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Due Regard Obligations in Areas beyond National Jurisdiction

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Abstract
Due regard obligations require both States and non-State actors to reasonably consider the rights or interests of other States or non-State actors when exercising their own rights and performing their duties. This article examines how due regard obligations should be interpreted in areas beyond national jurisdiction (ABNJ) in light of the adoption of 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). As human activities in ABNJ increase, due regard obligations become crucial for balancing the competing rights and interests of States, non-State actors and relevant institutions, frameworks and bodies (IFBs). The literature and case law have mainly addressed conflicts between coastal and flag States concerning the application of due regard obligations within national jurisdictions. Different dynamics arise in ABNJ from potentially conflicting activities and disagreements between States with the same rights or interests, or those between States, non-State actors and IFBs. This article addresses this gap by analysing the new dynamics of due regard that are expected to arise concerning marine genetic resources and area-based management tools with the implementation of the BBNJ Agreement.

Keywords: due regard; areas beyond national jurisdiction; United Nations Convention on the Law of the Sea; BBNJ Agreement; Conference of the Parties

1. Introduction

Due regard obligations prescribe that subjects owing due regard shall reasonably consider the rights or interests of others when exercising their own rights and performing their duties. In the international law of the sea, among other sources, these obligations are found in the United Nations Convention on the Law of the Sea (UNCLOS)[1] and the

[1] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). Some publications have also suggested due regard to be a basic organising principle of the law of the sea. See BH Oxman, 'The Principle of Due Regard' in ITLOS (ed), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016 / La*

Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ Agreement).[2]

Due regard obligations are stipulated in 18 provisions of UNCLOS,[3] yet it does not provide an authoritative definition of what constitutes 'due regard'.[4] The existing discourse on due regard obligations has primarily focused on the conflicting rights or interests between coastal States and flag States in areas within national jurisdiction.[5] The literature on due regard in areas beyond national jurisdiction (ABNJ) is far less extensive than that on areas within national jurisdiction, and has focused on specific activities that give rise to conflicting interests, such as the laying of submarine cables and deep seabed mining.[6] However, with the adoption of the BBNJ Agreement, more diverse conflicts between activities in ABNJ are expected to occur.[7]

Adopted in June 2023 and set to enter into force on 17 January 2026, the BBNJ Agreement establishes a comprehensive regime to address issues concerning marine genetic resources (MGR), area-based management tools, environmental impact assessments, capacity-building and the transfer of marine technology in ABNJ and it is to 'be interpreted and applied in the context of and in a manner consistent with' UNCLOS.[8] As the third implementing agreement of UNCLOS, the BBNJ Agreement

contribution du Tribunal international du droit de la mer à l'état de droit: 1996–2016 (Brill Nijhoff 2017) 108; J Mossop and C Schofield, 'Adjacency and Due Regard: The Role of Coastal States in the BBNJ Treaty' (2020) 122 Marine Policy 103877.

[2] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (adopted 19 June 2023, not yet in force) (BBNJ Agreement). The BBNJ Agreement will enter into force on 17 January 2026.

[3] UNCLOS (n 1) arts 27(4), 39(3), 56(2), 58(3), 60(3), 66(3), 79(5), 87(2), 142(1), 148, 161(4), 163(2), 167 (2), 234, 267; annex II, art 2(1); annex IV, arts 5(1), 5(2), 7(3).

[4] E Mendenhall et al, 'A Soft Treaty, Hard to Reach: The Second Inter-Governmental Conference for Biodiversity beyond National Jurisdiction' (2019) 108 Marine Policy 4.

[5] The following publications have discussed due regard obligations in the territorial sea and the Exclusive Economic Zone: RE Fife, 'Obligations of "Due Regard" in the Exclusive Economic Zone: Their Context, Purpose and State Practice' (2019) 34 International Journal of Marine and Coastal Law 43; Y Ishii, 'The "Due Regard" Obligation and the Peaceful and Economic Uses of the EEZ other than Fisheries' (2019) 34 International Journal of Marine and Coastal Law 73; T Scovazzi, '"Due Regard" Obligations, with Particular Emphasis on Fisheries in the Exclusive Economic Zone' (2019) 34 International Journal of Marine and Coastal Law 56; JJ Solski, 'The "Due Regard" of Article 234 of UNCLOS: Lessons from Regulating Innocent Passage in the Territorial Sea' (2022) 52 ODIL 398; S Hamamoto, 'The Genesis of the "Due Regard" Obligations in the United Nations Convention on the Law of the Sea' (2019) 34 International Journal of Marine and Coastal Law 7; J Gaunce, 'On the Interpretation of the General Duty of "Due Regard"' (2018) 32 OceanYB 27. Some of these publications mention due regard obligations on the high seas, but their general focus is on due regard obligations within national jurisdictions.

[6] See, e.g. D Kroon, 'Due Regard in the High Seas: The Tension between Submarine Cables and Deep Seabed Mining' (2018) 24 AILJ 35; T Treves, '"Due Regard" Obligations under the 1982 UN Convention on the Law of the Sea: The Laying of Cables and Activities in the Area' (2019) 34 International Journal of Marine and Coastal Law 167.

[7] The literature does not have a uniform term to indicate the conflicts, collisions, tensions or competition of rights or interests in due regard. These four terms are all found in the literature and although they have slight differences in meaning, they all involve some form of opposition or strain. This article, therefore, chooses to use the term 'conflict', in light of its dominant use in the literature.

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

is expected to be a 'game changer for the protection of the ocean and the sustainable use of its marine resources' in over two-thirds of the ocean.[9]

The BBNJ Agreement stipulates due regard obligations concerning the collection of MGR, area-based management tools and the transfer of marine technology in Articles 11, 22 and 43, respectively. However, the wording of the obligations does not specify how conflicts of rights and interests related to the three provisions can be resolved. Due regard obligations in ABNJ will involve conflicts between States with the same rights or interests and between States and non-State actors. An example of the former would be a conflict between flag States enjoying the freedom of the high seas in ABNJ, one collecting MGR and the other laying cables or pipelines, whereas in the latter the conflict would be between flag States collecting MGR and the mining contractors in the Area.[10] Conflicts in ABNJ may also involve institutions, either between two or more institutions or between a State and institutions. For example, a conflict may arise between States fishing on the high seas and the Conference of the Parties (COP) of the BBNJ Agreement over a newly established area-based management tool concerning no-take zones.[11] Inter-institutional conflicts may arise between the COP and existing regional fisheries management organisations (RFMO) concerning new fishing measures. The existing literature has seldom discussed the dynamics of these possible conflicts.

