Treaty System' in KN Scott and DL VanderZwaag (eds), *Research Handbook on Polar Law* (Edward Elgar 2020) 40. For a discussion of the origins of the ATS and its legal implications, see KN Scott, 'Antarctic Treaty System' in ET Bloom et al (eds), *Elgar Concise Encyclopedia of Polar Law* (Edward Elgar (forthcoming)).

[29] Convention for the Conservation of Antarctic Seals (opened for signature 11 February 1972, entered into force 11 March 1978) 11 ILM 251 (CCAS).

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Antarctic Treaty having been ratified by 58 States, the Protocol by 42 States and the CAMLR Convention by 36 States and the European Union (EU).[30]

The Antarctic Treaty dedicates the continent of Antarctica and the area south of 60° South Latitude[31] to peaceful purposes[32] and freedom of scientific research,[33] as well as banning nuclear explosions and the disposal of radioactive waste therein.[34] A fundamental principle underpinning the ATS is the sharing of scientific information and cooperation in scientific research,[35] as well as transparency relating to all activities taking place on the continent. This is demonstrated by the requirements for all States Parties to provide advance notice of all expeditions to, and activities in, Antarctica[36] and to submit to an open system of terrestrial, marine and aerial inspection and observation.[37] The sovereignty dispute over the continent of Antarctica (discussed in Section 4) has limited the development of rules relating to jurisdiction over activities,[38] resulting in jurisdiction, in practice, being exercised on the basis of nationality, the flag State of the vessel and the 'flag State' of the scientific base.[39]

While conservation and environmental protection were not initially included as standalone principles within the Antarctic Treaty (outside of the context of a prohibition on nuclear explosions and disposal of nuclear waste), they can now be considered fundamental values within the ATS. Sustainable management of marine resources became an early focus of the ATS with the adoption of the CCAS in 1972 and the CAMLR Convention in 1980. While commercial sealing has not resumed in Antarctica in the modern era—rendering the CCAS little more than a paper treaty—the CAMLR Convention is the primary regime for the conservation of Antarctic marine living resources.[40] While 'conservation' for the purposes of the CAMLR Convention

[30] There are 29 consultative and 29 non-consultative States Parties to the Antarctic Treaty (n 4). Only consultative States Parties have the right to participate in decision-making within the Antarctic Treaty Consultative Meeting. All 29 consultative States Parties to the Antarctic Treaty are also party to the Protocol (n 6). There are 42 States Parties to the Protocol, with 15 Antarctic Treaty non-consultative States Parties not yet having ratified the Protocol. All Antarctic Treaty consultative States Parties are also CAMLR Commission (CCAMLR) Members, with the exception of Czechia and Ecuador. Of the non-consultative Antarctic Treaty States Parties, only Canada, Greece and Pakistan are CCAMLR members. 26 States and the EU are Members of the CCAMLR, including Namibia, which has not ratified the Antarctic Treaty. Ten other States have acceded to the CAMLR Convention (but are not CCAMLR Members), including the Cook Islands, Mauritius, Panama and Vanuatu, which are not party to the Antarctic Treaty. 17 States have ratified CCAS (n 29). See Secretariat of the Antarctic Treaty, *Parties* <https://www.ats.aq/devAS/Parties?lang=e>; CCAMLR, *Members* <https://www.ccamlr.org/en/organisation/members>.

[31] Antarctic Treaty (n 4) art VI.

[32] ibid art I.

[33] ibid art II.

[34] ibid art V. For an overview of the Antarctic Treaty, see A Watts, *International Law and the Antarctic Treaty System* (Grotius Publications 1992) ch 2; J Hasessian, 'The Antarctic Treaty 1959' (1960) 9 ICLQ 436.

[35] Antarctic Treaty (n 4) art III. For a recent analysis of the important role that science has played in supporting the resilience of the Antarctic Treaty, see D Leary and J Jabour, 'The Resilience of Scientific Co-operation as a Foundational Principle of the Antarctic Treaty' (2024) XV Yearbook of Polar Law 348.

[36] Antarctic Treaty (n 4) art VII(5).

[37] ibid art VII(1)–(4).

[38] ibid art VIII.

[39] See R Lefeber, 'The Exercise of Jurisdiction in the Antarctic Region and the Changing Structure of International Law: The International Community and Common Interests' (1990) 21 NYIL 81.

[40] CAMLR Convention (n 5) art II(1). For an overview of the CAMLR Convention, see M Haward, 'Southern Ocean Fisheries' in Scott and VanderZwaag (n 28) 181.

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includes 'rational use'[41] and CCAMLR performs the functions of a regional fisheries management organisation (RFMO), it has (from the perspective of an RFMO) an unusually strong conservation mandate.[42] This is demonstrated by its very early endorsement of precautionary and ecosystem approaches in its management of Antarctic marine living resources.[43] CCAMLR's ecosystem approach is further illustrated by its geographical and biological scope. Geographically, the CAMLR Convention area extends beyond the Antarctic Treaty area to the Antarctic Convergence,[44] a natural ecological boundary between the colder Antarctic waters and the warmer waters to the north. Biologically, the CAMLR Convention applies to 'Antarctic marine living resources' defined as comprising 'populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence'.[45]

The Protocol, which applies to the Antarctic Treaty area, commits States Parties 'to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems' and designates 'Antarctica as a natural reserve, devoted to peace and science'.[46] It sets out a stringent set of environmental principles relating to all aspects of the Antarctic ecosystem and the atmosphere and hydrosphere,[47] as well as obligations relating to the promotion of cooperation.[48] Its most well-known provision is the ban on any activity relating to mineral resources outside of scientific research.[49] The Protocol is supplemented by six annexes, which set out detailed rules and principles on:

[41] CAMLR Convention (n 5) art II(2). While beyond the scope of this article, it is worth noting that 'rational use' has become an increasingly contested term within the CCAMLR: see further J Jacquet et al, '"Rational Use" in Antarctic Waters' (2016) 63 Marine Policy 28.

[42] For a compelling argument on why CCAMLR is not an RFMO, see AJ Press, I Hodgson-Johnston and AJ Constable, 'The Principles of the Convention on the Conservation of Antarctic Marine Living Resources: Why Its Commission is Not a Regional Fisheries Management Organisation' in N Liu, CM Brooks and T Qin (eds), *Governing Marine Living Resources in the Polar Regions* (Edward Elgar 2019) 9. By contrast, Lynda Goldsworthy takes a more sceptical approach. While she highlights key differences between CCAMLR and typical RFMOs, she nevertheless criticises 'the absence of a clear and common understanding of the intent of Article II' which 'provides a serious challenge to implementing the objective'. She asks '[c]an CCAMLR claim to be a conservation regime if it is only able to deliver fisheries management, albeit best-practice fisheries management?': L Goldsworthy, 'Finding the "Conservation" in the Convention on the Conservation of Antarctic Marine Living Resources' (2020) XII Yearbook of Polar Law 132, 151, 154.

[43] CAMLR Convention (n 5) art II(3). See further S Chopra and C Hansen, 'Deep Ecology and the Antarctic Marine Living Resources: Lessons for Other Regimes' (1997) 3 Ocean&CoastalLJ 117; AJ Constable, 'Lessons of CCAMLR on the Implementation of the Ecosystem Approach to Managing Fisheries' (2011) 12 Fish and Fisheries 138; D Miller et al, 'Managing Antarctic Marine Living Resources: The CCAMLR Approach' (2004) 19 International Journal of Marine and Coastal Law 317; G Parkes, 'Precautionary Fisheries Management: The CCAMLR Approach' (2000) 24 Marine Policy 83; H Österblom and O Olsson, 'CCAMLR: An Ecosystem Approach to the Southern Ocean in the Anthropocene' in K Dodds, AD Hemmings and P Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar 2017) 408.

[44] CAMLR Convention (n 5) art I(1).

[45] ibid art I(2).

[46] Protocol (n 6) art 2.

[47] ibid art 3.

[48] ibid art 6.

[49] ibid art 7.

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EIA;[50] the protection of Antarctic flora and fauna;[51] waste disposal;[52] marine pollution;[53] area-based protection;[54] and liability for environmental harm.[55] While it is beyond the scope of this article to provide a detailed overview of this regime,[56] it is worth noting that environmental protection in the Antarctic is based on arguably the most stringent standards anywhere in the world. Most activities are subject to a detailed form of EIA, the provisions of which are triggered by a low risk of harm. Antarctic fauna and flora are generally strictly protected, with permits required for any (except minimal) forms of interference. Similarly, once protected areas are established, relatively strict management rules are developed, with permits required to enter those areas most strictly protected. Rules relating to the management of waste both on the continent and in relation to vessels are generally rigorous (and often require the complete removal of waste from the Antarctic Treaty area), although ATS marine pollution standards are now largely implemented globally through IMO instruments.

There is therefore a significant degree of substantive overlap between the scope of the BBNJ Agreement and the ATS in terms of activities taking place within the Southern Ocean[57] surrounding Antarctica. In particular, the regimes overlap in respect of EIA,

[50] ibid art 8, annex I.

[51] ibid annex II.

[52] ibid annex III.

[53] ibid annex IV.

[54] ibid annex V.

[55] ibid art 16, annex VI (not yet in force).

[56] See generally SKN Blay, 'New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol' (1992) 86 AJIL 377; C Redgwell, 'Environmental Protection in Antarctica: The 1991 Protocol' (1994) 43 ICLQ 599; DR Rothwell, 'Polar Environmental Protection and International Law: The 1991 Antarctic Protocol' (2000) 11 EJIL 591; R Warner, 'Principles of Environmental Protection at the Poles' in Scott and VanderZwaag (n 28) 326.

[57] While the term 'Southern Ocean' has been used in legal and policy literature for many decades, its formal status as an ocean has, rather surprisingly, only recently been confirmed. First formally recognised as the fifth ocean in the second edition of *Limits of Oceans and Seas* (International Hydrographic Office (IHO) 1937), it was deliberately omitted from the third edition published in 1953. This was because 'the majority of opinions received since the issue of the 2nd Edition in 1937 are to the effect that there exists no real justification for applying the term Ocean to this body of water, the northern limits of which are difficult to lay down owing to their seasonal change. The limits of the Atlantic, Pacific and Indian Oceans have therefore been extended to the Antarctic Continent': see IHO, *Limits of Oceans and Seas* (3rd edn, IHO 1953) 4.

