BRILL
NIJHOFF

NORDIC JOURNAL OF INTERNATIONAL LAW
(2026) 1–31

NORDIC JOURNAL OF INTERNATIONAL LAW
brill.com/nord

Reconsidering the Role of International Law in the Arctic: Why We Should Exercise Caution in Relying on the Biodiversity Beyond National Jurisdiction Agreement to Conserve Biodiversity in the Arctic Ocean

*Thomas Baycock, LLM** | ORCID: 0009-0004-5977-3494
Lecturer in Law, Humanities and Social Sciences Cornwall, Exeter Centre for Environmental Law, University of Exeter, UK
Corresponding author
t.baycock@exeter.ac.uk

Dr Sara Dal Monico | ORCID: 0000-0002-5058-8688
Postdoctoral Research Fellow, Ca'Foscari University of Venice, Italy, Affiliate of Exeter Centre for Environmental Law, UK
sara.dalmonico@unive.it

Mathilde Morel, LLM | ORCID: 0000-0002-7458-637X
PhD Research Fellow, UiT The Arctic University of Norway and Norwegian Centre for the Law of the Sea, Norway, Affiliate of Exeter Centre for Environmental Law, UK
mathilde.d.morel@uit.no

Received 10 November 2025 | Accepted 19 February 2026 |
Published online 29 April 2026

* Although this contribution is the result of a collaborative effort and shared reasoning, paras. 1.1-1.2 and 4.1-4.2 can be attributed to Thomas Baycock; paras. 2.1-2.3 can be attributed to Dr. Sara Dal Monico; whilst paras. 3.1-3.3 can be attributed to Mathilde Morel. All authors shared the introduction and conclusions, and the final editing.

Published with license by Koninklijke Brill BV | DOI:10.1163/15718107-BJA10124
 | ISSN: 0902-7351 (print) 1571-8107 (online)

Abstract

The recently adopted Agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement), represents a landmark effort to protect marine biodiversity in global commons. This paper argues that the application of the BBNJ Agreement to the Arctic Ocean may be challenging due to the region's unique ecological vulnerability, fragmented governance, and complex jurisdictional landscape. Examining the interplay between the BBNJ Agreement and existing legal governance arrangements in the Arctic Ocean, such as the UNCLOS, the paper identifies key limitations and conflicts in its implementation. It concludes that alternative legal pathways – such as a moratorium on extractive activities or a dedicated Arctic Treaty System – may offer more appropriate means of safeguarding Arctic biodiversity through precautionary, ecosystem-based, and eco-centric governance in one of the planet's last relatively intact marine regions.

Keywords

Arctic Governance – biodiversity law – BBNJ agreement – ABNJ – sovereignty

1 Introduction

In June 2023, the Agreement under the United Nations Convention on the Law of the Sea (UNCLOS) on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) was adopted pursuant to extensive negotiations. The Agreement entered into force on 17th Janaury 2026 having reached the 60 ratficiations required as per Article 68(1).[1] Its overarching ambition is "to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction".[2] Meanwhile, the substantive parts of the Agreement are formed around four key aspects: the fair and equitable sharing of the benefits derived from marine genetic resources (MGRs); area based management tools

1 Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement) (Adopted 19th June 2023, entered into force 17th January 2026), Chapter XXI, 10, Article 68(1).

2 *Ibid.,* Article 2.

(ABMTs) and marine protected areas (MPAs); environmental impact assessments (EIAs); and capacity building and transfer of marine technology.[3] The Agreement applies only to "areas beyond national jurisdiction" (ABNJ),[4] and is thus concerned only with the areas of the global oceans that do not fall under the jurisdiction of sovereign states. This could prospectively apply to the central Arctic Ocean (AO), an approximately 2.8 million km^2 area that exists beyond the jurisdiction of the five Arctic littoral states,[5] central areas of which are permanently covered by ice year-round at present.[6]

The AO supports approximately 5,000 species of "marine mammals, birds (and) fish".[7] However, changing conditions flowing from climate change, such as sea ice recession, are driving a "catastrophic restructuring" of the AO ecosystem.[8] Whilst protective measures adopted to protect biodiversity are somewhat separate from, albeit not independent of, legal frameworks concerned with climate change, they are tasked with managing the indirect consequences of significant environmental change. Receding sea ice is especially problematic in the AO, paving the way for increased human activities in the region.[9]

A reassessment of the way biodiversity in the Arctic is protected is therefore required. The BBNJ Agreement is one possible framework that could be drawn upon in response, but this paper will argue that this agreement is unlikely to be the most effective approach. Instead, the research will argue that a unique opportunity exists for the international community to conserve the AO through a moratorium on extractive activities, or a more expansive treaty system, the foundations of which are already being laid.

The work will provide a short summary of the legal, governmental, and ecological contexts in section 2, outlining the existing frameworks and challenges. Section 3 will provide a critical assessment of the BBNJ Agreement, addressing its relationship with the UNCLOS and exploring some of the

3 *Ibid.,* Part II, III, IV and V.

4 *Ibid.,* Article 3.

5 C. Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction," *Marine Policy 142,* (2022): 3.

6 V. Gavrilov, R. Dremliuga and R. Nurimbetov, "Article 234 of the 1982 United Nations Convention on the Law of the Sea and Reduction of Ice Cover in the Arctic Ocean," *Marine Policy* 106 (2019): 1–6.

7 C. Prip, "Arctic Ocean Governance," 2.

8 D. N. Thomas, *et al.*, "A Changing Arctic Ocean," *Ambio* 51 (2022): 293.

9 T. Hirata, *et al.,* "Towards an Integrated Assessment of the Arctic Marine Ecosystems in Response to Abrupt Environmental Changes: Contribution from the Arctic Challenge for Sustainability II (ArCS II) Project," *Polar Science* 45 (2025): 1.

initial critiques of the Agreement,[10] despite its infancy. Section 4 will then assess the compatibility of the BBNJ Agreement and the AO, examining its compatibility with existing governance structures, and potential limitations in effectively protecting biodiversity. Finally, section 5 will propose two alternative legal frameworks that may be more suitable in protecting Arctic biodiversity: a moratorium on extractive activities, building on the Central Arctic Ocean Fisheries Agreement (CAOFA),[11] and an Arctic Treaty System, the structure for which is arguably already emerging.

2 Contextual Matters in the Arctic Region

2.1 *The Arctic Ocean Ecosystem*

As one of the few remaining pristine ecosystems on earth, the AO requires a new legal approach to the management of its variety of abundant resources, not least its unique biodiversity.[12] The AO supports a unique marine ecosystem that remains relatively intact compared to other oceans. The Arctic region is inhabited by 21,000 species,[13] including eleven species of Arctic Marine Mammals (AMMs), such as cetaceans, seals, walrus, and polar bears.[14] The AO ecosystem supporting these species however, is changing at an "unprecedented rate".[15] Of particular concern is the ever-reducing extent of the ice-covered areas, which are rapidly contracting in response to rising global temperatures.[16] Several AMMs are "sea ice obligates", that interact with or depend on sea ice,[17] and are uniquely vulnerable to reductions in both its

10 United Nations Convention on the Law of the Sea (UNCLOS) 1982 (adopted 10th December 1982, entered into force 16th November 1994), unts vol. 1833.

11 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018).

12 "Protection of the Arctic Marine Environment (PAME)," United Nations Environment Programme (UNEP), available here: <www.unep.org/protection-arctic-marine-environment-pame#:~:text=Arctic%20marine%20and%20coastal%20ecosystems,people%20on%20a%20global%20scale> visited on 29th October 2025.

13 "Safeguarding Arctic Biodiversity," The Arctic Council, available here: <www.arctic-council.org/explore/topics/biodiversity/> visited on 27th October 2025.

14 K. L. Laidre, *et al.,* "Arctic Marine Mammal Population Status, Sea Ice Habitat Loss, and Conservation Recommendations for the 21st Century," *Conservation Biology* 29, no 3 (2015): 725.

15 J. Overland, *et al.,* "The Urgency of Arctic Change," *Polar Science* 21 (2019): 6.

16 *Ibid.*

17 K. L. Laidre, *et al.,* "Arctic Marine Mammal Population Status," 725.

extent and quality.[18] Arctic sea ice has contracted by 40 per cent since 1972, receding at a rate of around 12.3 per cent per decade, nearly four times faster than the global average.[19] Ice-free summers in the AO are anticipated as imminently as 2050.[20] The increased accessibility afforded by temperature increases and subsequent sea ice recession,[21] as well as the loss of habitat for "ice-dependant animals",[22] will present novel challenges to species in the region. These species and their environment also support the "unique" ways of life of many Indigenous Arctic people.[23] Threats to the Arctic ecosystem risk directly impacting "connections between nature and indigenous life".[24]

Human activity in the region is expanding with the growth in accessibility provided by sea ice reduction.[25] "[C]ommercial shipping, fishing, tourism, and resource exploitation" are all sectors primed for growth,[26] with the immediate impacts of such novel activities in the region unclear.[27] The prospect of increased extractive activities, such as fishing, and the introduction of novel pollutants, both chemical and sonic, from both shipping and mineral extraction, is of significant concern.[28] Notably, warming temperatures are driving poleward shifts in marine species seeking lower

18 R. Caddell, "Marine Mammals at the Poles," in *Research Handbook on Polar Law,* ed. K. N. Scott and D. L. VanderZwaag (Cheltenham: Edward Elgar Publishing, 2020): 218.