In light of this research gap, this article analyses these new dynamics by considering potential conflict scenarios in ABNJ under due regard obligations. The article is structured as follows. Section 2 clarifies the content and scope of the due regard obligations under UNCLOS, drawing on both the origin of due regard obligations and the intention of the drafters of UNCLOS, which offers a blueprint for interpreting the obligations. Section 3 then examines the case law on due regard obligations, focusing on key points relevant to the context of ABNJ. Based on this background and context of the obligations, the article argues that new types of conflicts may surface concerning MGR and area-based management tools in the implementation of the BBNJ Agreement, which will require due regard obligations to be interpreted and applied in different ways. Such conflicts may involve actors with the same rights or interests engaging in competing activities in ABNJ, or may involve non-State actors, given that activities in ABNJ involve institutions (e.g. the International Seabed Authority (ISA)) and other non-State actors (e.g. mining contractors or cable-laying companies). Since the BBNJ Agreement seeks to structure interactions between a broader range of actors in ABNJ, including States, non-State actors, the COP and institutions, frameworks and bodies (IFBs), it is essential to understand how such actors conduct 'due regard assessments' to ensure compliance with their obligations in UNCLOS and the BBNJ Agreement. This article shows that fulfilling due regard obligations in ABNJ is not standardised. It argues that, due to the legal uncertainties in ABNJ, duty-bearers must

[9] European Commission Directorate-General for Maritime Affairs and Fisheries, 'An Historic Achievement: Treaty of the High Seas is Adopted' (Press Release, 19 June 2023) <https://oceans-and-fisheries.ec.europa.eu/news/historic-achievement-treaty-high-seas-adopted-2023-06-19_en>.

[10] According to UNCLOS (n 1) art 1, the Area is 'the seabed and ocean floor and subsoil thereof' beyond national jurisdiction that constitutes the common heritage of mankind pursuant to art 136 UNCLOS.

[11] No-take zones are used to protect depleted, threatened or endangered species from extractive industries. They can take many forms, prohibiting the extractive industries from harvesting in the area depending on the season, species, type of fishing gear used, etc.

assess the nature of the activities involved, the legal status of the area where the activities are taking place (used for the collection of MGR or the adoption of area-based management tools), the relevant actors whose rights and interests may be affected (i.e. States, non-State actors and IFBs), the rights and interests of States and the competences of IFBs.

2. Due regard obligations under UNCLOS

A due regard obligation generally has the structure of 'A shall have due regard to B'. Specific due regard provisions will articulate the subjects, objects and context of the duty in different ways, requiring a degree of contextual analysis. The phrase 'due regard', as well as synonymous and interchangeable terms like 'with reasonable regard', 'taking into account' and 'taking into consideration',[12] were discussed during the negotiation of UNCLOS.[13] The Geneva Convention on the High Seas provided for 'reasonable regard',[14] while UNCLOS uses a mixture of 'due regard' and 'reasonable regard'.[15] The main reason for this mixed use is due to the translation of the Spanish term '*debida consideracion*' into 'due regard', whereas 'reasonable regard' was based on the United States' proposed text for Article 147 UNCLOS.[16] Despite the different phrases, both terms carry the same meaning.[17]

Due regard obligations arise when there is an actual prospective conflict of rights or interests.[18] In the absence of such a conflict, due regard obligations do not apply. For instance, due regard obligations cannot be invoked where coastal States have not exercised their sovereign rights. They cannot repeatedly reject other States' requests to lay pipelines or cables in their Exclusive Economic Zones (EEZs) citing due regard obligations if they are not currently engaged in activities the area. Instead, their rights must be directly affected to invoke the due regard obligation.[19] In this sense, the

[12] Scovazzi (n 5) 57; M Forteau, 'The Legal Nature and Content of "Due Regard" Obligations in Recent International Case Law' (2019) 34 International Journal of Marine and Coastal Law 26. Drafters of UNCLOS (n 1) first suggested 'with reasonable regard' or 'without prejudice to' the rights and freedoms of other States. SN Nandan et al, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers 1993) vol II, 556.

[13] Nandan et al (n 12) 556; SN Nandan et al, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers 1995) vol III, 80; SN Nandan et al, *United Nations Convention on the Law of the Sea 1982: A Commentary* Martinus Nijhoff Publishers 2002) vol VI, 208; BH Oxman, 'The Regime of Warships under the United Nations Convention on the Law of the Sea' (1984) 24 VaJIL 827.

[14] UN Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11, art 2: 'These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.'

[15] See, e.g. UNCLOS (n 1) art 147 (emphasis added), which stipulates that '[a]ctivities in the Area should be carried out with *reasonable regard* for other activities in the marine environment', instead of due regard.

[16] Nandan et al, vol VI (n 13) 208–12; Oxman (n 13) 827.

[17] Nandan et al, vol VI (n 13) 215; Treves (n 6) 170.

[18] Fife (n 5) 43; Scovazzi (n 5) 56; Ishii (n 5) 73.

[19] A Proelss, 'Article 56' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) 418, 434.

obligation is a 'permanent legal arrangement for balancing … diverse interests'[20] to allow for the coexistence of rights or interests.[21]

International cases have provided guidance as to how this balancing exercise should be conducted, but these cases have mainly dealt with areas within national jurisdiction. Nevertheless, jurisprudential clarification of the content of due regard obligations in areas within national jurisdiction may guide the interpretation of the obligation in ABNJ. The *Bay of Bengal* case and the *South China Sea Arbitration* both indicated that due regard is an obligation of conduct, not of result.[22] Accordingly, in discharging the due regard obligation, States have the discretion to decide which measures are appropriate.[23] The arbitral tribunal in the *Chagos Marine Protected Areas Arbitration* (*Chagos Arbitration*)[24] viewed the due regard obligation as containing both a procedural obligation to consult with those whose rights or interests may be affected and a substantive obligation to balance other States' rights and interests.[25] The procedural limb of a due regard obligation requires that the consultation be timely, provide relevant information and suggests compromise.[26] The substantive limb demands that States balance their uses with other States' rights or interests,[27] taking the latter into account and identifying a compromise. The arbitral tribunal in the *South China Sea Arbitration* further added that States must show that they acted with nothing less than due diligence in fulfilling the due regard obligation under Article 58(3) UNCLOS, in this particular case to prevent their nationals from unlawfully fishing in the EEZs of other coastal States.[28] Considering that such a prevention effort entails both legislative and enforcement measures, due diligence is required in discharging both procedural and substantive limbs of the due regard obligation.