In 2000, the IHO revised the third edition of *Limits of Oceans and Seas* and recognised the Southern Ocean as a separate ocean, but did not include its northern limits owing to a lack of consensus between States. Some States supported the 60° South Latitude while others, notably Australia, put the limit much further north. See CM Johnson, 'The Relevance of the Southern Ocean to the Development of a Global Regime for Marine Areas beyond National Jurisdiction—An Uncommon Commons' (2017) 32 International Journal of Marine and Coastal Law 709, 711–12. In the event, the updates to the 1953 edition of *Limits of Oceans and Seas* were not adopted by the IHO owing to disagreement by States over parts of its content.

In 2022, the Conference of the IHO Hydrographic Commission on Antarctica (IHO Conference) adopted Decision 18/45, which recognised the Southern Ocean as a distinct maritime area surrounding Antarctica and proposed a resolution that the Southern Ocean be so recognized by the IHO. See IHO Conference, Decision 18/45 of 26 May 2022 relating to the Recognition of the Southern Ocean <https://iho.int/uploads/user/About%20IHO/Assembly/Assembly3/DOCUMENTS/PRO%20A3/A3_2023_PRO-3.3_EN_IHO_Resolution_Southern_Ocean_v2.pdf>. In 2023, the IHO formally recognised the Southern Ocean as the global sea area surrounding the continent of Antarctica as defined by the parallel Latitude 60° S. However, the relevant decision asserted that '[s]ince these limits have neither political nor oceanographic or, more

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area-based management tools and the exploitation of marine genetic resources. There is also potential scope for overlap in respect of dispute resolution and liability for environmental harm. The relationship between the two regimes is therefore complex, in many ways more so than other regions, owing to the contested status of the Southern Ocean and the nature of ABNJ as applied to the Antarctic.

4. The Antarctic Treaty area as an Area beyond National Jurisdiction

The BBNJ Agreement 'applies to areas beyond national jurisdiction'[58] which is defined as the 'high seas and the Area'.[59] Article VI Antarctic Treaty provides that it applies 'to the area south of 60° South Latitude, including all ice shelves', but goes on to stipulate that 'nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regards to the high seas within that area'. Initially, it was uncertain as to whether the provisions of the Antarctic Treaty applied to the marine environment south of 60° South Latitude or whether it was confined to the continent and ice shelves.[60] Within a short time, however, the Antarctic Treaty was consistently interpreted, implemented and indeed developed to apply to activities taking place on, in or under the Southern Ocean south of 60° South Latitude. Its provisions relating to the freedom of scientific research are applied to marine scientific research and its seas have been treated as being nuclear free and demilitarised (with the caveat that military vessels, personnel and equipment can be used for peaceful purposes).[61] Moreover, ATS constituent instruments including the CAMLR Convention and the Protocol were developed with an express scope of application to the marine environment. Today, there is no doubt that the ATS applies to the marine environment south of 60° South Latitude (and in the case of the CAMLR Convention, to the Antarctic Convergence).

The more interesting contemporary question is whether, and to what extent, the Southern Ocean constitutes an ABNJ. Seven States continue to assert sovereign claims to the continent of Antarctica with concomitant maritime claims: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom (UK).[62] All States claim a form of territorial sea and continental shelf, with France and Australia having formally claimed an exclusive economic zone (EEZ) off their respective Antarctic territories and

generally, environmental significance whatsoever, Hydrographic Offices may continue to adopt their own limits as long as these limits remain technically consistent with the data model of the polygonal demarcation of global sea areas': see IHO, Decision 02/2023 of February 2023 relating to the Recognition of the Southern Ocean and Consequences on the Limits of Some Global Sea Areas, reproduced in IHO, *Resolutions of the International Hydrographic Organisation* (2nd edn 2010, updated July 2023).

[58] BBNJ Agreement (n 1) art 3.

[59] ibid art 1(2).

[60] T Scovazzi, 'The Antarctic Treaty System and the New Law of the Sea' in F Francioni and T Scovazzi (eds), *International Law for Antarctica* (2nd edn, Kluwer Law International 1996) 377, 387.

[61] Antarctic Treaty (n 4) art I(2).

[62] See generally SV Scott, 'Antarctic: Competing Claims and Boundary Disputes' in Scott and VanderZwaag (n 28) 147. See also I Hodgson-Johnston, 'The Laws of Territorial Acquisition as Applied to Claims to Antarctic Territory: A Review of Legal Scholarship' (2015) 7 Yearbook of Polar Law 556; KN Scott, 'Managing Sovereignty Disputes in the Antarctic: The Next 50 Years' (2009) 20 YbInt'lEnvL 3.

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Chile and Argentina claiming a 200 nautical mile (NM) maritime zone from as early as the 1940s and 1960s respectively.[63] The United States (US) and Russia (as successor State to the Union of Soviet Socialist Republics (USSR)) appear to still maintain a right to make a territorial claim in the future. These claims are not generally recognised by other States Parties to the Antarctic Treaty or the international community more generally and are, in fact, not mutually recognised by all claimant States.[64] The claims of Argentina, Chile and the UK overlap, and there is a part of Antarctica that is not subject to any claim.

Article IV Antarctic Treaty is arguably the most important provision within the treaty and comprises a masterful compromise that permits both claimant and non-claimant States to participate within the treaty without undermining or prejudicing their respective positions as to the sovereign status of Antarctica. It stipulates that nothing in the treaty shall be interpreted as a renunciation by any party of previously asserted rights or claims to territorial sovereignty in Antarctica or any basis of claim or prejudicing the position of any party as regards to the recognition or non-recognition of claims.[65] It goes on to prohibit the making of new claims or the enlargement of existing claims to territorial sovereignty in Antarctica while the treaty is in force.[66] This provision, which is replicated with appropriate modification in the CAMLR Convention (Article IV), has facilitated cooperation between claimant and non-claimant States in developing a comprehensive regime (such that it is now described as a 'system') governing all activities in the Antarctic notwithstanding the sovereignty dispute. This is not to say that the sovereignty dispute has not impeded progress on initiatives (for example, the development of rules relating to jurisdiction or progress in relation to MPAs under CCAMLR) or been implicitly present in decisions relating to scientific research or the construction of infrastructure[67] but, overall, Article IV is undoubtedly integral to the success of the entire ATS.

Nevertheless, the existence of the sovereignty disputes has led to a level of uncertainty as to the status of the seas and seabed within the Antarctic Treaty area and a variable application of the law of the sea to the region.[68] While the general

[63] KN Scott and DL VanderZwaag, 'Polar Oceans and the Law of the Sea' in DR Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 724, 738. See more generally S Kaye and DR Rothwell, 'Southern Ocean Boundaries and Maritime Claims: Another Antarctic Challenge for the Law of the Sea?' (2002) 33 ODIL 359; P Vigni, 'Antarctic Maritime Claims: "Frozen Sovereignty" and the Law of the Sea' in AG Oude Elferink and DR Rothwell (eds), *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (Martinus Nijhoff 2001) 85.

[64] Argentina and Chile recognise one another's claims while Australia, France, New Zealand and Norway mutually recognise each other's claims.

[65] Antarctic Treaty (n 4) art IV(1).

[66] ibid art IV(2).

[67] See, e.g. KN Scott, 'Scientific Rhetoric and Antarctic Security' in AD Hemmings, DR Rothwell and KN Scott (eds), *Antarctic Security in the Twenty-First Century* (Routledge 2012) 284. Cf Leary and Jabour (n 35).

[68] See Joyner (n 10); C Joyner, *Antarctica and the Law of the Sea* (Martinus Nijhoff 1992) particularly ch 2; BH Oxman, 'Antarctica and the New Law of the Sea' (1986) 19 CornellInt'lLJ 211; DR Rothwell, 'A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean' (1994) 15 AYBIL 155; M Haward, 'The Law of the Sea Convention and the Antarctic Treaty System: Constraints or Complementarity' in J van Dyke (ed), *Maritime Boundary Disputes, Settlement Processes, and the Law of*

application of UNCLOS to the region is 'beyond question',[69] it is notable that the Antarctic was deliberately excluded from the third UN Conference on the Law of the Sea (commonly known as UNCLOS III) negotiating agenda and UNCLOS itself makes no explicit reference to the region.[70] In deference to the sovereignty dispute, States have, for example, generally not exercised coastal and port State jurisdiction in respect of 'their' maritime zones associated with the continent of Antarctica, relying instead on flag State jurisdiction and the jurisdiction associated with ports located in the metropolitan territories of so-called Antarctic gateway States. They have also not attempted to regulate fishing outside of the international regime established by CCAMLR, in contrast to fishing offshore sub-Antarctic island territories, which is subject to domestic regulation. On the other hand, all seven claimant States have engaged to a greater or lesser extent with the Commission on the Limits of the Continental Shelf established under UNCLOS with respect to continental shelf claims beyond 200 NM off the continent of Antarctica.[71]

The status of the seabed and surrounding seas is particularly relevant in relation to the exploitation of resources and this issue was discussed, but not resolved, with respect to deep-sea mining and the relationship between Part XI UNCLOS and the incipient Antarctic minerals regime adopted in 1988 by the Antarctic Treaty States Parties[72] and the subsequent ban in the Protocol on commercial minerals exploitation under Article 7. The Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) was deliberately designed to be as compatible as it could be with Part XI UNCLOS in that its scope was limited to activities south of 60° South Latitude 'and in the seabed and subsoil of adjacent offshore areas *up to the deep seabed*'.[73] Without using the term 'continental shelf', CRAMRA nevertheless would, in practice, have applied only to minerals activities on the Antarctic continental shelf.[74] The Final Act of the Meeting (at which CRAMRA was adopted) confirmed that the scope of the continental shelf would be determined in accordance with the criteria as set out in

the Sea (Brill 2009) 231. For a contemporary analysis of these long-standing issues, see R Strating, 'Assessing the Maritime "Rules Based Order" in Antarctica' (2022) 76 Australian Journal of International Affairs 286.

[69] Joyner (n 10) 305.

[70] SV Scott, 'The Evolving Antarctic Treaty System: Implications of Accommodating Developments in the Law of the Sea' in EJ Molenaar, AG Oude Elferink and DR Rothwell (eds), *The Law of the Sea and the Polar Regions: Interactions Between Global and Regional Regimes* (Brill 2013) 17, 19.

[71] States have either submitted information on their claims with a request that their Antarctic claim is not considered by the Commission on the Limits of the Continental Shelf or they have reserved the right to submit relevant information on an Antarctic claim at a future date. For a discussion of the approaches taken by Antarctic claimant States with respect to the continental shelf process under UNCLOS, see AG Oude Elferink, 'The Outer Limits of the Continental Shelf in the Polar Regions' in Molenaar, Oude Elferink and Rothwell (n 70) 61; AD Hemmings and T Stephens, 'Australia's Extended Continental Shelf: What Implications for Antarctica?' (2006) 60 Australian Journal of International Affairs 439.