19 J. Dusik and E. J. Molenaar, "Current and Projected Pressures on Arctic Biodiversity and Possible Governance Responses," in *The Routledge Handbook of Arctic Governance,* ed. E. Conde and Corine Wood-Donnelly (1st ed. London: Routledge, 2025): 412.

20 J. G. Mason, "Key Uncertainties and Modelling Needs for Managing Living Resources in the Future Arctic Ocean," *Earth's Future* 12 (2024): 2.

21 C. Cinelli, "A Legal Perspective of the Environmental Security in the Arctic Ocean," in *The Routledge Handbook of Arctic Governance,* ed. E. Conde and Corine Wood-Donnelly (1st ed. London: Routledge, 2025): 430.

22 J. Dusik and E. J. Molenaar, "Current and Projected Pressures," 413.

23 R. Caddell, "Marine Mammals at the Poles," 218.

24 V. Q. Buschman and E. Sudlovenick, "Indigenous-Led Conservation in the Arctic Supports Global Conservation Practices," *Arctic Science* 9 (2023): 714.

25 T. Hirata, *et al.,* "Integrated Assessment of the Arctic Marine Ecosystems," 1; T. Haug, *et al.,* "Future Harvest of Living Resources in the Arctic Ocean North of the Nordic and Barents Seas: A Review of Possibilities and Constraints," *Fisheries Research* 188 (2017): 39.

26 C. Connolly, "Under the Arctic Ice: Climate Futurism, Inuit Sovereignty, and Deep Seabed Mining in the Just Transition," *Ocean Yearbook Online* 37, no 1 (2023): 313.

27 T. Hirata, *et al.,* "Integrated Assessment of the Arctic Marine Ecosystems," 1.

28 S. A. Olaleye, *et al.,* "Impacts of Oil and Gas Exploration," in *Arctic Marine Ecotoxicology: Climate Change, Pollutants, and Their Far-Reaching Effects,* ed. P. O. Isibor (Switzerland: Springer Nature Switzerland, 2024): 195–210 and S. O. Adeniran-Obey, "Noise Pollution in the Arctic Marine Ecosystem," in *Arctic Marine Ecotoxicology: Climate Change, Pollutants, and Their Far-Reaching Effects,* ed. P. O. Isibor (Switzerland: Springer Nature Switzerland, 2024): 233–262.

temperatures,[29] with fishing activity and pressure "expected to surge in higher latitudes" accordingly.[30] The sub-Arctic oceans are presently recognised as particularly abundant and productive, with access to more northerly fishing grounds presently limited.[31] The combination of receding sea ice and the poleward movement of fish stocks,[32] make "increased fishery production" in the AO increasingly likely in the future.[33] This shift will result in more human activity in the region, requiring careful responses to manage the possible impacts.[34]

2.2 *Arctic Law and Governance*

Canada, Denmark, Finland, Iceland, Norway, The Russian Federation, Sweden and the United States are the sovereign states in the Arctic region. These states are also Arctic Council (AC) member states, a "key intergovernmental body for regional cooperation",[35] described as "the major international forum for dialogue and cooperation on Arctic challenges and opportunities".[36] The AC was conceived by virtue of the Ottawa Declaration in 1996,[37] and was "established as a high level forum",[38] designed to "provide a means for promoting cooperation, coordination and interaction among the Arctic States on common Arctic issues".[39] Council membership is thus extended to six

29 S. E. Campana, *et al.,* "Shifting Fish Distributions in Warming Sub-Arctic Oceans," *Scientific Reports* 10 (2020): 10; T. Haug, *et al.,* "Future Harvest of Living Resources," 39.

30 L. Cruz, M. Penino, and P. Lopes, "Fisheries Track the Future Redistribution of Marine Species," *Nature Climate Change* 14 (2024): 1093; A. H. Hoel, "The Evolving Management of Fisheries in the Arctic," in *Research Handbook on Polar Law,* ed. K. N. Scott and D. L. VanderZwaag (Cheltenham: Edward Elgar Publishing, 2020): 201.

31 P. Fauchald, *et al.,* "Poleward Shift in Marine Fisheries Under Arctic Warming," *Environemntal Research Letters* 16 (2021): 1; A. H. Hoel, "The Evolving Management of Fisheries in the Arctic," 201.

32 *Ibid.,* 1-2.

33 F. J. Mueter, "Arctic Fisheries in a Changing Climate," in *Global Arctic: An Introduction to the Multifaceted Dynamics of the Arctic,* ed M. Finger and G. Rekvig (Switzerland: Springer Nature Switzerland, 2022): 286.

34 T. Haug, *et al.,* "Future Harvest of Living Resources," 39.

35 A. A. Sergunin, "International Cooperation in the Arctic: The Arctic Council", in *The Handbook of the Arctic, a Broad and Comprehensive Overview,* ed. E. V. Pak, A. I. Kvrivtsov and N. S. Zagrebelnaya (Singapore: Springer Nature Singapore, 2022) 34.

36 S. V. Rottem, "Improving the Work of the Arctic Council: Challenges and Recommendations," *Polar Record* 59, e9 (2020): 1.

37 Arctic Council, Declaration on the Establishment of the Arctic Council (The Ottawa Declaration) (1996), Ottawa, Canada.

38 *Ibid.,* Article 1.

39 *Ibid.,* Article 1(a).

Indigenous People's organisations, described as "Permanent Participants".[40] Decisions of the Council are "not legally binding – only politically binding",[41] and consequently, the legally binding frameworks consist of national legislation established by Arctic States, and of the UNCLOS in ABNJ.[42]

Meanwhile, Canada, Denmark, Norway, The Russian Federation and the United States are the littoral Arctic States,[43] often referred to as the "Arctic Five",[44] and large areas of the marine environment thus fall under their jurisdiction.[45] Each exercises their jurisdictional rights under the UNCLOS or customarily,[46] establishing their relative maritime zones in the AO; including a 12nm territorial sea and an adjacent 200nm exclusive economic zone (EEZ).[47] Beyond these recognised sovereign territories exists the ABNJ,[48] identified as the high seas under the UNCLOS.[49] Article 87 of the UNCLOS makes provision for certain activities to be undertaken freely in this area, including fishing (subject to certain conditions),[50] while Article 89 prevents any state from subjecting "any part of the high seas to its sovereignty".[51]

The interests and cooperation of the Arctic Five are formalised by the Ilulissat Declaration, a document "consolidating the interests" of the Arctic coastal

40 "Permanent Participants," The Arctic Council, available here: <www.arctic-council.org/about/permanent-participants/> visited on 25th July 2025.

41 B. Steinveg, S. V. Rottem and S. Andreeva, "Soft Institutions in Arctic Governance – Who Does What?," *Polar Record* 60, e1 (2023): 2; M. A. Maksakova, "Revisiting the Arctic Strategy of Russia up to 2035," in *The Handbook of the Arctic, a Broad and Comprehensive Overview,* ed. E. V. Pak, A. I. Kvrivtsov and N. S. Zagrebelnaya (Singapore: Springer Nature Singapore, 2022) 34.

42 UNCLOS, Part VII, High Seas.

43 J. Rahbek-Clemmensen and G. Thomasen, "How Has Arctic Coastal State Cooperation Affected the Arctic Council?" *Marine Policy* 122 (2020): 1.

44 F. A. Cotta, "Navigating Arctic Realities: Geopolitics, Security and Climate Change," *Il Politico* 89, no 1 (2024): 46.

45 T. Koivurova, P. Kleemola-Juntunen and S. Kirchner, "Arctic Regional Agreements and Arrangements," 64.

46 K. Elmahmoud, "American Pick and Choose or Customary International Law," *Blog of the European Journal of International Law* (*EJIL*) (2024), available here: <www.ejiltalk.org/american-pick-and-choose-or-customary-international-law/> (visited on 5th August 2025).

47 UNCLOS, Territorial Sea: Articles 2–3, and EEZ: Articles 55–57.

48 C. Prip, "Identifying and Describing Ecologically or Biologically Significant Marine Areas (EBSAs): A Key Tool for the Protection of Ocean Biodiversity in Dispute," *Arctic Review on Law and Politics* 13 (2022): 184.

49 UNCLOS, Part VII, The High Seas.

50 *Ibid.,* Article 87.