The *Chagos Arbitration* provided two further points relevant to due regard obligations in ABNJ: first, the tribunal clarified that there is no universal rule of conduct to meet this obligation. Rather, there are factors to be weighed in conducting the due regard assessment, which include the nature of the rights held by subjects to whom the due regard obligation is owed, the anticipated impairment of their rights or interests, the nature and importance of the activities being undertaken by the subject(s) owing the obligation, and the availability of alternative activities that would impinge to a lesser extent on the rights and interests of those to whom the obligation is owed. This legal assessment will also 'necessarily involve at least some consultation with the rights-holding State'.[29] Second, the *Chagos Arbitration* confirmed that due regard to the rights

[20] G Andreone, 'The Exclusive Economic Zone' in D Rothwell et al (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 159, 165.

[21] Treves (n 6) 171.

[22] *South China Sea Arbitration (Philippines v China)* PCA Case No 2013-19, Award (12 July 2016) para 744; *Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* (Judgment, ITLOS Reports 2012) paras 475, 476.

[23] ibid.

[24] *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)* PCA Case No 2011-03, Award (18 March 2015).

[25] Y Tanaka, *The International Law of the Sea* (4th edn, CUP 2023) 167.

[26] *Chagos Arbitration* (n 24) paras 519, 528, 535; Proelss (n 19) 431.

[27] *Chagos Arbitration* (n 24) paras 528, 535.

[28] *South China Sea Arbitration* (n 22) para 744.

[29] *Chagos Arbitration* (n 24) para 519.

or interests of States can extend beyond UNCLOS to other rules of international law, namely the Lancaster House Undertakings made by the United Kingdom (UK) to Mauritius in 1965 to provide fishing and mineral rights, and to return the archipelago once it was no longer required for defence purposes. The tribunal viewed Mauritius' rights arising from the Lancaster House Undertakings as 'rights and duties of other States' under Article 56(2) UNCLOS.[30] The tribunal did not formulate a universal rule as to what may constitute 'other rules of international law' in assessing the fulfilment of the due regard obligation in Article 56(2), but it implied two factors for discerning other applicable rules of international law: first, the nature of the State's commitments; and, second, the disputed action or inaction.[31] The first factor was used to decide whether the commitments created other States' rights or interests, and the second was used to determine how the disputed action or inaction affected other States' rights or interests.[32] The tribunal considered that the nature of the UK's commitments was embodied in the Lancaster House Undertaking, and that the disputed act was the establishment of a marine protected area (MPA).[33] It therefore decided to apply the Lancaster House Undertakings as other rules of international law. As Mauritius not only sought the eventual return of the Chagos Archipelago but also was concerned with the condition of the archipelago, the establishment of the MPA significantly affected their interests. The consideration of other rules of international law beyond UNCLOS is significant in the context of ABNJ, as the BBNJ Agreement seeks harmony with the existing IFBs in ABNJ. A legal dispute concerning the interpretation of due regard obligations under the BBNJ Agreement would likely involve other rules of international law as created by IFBs.

Based on this overview of due regard obligations in UNCLOS and international jurisprudence, potential conflicts involving due regard obligations can be divided into three categories.[34] The first category involves conflicts between different types of States, such as between coastal and flag States. Conflicts between coastal and flag States have been at the centre of discussions on due regard obligations, especially regarding Articles 56(2) and 58(3) UNCLOS concerning the EEZ.[35] Article 56(2) outlines coastal States' obligation of due regard to the rights and duties of other States (such as navigation and overflight), which is reversed in Article 58(3), which outlines other States' obligations of due regard in relation to the rights and duties of coastal States (such as jurisdiction and rights over natural resources). In the EEZ, the due regard obligation is mutual and reciprocal.[36] A well-known example is a conflict between the sovereign rights of coastal States over the exploration and exploitation of natural resources and the freedom of navigation of flag States in the EEZ.

[30] ibid paras 534, 535.
[31] ibid paras 304, 519, 521.
[32] ibid para 298.
[33] ibid paras 520, 521.
[34] This tripartite classification covers all current categories in ABNJ. However, other conflicts which do not fit this classification may potentially arise in the future, particularly once the BBNJ Agreement enters into force and there are more actors engaged in different activities.
[35] Fife (n 5); Ishii (n 5); Scovazzi (n 5); Solski (n 5).
[36] Nandan et al (n 12) 556.

The second category involves conflicts between States that possess the same rights or interests. Due to the nature of ABNJ, it is highly probable that there will be many conflicts between States having the same rights or interests, such as between flag States enjoying the freedom of the high seas. An example of this is the conflicting use of the same area for fishing and navigation, but the conflict may arise between two States in relation to the same interest, e.g. navigation. The UNCLOS provision relevant to this category is Article 87(2) on the high seas, which embodies the obligation of a flag State to have due regard to the interests of other flag States in their exercise of the same freedom of the high seas. In this category, whether some activities are prioritised over others remains debateable. Some suggest that an 'established use' gains priority over a new use,[37] whilst others argue that only the explicit priorities in UNCLOS are recognised.[38] UNCLOS stipulates certain priority activities, such as 'intense fishing activity' and 'recognized sea lanes essential for international navigation', which are prioritised over, specifically, installations used to carry out activities in the Area.[39] However, UNCLOS does not provide a general rule that an 'established use' has priority over a new use. The BBNJ Agreement likewise does not prioritise as between old and new uses in ABNJ and, thus, no priority for 'established use' in cases of conflicting rights or interests can be asserted.

The third category involves conflicts between different actors, including States, non-State actors and IFBs. Conflicts involving the COP and IFBs, as well as between the COP and States, belong in this category. In particular, conflicts involving the COP and IFBs may involve the coordination and consultation of various IFBs in ABNJ. The BBNJ Agreement, however, does not specify whether due regard obligations are owed to IFBs.[40] Nonetheless, the obligation to have due regard to the rights and duties of all States may extend to IFBs and their competences, a category which this article analyses in-depth in Section 3.2.1 in light of the text of the BBNJ Agreement and case law.

The second and third categories are not mutually exclusive;[41] for example, when deep seabed mining sites overlap with the prospective sites for the laying of cable or pipeline or vice versa, this can create conflicts in both categories. For example, there could be a conflict between the freedom to lay cables and pipelines and the right to conduct deep seabed mining in ABNJ,[42] activities that flag States and non-State actors can conduct in ABNJ. The relevant due regard obligations in this category would be Article 87(2) UNCLOS concerning due regard for the interests of other States exercising the freedom of the high seas and the rights under UNCLOS regarding activities in the Area, and Article 147 UNCLOS which contains reciprocal due regard obligations between activities carried out in the Area and

[37] R Churchill, V Lowe and A Sander, *The Law of the Sea* (4th edn, Manchester University Press 2022) 378.