[72] Convention on the Regulation of Antarctic Mineral Resource Activities (opened for signature 2 June 1988, not yet in force) 27 ILM 868 (CRAMRA).

[73] ibid art 5(2) (emphasis added).

[74] Avoiding the term 'continental shelf' permitted CRAMRA (n 72) to define its effective scope of application without having to actually engage with whether States, in fact, had legitimate and/or recognised claims to a juridical continental shelf: see Rothwell (n 68) 167.

Article 76(1)–(7) UNCLOS.[75] The question of whether Part XI UNCLOS would have applied outside of the scope of CRAMRA but south of 60° South Latitude was never directly addressed. Article 7 Protocol is arguably less compatible with UNCLOS in that it applies to the entire Antarctic Treaty area irrespective of how the seabed is classified.[76]

The BBNJ Agreement provides a new focus on this question but, arguably, with renewed urgency. Whereas, practically, there was and is little interest in seabed mining off the coast of Antarctica (and thus the relationship between the two regimes is of greater academic than practical interest), there are activities already taking place off Antarctica that potentially fall within the scope of the BBNJ Agreement. These include bioprospecting for MGRs as well as processes associated with environmental protection such as EIAs and ABMTs.

There are potentially five status options that might be applied to the seabed and water column south of 60° South Latitude.[77] First, the entire water column and seabed can be classified as ABNJ. This would potentially be the position taken by States, particularly those States not party to the Antarctic Treaty that do not recognise any of the seven Antarctic claims or any form of collective jurisdiction under the Antarctic Treaty. Second, areas of territorial sea and continental shelf as per maritime zones existing in 1959 can be considered outside of ABNJ, with the remaining areas classified as such. This position is based on an assumption that an extension of claims to reflect 1982 UNCLOS maritime zones would be prohibited under Article IV(2) Antarctic Treaty on the basis that they constitute a 'new' or an 'enlarged' claim. Third, ABNJ comprises all areas outside of maritime zones asserted by claimant States in accordance with UNCLOS (which would include an EEZ and continental shelf up to or beyond 200 NM in accordance with Article 76(1) UNCLOS). This is based on an interpretation of Article IV Antarctic Treaty that would not classify a claim to modern maritime zones as contrary to paragraph 2 but, rather, as simply updating the 1959 claims or falling outside paragraph 2, which could be interpreted as applying only to new or enlarged *terrestrial* claims.[78] Fourth, a similar position to the third option in terms of the scope of ABNJ, but with areas that are subject to modern maritime zones under the jurisdiction of States being subject to a form of collective jurisdiction under the auspices of the Antarctic Treaty.[79] This would be a unique form of jurisdiction

[75] Final Act of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources reproduced in the *Final Report of the Fourth Special Antarctic Treaty Consultative Meeting on Antarctic Mineral Resources* (Wellington, New Zealand, 2 June 1988) annex B.

[76] Rothwell (n 68) 167–68 notes that at a point during the Protocol negotiations it was proposed that the mining ban would only apply up to the deep seabed, but this was rejected and thus, in his view, '[t]he Protocol is an indicator that the Antarctic Treaty parties do not believe there is any scope for the application of the UNCLOS deep seabed minerals regime in Antarctic waters'.

[77] While CCAMLR applies to the Antarctic Convergence, the waters north of 60° South are not contested as having any status other than the high seas or subject to the jurisdiction of States as part of their sub-Antarctic island territories.

[78] See Rothwell (n 68) 157–65. Joyner (n 10) 310 suggested that as all claims other than those of Norway originally ended at 60° South Latitude, delimiting a claim in accordance with UNCLOS rules relating to the EEZ and continental shelf 'merely furnished a more precise legal definition of an already existent claim to title'.

[79] Christopher Joyner suggested that 'when viewed in composite, the Antarctic Treaty System may present an acceptable surrogate in the Antarctic for jurisdiction tantamount to the coastal State-derived EEZ concept':

under international law, but arguably broadly reflects the approach of the States in their negotiations of CRAMRA, although it was never explicitly so stated and, in fact, the proposed jurisdiction of CRAMRA would have gone beyond areas subject to contested claims to include the 'continental shelf' off the unclaimed area of Antarctica.[80] Finally, and most radically, no marine area is ABNJ south of 60° South Latitude but, rather, is subject in its entirety to a collective jurisdiction under the auspices of the Antarctic Treaty on the basis of the special responsibility that the States Parties exercise in respect of Antarctica. On this interpretation, the BBNJ Agreement would have no application south of 60° South Latitude.

Although the Antarctic Treaty parties have asserted, on a regular basis, that the ATS comprehensively regulates *all* activities south of 60° South Latitude—with the implication that the BBNJ Agreement has no mandate in the region[81]—the characterisation of the marine environment within the Antarctic Treaty area as being subject to a unique sui generis regime outside of any other regime would be challenging to support on the basis of even the practice of the Antarctic Treaty States Parties themselves. Moreover, the 'comprehensive' scope of the ATS should not be overstated, with a number of activities, not least shipping, being subject to regimes developed outside the ATS, such as by the IMO. Thus, it is reasonable to assume that at least part (outside of areas claimed by States), if not all, of the Southern Ocean can be said to constitute ABNJ.

5. The relationship between the BBNJ Agreement and the ATS

As noted in Section 2, the question of how the BBNJ Agreement would relate to, and intersect with, IFBs that already have a mandate to operate or regulate activities taking place in ABNJ dominated negotiations and is addressed in a number of places in the BBNJ Agreement. First, Article 5 provides that, generally, the BBNJ Agreement must not undermine other frameworks and must be interpreted and implemented in such a way as to promote coherence and coordination with other relevant bodies. The obligation to cooperate is reinforced in Article 8 BBNJ Agreement. In addition, as will be discussed in Section 6, there are specific provisions which develop the 'not undermine' principle in the context of EIA and ABMTs.

Two further principles are of particular interest from an Antarctic perspective. First, Article 6 BBNJ Agreement asserts that any decision or recommendation of COP or any

see C Joyner, 'The Exclusive Economic Zone and Antarctica: The Dilemmas of Non-Sovereign Jurisdiction' (1988) 19 ODIL 469, 482. Oxman (n 68) 223–24 has similarly suggested that '[a]t least in theory, it is possible to take the position that certain states—principally the Consultative Parties—have collective rights applicable *erga omnes* to establish regulatory regimes for the Antarctic continent and for offshore areas subject to coastal state jurisdiction'.

[80] CRAMRA (n 72) art 5.

[81] See, e.g. the UK's declaration upon signing the BBNJ Agreement (n 1), where it stated that 'the United Kingdom notes that the Antarctic Treaty system comprehensively addresses the legal, political and environmental considerations unique to that region and provides a comprehensive framework for the international management of the Antarctic': see UNTC, *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—Declarations* <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en>.

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subsidiary body, and any acts, measures or activities undertaken on the basis thereof, 'shall be without prejudice to, and shall not be relied upon as a basis for asserting or denying any claims to, sovereignty, sovereign rights or jurisdiction, including in respect of any disputes thereto'. This is consistent with the aims and objectives of Article IV Antarctic Treaty, although would obviously have application to other regions where sovereignty is contested, such as the South China Sea. Second, Article 4 excludes the application of the BBNJ Agreement to government vessels and aircraft operated on non-commercial service (with the normal caveat that States should endeavour to ensure that such vessels and aircraft are acting consistently with the BBNJ Agreement as far as reasonable and practicable). This has particular implications for Antarctic activities given the very high number of naval and government non-commercial vessels operating in support of national and scientific programs in the region.

More generally, Article 7 BBNJ Agreement sets out 14 'general principles and approaches' which are intended to guide its implementation. None are obviously incompatible with the core values, principles and approaches of the ATS, with the possible exception of 'the principle of common heritage of humankind which is set out in the [Law of the Sea] Convention'.[82] As noted in Section 3, the Protocol precludes the exploitation of mineral resources south of 60° South Latitude and the ATS more generally does not adopt a common heritage of humankind approach in relation to Antarctic resources. A number of the Article 7 principles are strongly supportive of Antarctic principles and values, such as precautionary and ecosystem approaches,[83] the use of best available scientific information[84] and the polluter pays principle.[85] Others, which advocate for the interests of Indigenous Peoples, small island developing States and landlocked developing countries, do not conflict with ATS values but are less obviously relevant to the regulation of activities in the Southern Ocean.

It is notable that, to date, the States Parties to the Antarctic Treaty have taken a cautious, if not defensive, stance in respect of the BBNJ Agreement. Since 2009, States Parties have consistently, in the context of MGR activities, asserted that it is the ATS that is 'the appropriate framework for managing the collection of biological material in the Antarctic Treaty area and for considering its use'.[86] More recently, similar language has been used in relation to all activities relating to the conservation and sustainable use of biodiversity in the Antarctic region.[87] At the 2024 ATCM, a paper put forward by the UK, Australia, Norway and New Zealand proposed a resolution welcoming the adoption of the BBNJ Agreement, but which '[r]eaffirm[ed] that the Antarctic Treaty System (ATS) has competence over matters relating to the Antarctic; and [re]assert[ed] that the ATS is the competent framework within which to address issues relating to the conservation and sustainable use of Antarctic marine biological diversity'.[88]

[82] BBNJ Agreement (n 1) art 7(b).
[83] ibid art 7(e), (f).
[84] ibid art 7(i).
[85] ibid art 7(a).
[86] ATCM Res 9 (2009) on Collection and Use of Antarctic Biological Material, para 1. See also ATCM Res 6 (2013) on Biological Prospecting in Antarctica.
[87] See, e.g. ATCM, 'Final Report of the Fortieth ATCM' (Beijing, China, 2017) para 173.
[88] UK, Australia, Norway and New Zealand, '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")' (ATCM, Working Paper No 40, 2024).