51 *Ibid.,* Article 89.

states.[52] In relation to challenges facing the AO, the document states that "by virtue of their sovereignty… and jurisdiction in… the Arctic Ocean the five coastal states are in a unique position to address these possibilities and challenges".[53] The Arctic five thus ascribed themselves a "stewardship role" in protecting the region's unique ecosystem.[54] This implies the attribution of "both a right and a duty" to protect the region by virtue of their "geographical nearness".[55] The AO is "not *terra nullius"* from the perspective of the Arctic Five.[56]

Unlike the Antarctic Treaty System (ATS) that provides a comprehensive framework governing "the rights and obligations of states" in Antarctica,[57] no such framework governing the Arctic as a singular region exists; nor does the UNCLOS make specific provision for Arctic governance.[58] Instead, the legal landscape is fragmented, with various Agreements and a handful of provisions that either indirectly or specifically address Arctic conditions. For example, Article 234 of the UNCLOS, responds to the unique navigational and environmental challenges posed by ice-covered waters, reflecting the geopolitical sensitivity surrounding Arctic navigation rights and coastal state jurisdiction in ice-covered waters.[59]

Beyond the UNCLOS, and despite the adoption of three binding instruments under the auspices of the AC, domestic and regional instruments remain more commonplace.[60] Existing legal frameworks are often issue or sector-specific in their dealings with environmental issues, such as the

52 K. Dodds, "The Ilulissat Declaration (2008): The Arctic States, "Law of the Sea", and Arctic Ocean," *The SAIS Review of International Affairs* 33, no 2 (2013): 45.

53 Ilulissat Declaration (2008), Ilulissat, Greenland, p1.

54 *Ibid.,* p2.

55 T. Henriksen, "The Arctic Ocean, Environmental Stewardship, and the Law of the Sea," *UC Irvine Law Review* 6, no 1 (2016): 74.

56 K. Dodds, "The Ilulissat Declaration," 54.

57 J. M. Barrett, "The Antarctic Treaty System," in *Research Handbook on Polar Law,* ed. K. N. Scott and D. L. VanderZwaag (Cheltenham: Edward Elgar Publishing, 2020): 40.

58 R. Fang, "Arctic Governance from the Perspective of "Self-Governance" Theory," *Advances in Education, Humanities and Social Science Research* 1, no 1 (2022): 409.

59 Jan Jakub Solski, "The Genesis of Article 234 of the UNCLOS," *Ocean Development & International Law* 52, no 1 (2021): 3.

60 K. N. Scott and D. L. VanderZwaag, "Introduction to Polar Law," in *Research Handbook on Polar Law,* ed. K. N. Scott and D. L. VanderZwaag (Cheltenham: Edward Elgar Publishing, 2020): 9–10; M. Smieszek, *et al.*, "The State and Challenges of Arctic governance in an Era of Transformation," *One Earth* 4 (2021): 1667. The three agreements are the Agreement on Cooperation on Aeronautical and Maritime Search and Rescue in the Arctic (2011), the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (2013) and the Agreement on Enhancing International Arctic Scientific Cooperation (2017).

Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR),[61] and the International Maritime Organisation's (IMOs) regulation of pollution from shipping via the International Code for Ships Operating in Polar Waters (Polar Code).[62] This structure and subsequent fragmentation have been criticised for several reasons, some of which will be explored later in this paper. This fragmentation underscores the need to evaluate whether the BBNJ Agreement meaningfully addresses the governance gaps left by these arrangements.

3 Critical Assessment of the BBNJ Agreement

3.1 *Purpose, Scope, and Relationship with UNCLOS*

The BBNJ Agreement has been in the works for almost twenty years.[63] Its drafting was born out of the need to address the conservation and sustainable use of marine biological diversity in ABNJ, an aspect which was unaddressed in UNCLOS. This aim is set out in the Preamble: "the need for the comprehensive global regime under the Convention to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction".[64] This recognises the urgent need for a "just and equitable economic international order", and to concurrently address "biological diversity loss and degradation of ecosystems of the ocean due to climate change impacts on marine ecosystems".[65] Reaching an agreement entailed five rounds of negotiations before the text was finalised. The final text was adopted in June 2023 and opened for signature in September 2024.[66] The BBNJ Agreement entered into force in January 2026, counting 86 parties to the agreement at the time of writing.[67]

---

61 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (adopted 22nd September 1992, entered into force 25th March 1998).

62 "International Code for Ships Operating in Polar Waters (Polar Code)," International Maritime Organisation, available here: <https://www.imo.org/en/ourwork/safety/pages/polar-code.aspx> visited on 1st November 2025.

63 "Background on BBNJ Agreement," United Nations Environment Programme, available here: <https://www.unep.org/unep-and-bbnj/background> visited on 7th January 2026.

64 BBNJ Agreement, Preamble.

65 V. De Lucia, "The integration of the ecosystem approach in the BBNJ agreement—An initial assessment of limits and opportunities," *Review of European, Comparative and International Environmental Law* 33, no 3 (2025): 555.

66 *Ibid*.

67 "United Nations Treaty Collection," United Nations, available here: <https://treaties.un.org/> visited on 1st March 2026.

Beside addressing the sustainable use and conservation of MGRs, the final text of the BBNJ Agreement is built around three other key features: ABMTs, which include MPAs, EIAs, and capacity building and aspects related to the use and transfer of marine technology. ABMTs refer to 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" as outlined in Article 1(1).[68] EIAs meanwhile seek to identify and evaluate the potential impacts of activities to inform decision making (Art. 1(1)), and State parties are obliged to undertake them before authorising activities which may impact the marine environment as per Article 28.[69] The transfer of marine technology is provided for in Part V and includes an obligation of cooperation for the State parties to assist especially developing countries through capacity building and the transfer of marine technology.[70]

Another key feature of the BBNJ Agreement lies in its scope. The Agreement applies to ABNJ, thus to the high seas and to the International Seabed Area (Area),[71] thus regulating spaces which have historically been governed only by principles such as the freedom of scientific research, fishing, of constructing artificial islands, of laying submarine cables and pipelines, of navigation and overflight.[72] The BBNJ Agreement fills a legal void in the UNCLOS regime and must be interpreted in a manner that is consistent and that does not undermine the rights, jurisdiction and duties of its State Parties.[73] Beyond UNCLOS, the BBNJ Agreement has "roots in the oceans and biodiversity regimes",[74] and thus sits at the intersection of the UNCLOS and the Convention on Biological Diversity (CBD).[75]

3.2 *Principles Governing the BBNJ*

The principles and approaches of the BBNJ Agreement are laid out in Article 7, and offer an important interpretative tool "providing insights to the negotiators' intent behind the text of the Agreement",[76] alongside the preamble and

68 BBNJ Agreement, Article 1(1).
69 *Ibid.,* and Article 28.
70 *Ibid.,* Part V.
71 *Ibid.,* Article 3.
72 UNCLOS, Article 89.
73 BBNJ Agreement, Article 5.
74 V. De Lucia, "The Integration of the Ecosystem Approach", 555.
75 Convention on Biological Diversity (CBD) (adopted 11–22nd May 1992, entered into force 29th December 1993) unts vol. 1760, p79.
76 H. Muraki Gottlieb, D. Kachelriess, and L. Slobodian, "Understanding the Preamble, Objectives and Principles of the BBNJ Agreement: A Focus on the Fair and Equitable

the objectives.[77] Article 7 includes innovative aspects, including a clear reference to the polluter-pays principle and the precautionary principle,[78] and reference to the use of traditional knowledge of indigenous peoples. These concepts build upon the regimes contained within the CBD and Nagoya Protocol. Both regimes were criticised by indigenous activists and scholars as failing to recognise indigenous peoples' unique relationship with nature and biological diversity, and the key contribution of traditional knowledge.[79] The ecosystem approach laid out under Article 7(f) recalls the CBD and the ecosystems approach contained therein.[80]

Of particular relevance to this work are letters (b) and (c), which require specific consideration owing to their potential incompatibility, referring specifically to the principle of the common heritage of humankind (CHH), and the freedom of marine and scientific research respectively. This alleged conflict, on the one hand seeing MGRs as CHH whose exploitation and exploration should be carried out for the benefit of humankind as a whole, and promoting mandatory benefit sharing on the other, seeing it as a resource to be studied and potentially patented, reflects disagreement between the drafters, divided by the opposing perspectives of developing and developed countries. The former argued in favour of the inclusion of the CHH as guiding principle, thus "the mandatory benefit sharing (including monetary benefit sharing) scheme would be incorporated in the BBNJ Agreement, in the same manner as the implementing agreement on deep seabed mining".[81] Conversely, developed countries strongly opposed the mandatory benefit sharing (especially potential financial aspects), and argued for the freedom of marine research principles, which, as per the CHH, is already part of the UNCLOS regime.

Meanwhile, the freedom of marine research is already contained within the wider principle of the freedom of the high seas, set out in Article 87 of the UNCLOS, which includes freedoms of navigation, fishing and scientific

Sharing of Benefits of Marine Genetic Resources," in *Decoding Marine Genetic Resource Governance Under the BBNJ Agreement,* ed. F. Humphries (Switzerland: Springer Nature Switzerland, 2025): 96.

77 *Ibid.,* 96.