[38] Treves (n 6) 185.

[39] UNCLOS (n 1) art 147(2)(b).

[40] In a way, the 'not undermine' provision in the BBNJ Agreement (n 2) serves this purpose. See Section 3 for analysis of the relationship between due regard obligations and the 'not undermine' provision.

[41] Although the second and the third categories overlap, the distinction is important as the third category, particularly the inter-institutional conflict of due regard, will be pertinent once the BBNJ Agreement (n 2) enters into force and the COP becomes operational.

[42] Kroon (n 6) 36.

other activities in the marine environment.[43] In other words, the mining State and cable-laying State have mutual due regard obligations. The current example also has the potential for conflicts of the third type, as the competing activities here involve IFBs and may be carried out by non-State actors, namely, the mining contractors and cable laying companies or owners. The relevant IFBs (the ISA and the International Cable Protection Committee) have both acknowledged the need for cooperation in cases of conflict between cable-laying and deep seabed mining.[44] The duty bearers in relation to non-State actors' activities would be States, such as the sponsoring State for the contractors, who would bear the due regard obligation for deep seabed mining under Article 147 UNCLOS. Under Article 87(2) UNCLOS, the due regard obligation in respect of the cable-laying activities would lie either with the flag State of the vessel laying or repairing the cables or the State(s) with jurisdiction over the owners of the cables.[45]

The second and third categories, which have received less attention in the literature than the first category,[46] are likely to be more pertinent in ABNJ. This is due to the diverse activities of States and non-State actors as well as the overlapping competences of IFBs, as illustrated in the previous paragraph. The plurality of actors distinguishes these conflicts from purely inter-State conflicts between coastal and flag States. Thus, the role that due regard obligations will play in the implementation of the BBNJ Agreement is likely to be significant because they seek to balance these conflicts and facilitate the coexistence of these activities.

In sum, due regard obligations represent self-restraint and mutual respect for freedom and jurisdiction when using the ocean.[47] Analysing whether this has been achieved requires a case-by-case analysis to determine whether the balancing of rights or interests is appropriate.[48] This is not a unilateral exercise where a single State's decision-making discharges the obligation; the balancing exercise is inherently bilateral or multilateral (in cases where more than two parties' activities are conflicting) and the parties need to negotiate and suggest compromises. Further, consideration should also be given to 'other rules of international law' in assessing fulfilment of due regard obligations, as stipulated by the tribunal in *Chagos Arbitration.* The adoption of the BBNJ Agreement raises two possibilities: first, that multiple 'other rules of international law' may be used to weigh the relevant rights and interests; and, second, that the rights and/or interests of multiple actors, including States, non-State actors, the COP and IFBs, should be considered.

[43] International Seabed Authority (ISA), 'Deep Seabed Mining and Submarine Cables: Developing Practical Options for the Implementation for the "Due Regard" and "Reasonable Regard" Obligations under UNCLOS' (ISA Technical Study Series No 24, 2019) 18.

[44] T Davenport, 'Submarine Communications Cables and Law of the Sea: Problems in Law and Practice' (2012) 43 ODIL 216; International Cable Protection Committee and ISA, 'Memorandum of Understanding between the International Cable Protection Committee and the International Seabed Authority' (2010) <https://www.isa.org.jm/wp-content/uploads/2022/04/MOU-ICPC.pdf>.

[45] ISA (n 43) 19.

[46] In the literature, only the second scenario has been discussed in the context of cable laying or deep seabed mining in the Area. See Kroon (n 6); Treves (n 6).

[47] Oxman (n 1)108.

[48] Churchill, Lowe and Sander (n 37) 378; Treves (n 6) 185.

3. Due regard obligations in the BBNJ Agreement

The BBNJ Agreement covers the high seas and the Area,[49] excluding areas within national jurisdiction, such as the territorial sea, the EEZ and the continental shelf. As noted in Section 1, the BBNJ Agreement explicitly stipulates due regard obligations in Articles 11, 22 and 43 in relation to the collection of MGR, area-based management tools and the transfer of marine technology, respectively. It also includes provisions mentioning phrases such as 'taking into account', 'taking particular consideration' or 'particular regard' in the BBNJ Agreement, which could be considered synonymous with a due regard obligation. For example, Article 32(5) requires 'particular regard to comments concerning potential impacts in areas within national jurisdiction' in the public notification and consultation process. While other provisions of the BBNJ Agreement refer to phrases synonymous with 'due regard', these provisions are not addressed to States or intergovernmental organisations and thus will not be examined in this article.[50]

The following sections analyse Article 11 on the collection of MGR and Article 22 on area-based management tools because of the novel issues they raise concerning the three conflict types discussed in Section 2, and because they involve States, the COP and IFBs as entities that either owe or are owed obligations of due regard. Article 43 is not considered because of its similarity to Article 267 UNCLOS concerning the protection of legitimate interests of holders, suppliers and recipients of marine technology. The doctrinal interpretation of Article 267 of UNCLOS can be applied by analogy to Article 43 of the BBNJ Agreement.[51] The analysis presented in this section clarifies the novel aspects of the due regard obligations in the BBNJ Agreement by interpreting the provisions based on the analysis presented in Section 2. This section discusses what these provisions entail and draws similarities with and distinctions between the due regard obligations in UNCLOS and in previous drafts of the BBNJ Agreement.[52] Section 3.1 discusses Article 11 on the due regard obligation in respect of the collection of MGR, with two sub-sections devoted, respectively, to the obligation owed to coastal States (Section 3.1.1), and to other States and IFBs generally (Section 3.1.2). Section 3.2 covers Article 22, on the due regard obligations in respect of area-based management tools, with a specific focus on the obligations owed by the COP and the obligations owed to coastal States.

3.1. Article 11 BBNJ Agreement: MGR

Article 11(3) prescribes that when collecting *in situ* MGR,[53] States must pay due regard to 'the rights and legitimate interests of coastal States in areas within their national

[49] BBNJ Agreement (n 2) arts 1(4), 3.

[50] See BBNJ Agreement (n 2) preamble para 2, arts 14(9), 16(3), 24(3), 32(5), 39(3). Given that 'due regard' is an interchangeable term for 'taking into consideration', 'particular regard', 'reasonable regard' and 'the need to respect', these provisions also reflect due regard obligations on parties other than States.