The proposed resolution received widespread support, but was not adopted owing to the objection of Russia.[89] As noted above, the UK used very similar language in its declaration upon signing the BBNJ Agreement,[90] although Chile's declaration was somewhat more flexible in that it asserted that the BBNJ Agreement 'shall in no way undermine the legal regime to which Chile is a party, such as, among others, the Antarctic Treaty and its related instruments in force …'.[91] Therefore, using Haward's framework as described in Section 1, the ATS has thus far adopted a 'competence' approach to engaging with the BBNJ Agreement.[92]

As will be discussed in Section 6, the interpretation of 'not undermine' is far from definitive and the intersection of the BBNJ Agreement and the ATS is fairly extensive across a number of substantive areas. On the one hand, the processes of EIA in respect of Antarctic activities can be described, to use the term favoured by the Antarctic Treaty States Parties, as 'comprehensive' within the ATS. On the other hand, the ATS does not regulate issues of access and benefit sharing associated with the exploration for and exploitation of MGRs. Both the Protocol and the CAMLR Convention provide for the use of ABMTs, but the Protocol processes have been applied in a very limited way in respect of the marine environment and the designation of MPAs under CCAMLR has been stalled since 2016. The case that the ATS is comprehensive in terms of its regulation of all activities otherwise falling within the scope of the BBNJ Agreement is not compelling and there are obvious opportunities for Antarctic Treaty States Parties to engage and cooperate as per Article 8 BBNJ Agreement. This article advocates that the ATS adopts a position of at least complementarity with the BBNJ Agreement and, arguably, congruence in respect of the regulation of MGR exploitation in the Southern Ocean.

6. Intersection of the BBNJ Agreement and the ATS

For the purposes of this article, four areas of intersection between the BBNJ Agreement and the ATS will be discussed: EIA; ABMTs; MGRs; and dispute resolution and liability for environmental harm. This is not intended to exclude other potential areas of intersection, such as, for example, technology transfer and capacity building, but these issues are not addressed substantively in this article outside of the four areas identified. The following discussion will highlight the key components of each regime in relation to each area and identify potential gaps as well as areas where additional obligations would potentially arise for States Parties to both regimes.

6.1. Environmental Impact Assessment

The objective of Part IV BBNJ Agreement is to operationalise Article 206 UNCLOS on EIA for ABNJ 'by establishing processes, thresholds and other requirements for

[89] ATCM, 'Final Report of the Forty-sixth ATCM' (Kochi, India, 2024) paras 159–162.

[90] See UNTC (n 81).

[91] ibid. It is interesting to note that France's declaration upon ratification of 5 February 2025 makes no reference to the Antarctic.

[92] Haward (n 9) 308.

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conducting and reporting assessments by Parties'.[93] EIA is defined, for the purposes of the BBNJ Agreement, as 'a process to identify and evaluate the potential impacts of an activity to inform decision-making'[94] and the BBNJ Agreement applies to activities taking place on the high seas and in the Area[95] as well as to activities taking place in the marine environment under the jurisdiction of States that risk substantial pollution or significant harm to the marine environment.[96] Its provisions therefore do not apply to activities taking place in a State's terrestrial environment—or, indeed, terrestrial environment beyond national jurisdiction, such as Antarctica—that risk substantial pollution or significant harm to the marine environment.

The BBNJ Agreement sets out a three-stage EIA process beginning with a preliminary assessment to determine if activities are likely to have more than a minor or transitory impact on the environment, drawing directly from language used by the Protocol. For those activities likely to have more than a minor or transitory impact, or where the effects of the activities are unknown or poorly understood, States Parties shall conduct a screening assessment in order to determine whether there are reasonable grounds for believing that the activity may cause substantial pollution or significant and harmful changes to the marine environment.[97] Article 30(1)(a) sets out the factors that must be considered as part of the screening process, including the site location, the duration and intensity of the activity as well as its cumulative impacts.[98] If it is determined that there are reasonable grounds for believing that the activity may cause substantial pollution or significant harm, States Parties must carry out an EIA[99] following the detailed process set out in Articles 31–39 BBNJ Agreement. The process includes extensive obligations relating to consultation with States, Indigenous peoples and relevant organisations,[100] and there are opportunities for a State Party to register a concern and seek feedback from the Scientific and Technical Body (STB).[101] States Parties are required to take steps for the prevention, mitigation and management of potential adverse effects of the activities authorised.[102]

EIA reports must be prepared and made publicly available and may be commented on by the STB.[103] It is the State Party proposing the activity that makes the ultimate decision as to whether to proceed but they must consider any feedback from those

[93] BBNJ Agreement (n 1) art 27(a). See generally, on EIA under the BBNJ Agreement, Y Tanaka, 'Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic beyond National Jurisdiction' (2024) 55 ODIL 85.

[94] BBNJ Agreement (n 1) art 1(7).

[95] ibid art 28(1), (2).

[96] ibid art 28(2).

[97] ibid art 30(1).

[98] Cumulative impacts are defined as 'the combined and incremental impacts resulting from different activities, including known past and present and reasonably foreseeable activities, or from the repetition of similar activities over time, and the consequences of climate change, ocean acidification and related impacts': ibid art 1(6).

[99] ibid art 30(1)(b).

[100] ibid arts 31, 32.

[101] ibid art 31(1)(a)(iv).

[102] ibid art 31(1)(d).

[103] ibid art 33.

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consulted and any comments from the STB when making a decision.[104] The decision, EIA report and, in fact, documents associated with every stage of the process from preliminary assessment onwards must be made publicly available through the Clearing-House Mechanism (CHM), established under Article 51 BBNJ Agreement. Where an EIA is required in respect of an activity taking place under the jurisdiction of a State, that State may use the BBNJ Agreement process or conduct an EIA under national processes, making information available through the CHM.[105] In respect of EIAs carried out, the BBNJ Agreement establishes detailed rules around monitoring and review.[106] Finally, the Agreement provides for a basic form of strategic environmental assessment in Article 39.

Part IV BBNJ Agreement includes specific provisions addressing the relationship between EIA under the BBNJ Agreement and similar processes managed by other institutions or regimes with a mandate to manage activities in ABNJ. Article 29(4) stipulates that it is not necessary to carry out an EIA under the BBNJ Agreement provided that there is an assessment process under the institution or regime that is 'equivalent to' the BBNJ Agreement process, and that the results of the assessment are taken into account in the decision-making process, or that the regulations or standards regulating the activity under the institution or regime are sufficient to prevent, mitigate or manage potential impacts below the threshold for an EIA and they have been complied with. A report of an EIA carried out under another institution or regime must be published through the CHM[107] as well as any monitoring and review reports.[108]

In relation to Antarctica, the Protocol provides for a detailed process of environmental assessment of all governmental and non-governmental activities, for which advance notice under Article VII(5) Antarctic Treaty is required, taking place south of 60° South Latitude.[109] This includes scientific research, the construction (and decommissioning) of infrastructure, tourism and logistical support-related activities.[110] There is no requirement to carry out an EIA in respect of fishing under CCAMLR.[111] EIAs are carried out by the State Party responsible for the proposed activity,[112] although they may also be carried out jointly,[113] and the threshold for assessment is low. Parties

[104] ibid art 34.
[105] ibid art 28(2).
[106] ibid arts 35–37.
[107] ibid art 29(5).
[108] ibid art 29(6).
[109] Protocol (n 6) art 8, annex I. Although Protocol (n 6) art 3 refers to 'dependent and associated ecosystems' in the context of its scope, this has not been interpreted as requiring the carrying out of an EIA in respect of activities taking place outside the Antarctic Treaty area. On EIA under the Protocol, see K Bastmeijer and R Roura, 'Environmental Impact Assessment in Antarctica' in CJ Bastmeijer and T Koivurova (eds), *Theory and Practice of Transboundary Impact Assessment* (Brill 2007) 175; LD Fallon and L Kriwoken, 'Environmental Impact Assessment under the Protocol on Environment Protection to the Antarctic Treaty and Australian Legislation' (2005) 2 Macquarie Journal of International and Comparative Environmental Law 67; R Chuffart and J Jabour, 'Environmental Impact Assessment in the Polar Regions' in Y Tanaka, R Johnstone and V Ulfbeck (eds), *The Routledge Handbook of Polar Law* (Routledge 2023) 189.
[110] Protocol (n 6) art 8(2).
[111] 'Final Act of the 11th Antarctic Treaty Special Consultative Meeting' (Madrid, 4 October 1991).
[112] Protocol (n 6) art 8(2).
[113] ibid art 8(4).

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must undertake a preliminary assessment to determine whether an activity is likely to have a less than minor or transitory impact.[114] In the event that the preliminary assessment indicates an affirmative response, States Parties must carry out an Initial Environmental Evaluation (IEE).[115] Where an activity is likely to have a more than minor or transitory impact, States Parties must carry out a Comprehensive Environmental Evaluation (CEE).[116]

As would be expected, the process of a CEE is more onerous than that of an IEE and requires consideration of a broader range of factors, including cumulative impacts as well as the impacts of the activity on scientific research and Antarctic values.[117] Notably, the terms 'minor' and 'transitory' are not defined in Annex I Protocol or in the EIA Guidelines, leaving parties to determine whether the thresholds are met on a case-by-case basis.[118] IEEs are carried out by the proposing State with minimal involvement of or consultation with other States Parties or bodies and only a requirement to provide bare information on the project through the process of information exchange.[119] By contrast, draft CEEs must be forwarded to the Committee on Environmental Protection (CEP) established under the Protocol,[120] in addition to being considered by an open-ended intersessional contact group, which reports to the CEP.[121] Draft CEEs are made publicly available[122] in addition to final CEEs plus comments and evaluations of impacts.[123] All draft CEEs are considered by the ATCM and no decision to proceed can be taken until such consideration has been completed.[124] While feedback from other States, the CEP and the ATCM must be responded to,[125] the ATCM has no power to prevent an activity from going ahead or to impose mandatory conditions on any activity. Finally, the Protocol imposes specific obligations to mitigate environmental harm[126] and these are developed in detail in the EIA Guidelines.[127] Obligations relating to monitoring are set out in respect of CEEs in Article 5 of Annex 1.[128]

[114] ibid annex I, art 1.
[115] ibid annex I, art 2.
[116] ibid annex I, art 3.
[117] ibid.
[118] ATCM Res 1 (2006) ATCM XXXIX on the Revised Guidelines for Environmental Impact Assessment in Antarctica (EP EIA Guidelines) 3. It should also be noted that the equivalent terms are not yet defined for the purposes of the BBNJ Agreement (n 1).
[119] Protocol (n 6) annex I, art 2.
[120] The CEP was established under Protocol (n 6) art 15.
[121] EP EIA Guidelines (n 118) 6; ATCM, C.1 'Procedures for Intersessional CEP Consideration of Draft CEEs' (8 June 2023).
[122] Protocol (n 6) annex I, art 3(3).
[123] ibid annex I, art 3(6).
[124] Provided that the decision has not been delayed for more than 15 months from the date of circulation of the draft CEE: ibid annex I, art 3(5).
[125] Protocol (n 6) annex I, art 3(6).
[126] ibid art 3(2)(g).
[127] There is no equivalent requirement for activities subject to IEEs, but ATCM Res 1 (2023) on the Consideration of Mitigation Measures in Environmental Impact Assessment recommends that States Parties encourage the identification of mitigation measures in respect of preliminary assessments and IEEs.
[128] See also ATCM Res 2 (1997) on the Procedures for Comprehensive Environmental Follow-up; EP EIA Guidelines (n 118) 20–21.