78 BBNJ Agreement, Article 7(a) and (e).

79 M. Y. Teran, "The Nagoya Protocol and Indigenous People," *The International Indigenous Policy Journal* 7, no 2 (2016): 1–32.

80 BBNJ Agreement, Article 7(f).

81 H. Muraki Gottlieb, D. Kachelriess, and L. Slobodian, "Understanding the Preamble, Objectives and Principles of the BBNJ Agreement," 109.

research, among others.[82] However, the right to conduct research activities is not absolute and is limited by certain conditions, including, most importantly, the protection and preservation of the marine environment.[83]

Nonetheless, there is still little clarity as to why the drafters decided to incorporate two principles which were already part of the regime in Article 7, if not, as suggested by Muraki Gottlieb and others, to provide guidance on the means to achieve the objectives of the Agreement. It is still open to interpretation how these two principles will be reconciled, thus leaving a legal grey area, as indeed: "the text is possibly open to multiple avenues of interpretation, potentially achieving the goal of some countries not to resolve but to preserve the controversy".[84]

3.3 *Some Preliminary Considerations on Critical Issues: Too Early to Tell?*

The BBNJ Agreement has sought to fill a legal void in the UNCLOS and CBD's regimes, but given its nascent nature, a period of time will be reqired before the true effectiveness of the mechanism can be properly assessed. Yet, by adopting a critical lens to the analysis of the BBNJ Agreement, some general reflections can already be put forth. A first reflection concerns its overall approach. MGRs are primarily perceived as a resource to be used for commercial purposes, something to be sustainably exploited by humankind. The overall approach of the BBNJ Agreement, despite its inclusion of the ecosystem approach, is still entrenched in anthropocentrism, attributing "value and meaning" to the various aspects considered according to their ability to serve humankind.[85] It perpetuates the anthropocentric division of the oceans into zones depending on the distance from the coastline, instead of reflecting on ocean spaces holistically. As argued by Ollino: "the depletion of marine living resources appears as the structural consequences of the anthropocentric nature and the system of rationality that underpins the tenets of international law".[86] This is further evidenced in the BBNJ Agreement remaining silent regarding ocean health, a crucial issue referred to in its Preamble, which

82 UNCLOS, Article 87(a)-(f).

83 H. Muraki Gottlieb, D. Kachelriess, and L. Slobodian, "Understanding the Preamble, Objectives and Principles of the BBNJ Agreement," 110.

84 *Ibid.,* 111.

85 R. Eckersley, "Environmentalism and Political Theory," in M. Halsey and R. White, "Crime, Ecophilosophy and Environmental Harm," *Theoretical Criminology* 2(3) (1998): 349.

86 A. Ollino, "Feminism, Nature and the Post-Human: toward a Critical Analysis of the International Law of the Sea Governing Marine Living Resources Management," in *Gender and the Law of the Sea*, ed. I. Papanicolopulu (Leiden: Brill/Nijhoff, 2019): 204–228.

acknowledges "biological diversity loss and degradation of ecosystems of the ocean, due, in particular, to climate change impacts on marine ecosystems".[87] Certain criteria are outlined in Annex I of the BBNJ Agreement, the "Indicative criteria for identification of areas",[88] that support proposals for ABMTs, including the establishment of MPAs.[89] Whilst these criteria provide support, they do not however reform the zonal approach that perpetuates the ecologically damaging practices that flow from such anthropocentric underpinnings.

Further, there is room for debate as to whether the CHH principle can be broadly extended to MGRs in the Area. Indeed, the BBNJ Agreement fails to recognise the seabed, the ocean floor and marine biological diversity as a common *concern* of humankind (CCH). The BBNJ Agreement includes the CHH as a guiding principle to achieve its objectives; yet fails to recognise ABNJ specifically.[90] It fails also to recognise the *conservation* of MGRs and marine ecosystems as a CCH.[91] Muraki Gottlieb *et al.* reason that the CHH could nonetheless be expanded to MGRs.[92] This position would be substantiated by three different grounds: i) the interpretation is present under the UNCLOS; ii) no provision within the UNCLOS would suggest that the principle cannot be extended to the water column; iii) the wording of Article 7(b) is wide and may extend the application of the CHH principle to all MGRs.[93] The text of the BBNJ Agreement offers no clarity in this regard, leaving a significant void that the Agreement has been unable to repair. According to the aforementioned authors, there is no incompatibility between the principle of CHH and the principle of freedom of scientific research.[94]

If interpreted in light of the core objectives and purpose of the Agreement, the argument that the CHH principle applies to all MGRs can be advanced. This reasoning is also substantiated when read systemically in relation to the other principles and approaches laid out in Article 7, such as building

87 BBNJ Agreement, Preamble.

88 *Ibid.*, Annex I.

89 *Ibid.,* Article 19.

90 UNCLOS, Article 136.

91 "The Common Concern of Humankind: A Potential Framework for a New International Legally Binding Instrument on the Conservation and Sustainable Use of Marine Biological Diversity in the High Seas,", C. Bowling, E. Pierson, S. Ratté, available here: www.un.org/depts/los/biodiversity/prepcom_files/BowlingPiersonandRatte_Common_Concern.pdf visited on 3rd November 2025.

92 H. Muraki Gottlieb, D. Kachelriess, and L. Slobodian, "Understanding the Preamble, Objectives and Principles of the BBNJ Agreement," 109.

93 *Ibid.,* 111.

94 *Ibid.*

ecosystem resilience, and the Preamble, which outlines the Parties' desire to: "act as stewards of the ocean in areas beyond national jurisdiction… by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biological diversity".[95]

This interpretation resonates with the recent findings of several Advisory Opinions, including the Advisory Opinion on Climate Change and International Law, delivered by the International Tribunal on the Law of the Sea (ITLOS);[96] the Advisory Opinion of the Inter-American Court of Human Rights (IACHR) on Climate Emergency and Human Rights;[97] and the Advisory Opinion on the Obligations of States in respect to Climate Change delivered by the International Court of Justice (ICJ).[98]

CHH is only referred to directly in the Advisory Opinion of the IACHR, albeit phrased as the "common heritage of humanity", which acknowledges that the "right to a healthy climate" extends to present and future generations.[99] CCH meanwhile is noted in both the ITLOS Advisory Opinion,[100] and in the ICJ Advisory Opinion. The ICJ addresses the concept of CCH by recalling the Preamble of the CBD, which establishes that "the conservation of biological diversity is a common concern of humankind", and reiterates that climate change is also the CCH, emphasising that a customary obligation to cooperate in this context is well established in international law.[101]

With particular regard to the marine environment and resources, each of the judicial bodies recognise a stringent due diligence obligation to protect and prevent degradation of the marine environment.[102] Much emphasis is placed on the concept of intergenerational equity, "an expression of the idea that present generations are trustees of humanity",[103] in both the IACHR and

95 BBNJ Agreement, Preamble.

96 *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, 21st May 2024, ITLOS, Advisory Opinion, No. 31.

97 *Climate Emergency and Human Rights,* 29th May 2025, IACHR, Advisory Opinion AO-32/25.

98 *Obligations of States in Respect of Climate Change*, 23rd July 2025, ICJ, Advisory Opinion, No. 187.

99 *Advisory Opinion,* IACHR, para. 311.

100 *Advisory Opinion*, ITLOS, paras 47 and 122.

101 *Advisory Opinion,* ICJ, para. 325–330.

102 *Advisory Opinion*, ITLOS, paras. 398–399; *Advisory Opinion,* IACHR, para. 333; and *Advisory Opinion,* ICJ, paras. 343–344.

103 *Advisory Opinion,* ICJ, para. 156.

ICJ opinions.[104] This arguably captures some aspects of CHH. Tladi, for example, observes that: "it is the intergenerational equity element that reminds us that, more than just being about benefit sharing, the idea of the ocean and ocean floor being the common heritage of mankind is also about the protection, conservation and preservation of marine biological diversity in areas beyond national jurisdiction".[105]

Moreover, the ICJ in particular clarified that certain obligations are indeed *erga omnes*: "the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic greenhouse gas (GHG) emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*".[106] The Advisory Opinions of the ITLOS and IACHR also note the significance of the prevention of transboundary environmental harm, the former stating that in the context of transboundary pollution, "the standard of due diligence can be even more stringent",[107] whilst the latter acknowledges "the obligation, *erga omnes"* not to cause transboundary environmental damage,[108] referring to "the obligation to preserve our common ecosystem" as being of a "*jus cogens* nature".[109] This obligation is also recalled under Article 3 of the CBD, which confirms the responsibility of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond national jurisdiction".[110]

A further issue is fragmented regulation, which poses another significant point of concern when considering the interactions between the BBNJ Agreement and existing legal frameworks.[111] Article 5(1) of the BBNJ Agreement establishes the relationship between itself, UNCLOS, and other agreements.[112] The Arctic is governed by different regimes, but De Lucia adds

104 *Advisory Opinion,* IACHR, para. 287.