[51] For analysis of UNCLOS (n 1) art 267, see SN Nandan et al, *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers 1991) vol IV, 680–82; K Bartenstein, 'Article 267' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (CH Beck/Hart/Nomos 2017) 1774.

[52] UNGA, 'Further Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction' (30 May 2022) (2022 draft).

[53] According to BBNJ Agreement (n 2) art 1, this collection *in situ* is 'the collection or sampling of marine genetic resources in areas beyond national jurisdiction'.

jurisdiction and with due regard for the interests of other States in areas beyond national jurisdiction' in accordance with UNCLOS. It is ambiguous how the 'in accordance with UNCLOS' caveat applies here, as it could refer to the act of collecting MGR, the conduct of the due regard assessment, the rights and legitimate interests of coastal States or the interests of other States. A narrow interpretation would limit the phrase's application to the last clause—the interests of other States in ABNJ. However, a more persuasive interpretation based on UNCLOS is that the phrase 'in accordance with UNCLOS' applies to both the rights and legitimate interests of coastal States and the interests of other States. A parallel can be drawn with Article 58(3) UNCLOS, which uses similar wording: 'States shall have due regard … and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention'.[54] The latter phrase was intended to ensure that the laws and regulations of coastal States are compatible with UNCLOS.[55] In essence this means that, when due regard obligations come into play, any rights, interests or activities that may conflict with other activities must be compatible with UNCLOS.[56] Therefore, assuming a similar intention was behind the wording of the phrase in Article 11(3), it should be construed as a caveat applying to the rights and interests of all States, requiring them to be consistent with UNCLOS.

Article 11(3) refers to three groups of States: States with jurisdiction over the collection of MGR, coastal States in areas within their national jurisdiction and other States in ABNJ. It is the States with jurisdiction over the collection of MGR that owe due regard to the others, i.e. coastal States and other States in ABNJ. While other actors, particularly non-State actors, are involved in the collection of MGR, this article focuses on the responsibility of States under Article 11(3).

3.1.1. The due regard obligation owed to coastal States

The BBNJ Agreement does not define coastal States. Compared to areas within national jurisdiction in which coastal States exercise sovereignty over the maritime zone, determining what constitutes a 'coastal State' in areas with no national jurisdiction is more difficult. The BBNJ Agreement refers to coastal States sparingly, either calling them 'adjacent coastal States' or simply 'coastal States', as in Article 11(3).[57] A possible definition of coastal States can be found in Article 9(2) of the 2022 draft. The current version of Article 11 is open-ended in terms of what constitutes a 'coastal State' whereas the 2022 draft had a narrower definition, limited to those whose resources are found both within and beyond areas of national jurisdiction.[58] This reflects the debate

[54] There is further room for debate on this interpretation, as the phrase 'in accordance with the Convention' begins with a comma in art 11(3), unlike UNCLOS (n 1) art 58(3). This difference in punctuation may have been intended to limit the scope of the phrase, or it may have arisen without substantial discussion.

[55] Nandan et al (n 12) 563.

[56] Ishii (n 5) 74.

[57] On the concept of adjacency in UNCLOS (n 1) and the BBNJ Agreement (n 2), see Mossop and Schofield (n 1).

[58] 2022 draft (n 52) art 9(2): 'In cases where marine genetic resources of areas beyond national jurisdiction are also found in areas within national jurisdiction, activities with respect to those resources shall be conducted with due regard for the rights and legitimate interests of any coastal State in areas within national jurisdiction of which resources are found.'

surrounding the scope of involvement of coastal States in accessing MGR. Whilst it was generally agreed that prior consent need not be sought for the collection of MGR in ABNJ from coastal States with overlapping rights to resources, the modalities of notification or consultation were controversial.[59] It was also suggested that adjacent coastal States (without overlapping resources) should be notified of works in ABNJ for coordination purposes, in case of transboundary harm.[60] In contrast, others proposed deleting Article 9(2) of the 2022 draft in opposition to the granting of special status to coastal States.[61] Given that Article 9(2) was deleted, the changes in the final version may imply the negotiating parties' intention to broaden the scope of the meaning of coastal State to cover not only those where resources are found both within and beyond areas of national jurisdiction but also to those that are simply adjacent to ABNJ.

The absence of a definition of coastal States, however, makes it difficult for States to discern to whom they should pay due regard, which rights or interests are affected and the extent to which regard must be given. Based on the principles set out in UNCLOS and case law, particularly in the *Chagos Arbitration*, States with jurisdiction over the collection of MGR must consider the nature of the MGR collection activities, the nature of the affected rights or interests, the anticipated impairment to the rights or interests of others and the availability of alternatives to the impairment of others' rights or interests. Returning to the example of coastal States with an outer continental shelf, the State with jurisdiction over the collection of MGR in the water column must consider how this activity could impair the rights or interests of the coastal State, depending on the coastal State's intended or ongoing activity on the outer continental shelf. Under the due regard obligation, first, the State with jurisdiction over the collection of MGR must examine any competing activities of the coastal States and assess whether the collection of MGR impairs these activities. In the assessment, the State needs to determine whether the collection of MGR impairs coastal States' options or consider the alternatives to the impairment of coastal States' rights or interests. Second, the State must comply with the procedural obligation set out in the *Chagos Arbitration*, which is to notify, consult and negotiate with the coastal State in a timely manner and with appropriate information. This consultation and negotiation must ensure that the two activities can coexist.[62]

It is uncertain whether the BBNJ Agreement presupposes the modality of the notification and consultation. Article 12 BBNJ Agreement obliges States to notify the Clearing-House Mechanism[63] before the collection *in situ* of MGR, but it is doubtful whether this satisfies the notification duty under the due regard obligation to the coastal States. The Parties can access the Clearing-House Mechanism to view details of the

[59] International Institute for Sustainable Development (IISD), 'Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19–30 August 2019' (2 September 2019) 25 Earth Negotiations Bulletin 8.

[60] ibid, 7; IISD, 'Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4–17 September 2018' (20 September 2018) 25 Earth Negotiations Bulletin 11.

[61] IISD (n 59) 7.

[62] ISA (n 43) 21.

[63] The Clearing-House Mechanism is a centralised platform established under art 51 BBNJ Agreement (n 2) which facilitates the sharing of information relating to ABNJ.

planned activities, but the BBNJ Agreement does not specify whether the Clearing-House Mechanism notifications are also directed to the coastal States or relevant Parties. Considering that the UK-Mauritius bilateral consultation in the *Chagos Arbitration* was ruled to be insufficient, it seems appropriate to conduct individual consultations with the relevant Parties, meeting the procedural and substantive limbs of the due regard obligation. Nevertheless, it is unequivocal that notifying the Clearing-House Mechanism of collection activities is part of discharging the due regard obligation under Article 11(3), as it stipulates that '[t]o this end, Parties shall endeavour to cooperate, as appropriate, including the specific modalities for the operation of the Clearing-House Mechanism'. Therefore, notification to the Clearing-House Mechanism is a necessary, but insufficient, step in meeting the due regard obligation.