While there are potentially a number of ways of assessing 'equivalence' for the purposes of Article 29, it is likely that EIA under the Protocol can be assessed as broadly equivalent in terms of outcomes, substance and process.[129] While the process requirements around IEEs are weak, the BBNJ Agreement's EIA threshold is equivalent to the Protocol's CEE threshold, which largely achieves similar standards, except perhaps in respect of consultation relating to other bodies and Indigenous Peoples.

Importantly, however, there are a number of additional obligations that arise in respect of BBNJ Agreement States Parties that are engaged in EIA processes under the ATS. First, Protocol CEEs must be made available through the CHM.[130] Second, any EIAs that are carried out under national processes pursuant to Article 28(2) BBNJ Agreement, which may be relevant to sub-Antarctic States with maritime zones adjacent to the Antarctic Treaty area, must also be shared under the CHM.[131] Third, the BBNJ Agreement EIA processes apply to activities taking place outside of the Antarctic Treaty area that may have impacts on Antarctic ecosystems, but which are currently excluded from the ATS EIA mandate. Finally, and more speculatively, there may be an argument that fisheries under CCAMLR could be subject to BBNJ EIA processes if it can be demonstrated that CCAMLR regulations and standards do not prevent, mitigate or manage potential impacts below the threshold for EIA processes.[132]

Moreover, the BBNJ Agreement provides some important innovations that ATS States Parties could learn from in order to strengthen EIA under the Protocol, for example, the much more robust processes and principles around consultation, information sharing and transparency under the BBNJ Agreement. In addition, BBNJ Agreement EIA processes are subject to further development by the COP and possible clarification of key terms such as 'minor' and 'transitory' could subsequently inform State practice under the Protocol. Finally, the BBNJ Agreement EIA processes will apply to BBNJ Agreement States Parties which are not party to the Protocol, but that are operating within the Antarctic Treaty area, such as tourist operators.

6.2. Area-based Management Tools

The creation of a legal basis and regime for the designation of ABMTs, including MPAs, beyond national jurisdiction was a core objective of the BBNJ Agreement. The negotiation of Part III BBNJ Agreement, however, was complex, with very different views being expressed on the role of BBNJ Agreement institutions, with options ranging from a low-key advisory role to designation of ABMTs and/or MPAs by the COP.[133]

[129] The author acknowledges the particular work of Neil Craik in developing this three-fold criteria. See KN Scott and N Craik, 'Environmental Impact Assessment Beyond National Jurisdiction: The BBNJ Agreement and the Equivalence Exception' (2025) IJMCL (forthcoming).

[130] BBNJ Agreement (n 1) art 29(5). It is not obvious that IEEs must be made available given that they sit below the BBNJ Agreement threshold; however, to make them available through the CHM would have clear transparency benefits.

[131] BBNJ Agreement (n 1) art 28(2)(c).

[132] ibid art 29(4)(b)(ii).

[133] For a general introduction to the BBNJ Agreement (n 1) pt III, see V De Lucia, 'After the Dust Settles: Selected Considerations about the New Treaty on Marine Biodiversity in Areas beyond National Jurisdiction with respect to ABMTs and MPAs' (2024) 55 ODIL 155. See also BE Klerk, 'A Sheep in Wolf's Clothing? Reflections on the Institutional Nature of the New Regime for ABMTs and MPAs under the BBNJ Agreement' (2025) 56 ODIL 1.

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In any event, and perhaps rather surprisingly, the BBNJ Agreement has developed a relatively robust regime, which permits the COP to designate ABMTs and/or MPAs in any part of ABNJ. For the purposes of the BBNJ Agreement, ABMTs are defined as 'a tool, including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives'.[134] An MPA is defined as a geographically defined marine area but one 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'.[135]

Under the BBNJ Agreement, States Parties, either individually or collectively, may propose ABMTs or MPAs through the Secretariat[136] on the basis of detailed criteria, which are set out under the BBNJ Agreement.[137] A notable feature of the BBNJ Agreement are the extensive obligations around consultation under Articles 19 and 21 with other States, relevant global and regional bodies, Indigenous Peoples, civil society, sectoral bodies and scientific bodies. Proposals are also subject to preliminary review by the STB.[138] On the basis of feedback from the STB and consultation, the COP may decide to adopt an ABMT and/or MPA and related measures.[139] As decisions can be taken on the basis of three-fourths majority, should consensus not be achieved,[140] States Parties have an opportunity to object to and not be bound by an ABMT and/or MPA.[141] The BBNJ Agreement also provides for the designation of ABMTs on an emergency basis.[142]

There are a number of existing global and regional bodies which have a mandate to designate ABMTs in ABNJ including, but not limited to, the IMO, RFMOs, regional seas organisations such as the Commission for the Convention for the Protection of the Marine Environment of the North-East Atlantic and, of course, the ATS. The issue of whether the COP could potentially designate measures within an area under the jurisdiction of another body was a key question during the negotiations. The question was—again, perhaps surprisingly—answered in the affirmative: the COP '[m]ay take decisions on measures compatible with those adopted by relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, in cooperation and coordination with those instruments, frameworks and bodies'.[143] Where, however, proposed measures fall within the competences of those other organisations, the COP may only make recommendations to BBNJ Agreement States Parties and to those other organisations to promote the adoption of such measures.[144]

[134] BBNJ Agreement (n 1) art 1(1).
[135] ibid art 1(9).
[136] ibid art 19(1).
[137] ibid art 19(4), annex 1.
[138] ibid art 20.
[139] ibid art 22.
[140] ibid art 23(1)–(2).
[141] ibid art 23(4)–(10).
[142] ibid art 24. See X Jiang and Z Wang, 'Emergency Marine Protected Areas under the BBNJ Agreement: A Feasible Solution for Emergencies in ABNJ?' (2024) 55 ODIL 25.
[143] BBNJ Agreement (n 1) art 22(1)(b).
[144] ibid art 22(1)(c).

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Within the ATS, ABMTs and MPAs can be designated under the auspices of the Protocol or by CCAMLR. Annex V Protocol provides for Antarctic Specially Protected Areas (ASPAs) and for Antarctic Specially Managed Areas (ASMAs), with the former being the most highly protected areas. Protected areas may be designated to protect outstanding environmental, scientific, historic, aesthetic or wilderness values or any combination thereof or to protect planned scientific research.[145] Proposed ASPAs and ASMAs must be accompanied by a management plan[146] and are designated by the ATCM on the basis of consensus after receiving advice by the Committee on Environmental Protection, the Scientific Council for Antarctic Research (SCAR) and, in the case of MPAs, CCAMLR.[147] Where protected areas have a marine component, the ATCM must seek the prior approval of CCAMLR.[148] To date, the ATCM has designated very few ASPAs and/or ASMAs in the marine environment or even with a significant marine component.[149]

CCAMLR has a mandate to adopt ABMTs and/or MPAs south of the Antarctic Convergence under Article IX(2)(f) CAMLR Convention, and principles and processes for such designation have been developed in the General Framework for the Establishment of CCAMLR Marine Protected Areas.[150] MPAs may be established to protect representative examples of marine ecosystems, biodiversity and habitats in order to protect their viability and integrity in the long-term and to maintain resilience or the ability to adapt to the effects of climate change. CCAMLR may designate MPAs following advice from the Scientific Committee and must adopt conservation measures in association with the MPA, which include the identification of activities that are prohibited, restricted or limited on a temporal or seasonal basis. The first MPA to be established was in the South Orkney Islands southern shelf in 2009[151] and the second was the Ross Sea region MPA in 2016.[152] In addition, CCAMLR may designate time-limited special area status for marine areas that are newly exposed owing to ice shelf retreat or collapse in the Antarctic peninsula area for the purposes of scientific study.[153]

While the jurisdiction of the ATS to designate Southern Ocean ABMTs is reasonably comprehensive, it is not complete, with the management of shipping activities an obvious lacuna (which has been addressed in part by measures taken by the IMO). More fundamentally, however, the process of MPA designation under CCAMLR has

[145] Protocol (n 6) annex V, art 3(1).

[146] ibid annex V, art 5.

[147] ibid annex V, art 6.

[148] ibid annex V, art 6(2).

[149] For information on designated ASMAs and ASPAs, see Secretariat of the Antarctic Treaty, *Antarctic Protected Areas Database* <https://www.ats.aq/devph/en/apa-database>.

[150] CCAMLR Conservation Measure 91-04 of 2011 on the General Framework for the Establishment of CCAMLR Marine Protected Areas. See also CCAMLR, Conservation Measure CM 91-01 (2004) on the Procedure for According Protection to CEMP Sites; CCAMLR, Conservation Measure CM 91-02 (2012) on the Protection of the Values of Antarctic Specially Managed and Protected Areas.

[151] CCAMLR, Conservation Measure CM 91-03 (2009) on the Protection of the South Orkney Islands Southern Shelf.

[152] CCAMLR, Conservation Measure CM 91-05 (2016) on the Ross Sea Region Marine Protected Area.