105 D. Tladi, "The Common heritage of Mankind in the Proposed Implementing Agreement," in *Legal Order in the World's Oceans,* ed. M. H. Nodquist, J. Norton Moore, and R. Long (Leiden: Brill/Nijhoff, 2018): 86.

106 *Advisory Opinion,* ICJ, para. 440.

107 *Advisory Opinion,* ITLOS, para. 256.

108 *Advisory Opinion,* IACHR, para. 287.

109 *Ibid.,* para. 291.

110 CBD, Article 3.

111 V. De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," *Marine Policy* 142 (2019): 1–10.

112 BBNJ Agreement, Article 5(1) states: "This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention. Nothing in this

a second issue regarding fragmented jurisdiction, writing: "an effective program of conservation of Arctic biodiversity must be able to include within its purview all relevant activities in all ecologically relevant zones, regardless of jurisdictional fragmentation, in line with the inherently integrative logic of the ecosystem approach".[113] The Arctic region and its unique biodiversity would benefit from ecosystem-based governance which overlooks spatial and jurisdictional fragmentations and is more focused on the preservation of its ecosystems. The unique features and space that embody and are inherent to the Arctic region, offer unique opportunities to rethink governance using an ecocentric approach.[114]

An ecocentric approach, one that recognises and promotes an "inherent intrinsic" value and interpretation of nature,[115] would further argue for a governance system based on the recognition of the interconnection between all elements of the environment and on the need to ensure their protection and preservation, rather than their use and conservation.

Whilst, as mentioned, it is premature to draw definitive conclusions on the effectiveness of the regime established by the BBNJ Agreement, it would appear that it fails to take into account the specific vulnerability of Arctic ecosystems, particularly regarding the preservation of biodiversity. The BBNJ Agreement could apply in the Arctic region, but the question remains as to whether it is the most suitable tool to address its preservation.[116]

4 BBNJ Agreement in the Arctic Ocean

4.1 *Introduction to the Arctic Context for BBNJ Applicability*

The potential role of the BBNJ Agreement in the Arctic must be understood against the region's jurisdictional and ecological particularities. The AO presents a complex mosaic of maritime zones governed by coastal state jurisdiction under the UNCLOS, alongside areas of ABNJ. These characteristics

Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention, including in respect of the exclusive economic zone and the continental shelf within and beyond 200 nautical miles."

113 V. De Lucia, "The BBNJ Negotiations and Ecosystem Governance in the Arctic," 1–10.

114 *Ibid.*

115 "Why Ecocentrism is the Key Pathway to Sustainability," P. Cryer *et al.*, in Millennium Alliance for Humanity and the Biosphere (Stanford University) (2017), available here: https://mahb.stanford.edu/blog/statement-ecocentrism/ visited on 7th January 2026.

116 V. De Lucia, "The Arctic Environment and the BBNJ Negotiations. Special rules for Special Circumstances," *Marine Policy* 86 (2017): 234–240.

make the Arctic a compelling yet challenging context in which to examine how the BBNJ Agreement may interact with existing legal and governance arrangements and address concerns around Arctic biodiversity. This section will seek to highlight key dimensions that illustrate how the Agreement might influence, and be influenced by, this region's unique configurations, and why an alternative arrangement may be more effective.

Scholars have expressed differing perspectives on the implications of the BBNJ Agreement process for the Arctic. Koivurova and Caddell view the BBNJ Agreement as a "global platform for enhanced protection of Arctic Ocean biodiversity within the existing legal and institutional framework for the Ocean."[117] Several other scholars have questioned whether the BBNJ Agreement will add meaningful value to Arctic governance or will further complicate an already layered institutional landscape.[118] These divergent views reflect broader debates around local, regional and international ocean governance, and how novel instruments may interact with regionally specific regimes such as the AC and the UNCLOS.

4.2 *Compatibility with Existing Legal and Governance Structures in the Arctic*

As indicated earlier in this paper, the vast majority of Arctic marine spaces fall within coastal state EEZs or continental shelf extensions pursuant to the UNCLOS.[119] At present, four of the five Arctic coastal states (Canada, Denmark, Norway, Russia) have initiated processes before the Commission on the Limits of the Continental Shelf (CLCS) to delineate the outer limits of their continental shelves in the central AO under Article 76 of the UNCLOS.[120] These submissions indicate that the seabed and subsoil beyond 200nm in the region may fall under extended continental shelf jurisdiction rather than

117 T. Koivurova and R. Caddell, "Managing Biodiversity Beyond National Jurisdiction in the Changing Arctic," *AJIL Unbound* 112 (2018): 134–138; C. Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument," 3.

118 M. Tugend, "What Role for Traditional Knowledge in the Conservation of Marine Biodiversity in the Arctic High Seas?," The NCLOS Blog (April 26, 2021), available here: <https://site.uit.no/nclos/2021/04/26/what-role-for-traditional-knowledge-in-the-conservation-of-marine-biodiversity-in-the-arctic-high-seas/> visited on 3rd November 2025; V. De Lucia, "The Arctic Environment and the BBNJ Negotiations,"; K. Nishimoto, "The Impact of the BBNJ Agreement on the Legal Framework for the Governance of the Central Arctic Ocean," *Yearbook of Polar Law* 13 (2022): 275–298.

119 UNCLOS, Articles 56 and 57.

120 *Ibid.,* Art. 76(1).

remain as part of the Area.[121] The likely shrinking extent of seabeds in ABNJ in the central AO emphasises the importance of the BBNJ Agreement for the high seas water column above continental shelf zones, rather than the seabed itself. Having these geographical limitations in mind, where high seas (and remaining seabed areas under the regime of the Area) zones exist in the Arctic, the Agreement may theoretically be applied without interfering with coastal state rights within EEZs under the UNCLOS.

Nevertheless, Article 5(2) of the BBNJ Agreement provides that implementation of this agreement must not undermine the mandates of existing regional and sectoral bodies.[122] This is central to Arctic governance, which is characterised by well-developed institutional arrangements in specific sectors, such as the Polar Code[123] and the CAOFA.[124] From a critical viewpoint, this can be seen to reflect how international environmental law often proliferates institutions while diffusing accountability; a form of normative layering that legitimises global governance while leaving unresolved the question of who, in practice, governs the Arctic's biodiversity.

Article 5 is also indicative of a hybrid approach that integrates regional autonomy with global oversight.[125] This balance was a central point of debate during the negotiations, as states and observers disagreed over whether the new instrument should function as a global supervisory regime or as a framework complementing existing regional and sectoral bodies.[126] Article 22 does in some way also reflect this compromise: while granting the conference of the parties (CoP) the authority to promote coherence and coordination across regimes, it limits the CoP to issuing recommendations where proposals overlap with other competent organisations.[127]

Within the Arctic in particular, where governance is already structured around the UNCLOS, the AC, and regional and sectoral arrangements, this

121 The seabed beyond national jurisdiction in the Arctic Ocean is subject to overlapping claims by Canada, Russia, and Denmark (via Greenland). For an overview of pending submissions before the CLCS, see: "Submissions," Oceans and Law of the Sea: United Nations, available here: <https://www.un.org/depts/los/clcs_new/commission_submissions.htm> visited on 15 August 2025.

122 BBNJ Agreement, Article 5(2).

123 Polar Code.

124 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018).

125 BBNJ Agreement, Article 5.

126 G. Wright, *et al.*, "The Long and Winding Road: Negotiating a Treaty for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction," Insitut du Developpement Durable et des Relations Internationales (IDDRI) Studies N°08/18 (2018): 1–82.

127 BBNJ Agreement, Article 22.

arrangement underscores that the influence of the BBNJ Agreement will depend less on formal authority and more on the willingness of regional actors to engage with its objectives. Opposingly, the agreement could also promote the influence of non-Arctic states in advocating for certain regulations or limitations in the region. This could lead to disagreement and discord regarding the management of the AO, particularly recalling the aforementioned position adopted by the Arctic Five in the Ilulissat Declaration, regarding their desire and asserted competency to manage the AO themselves.

4.3 *Opportunities and Limitations for Arctic Biodiversity Protection*

The Arctic is undergoing a rapid transformation driven by both changing ecological conditions and increasing human activity. These dynamics intensify both the urgency and the political complexity of establishing effective biodiversity governance in ABNJ. As several commentators noted during the negotiations of the BBNJ Agreement, a major concern was the potential for institutional and normative fragmentation within the broader law of the sea framework.[128]

Unlike the Antarctic, which is governed by a bespoke treaty system providing a comprehensive legal architecture for environmental protection and scientific cooperation, the Arctic lacks a comparable regime of protection. The relevance of the BBNJ Agreement to the Arctic lies primarily in its potential to regulate biodiversity in ABNJ through mechanisms related to MGRs and benefit-sharing, ABMTs, including MPAs, EIAs, and capacity-building and technology transfer obligations.

Under the existing law of the sea regime, several provisions of the UNCLOS already apply to the Arctic. Article 194(5) requires states to take necessary measures to protect and preserve rare or fragile ecosystems as well as the habitats of depleted, threatened, or endangered species and other forms of marine life.[129] Article 234 provides coastal states with additional regulatory competence in ice-covered areas within their EEZs, though its geographical scope is limited.[130] The BBNJ Agreement, by contrast, establishes a more detailed and operational set of norms for biodiversity conservation in ABNJ, potentially complementing these existing obligations.