3.1.2. The due regard obligation owed to other States and IFBs

A due regard obligation is also owed to other States and IFBs in ABNJ. This dynamic is similar to the second category of conflict discussed in Section 2—that between actors possessing the same rights or interests in using the high seas. In the context of the collection of MGR in ABNJ, conflicts can largely be divided into two types: first, conflicts only between flag States; and, second, conflicts involving IFBs.

The first type of conflict between flag States raises the issue of which competing activity takes priority over the other. As noted in Section 2, there is no academic consensus on whether any rule prioritises established use. It could be argued that because the collection of MGR is a new use, it should be deprioritised in favour of established uses, but this is neither explicitly prescribed in UNCLOS nor consistent with the BBNJ Agreement, which acknowledges that 'the generation of, access to and utilization of digital sequence information on marine genetic resources … contribute to … the general objective of this Agreement'.[64] Arguably, established use is not prioritised over the collection of MGR.

Absent such prioritisation, the goal in this first scenario is for the collection of MGR to coexist with any high seas activities. The required steps here would be similar to those in relation to coastal States, but recognises that more than one State may be owed due regard with multiple activities potentially conflicting with the collection of MGR. The State with jurisdiction over the collection of MGR would first need to map out all ongoing activities and determine whether these activities are in accordance with UNCLOS. In assessing whether the MGR collection impairs any activities, these activities may be divided into those which compete with the collection activities and those which do not, with the threshold for due regard being lower in relation to the latter. Rather than having the duty to consult, simply notifying the States of non-competing activities may be sufficient. Notifying the other State can lead to further possible consultation, negotiation or unilateral measures if the other State deems it necessary.[65] In relation to competing activities, the State must notify, consult and negotiate to ensure that the competing activities may coexist. In this process, the

[64] BBNJ Agreement (n 2) preamble.

[65] This can encompass a case of cables laid down for military purposes or in secrecy: ISA (n 43) 21.

State may need to consult with multiple States engaged in activities in the high seas at the specific site where the collection of MGR is conducted.

The second type of conflict involves IFBs, for example, where sites for MGR collection overlap with mining sites in ABNJ. This can be further subdivided into the collection of MGR in the water column and on the seabed. In both cases, the State with jurisdiction over the collection of MGR needs not only to pay due regard to the rights or interests of the contractors of the mining site and their sponsoring States but also to the ISA. The rights or interests of the ISA and contractors/sponsoring States will vary according to several factors: first, whether there is an exploration or exploitation site with a contractor; second, whether there is prospecting and a draft contract is under preparation; or, third, whether the site is an area reserved for future contracts.[66] In relation to the first two scenarios, the State with jurisdiction over the collection of MGR must pay due regard to the contractors and the sponsoring States by notifying them of the possible conflict of activities and seeking consultation and negotiation. In particular, in the second situation, the State should communicate with the prospective contractor, the sponsoring State and the ISA.[67] In the third situation where the site has no immediate mining prospects but has been reserved for future contracts, no other States are owed due regard yet. However, the fact that the area is reserved denotes the presence of resources, and the State must consider the possibility that the ISA may award contracts in the future. Although the State is not obliged to do so under the due regard obligation, they may benefit from studying any developments on the site and maintaining communication with the ISA.

The analysis in Section 3.1.1 on whether the notification to the Clearing-House Mechanism satisfies the notification requirement in the due regard obligation is also applicable in this section. A State with jurisdiction over the collection of MGR must notify the Clearing-House Mechanism as a means of paying due regard. In addition, it must also notify the individual States, non-State actors and IFBs of any potential conflicts of activities, which specifically concern the individual actors' rights or interests, and seek consultation and negotiation with said parties.

3.2. Article 22 BBNJ Agreement: Area-based management tools

Article 22(1) BBNJ Agreement stipulates the obligation of the COP to adopt area-based management tools and measures therein and authorises the COP to 'take decisions on measures compatible with' relevant global, regional, sub-regional and sectoral bodies. Article 22(3) obliges the COP of the BBNJ Agreement to facilitate inter-institutional cooperation and coordination by regularly consulting with IFBs. The due regard obligation in Article 22(5) has two components: first, the decisions and recommendations adopted by the COP shall pay due regard to the rights and duties of all States; and, second, measures taken in the water superjacent to the continental shelf shall pay due regard to the sovereign rights of coastal States.

[66] ISA, 'Current Status of the Reserved Areas in the International Seabed Authority' (Policy Brief 01/2019, 2019) <https://www.isa.org.jm/wp-content/uploads/2022/06/statusofreservedareas-01-2019-a_1-1.pdf>.

[67] ISA (n 43) 20.

3.2.1. The due regard obligation owed by COP

The first component of Article 22(5) identifies that it is the COP that owes due regard to the rights and duties of all States, without specifically indicating which competing rights and duties they may hold. The COP must therefore pay due regard to all competing activities in ABNJ. Bestowing a due regard obligation upon an institution is unprecedented, thus requiring the obligation to be construed differently than in the context of inter-State relations. Given that the due regard obligation is a balancing of rights and duties, it is difficult to determine how it will operate in relation to the COP, which does not possess rights under the BBNJ Agreement. It is also difficult to ascertain whether the COP has uniform interests, as it functions as a proxy for its Member States and reflects their diverse interests. The closest thing to the rights and interests of the COP are its conferred competences and the rights and interests of its Member States. When exercising its competences, such as deciding or recommending area-based management tools or making arrangements for regular consultations, the COP should pay due regard to States' existing rights and interests, including those of its Member States.