[153] CCAMLR, Conservation Measure CM 24-04 (2017) on Establishing Time-Limited Special Areas for Scientific Study in Newly Exposed Marine Areas following Ice-Shelf Retreat or Collapse in Statistical Subareas 48.1, 48.5 and 88.3.

stalled since 2016 despite there being three other advanced proposals[154] under negotiation for a number of years. It is beyond the scope of this article to provide an overview of the geopolitical and scientific disputes that have paralysed MPA progress within CCAMLR,[155] but the challenge can be summed up by a statement issued by the Republic of Korea on behalf of Australia, the EU, New Zealand, Ukraine, the UK, the US and Uruguay at a special CCAMLR meeting on MPAs held in Santiago, Chile, in 2023, which tried but failed to break the deadlock in developing area-based protection under CCAMLR:

> Recent important steps in multilateral processes like the adoption of the Kunming-Montreal Global Biodiversity Framework and of the BBNJ agreement have proved that such progress can be made, if there is willingness from all parties. We are here this week in Chile in an effort to find a way forward, consistent with our commitment to a representative system of MPAs in the Convention Area. However, we regret we have not succeeded in agreeing a roadmap for the adoption of a representative system of MPAs at this special meeting. This is another missed opportunity to progress this important issue which we have spent extensive time and resources on, collectively and working within delegations, to establish such a system of MPAs.[156]

This therefore raises the question as to whether there is scope for ABMTs to be designated under the BBNJ Agreement in the CCAMLR area. As noted in Section 2, such an option is provided for under Article 22 BBNJ Agreement. However, any such measures must be adopted 'in cooperation and coordination' with the relevant body (in this case, CCAMLR). Given that CCAMLR operates on the basis of consensus[157] and that Russia has disassociated itself from the consensus decision to adopt the BBNJ Agreement,[158] it is unlikely that CCAMLR as a body would be in a position to cooperate. At most, the BBNJ Agreement could recommend measures to support CCAMLR to BBNJ States Parties,[159] although this could certainly operate as a positive and practical interim measure. Even this prospect is unlikely, however, given the view of ATS States Parties that the ATS 'comprehensively' regulates Antarctic matters. More likely, concern that the COP may be asked to consider measures for the CCAMLR area might serve as a catalyst to break the deadlock within CCAMLR itself and to permit MPA designation by CCAMLR. This would be an extremely positive, indirect outcome

[154] For East Antarctica, the Weddell Sea and the Antarctic Peninsula. For the most recent discussion of these proposals, see CCAMLR, 'Report of the Forty-third Meeting of the Commission' (Hobart, Australia, 2024) paras 5.16–5.43.

[155] See CM Brookes et al, 'Reaching Consensus for Conserving the Global Commons: The Case of the Ross Sea, Antarctica' (2019) Conservation Letters 2019e12676; KN Scott, 'Protecting the Commons in the Polar South: Progress and Prospects for Marine Protected Areas in the Antarctic' in K Zou (ed), *Global Commons and the Law of the Sea* (Brill Nijhoff 2018) 326; KN Scott, 'MPAs in the Southern Ocean under CCAMLR: Implementing SDG 14.5' (2021) 9 KoreanJIntlCompL 84.

[156] CCAMLR, 'Report of the Third Special Meeting of the Commission' (Santiago, Chile, 19–23 June 2023) para 5.8.

[157] CAMLR Convention (n 5) art XII(1).

[158] See UNGA Intergovernmental Conference on Marine Biodiversity, 'Demonstrating "the Power of Multilateralism", Intergovernmental Conference Adopts Historic New Maritime Biodiversity Treaty' (Press Release, 19 June 2023) UN Doc SEA/2181; ATCM, 'Final Report of the Forty-Sixth ATCM' (Kochi, India, 2024) para 162.

[159] BBNJ Agreement (n 1) art 22(1)(c).

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of the adoption of the BBNJ Agreement.[160] Moreover, there are obvious opportunities for the BBNJ Agreement's ABMT process to learn from CCAMLR's experience[161] but as Emily Nocito and Cassandra Brooks point out, this requires CCAMLR to become an active participant within the COP and for CCAMLR Member States to 'come to the table and work alongside that process'.[162] While it is difficult to see this occurring in the immediate term given the complex geopolitics surrounding Russia and China within CCAMLR, it is a realistic longer-term prospect.

6.3. Marine Genetic Resources

The creation of a regime managing access to, and sharing the benefits of, MGRs was one of the most challenging aspects of the BBNJ Agreement negotiations. In the early stages of the negotiations, States had very different views as to the principles which should apply to MGR exploitation, ranging from freedom of the seas to common heritage of humankind modelled on the regime that applies to deep seabed minerals under Part XI UNCLOS.[163] Ultimately, a middle course (which perhaps leans towards the freedom of the seas principle) was agreed in Part II BBNJ Agreement, which has as its objectives the fair and equitable sharing of benefits arising from MGRs and digital sequence information on MGRs of ABNJ, capacity development for States—ranging from least-developed countries to archipelagic States and middle-income countries—and the generation of knowledge and technical innovation.[164] MGRs are defined as 'any materials of marine plant, animal, microbial or other origin containing functional units of heredity or actual or potential value'.[165]

In summary, the BBNJ Agreement confirms that all States may access MGRs in ABNJ[166] and all activities must be for the benefit of humankind and carried out with due regard for the rights of coastal States.[167] The BBNJ Agreement develops detailed obligations for States to share information through the CHM on their activities associated with the collection, deposit and utilisation of MGRs[168] as well as information on benefit sharing.[169] The BBNJ Agreement, notably, requires the protection of traditional knowledge held by Indigenous Peoples and local communities and requires States

[160] Such constructive engagement was being urged by commentators prior to the adoption of the final text of the BBNJ Agreement (n 1). See NB Gardiner, 'Marine Protected Areas in the Southern Ocean: Is the Antarctic Treaty System Ready to Co-exist with a New United Nations Instrument for Areas beyond National Jurisdiction?' (2020) 122 Marine Policy 104212. See also Haward (n 9).

[161] A point made well in advance of the conclusion of the BBNJ Agreement (n 1) by Gardiner (n 160) 6.

[162] ES Nocito and CM Brooks, 'The Influence of Antarctic Governance on Marine Protected Areas in the Biodiversity Beyond National Jurisdiction Agreement Negotiations' (2023) 2(13) NPJ Ocean Sustainability 9.

[163] See, e.g. M Rabone et al, 'Access to Marine Genetic Resources (MGR): Raising Awareness of Best-Practice through a New Agreement for Biodiversity Beyond National Jurisdiction (BBNJ)' (2019) 6(520) Frontiers in Marine Science; N Samata, 'The Common Heritage of Humankind Principle and Marine Genetic Resources: A Critical Assessment of the BBNJ Process' (2023) 41 AYBIL 101.

[164] BBNJ Agreement (n 1) art 9.

[165] ibid art 1(8).

[166] ibid art 11(1).

[167] ibid art 11(3).

[168] ibid art 12.

[169] ibid art 16.

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Parties to ensure that such knowledge is accessed only with the free, prior and informed consent of relevant groups.[170] The most contentious part of the regime relates to benefit sharing, with significant modalities yet to be developed. Article 14 BBNJ Agreement provides for benefit sharing through permitting access to samples and digital sequence information, the transfer of technology and capacity building. The sharing of monetary benefits from the commercialisation of MGRs is also envisaged through the financial mechanism established under Article 52, but with details to be determined by the COP. In contrast to the regimes developed for EIA and ABMTs, there are no specific provisions in Part II BBNJ Agreement that govern its relationship with any other regime in respect of MGRs outside of the general principle as set out in Article 5(2) BBNJ Agreement.

In the Antarctic, research relating to MGRs and commercial exploitation has been undertaken by States Parties to the Antarctic Treaty for several decades.[171] In a recent survey undertaken by SCAR, 68 per cent of respondents, comprising 27 States Parties to the Antarctic Treaty, confirmed that their national programs had supported or carried out research related to bioprospecting.[172] The largest number of patents filed between 2011 and 2017 was by China.[173] Bioprospecting is neither specifically defined for the purposes of the Antarctic Treaty[174] nor subject to special regulation under the ATS[175] beyond three hortatory resolutions adopted by the ATCM in 2005, 2009 and 2013.[176] These resolutions confirm that activities involving the collection of material in the Antarctic are subject to the general principles of the Antarctic Treaty, including peaceful purposes, freedom of scientific research and the sharing of information as well as strict environmental protection in accordance with the rules of the Protocol. The latter includes controls on the taking of, or interference with, species under Annex II Protocol and entry into protected areas under Annex V. As noted in Section 3, States must provide information through the Information Exchange on their activities to other States Parties (implementing Article VII(5) Antarctic Treaty). To the

[170] ibid art 13. See further S Friedman, 'The Law of the Sea Goes Digital: Indigenous Peoples' "Right to Exclude" their Traditional Knowledge from the Digital Sphere' (2025) 56 ODIL 88.

[171] See generally AD Hemmings, 'Does Bioprospecting Risk Moral Hazard for Science in the Antarctic Treaty System?' (2010) 10 Ethics in Science and Environmental Politics 5; BP Herber, 'Bioprospecting in Antarctica: The Search for a Policy Regime' (2006) 42(221) Polar Record 136; J Jabour, 'Biological Prospecting: The Ethics of Exclusive Reward from Antarctic Activity' (2010) 10 Ethics in Science and Environmental Politics 19; J Jabour-Green and D Nicol, 'Bioprospecting in Areas Outside National Jurisdiction: Antarctica and the Southern Ocean' (2003) 4 MJIL 76; D Leary, 'Bioprospecting at the Poles' in Scott and VanderZwaag (n 28) 272.

[172] Scientific Council for Antarctic Research, 'Antarctic Bioprospecting: SCAR Survey of Member Countries' (Information Paper No 12, 2021).

[173] China filed 656 patents, almost the equivalent of the total number for all other countries. See Y Chen, 'China's Role of Bioprospecting in Antarctica and Future Prospects' (2023) 7 Chinese Journal of Environmental Law 75, 80.

[174] Recommendations for a definition were made by the UK in 2002, New Zealand in 2003 and Argentina in 2006. See Chen, ibid 80. Julia Jabour-Green and Dianne Nicol have convincingly argued that bioprospecting comprises four stages: sampling; isolation and characterisation; development; and commercialisation. See Jabour-Green and Nicol (n 171).

[175] See the references cited in (n 171).

[176] ATCM Res 7 (2005) on Biological Prospecting; ATCM Res 9 (2009) on the Collection and Use of Antarctic Biological Material; ATCM Res 6 (n 86).

extent that bioprospecting involves the harvesting of marine species (as is the case for krill), activities must comply with the regulations of CCAMLR.

Regulation of MGRs under the ATS, when compared to the BBNJ Agreement, is far from comprehensive.[177] While the Antarctic Treaty requires scientific information to be exchanged and made freely available,[178] it is unclear what is encompassed by 'scientific information' beyond raw data. This obligation has not been interpreted to date to include information on utilisation or information associated with the development of applications relating to MGRs. It also does not appear to have been interpreted to apply to digital sequence information in respect of MGRs ex situ. There is also no obligation to share information with the international community more generally under the Antarctic Treaty although, in practice, much of the information shared between States Parties is now made publicly available. More fundamentally, the ATS does not address the issue of MGR benefit sharing (beyond information sharing) among either Antarctic Treaty States Parties or the international community. This is not surprising in the context of the ATS given the disputed sovereignty over the continent of Antarctica. Questions of who should benefit from Antarctic resources are assiduously avoided by States Parties, have not been addressed in the context of tourism or fishing and were not even addressed substantively under the previously proposed (now defunct) minerals regime.