128 A. G. O. Elferink, "Exploring the Future of the Institutional Landscape of the Oceans Beyond National Jurisdiction," Review of European, Comparative and International Environmental Law 28 (2019): 237.

129 UNCLOS, Article 194(5).

130 *Ibid.*, Article 234.

One example is Article 30 of the BBNJ Agreement, that establishes thresholds and factors for conducting EIAs, requiring Parties to undertake a screening of any planned activity that "may have more than a minor or transitory effect on the marine environment," or where the effects are "unknown or poorly understood."[131] This provision introduces a precautionary dimension that may be of particular relevance in Arctic contexts. However, the BBNJ Agreement contains no polar-specific provisions. It does not explicitly address the seasonal dynamics of ice-covered navigation, the heightened ecological vulnerability of polar marine ecosystems, or the interconnectedness of Indigenous cultural and ecological rights that underpin Arctic governance debates.[132] Consequently, the Arctic remains governed through a fragmented patchwork of national, regional, and sectoral instruments, loosely coordinated under the UNCLOS framework. As Tugend has cautioned, a generalised high seas treaty such as the BBNJ Agreement may struggle to account for the Arctic's distinctive socio-ecological realities.[133] Without explicit recognition of the region's rapidly changing environmental conditions and the rights and knowledge systems of indigenous peoples whose livelihoods depend on marine biodiversity, implementation risks reproducing a form of universal governance that obscures regional specificities and undermines local legitimacy.

The BBNJ Agreement potentially represents a welcome development for Arctic biodiversity protection, as it introduces clearer procedures and stronger legal support for establishing and managing biodiversity in ABNJ. This may indeed enhance the durability and legitimacy of high seas conservation measures, particularly in ecologically sensitive polar regions where legal and institutional gaps have long hindered coordinated protection efforts. Contrastingly, tensions remain regarding how the BBNJ regime will interact with existing Arctic governance structures, including the AC's ongoing work on Large Marine Ecosystems (LMEs) and its guidelines for ecosystem-based management. Several LMEs encompass both national waters and ABNJ, raising practical and jurisdictional challenges for aligning different governance scales and mandates.[134]

131 BBNJ Agreement, Article 30.

132 M. Tugend, "What Role for Traditional Knowledge,".

133 *Ibid.*

134 "Large Marine Ecosystems (LMEs) of the Arctic area. Revision of the Arctic LME Map," Protection of the Arctic Marine Environment (2013), available here: <https://www.pame.is/images/03_Projects/EA/LMEs/LME_revised.pdf> visited on 10th October 2025.

As Prip observes,[135] global attention to the ecological vulnerability of polar marine ecosystems intensified following the establishment of the Ross Sea MPA in 2016 under the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR).[136] The Ross Sea precedent demonstrates both the feasibility and the diplomatic challenges of large-scale marine protection in polar contexts. Translating similar ambitions to the Arctic will require addressing more complex jurisdictional and political realities, and may in fact be better addressed in the form of a separate, specific, situated agreement or treaty system.

Furthermore, although the BBNJ Agreement has now entered into force, the geography of ratification and participation emphasises the uneven politics that continue to structure the governance of the global oceans. The European Union's (EU) ratification in May 2025 was celebrated as a milestone in global environmental multilateralism,[137] yet it also reaffirmed the central role of powerful normative actors in defining the pace and priorities of implementation. Several Arctic states, including Norway, have either ratified or are in the process of implementing the Agreement,[138] while others remain hesitant or strategically disengaged. The legal relationship between the UNCLOS and the BBNJ Agreement would presuppose that the United States, still a non-party to the former,[139] could not currently become a party, despite having signed the BBNJ Agreement, but not ratified it.[140] However, Turkey's ratification of the BBNJ Agreement, despite not being a party to the UNCLOS,

135 C. Prip, "Arctic Ocean Governance in Light of an International Legally Binding Instrument," 6.

136 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) (adopted 20th May 1980, entered into force 7th April 1982) unts vol. 1329, p 47. "Marine Protected Areas (MPAs)," Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) (2025) available here: <https://www.ccamlr.org/en/science/marine-protected-areas-mpas> visited on 30th October, 2025.

137 "EU leads global efforts to protect high seas biodiversity with landmark Treaty ratification," European Commission (2025), available here: <https://oceans-and-fisheries.ec.europa.eu/news/eu-leads-global-efforts-protect-high-seas-biodiversity-landmark-treaty-ratification-2025-05-28_en> visited on 30th October 2025.

138 "Act relating to the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction," The Kingdom of Norway, entered into force 17th January 2026, available here: <https://lovdata.no/dokument/NLE/lov/2025-05-27-21> visited on 1st March 2026.

139 "Law of the Sea", United Nations Treaty Collection (status at 1st March 2026), available here: <https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en> visited on 1st March 2026.

140 J. F. DiMento and J. L. Pierucci, "Arctic Law: Even More Sustainable? Roles of the US and EU," University of Missouri-Kansas City Law Review 93 (2025): 953.

challenges the presumption that state participation in the BBNJ Agreement is contingent upon being a party to the UNCLOS.[141] The Russian Federation meanwhile, has distanced itself from the process at present.[142] Considering that the Arctic coastal states have long argued that environmental governance in the Arctic is sufficiently provided through the UNCLOS regime as per the Ilulissat Declaration, these asymmetries matter, they expose how the governance of ABNJ remains deeply entangled with geopolitical alignments and competing resource imaginaries.

Even with formal entry into force, the BBNJ Agreement will not immediately transform legal realities in the Arctic. The slow choreography of institutional design, capacity building, and consensus-based decision-making is likely to defer tangible biodiversity outcomes for years. In the meantime, Arctic governance will continue to depend on fragmented regional initiatives – such as those under the AC or the CAOFA – whose capacity to resist extractivist pressures remains contested.

5 Opportunities for Alternative Legal Frameworks

5.1 *A Moratorium on Extractive Activities in the Arctic*

Whilst this paper has sought to outline several challenges regarding the implementation of the BBNJ Agreement in the Arctic, there are other alternative avenues that should be explored as a potential solution to ensure that this comparably pristine ecosystem remains unharmed. Much like the 1986 moratorium imposed by the International Whaling Commission (IWC) has "significantly reduced" global whaling efforts,[143] a moratorium is one such legal mechanism that should be proposed to protect the AO. A moratorium on activities that negatively impact biodiversity would not be an entirely unfamiliar prospect, and foundations for such a concept already exist. The CAOFA could provide a prospective platform for a broader moratorium in the AO.[144] An expansion of this mechanism could see not only restrictions on fishing

141 United Nations, Türkiye Ratification, Reference: C.N.61.2026.TREATIES-XXI.10 (Depositary Notification), 16th January 2026, available here: <https://treaties.un.org/doc/Publication/CN/2026/CN.61.2026-Eng.pdf> visited on 1st March 2026.

142 J. F. DiMento and J. L. Pierucci, "Arctic Law: Even More Sustainable? Roles of the US and EU," 953–54.

143 K. Hovden, "International Whaling: Reframing the IWC Moratorium for the Effective Conservation of Whales," *Animal Law* 29, no 1 (2023):19.

144 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018).

activities, but also on the extraction of minerals and of MGRs, thus significantly restricting human activity in the region.

In 2021, the CAOFA entered into force,[145] gaining signatures from the Arctic Five, plus China, Iceland, Japan, South Korea, and the European Union,[146] who are identified as the "Other Five" by virtue of their "capacity as high seas fishing states or entities".[147] The agreement aims to "prevent unregulated fishing in the high seas portion of the central Arctic Ocean", drawing upon precautionary conservation and management measures to protect the marine ecosystem.[148] It establishes an initial 16-year term for the agreement preventing commercial fisheries activity in the Arctic high seas,[149] after which it can be extended by five-year increments at the agreement of the parties.[150] Whilst the CAOFA Agreement refers to the high seas, it does so specifically to an 'Agreement Area' consisting of the "single high seas portion of the central Arctic Ocean", that exists adjacent to the EEZs of the Arctic coastal states.[151] This suggests that the CAOFA Agreement does not apply to "other high seas enclaves in the Arctic Ocean", such as the Donut Hole or the Loop Hole,[152] which therefore remain open to exploitation.

Perhaps most notable regarding the CAOFA Agreement, is the willingness of the parties to forego their entitlement to undertake commercial fishing activities in areas of high seas, expressed under Article 87(1)(e) of the UNCLOS, which makes provision for the "freedom of fishing" in ABNJ.[153] This aspect makes the prospect of the negotiation of a wider moratorium appear possible in the AO. There is an apparently genuine recognition of the need to adopt a precautionary approach to the prospective use of resources in the AO, given the demonstrable awareness shown by the parties in their willingness to

145 The Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018).

146 O. S. Stokke, "Arctic Geopolitics, Climate Change, and Resilient Fisheries Management," *Ocean Yearbook* 36 (2022): 440.