As an institution with greater geographical coverage than a State, the COP inherently deals with more potentially conflicting activities in the proposed areas than a State. Even though the due regard obligation entails an obligation of due diligence, it is debatable whether the same standards are held at the COP when establishing area-based management tools. When reading the BBNJ Agreement in its entirety, Part III seemingly shares the burdens of the due regard obligation with the proposing Party. In inter-State relations, such as in the *Chagos Arbitration*, the UK had to first trigger the notification and consultation requirement for establishing the Chagos MPA in their EEZ. Mauritius then had to respond to such notification or consultation.[68] In contrast, Article 19(2) BBNJ Agreement obliges Parties to 'collaborate and consult … with relevant stakeholders … for the development of proposals'. In addition, Article 19(4) BBNJ Agreement requires Parties to include 'information on any consultations undertaken with States, including adjacent coastal States and/or relevant' IFBs or any other relevant information in the proposal of area-based management tools. In practice, these provisions may be elaborated upon by requesting Parties to include information on any competing or non-competing activities in the area in their proposals. The COP can then facilitate consultation and negotiation with States with competing activities and notify States with non-competing activities. In sum, the COP's obligation to pay due regard begins at the proposal stage for an area-based management tool by ensuring due regard between the proposing States and other relevant States.

Another aspect of paying due regard to all States' rights and duties relates to considering other rules of international law. As noted in Section 2, the *Chagos Arbitration* set out two factors for considering other rules of international law beyond UNCLOS: first, the nature of the State's commitments; and, second, the disputed action or inaction. This indicates that the COP must consider any rights or duties flowing from other rules of international law if they are affected by the decisions or recommendations of the COP. This inevitably touches upon the 'not undermining'

[68] *Chagos Arbitration* (n 24) paras 528–533.

provisions in Articles 5 and 22(2) BBNJ Agreement. Article 5(2) BBNJ Agreement stipulates that it is to be 'interpreted and applied in a manner that does not undermine relevant' IFBs. In the context of area-based management tools, Article 22(2) prescribes that the COP 'shall respect the competences of, and not undermine' relevant IFBs. Both the due regard obligation and the 'not undermining' principle serve as a linchpin in defining the relationship between the newly concluded BBNJ Agreement and the complex web of IFBs and States in ABNJ.[69] Both obligations exist to respect States and IFBs, with the due regard obligation balancing the rights and interests of States and the 'not undermining' principle respecting the competences of IFBs.

The COP's exercise of its due regard obligation may help its compliance with the 'not undermining' principle. After all, States are part of the IFBs and their rights and interests also flow from them. In order for the COP to pay due regard to States' rights and duties relating to other rules of international law, this inevitably requires the COP to consider the rules, MPAs or measures established through IFBs. In other words, weighing the rights and interests of States inevitably touches upon the competences of IFBs. A hypothetical example could be when a State is given a fishing quota on the high seas under a RFMO. The COP decides to establish a no-take zone on the high seas, and this area is under the competence of the RFMO. The no-take zone would affect the State's freedom of the high seas and their obligations under the UN Fish Stocks Agreement to participate in a RFMO,[70] as well as the competence of the RFMO. Establishing a no-take zone would require the COP to consider other rules of international law and the competences of the IFBs.[71] Therefore, both the due regard obligation and the 'not undermining' principle require the COP to consider rules of international law established by other bodies. With these rules acting as a bridge, exercising due regard can assist the COP in respecting the competences of IFBs, thereby complying with the 'not undermine' principle.

As observed in the *Chagos Arbitration*, the due regard obligation entails a duty to notify and to consult. To operationalise this, Article 21 obliges the Secretariat to notify the area-based management tool proposals to IFBs and invites their general input, including information on existing measures and aspects of the proposal that may fall within the bodies' competence. The consultation period inviting bodies to respond is time-bound. After their input is submitted, the Scientific and Technical Body responds to the contributions or revises the proposal accordingly and then gives its

[69] A number of publications discussed the relationship between the BBNJ Agreement (n 2) and IFBs. See VD 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; RE Kim, 'The Likely Impact of the BBNJ Agreement on the Architecture of Ocean Governance' (2024) 165 Marine Policy 106190; NA Clark, 'Institutional Arrangements for the New BBNJ Agreement: Moving beyond Global, Regional, and Hybrid' (2020) 122 Marine Policy 104143; A Langlet and A Vadrot, 'Not "Undermining" Who? Unpacking the Emerging BBNJ Regime Complex' (2023) 147 Marine Policy 105372.

[70] 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.

[71] D Diz, 'The Interface Between the BBNJ Agreement and RFMOs' in B Kunoy, T Heidar and C Yiallourides (eds), *International Fisheries Law: Persistent and Emerging Challenges* (Routledge 2025) 309, 312.

recommendation to the COP.[72] Through this invitation of input into the consultation, the burden of deciding whether any other rules of international law need to be considered in the proposal is shared with other IFBs.

It is, however, questionable whether the COP has fulfilled the due regard obligation by simply inviting input from States and IFBs. If States or IFBs do not provide sufficient information relevant to the proposal and the COP subsequently establishes an area-based management tool which conflicts with other bodies' measures or competences, the COP could be criticised for failing to foresee and address such conflicts. The COP might not be held to the same standard as States in complying with the due regard obligation when sharing the due regard obligation with Parties in light of Article 19. If not, the COP exercises due regard simply through the notification and invitation of submissions, based on the proposals submitted by the Parties. In contrast, if the COP is held to the same standard as States, then the COP should undertake further steps to assess any potential conflicting activities of which it becomes aware despite non-notifications by States or IFBs. This question should be dealt with in the first meeting of the Scientific and Technical Body or the COP on the modalities of the consultations under Article 21(8). The development of this modality of the consultation process will need to consider how the COP can fulfil the due regard obligation through consultation and will require the COP to decide which standard of due regard it will hold itself to. Since consultations with States and IFBs are crucial in establishing and managing area-based management tools, the COP has the primary task of deciding the modalities of coordinating consultations with multiple States and IFBs.

3.2.2. The due regard obligation owed to coastal States

The second aspect of the due regard obligation in Article 22(5) concerns when measures are taken in the waters superjacent to the seabed and subsoil of coastal States. The COP must exercise due regard with respect to any measures which 'would affect or could reasonably be expected to affect the superjacent water above the continental shelf' where the coastal States exercise sovereign rights.[73] The provision also explicitly requires consultation to fulfil the obligation of due regard. The due regard obligation in Article 22 concerns a specific case when there is a vertical difference in the jurisdiction: the continental shelf is under the jurisdiction of coastal States, whereas the superjacent water column above the seabed is part of the high seas. It is therefore important to identify the relevant coastal States who must pay due regard under Article 22(5).