The potential conflict between the BBNJ Agreement and the ATS was identified by commentators long before the final details of the BBNJ Agreement were settled.[179] As noted in Section 5 however, ATS States Parties have taken a consistent and robust view that the BBNJ Agreement has no application to bioprospecting activities in the Antarctic. To return to Haward's typology, the relationship between the ATS and the BBNJ Agreement is either one of competence or, to the extent that the ATS is not regulating aspects of MGR activities, competition, whereby the BBNJ Agreement and the ATS are asserting competing interests in relation to MGR jurisdiction. But is this view sustainable? Is it realistic for a State Party to both the BBNJ Agreement and the Antarctic Treaty to eschew its obligations relating to information sharing under the BBNJ Agreement in respect of MGRs taken from south of 60° South Latitude?[180] Is it likely that States not party to the Antarctic Treaty (and even potentially some that are) would be content with Antarctic MGRs being excluded from the benefit sharing arrangement under the BBNJ Agreement? While it is clear that the BBNJ Agreement must be interpreted and applied in a manner that does not undermine the ATS, if the ATS does not regulate benefit sharing with respect to MGRs, can it be said that by regulating benefit sharing the BBNJ Agreement undermines the ATS?

[177] See Leary (n 171).

[178] Antarctic Treaty (n 4) art III(1)(4).

[179] See PP Nickels, 'Revisiting Bioprospecting in the Southern Ocean in the Context of the BBNJ Negotiations' (2020) 51 ODIL 193; K Heinrich, 'Biological Prospecting in Antarctica: A Solution-Based Approach to Regulating the Collection and Use of Antarctic Marine Biodiversity by Taking the BBNJ Process into Account' (2020) XII Yearbook of Polar Law 41. It is notable that scholars based in China have taken a particular interest in this issue: see Chen (n 173); L Jingchang, 'Harmonization Between the BBNJ Agreement and the Antarctic Treaty System' (2018) 2018 China Oceans Law Review 189.

[180] This question becomes more fraught if it is difficult to distinguish between species taken north or south of the 60° South Latitude line.

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One potential resolution to this conflict is that the States Parties develop a more comprehensive regime for the regulation of MGRs, including more robust rules around information and the creation of a system for sharing the benefits.[181] In contrast to ABMTs, where it was suggested that this was a likely response to potential challenges from the BBNJ COP in the CAMLR Convention area, this is perhaps less likely in the context of MGRs. As noted in Section 3, it is difficult to address who should benefit from Antarctic resources without engaging in the debate as to whether any State is entitled to exercise sovereignty over the continent of Antarctica. It has been the avoidance of this debate over the last 60 years that has enabled the development of a relatively comprehensive and effective regime for the management of Antarctica. A distinct but no less important issue relates to the impact of bioprospecting regulation on the core Antarctic values of freedom of scientific research and open exchange of information.[182] As Alan Hemmings has strikingly observed: '[h]ere, for the first time, Science wears two hats: its traditional Antarctica Bonnet, and the hard-hat of commercial self-interest'.[183] States Parties will be reluctant, and legitimately so, to jeopardise what has, until recently, been regarded as an exceptional and a successful regime based on the core values of peace, freedom of scientific research and environmental stewardship. Furthermore, it is unclear whether or to what extent the Antarctic Treaty States Parties could or would address the interests of States not party to the Antarctic Treaty within any benefit sharing regime. The Antarctic Treaty recognises the interests of [hu]mankind in Antarctica[184] and the Protocol refers to the 'special responsibility' of the States Parties[185] but, notwithstanding the rhetoric, the ATS is largely designed and implemented for the benefit of States Parties only.

In light of these constraints, it is argued that rather than resist the BBNJ MGR regime, it is in the interests of the Antarctic Treaty States Parties and the stability of the ATS to embrace its principles and modalities, and to implement the BBNJ Agreement in relation to Southern Ocean MGRs south of 60° South Latitude as between Antarctic Treaty States Parties. To return to the four-fold typology of relationships between the ATS and other regimes as set out by Marcus Haward,[186] this proposal advocates 'congruence' between the ATS and the BBNJ Agreement in respect of MGR activities. Applying BBNJ Agreement modalities and standards would avoid the need to engage in a direct debate over Antarctic sovereignty. Moreover, claimant and non-claimant States would be able to participate in the BBNJ Agreement regime without prejudice to the positions that they take on the status of those claims, as confirmed by Article 6 BBNJ Agreement.[187] Adopting a position of

[181] See Heinrich (n 179).

[182] See especially K Bastmeijer et al, 'Money-Making in Antarctica and Related Challenges to the Antarctic Treaty System' (2024) XV Yearbook of Polar Law 309, 338–39.

[183] Hemmings (n 171) 11.

[184] Antarctic Treaty (n 4) preamble.

[185] ibid.

[186] Haward (n 9).

[187] Antarctic Treaty States Parties adopted the same approach addressing the sovereignty dispute in relation to minerals exploitation under CRAMRA (n 72). Art 9 CRAMRA, explicitly titled 'Protection of Legal Positions under the Antarctic Treaty', reiterated that no acts of activities taking place under CRAMRA (which potentially would have included the exploitation of minerals) would be interpreted as a renunciation or diminution of any claim or exercise of coastal State jurisdiction or affecting any State Party's position on the recognition (or lack thereof) of claims.

congruence would also avoid a potentially regime-destabilising negotiation at a time where geopolitics within the ATS is already fraught. Any MGR activity within the Antarctic Treaty area would necessarily also have to comply with ATS rules, particularly around environmental protection in order to ensure that the BBNJ Agreement does not 'undermine' the ATS.

The most significant risk associated with this proposal is that the BBNJ Agreement obviously applies only to marine genetic resources whereas the ATS (and any regime negotiated thereunder) would (presumably) apply to both marine and terrestrial species. This raises a very legitimate question as to the efficacy of adopting one set of rules, Part II BBNJ Agreement, in respect of MGRs and another—or none—in relation to terrestrial genetic resources. There are at least two reasonable responses to this question. First, outside of the Antarctic there are different regimes which apply to MGR activities taking place in ABNJ in contrast to activities under the terrestrial and maritime jurisdictions of States. Whereas the former is or will be governed by the BBNJ Agreement, the latter is subject to the modalities developed under the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.[188] There is thus no obvious reason why the Antarctic Treaty States Parties cannot develop modalities for regulating bioprospecting activities on the continent of Antarctica and ice shelves under the ATS while simultaneously adopting the BBNJ regime in respect of MGRs. Alternatively, the Antarctic Treaty parties could choose to extend the BBNJ regime to apply to terrestrial genetic resources. The majority of the international community views Antarctica as well as the Southern Ocean as beyond the jurisdiction of States and there is a strong argument that the principles of benefit sharing should apply to all genetic resources beyond national jurisdiction. The principles developed under the BBNJ Agreement are strongly supportive of the ATS principles of freedom of scientific research and information sharing, and the environmental controls under the BBNJ Agreement are compatible with, and would be strengthened by, the Protocol. Ultimately, and perhaps counterintuitively, incorporating the BBNJ Agreement MGR benefit sharing regime into the ATS for MGRs or for all Antarctic genetic resources is arguably the best means of strengthening and preserving the values of the ATS in the longer-term.

6.4. Dispute resolution and liability for environmental harm

The final topic that will be discussed is dispute resolution and liability for environmental harm. The Antarctic Treaty requires States Parties to consult among themselves in the event that a dispute arises, but does not provide for compulsory dispute resolution.[189] A largely equivalent provision is set out in the CAMLR Convention, with the caveat that failure to agree to resolve the dispute through referral to the International Court of Justice (ICJ) or to arbitration 'shall not absolve Parties to the dispute from the

[188] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (adopted 29 October 2010, entered into force 12 October 2014) 3008 UNTS 3.

[189] Antarctic Treaty (n 4) art XI encourages States Parties to resolve their disputes by means of their own choice and, where not so resolved, a dispute can be referred to the ICJ with the consent of the parties.

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responsibility of continuing to seek to resolve it …'.[190] By contrast, the Protocol does provide for compulsory dispute resolution in relation to disputes concerning the interpretation or application of Articles 7 (the ban on non-scientific minerals activities), 8 (EIA), 15 (emergency measures) or (unless expressly excluded) the provisions of Annexes I to VI as well as issues of compliance associated with these articles or annexes (Article 13) where a resolution to the dispute has not been reached after 12 months by other means.[191] Such disputes must be submitted to the ICJ or an arbitral tribunal at the choice of the disputing parties.[192] In relation to other issues, there is no compulsory dispute resolution procedure. Indeed, Article 20(2) Protocol expressly denies the arbitral tribunal any competency to decide or rule on any matter within the scope of Article IV Antarctic Treaty and asserts that 'nothing in this Protocol shall be interpreted as conferring competence or jurisdiction on the International Court of Justice or any other tribunal established for the purpose of settling disputes between Parties to decide or otherwise rule upon any matter within the scope of Article IV of the Antarctic Treaty'. Thus, any dispute connected with the sovereign status of Antarctica or associated maritime zones is explicitly excluded from dispute resolution under the Protocol.

The BBNJ Agreement provides for compulsory dispute resolution under Article 60 and relies on the comprehensive dispute resolution system established under Part XV UNCLOS.[193] Articles 297 and 298 UNCLOS set out categories of disputes that are, respectively, automatically and optionally excluded from compulsory dispute resolution and a number of these are particularly relevant to the Antarctic, for example, disputes over scientific research and sovereignty issues. Moreover, Articles 281 and 282 UNCLOS permit alternative dispute resolution processes to be used where the parties have agreed to resolve their dispute by other means (Article 281) or where parties have, through an external general, regional or bilateral agreement, decided that a dispute should be resolved through that process (Article 282). Furthermore, Article 60(9) BBNJ Agreement explicitly stipulates that:

> nothing shall be interpreted as conferring jurisdiction upon a court or tribunal over any dispute that concerns or necessarily involves the concurrent consideration of the legal status of an area as within national jurisdiction, nor over any dispute concerning sovereignty or other rights over continental or insular land territory or a claim thereto of a Party to this Agreement.[194]

In conclusion, reverting to Haward's typology, the relationship between the ATS and the BBNJ Agreement with respect to dispute resolution is one of competence and, given the underlying sovereignty dispute, it is unlikely that Southern Ocean disputes that

[190] CAMLR Convention (n 5) art XXV.

[191] Protocol (n 6) arts 18, 20.

[192] ibid art 19. A declaration may be made on ratifying the Protocol or at any point thereafter selecting the preferred dispute resolution method.