147 E. J. Molenaar, "The Central Arctic Ocean Fisheries Agreement," in *Non-Use Measures for Global Goods and Commons in International Law,* ed. S. Guggisberg and C. Blanchard (Leiden: Brill/Nijhoff, 2025): 114.

148 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018), Article 2.

149 *Ibid.,* Article 13.

150 *Ibid.*

151 *Ibid.,* Article 1(a).

152 A. N. Vylegzhanin, O. R. Young and P. A. Berkman, "The Central Arctic Ocean Fisheries Agreement as an element in the evolving Arctic Ocean governance complex," *Marine Policy* 118 (2020): 8.

153 UNCLOS, Article 87(1)(e).

prioritise its wellbeing.[154] Fish stocks in this area however are, legally speaking, available to any country, considered an "open access resource",[155] thus there remains the risk that other states not party to the CAOFA could choose to invoke their legal rights under Article 87(1)(e).

One of the challenges demonstrated by existing legal moratoriums or prohibitions in relation to natural resources, is their impermanence and their enforcement challenges. Recall for example, the case of *Whaling in the Antarctic, Australia v Japan* that observed Japan seek an end to the existing moratorium before leaving the International Convention for the Regulation of Whaling (ICRW) following the decline of its request.[156] The moratorium remains temporary, despite its longevity, with commercial whaling to be resumed when sufficient management systems are established and whale populations have sufficiently stabilised.[157] Presently, the moratorium remains active, and looks likely to remain so "indefinitely".[158] Similarly, the Protocol on Environmental Protection to the Antarctic Treaty (1991) (Madrid Protocol),[159] a key agreement within the ATS prohibiting "any activity relating to mineral resources",[160] is time limited to an initial 50-year period before a review under Article 25.[161]

As a consequence, there remains a risk that after 16 years, the CAOFA moratorium on commercial fishing in the AO is lifted, although Molenaar suggests that this is likely to occur only in the presence of an alternative

154 C. Calderwood and F. A. Ulmer, "The Central Arctic Ocean Fisheries Moratorium: A Rare Example of the Precautionary Principle in Fisheries Management," *Polar Record* 59, e1 (2022): 12.

155 *Ibid.,* 1.

156 *Whaling in the Antarctic, Australia and New Zealand* (*Intervening*) *v Japan* (2014) ICJ GL No 148. For contextual commentary and analysis, see C. Yiallourides, "Understanding Japan's Resumption of Commerical Whaling Under International Law," in *The Environmental Rule of Law for Oceans,* ed. F. M. Platjouw and A. Pozdnakova (Cambridge University Press, 2023): 327–345. International Convention for the Regulation of Whaling (adopted 2nd December 1946, entered into force 10th December 1948), unts vol. 161, p72.

157 M. Fitzmaurice, "Whaling," in *Max Planck Encyclopedia of Public International Law* (MPEPIL) (Oxford Public International Law, Oxford University Press, Online, 2023), para. 16–18, available here: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1236 visited on 3rd November 2025.

158 *Ibid.*

159 Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol) (adopted 4th October 1991, entered into force 14th January 1998) unts vol. 2941.

160 *Ibid.,* Article 7.

161 *Ibid., Article* 25; M. P. Nevitt and R. V. Percival, "Polar Opposites: Assessing the State of Environmental Law in the World's Polar Regions," *Boston College Law Review* 59 (2018): 1685.

management regime, such as a Regional Fisheries Management Organisation (RFMO).[162] The duration of the abstention however will provide sufficient time for the Joint Program of Scientific Research and Monitoring (JPSRM) established under Article 4 of the CAOFA, to carry out the work it is tasked with in the Agreement. Article 4(2) states that the JPSRM will be established by the parties within two years of the Agreement entering into force, "with the aim of improving their understanding of the ecosystems of the Agreement Area and… determining whether fish stocks might exist in the Agreement area now or in the future that could be harvested on a sustainable basis".[163] Critically, the CAOFA is intended as a stop-gap with a view to authorising commercial fishing in the future,[164] but it arguably offers a foundation for evolution.

Whilst the CAOFA moratorium is a welcome legal agreement that provides protection to regional fish stocks, it fails to protect other biodiversity or the wider ecosystem. Firstly, the Agreement only applies to fisheries, as opposed to all biodiversity; Article 1(b) specifically excludes "sedentary species", for example.[165] Secondly, the Agreement addresses the threats posed to fish stocks by unregulated fishing specifically, as opposed to other biological species and associated threats. It has thus been suggested that the CAOFA Agreement is "not a panacea", and caution should be exercised owing to the fact that the Agreement addresses only one aspect among many that may affect biodiversity loss in the AO.[166]

Nonetheless, the CAOFA does demonstrate the potential for a broader moratorium to function effectively in the AO region. An expanded version could adopt broader prohibitions on the use of resources, or the AO itself, providing more holistic protections against threats which are notably broad and often interconnected. For example, it is well established that biodiversity is afflicted by and experiences multiple drivers of loss, which include "habitat

162 E. J. Molenaar, "The Central Arctic Ocean Fisheries Agreement and Arctic Indigenous Peoples," *Marine Policy* 164 (2024): 2.

163 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018), Article 4(2).

164 A. N. Vylegzhanin, O. R. Young and P. A. Berkman, "Central Arctic Ocean Fisheries Agreement," 8.

165 Agreement to Prevent Unregulated High Seas Fisheries in the Central Arctic Ocean (2018), Article 1(b).

166 "The Central Arctic Ocean Fisheries Agreement, What It Is, Is Not and Might Be," Worldwide Fund for Nature (WWF) (2023), available here: <www.arcticwwf.org/newsroom/features/the-central-arctic-ocean-fisheries-agreement-what-it-is-is-not-and-might-be/> visited on 11th August 2025.

change, climate change, invasive species, overexploitation and pollution".[167] These are often considered to be "complex, intertwined, and multi-scale".[168] An expansion of the CAOFA moratorium could also include a prohibition on deep sea mining, for example, which risks "pollution, disturbances from extraction… and other activities".[169] The extraction of oil is of particular concern owing to the "severe" impact its escape can have on a sensitive and unique ecosystem that also presents challenges in terms of any cleanup operations.[170]

Such a moratorium could thus also have positive interactions with the Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (MOSPA Agreement), which seeks to protect the "vulnerable Arctic marine environment" from the threat of marine oil pollution, ensuring parties are prepared to respond to oil pollution in the region.[171] The "Scope of Application" of the MOSPA Agreement under Article 3 limits the scope to the sovereign areas of the Arctic States, but a moratorium on deep sea mining could support the expansion to ABNJ.

The CAOFA already commands the support and participation of the Arctic Five and the additional five high seas fisheries states, which provides an excellent foundation for a more elaborate agreement to flow from. The abstention of commercial fisheries operations in the central AO is welcome and is indicative of a willingness among states to adopt a broader precautionary approach to the protection of the AO.

5.2 *An Arctic Treaty System*

The idea of an Arctic Treaty system, similar to that which governs the Antarctic, the ATS, has been advanced in the past.[172] Verhaag expressed in no uncertain terms that "an international effort is the only way that the road to

167 T. Mazor, *et al.,* "Global Mismatch of Policy and Research on Drivers of Biodiversity Loss," *Nature Ecology and Evolution* 2 (2018): 1071.

168 C. J. A Bradshaw, "Grand Challenges in Global Biodiversity," *Frontiers in Conservation Science* 1 (2020): 2.

169 "Arctic Mining: Environmental Issues, Mitigation, and Pollution Control for Marine and Coastal Mining," Arctic Council: Protection of the Arctic Marine Environment (PAME) (May 2025): 22, available here: <www.pame.is/ourwork/resource-exploration-and-development/marine-and-coastal-mineral-extraction/> visited on 12th August 2025.

170 O. O. Onwaeze, "Ecotoxicology in Arctic Waters," in *Arctic Marine Ecotoxicology: Climate Change, Pollutants, and Their Far-Reaching Effects,* ed. P. O. Isibor (Switzerland: Springer Nature Switzerland, 2024): 26.

171 Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic (2013), Preamble and Article 1.

172 D. Pharand, "The Case for an Arctic Region Council and a Treaty Proposal," *Revue Générale de Droit* 23, no 2 (1992): 163–195; M. A. Verhaag, "It Is Not Too Late: The Need for a

environmental protection can be paved. The best way to start is to negotiate a treaty, modeled on the incredibly successful ATS".[173] Similarly, Pharand argued that "the conclusion of a treaty… which gives legally binding effect to the political will of the Parties, is eventually necessary to ensure the effectiveness of such cooperation".[174] It is not only academics who have advocated for this approach, in 2013, Finland's Strategy for the Arctic Region was published. The document stated that, given the AC's growing institutional role and breadth of its agenda;[175] the conclusion of several international agreements;[176] and the installation of a permanent secretariat;[177] "Finland supports the continuation of this development and the recognition of the Arctic Council as a treaty-based international organization".[178] A treaty system would provide opportunity to develop and implement effective agreements tailored specifically to the region's unique characteristics and needs, and thus capture a range of issues relative to the protection of biodiversity, and engage local people and indigenous communities to account for nuanced issues and challenges.

Nonetheless, such a concept is broadly considered controversial.[179] Rahbek-Clemmensen outlines the challenges around decision-making on critical issues such as the management of natural resources, which could thus obfuscate responses and "diminish the influence" of the Arctic States;[180] though one could argue conversely that the numerous BBNJ Agreement parties could diminish this influence further. There are also concerns that such a transformative approach to Arctic governance would require a broad range of agreements to respond effectively to the diverse range of challenges in the region, and such agreements may not be sufficiently adaptive or flexible to deliver appropriate responses with sufficient expedience to match the rapid

---

Comprehensive International Treaty to Protect the Arctic Environment," *Georgetown International Environmental Law Review* 15, no 3 (2003): 555–580.

173 M. A. Verhaag, "It Is Not Too Late," 578.

174 D. Pharand, "Arctic Region Council," 186.

175 "Projects," The Arctic Council, available here: <www.arctic-council.org/projects/> visited on 13th August 2025.

176 "International Cooperation in the Arctic," The Arctic Council, available here: <www.arctic-council.org/explore/work/cooperation/> visited on 13th August 2025.

177 "AC Secretariat," The Arctic Council, available here: <www.arctic-council.org/about/secretariat/> visited on 13th August 2025.

178 "Finland's Strategy for the Arctic Region 2013," Prime Minister's Office, Finland, (August 2013), available here: <www.julkaisut.valtioneuvosto.fi/handle/10024/79544> visited on 13th August 2025.

179 J. Rahbek-Clemmensen, "When Do Ideas of an Arctic Treaty Become Prominent in Arctic Governance Debates?" *Arctic* 72, no 2 (2019): 116–117.

180 *Ibid.,* 117.

rate of change observed in the region.[181] Most notably, perhaps, most Arctic States, via the AC, have "long opposed any proposed treaties" and accompanying treaty systems.[182]

Nonetheless, there remain concerns around the longevity of the current Arctic structure of governance given contemporary international political conditions, both locally to the Arctic, and in Ukraine and the Middle East. Tensions have most recently "intensified" in response to Russia's ongoing invasion of Ukraine.[183] This has put distance between Moscow and the other Arctic States,[184] culminating in the "unilateral refusal to cooperate" with Russia and the subsequent suspension of the AC.[185] Whilst "Project-Level Work" resumed in February 2024,[186] Andreeva and Rottem argue that the war in Ukraine has "severely affected cooperation in the Arctic", largely due to the flagrant disregard for sovereignty, the very concept around which the extant Arctic governance structure was built upon.[187]

As a result, a prospective treaty regime has been described as "essential" by Kavanagh, who argues that the discontinuation of cooperation observed in the wake of the Russian invasion of Ukraine, would likely have been avoided were a treaty-based framework to be in force.[188] It has been suggested that the threshold for suspending activity predicated by a treaty is higher.[189] This assessment is based on the legally binding Articles of the Vienna Convention on the Law of Treaties (VCLT) managing the withdrawal or termination of a

181 O. R. Young, "Arctic Tipping Points," 82.

182 E. Kavanagh, "Arctic Governance: An Analysis of a Treaty-Based Cooperation Hypothesis," *Spanish Yearbook of International Law* 27 (2023): 258.

183 C. E. Morrison and M. Bennett, "The Fall and Rise of Global Geopolitics in the Arctic," in *North Pacific Perspectives on the Arctic: Looking Far North in Turbulent Times*, ed. O. R. Young and J-D. Kim (Cheltenham: Edward Elgar Publishing, 2024): 2.

184 *Ibid.,* 2.

185 "The Rise and Sudden Fall of the Arctic Council," B. Simpson in Foreign Policy (Online) (2023) available here: <www.foreignpolicy.com/2023/05/31/arctic-council-russia-norway/> visited on 15th August 2025.

186 "Arctic Council Advances Resumption of Project-Level Work," The Arctic Council (February 2024), available here: <www.arctic-council.org/news/arctic-council-advances-resumption-of-project-level-work/> visited on 15th August 2025.

187 S. Andreeva and S. V. Rottem, "How and Why the Arctic Council Survived Until Now – An Analysis of the transition in Chairship Between Russia and Norway," *The Polar Journal* 14, no 1 (2024): 231.

188 E. Kavanagh, "Arctic Governance," 258.

189 T. Koivurova and A. Shibata, "After Russia's Invasion of Ukraine in 2022: Can We Still Cooperate with Russia in the Arctic?" *Polar Record* 59, e12 (2023): 7.

state's participation in a treaty.[190] Such an assertion is supported by Koivurova and Shibata, who argue "it is mostly treaty-based cooperation that is more resilient" where volatile and controversial acts are undertaken by state actors.[191] This is demonstrated by the fact that Russia has remained an engaged party in treaty-based frameworks relevant to the Arctic, such as the United Nations Framework Convention on Climate Change (UNFCCC), the International Maritime Organisation (IMO), the Svalbard Treaty, and the Polar Bear Agreement; all of which remain legally intact despite the conflict.[192]

Thus, when positioned and examined in the context of Arctic biodiversity, it is critical that states, Arctic, regionally, and internationally, remain engaged to prevent the fallout of an anthropocentric conflict compromising protections for biodiversity. Much like the ATS houses the Madrid Protocol,[193] the Convention on the Conservation of Antarctic Seals (1972) (CCAS),[194] and the CCAMLR,[195] an Arctic Treaty System would have the same opportunities to implement similar protections. Such agreements could, prospectively, be insulated against the geopolitical challenges afflicting the region, through robust legal footings capable of ensuring more extensive protections to biodiversity. It would also provide opportunities for states to collaborate on global issues that are felt most sharply in the Arctic region, without compromising the jurisdictional zones established by the UNCLOS, regarding the territorial seas and EEZs. At present, the high seas remain open to all states, with the CAOFA providing some level of protection. However, its parties are limited, and opportunities in the Arctic await.

6 Concluding Thoughts

This paper has sought to explicate the BBNJ Agreement in both its independent form and in the imagined context of its implementation in the AO. It has sought to evaluate the role of the BBNJ Agreement concerning the protection of biodiversity in the Arctic, highlighting the potential limitations – as

190 Vienna Convention on the Law of Treaties (adopted 23rd May 1969, entered into force 27th January 1980) 1946 unts vol. 1155, p331, Article 54.

191 T. Koivurova and A. Shibata, "After Russia's Invasion of Ukraine," 2.

192 *Ibid*.

193 The Madrid Protocol.

194 Convention on the Conservation of Antarctic Seals (CCAS) (adopted 1st June 1972, entered into force 11th March 1978) unts vol. 1080, p175.

195 CCAMLR.

well as strengths – of the implementation of such a regime in the region. Despite being, as mentioned, a welcome development, the BBNJ Agreement fails to take into account the specificity of the AO and thus presents several overarching structural challenges. Particularly relevant in regard to biodiversity protection and conservation are, from an ecocentric perspective, the anthropocentric approach towards MGRs, regarded as a resource to (sustainably) exploit, rather than as a natural entity to preserve; as well as the failure to clearly establish MGRs as CHH. Though the effectiveness of the regime can only be properly assessed over time in the coming years, these preliminary considerations raise some concerns. Similarly, when applied to the AO, albeit hypothetically, there are challenges around the integration with existing governance structures, and the ability of a generic regime to suitably reflect the nuanced and unique characteristics observed in the region.

Given the patchwork of fragmented regulations that presently govern the AO, this paper has also considered other alternative avenues that could contribute more effectively and sit more naturally within the parameters of the existing regime, such as a moratorium on extractive activities in the Arctic, specifically, an extension of the CAOFA Moratorium, or an Arctic Treaty System. The latter, a not recent yet still underexplored alternative, could draw from the experience of the ATS already in place and offer an *ad hoc* regime to protect the AO. Despite the advantages that an *ad hoc* treaty system could provide, caution should be exercised so as not to add yet another treaty to the patchwork of fragmented regulations already in place. Rather, it is crucial to take into account the unique charcteristics of the Arctic and the deeply interconnected relationships between its human and non-human inhabitants. It will be necessary to move beyond traditional anthropocentric understandings and approaches, which have historically framed the environment and its elements solely as resources to be exploited, owned, or controlled. Instead, a more holistic and ecocentric approach can be embraced, one that achnowledges the intrinsic value of the Arctic's ecosystems and fosters a more sustainable and respectful relationship with its diverse forms of life.[196]

196 For further consideration of nature as a subject of rights, see: *Advisory Opinion,* IACHR, para. 279–286.

Acknowledgments

The authors are extremely grateful for the helpful feedback on the initial draft provided by Professor Alla Pozdnakova, University of Oslo, Norway. This study did not generate any new data.