[193] On dispute settlement under the BBNJ Agreement generally, see J Mossop, 'Dispute Settlement Provisions in the Agreement for Biodiversity beyond National Jurisdiction' (2024) 1 Portuguese Yearbook of the Law of the Sea 98.

[194] BBNJ Agreement (n 1) art 60(9).

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engage provisions of the BBNJ Agreement would be subject to compulsory dispute resolution under it.

With respect to the more specific issue of liability for environmental harm, the BBNJ Agreement does not provide for specific rules relating to the resolution of disputes for damage caused to the environment beyond national jurisdiction. Disputes relating to such harm would thus be decided on the basis of UNCLOS,[195] the general rules of State responsibility or specific regimes that address environmental harm in the marine environment (such as oil pollution from ships).[196] By contrast, the ATS States Parties have developed detailed rules relating to liability arising from environmental emergencies within the Antarctic Treaty area in Annex VI Protocol.[197] These rules, however, were adopted in 2005 and, after 20 years, have yet to enter into force. For the time being, therefore, liability for environmental damage in the Antarctic would likely also be resolved on the basis of the general rules of State responsibility.

7. Concluding remarks

Whether the Antarctic Treaty area or parts thereof constitute, legally, ABNJ, depends very much on whether sovereign claims to the continent of Antarctica are recognised (with their concomitant 1959 or 1982 maritime zones) or if the ATS is regarded as establishing a sui generis regime providing for a form of unique collective jurisdiction over the Southern Ocean south of 60° South Latitude. These are interesting, intellectual questions and are clearly of importance to the seven claimant States as well as to many Antarctic Treaty States Parties. In practice, however, Antarctica for most States is regarded as ABNJ and treated as such. That all States have an interest in the Antarctic was recognised by the States Parties to the Antarctic Treaty and the notion of a 'special responsibility' of the States Parties to the international community for the Antarctic and Antarctic matters has been developed through subsequent instruments, including the Protocol.

Thus far, the ATS has adopted a reserved, if not defensive, response to the BBNJ Agreement, stipulating that it is the ATS that comprises the 'comprehensive' regime for regulating matters concerning the Antarctic with the implicit assertion that the BBNJ Agreement need not concern itself with the region. This reflects the 'competence' approach on the scale of relationships between the ATS and other regimes as developed by Marcus Haward.[198] In the opinion of this author, this approach is, with respect, misguided and arguably contrary to the long-term interests of the both the ATS and the BBNJ Agreement. As the discussion in this article has demonstrated, the areas of

[195] UNCLOS (n 11) art 235.

[196] International Maritime Organization Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage of 29 November 1969 (adopted 27 November 1992, entered into force 30 May 1996) [1996] ATS 2; International Maritime Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1972 (adopted 27 November 1992, entered into force 30 May 1996) [1996] ATS 3; International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) UKTS No 47 (2012).

[197] See KN Scott, 'Liability for Environmental Damage in Antarctica: Annex VI to the Environmental Protocol on Liability Arising from Emergencies' (2006) 14(3) Environmental Liability 87.

[198] Haward (n 9).

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intersection between the BBNJ Agreement and the ATS are numerous and substantive. There are opportunities for both regimes in developing a positive and constructive relationship that does 'not undermine' the ATS and supports obligations under both regimes to cooperate and collaborate. Moreover, Article 6 BBNJ Agreement complements Article IV Antarctic Treaty and protects the delicate Antarctic sovereignty compromise as well as the positions of claimant and non-claimant States with respect to the status of Antarctica. To return to Haward's typology, the relationship between the ATS and the BBNJ Agreement might be described as complementary in relation to EIAs and ABMTs and, as argued in Section 6, is best served by congruence in respect of MGRs.

It is evident that in the area of EIA, the BBNJ Agreement negotiators drew direct inspiration from the thresholds and processes as developed under the Protocol. It is not surprising, therefore, that it can be asserted with reasonable certainty that the EIA process under the Protocol should be regarded as broadly 'equivalent to' the BBNJ Agreement EIA processes. EIA is thus a very 'safe' place from which Antarctic Treaty States Parties might begin to cooperate with the BBNJ Agreement. That cooperation is likely to strengthen EIA processes under the Protocol in that stronger BBNJ Agreement requirements around consultation and information exchange should be seen as positive developments in relation to Antarctic activities, and the opportunities to broaden EIA obligations within the region—to States not party to the Protocol and to activities taking place north of 60° South Latitude—are likely to benefit the broader Antarctic ecosystem.

The intersection of both regimes in the context of ABMTs and MPAs has the potential to be more challenging given the very significant obstacles that have prevented much progress on area-based protection under the CAMLR Convention over the last (almost) decade. However, there is significant potential for the BBNJ Agreement to play a positive and constructive role. It could, for example, be used to recommend to BBNJ Agreement States Parties measures in the CCAMLR area if the standoff within CCAMLR itself continues. This is, it must be acknowledged, a controversial proposition and not without risks to both the efficacy of the BBNJ COP and also the ATS. More likely, the fact that the BBNJ Agreement provides a potential alternative forum for area-based protection measures in the Southern Ocean may provide a catalyst to break the deadlock within CCAMLR and an incentive to act to adopt measures protecting the CAMLR Convention area.

The issue of most concern to the ATS is the regulation of MGRs under the BBNJ Agreement and it is in respect of this issue that ATS States have been most consistent in denying the BBNJ Agreement a mandate in the Antarctic. Given that MGR activities are subject only to general regulation under the ATS and there are no rules around benefit sharing or information sharing with the wider international community, the ATS position does not seem sustainable. In fact, it arguably puts the ATS at risk of challenge from non-Antarctic Treaty States Parties which may feel, as many States did from the 1980s to the early 2000s, that the Antarctic should be managed by the international community and not by an 'exclusive club' of States with interests dating from the colonial era.[199] Moreover, it is unlikely that the ATS itself could negotiate an

[199] See generally SV Scott, 'Three Waves of Antarctic Imperialism' in K Dodds, AD Hemmings and P Roberts (eds), *Handbook on the Politics of Antarctica* (Edward Elgar 2017) 37. See also P Beck, 'Twenty Years On: The UN and the "Question of Antarctica" 1983–2003' (2004) 40(214) Polar Record 205.

MGR regime that addresses access and benefit sharing without engaging with the question of sovereign claims and neither claimant nor, arguably, non-claimant States would be keen to open that Pandora's Box for fear of destabilising the entire regime—a regime that is currently more vulnerable to geopolitical challenge than at any other time in its history.[200]

By contrast, the BBNJ Agreement has established a comprehensive regime for regulating access to, and benefit sharing of, MGRs that is broadly consistent with the principles and values of the ATS and could be implemented within the Antarctic alongside existing Protocol environmental controls in a way that does 'not undermine' the ATS. This would require Antarctic Treaty States Parties to engage with the BBNJ Agreement in a way that they have thus far avoided with other international institutions on the basis of so-called 'Antarctic exceptionalism',[201] and is unlikely to be an easy pivot. Moreover, the extent of support for the BBNJ Agreement by Antarctic Treaty States Parties is not apparent given the current low number of ratifications (and Russia has explicitly distanced itself from the consensus decision to adopt the BBNJ Agreement). This notwithstanding, a strong case can be made that adopting the BBNJ Agreement MGR regime in the Antarctic is as much in the long-term interests of the ATS as for the BBNJ Agreement.

It is nevertheless worth noting that while the various treaties form the ATS and are underpinned by a core set of values, not all States have ratified all instruments. Beyond the 29 States which have ratified the Antarctic Treaty, Protocol and the CAMLR Convention, there is a divergence in the membership of each instrument. For example, the EU is a member of CCAMLR but is not party to the Antarctic Treaty. The majority of non-consultative parties to the Antarctic Treaty have ratified neither the Protocol nor the CAMLR Convention. Five States have ratified the CAMLR Convention owing to their status as flag or port States with regional fishing interests and are not engaged in Antarctic matters more generally. This potentially complicates the engagement of the ATS as a unified grouping of States within the BBNJ Agreement, although this is not a unique or an insurmountable challenge.

As the BBNJ Agreement prepares for entry into force, it is likely that there will be increased scrutiny on activities taking place in areas beyond national jurisdiction and on the bodies and institutions with a regulatory mandate in respect of such activities. Following two decades of challenge within the UN between the 1980s and 2000s, the ATS has been subject to relatively benign neglect by the UN and other organisations for almost 20 years. This has been to the apparent benefit of the Antarctic claimant States and, arguably, to ATS States Parties, although given the importance of the Antarctic and the Southern Ocean to climate change it is questionable whether this approach has benefitted the international community more generally. It is almost inevitable that States and organisations without traditional interests in the Antarctic will begin to take a

[200] See generally SV Scott, T Stephens and J McGee (eds), *Geopolitical Change and the Antarctic Treaty System* (Springer 2024); see especially KN Scott, 'Foreword' in Scott, Stephens and McGee, ibid v–x. See also M Haward and A Jackson, 'Antarctica: Geopolitical Challenges and Institutional Resilience' (2023) 13 Polar Journal 31.

[201] See AD Hemmings, 'The Philosophy of Law in the Antarctic' in D Bunikowski and AD Hemmings (eds), *Philosophies of Polar Law* (Routledge 2020) 13.

greater interest in Antarctic governance, particularly in relation to area-based protection and the exploitation of MGRs. Positively engaging with the BBNJ Agreement and adopting its processes and modalities as appropriate and in a way that does not undermine the ATS is the most effective way of responding to such scrutiny and maintaining the legitimacy of the ATS mandate for Antarctic and Southern Ocean governance.

In 1995, following the entry into force of UNCLOS and the so-called 'new law of the sea', Christopher Joyner pertinently and eloquently observed that:

> [w]hat can be posited unequivocally is that the instruments adopted by the Consultative Party governments for the Antarctic Treaty System have been purposively designed to comport with (i.e. not conflict with) the law of the sea as it has continued to evolve in state practice over the past three decades.[202]

He went on to say that:

> [t]he competing jurisdictions of international regimes in Antarctic seas thus serve more as complementary reinforcement of desirable norms, rather than conflictive or duplicative efforts creating difficulties for the affected states. In this way both these regimes [the law of the sea and the ATS] contribute considerably to strengthening the rule of law in the ocean space surrounding Antarctica.[203]

Thirty years on, this conclusion can and should be applied to the relationship between the ATS and the BBNJ Agreement. Both are complementary in that they reinforce and strengthen mutually compatible norms and, when implemented in a way that reflects complementarity and congruence, they have significant potential to strengthen 'the rule of law in the ocean space surrounding Antarctica' for the benefit of all humankind.

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[202] Joyner (n 10) 329.
[203] ibid 331.

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