In theory, the COP may decide on area-based management tools in the following scenarios: first, when the protected area is undoubtedly beyond national jurisdiction by being at least 350 nautical miles from the baseline or 100 nautical miles from the 2500-metre isobath;[74] second, when the boundaries of ABNJ are clear, with outer continental shelf claims settled, and the protected area does not overlap with the outer continental shelf; third, the boundaries of ABNJ may not be clear but all relevant coastal States with outer continental shelf claims are States Parties to the BBNJ Agreement and have

[72] BBNJ Agreement (n 2) art 21(5)–(7).
[73] ibid art 22(5).
[74] UNCLOS (n 1) art 76(5).

participated in the decisions regarding the MPA. In the first and second scenarios, the COP has the authority to establish MPAs in the seabed without the concern of violating the due regard obligation owed to coastal States. In the third scenario, in order to pay due regard to the possible sovereign rights of coastal States, the COP may only govern the water column superjacent to the seabed.

Fulfilling the due regard obligation is particularly difficult when the outer continental shelf is not delimited, or the coastal States' submissions are under the consideration of the Commission on the Limits of the Continental Shelf (CLCS). Considering that the decisions of the CLCS have been slow and that many more submissions are expected to be made, the scope of ABNJ is uncertain.[75] UNCLOS does not cover the due regard obligation in this specific scenario. Article 22 reflects concern about the absence of a legal regime for establishing MPAs in ABNJ. This absence has caused uncertainties in the high seas MPAs, notably in the practice of the Oslo-Paris Convention Commission (OSPAR Commission) in the North-East Atlantic. The OSPAR Commission has adopted MPAs in the North-East Atlantic, the maritime zones of the territorial sea, the EEZ and the high seas. However, the outer continental shelf of Portugal, Iceland, Ireland and the UK may overlap with the OSPAR MPAs on the high seas. For example, according to Portugal's submissions to the CLCS in 2009, four OSPAR high seas MPAs overlap with the outer continental shelf.[76] The CLCS has not made any recommendations on the submissions of Portugal, Ireland or the UK.[77]

As many submissions to the CLCS are undecided, the COP is highly likely to face a similar issue as did the OSPAR Commission when establishing MPAs in ABNJ as per Article 22(1). When facing this issue, the OSPAR Commission either exercised their legal competence over the seabed in a limited manner by establishing MPAs only in the water column, or classifying the high seas MPAs as 'nationally nominated MPAs'.[78] Moreover, the OSPAR Commission also included all relevant coastal States (Portugal, Ireland and the UK) as members of the Commission when deliberating the establishment of the high seas MPAs. With the due regard obligation at stake, the pertinent issue is whether all relevant coastal States would be States Parties to the BBNJ

[75] J Mossop and C Schofield, 'Biodiversity beyond National Jurisdiction and the Limits of the Commons: Spatial and Functional Complexities' in MH Nordquist and R Long (eds), *Marine Biodiversity of Areas Beyond National Jurisdiction* (Brill Nijhoff 2021) 285, 293.

[76] Commission on the Limits of the Continental Shelf, 'Statement by the Chairperson of the Commission on the Limits of the Continental Shelf on the Progress of Work in the Commission' (30 April 2010) Doc No CLCS/66, 10; R Churchill, 'The Growing Establishment of High Seas Marine Protected Areas: Implications for Shipping' in R Caddell and DR Thomas (eds), *Shipping Law and the Marine Environment in the 21st Century: Emerging Challenges for the Law of the Sea – Legal Implications and Liabilities* (Lawtext Publishing Limited 2013) 53, 65.

[77] UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea, 'Submissions, through the Secretary-General of the United Nations, to the Commission on the Limits of the Continental Shelf, pursuant to Article 76, Paragraph 8, of the United Nations Convention on the Law of the Sea of 10 December 1982' (23 May 2025) <https://www.un.org/depts/los/clcs_new/commission_submissions.htm>.

[78] OSPAR Commission, '2018 Status Report on the OSPAR Network of Marine Protected Areas' (2019) 21. The latter is the case of Rainbow Hydrothermal Vent Field, Hatton Bank and Hatton-Rockall Basin, which may overlap with the outer continental shelf of the UK.

Agreement. In the OSPAR Commission, establishing the high seas MPAs in the North-East Atlantic was possible because all relevant coastal States with outer continental shelf claims were included as members of the Commission. However, the COP has to consider that some relevant coastal States may not be States Parties to the BBNJ Agreement.

If a newly proposed area does not fall under any of the three scenarios where the limits of the continental shelf or the scope of relevant coastal States are certain, the COP may need to avoid areas where the outer limits of the continental shelf are undecided in order to exercise due regard. The limits of the outer continental shelf are only 'final and binding' when the coastal State establishes the limits based on the recommendations of the CLCS.[79] As of May 2025, only 12 recommendations of the CLCS were followed by deposits of the coastal States for publicity under Article 76(9) UNCLOS.[80] This means very few outer limits are 'final and binding'. Furthermore, the data on the limits of the continental shelf relevant to the first scenario (when the protected area is undoubtedly beyond national jurisdiction by being at least 350 NM from the baseline or 100 NM from the 2500-metre isobath) may not be always available. This would leave vast areas with no clear delineation between the coastal State's continental shelves and ABNJ and subject to uncertainties as regards the due regard obligation.

If the COP were to establish an MPA in such an area, then the COP needs to adopt safeguard measures to adjust the limits of MPAs accordingly once the limits of the outer continental shelf are decided. The COP cannot simply avoid undecided areas as this would exclude vast areas of the oceans from their competence. Legally, Article 22(6) safeguards the coastal States' sovereign rights by prescribing that when area-based management tools fall within the jurisdiction of a coastal State, the part within the national jurisdiction shall cease to be in force. This safeguarding provision may allow a greater degree of freedom to the COP in establishing area-based management tools, but how much the COP will utilise this degree of freedom remains uncertain.

The COP's use of ABMTs requires a fine balance between respecting the undecided limits of the continental shelf and ensuring the protection and preservation of biodiversity in ABNJ. For this balancing to be successful, the COP needs to institutionalise the process of consulting and coordinating with the CLCS and coastal States,[81] and revise the limits of MPAs promptly once the limits are final and binding. Further work on the modalities of consultation and coordination with IFBs and relevant States is necessary for the effective operation of the COP in area-based management tools.

[79] UNCLOS (n 1) art 76(8). See KA Baumert, 'The Outer Limits of the Continental Shelf under Customary International Law' (2017) 111 AJIL 860.

[80] Division for Ocean Affairs and the Law of the Sea (n 77).

[81] This was suggested during the Intergovernmental Conference. IISD, 'Summary of the Second Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 25 March–5 April 2019' (8 April 2019) 25 Earth Negotiations Bulletin 3.

4. Conclusion

During the negotiation of the BBNJ Agreement, the negotiators intended due regard to be 'the most appropriate principle for balancing the rights of States'.[82] The negotiators further sought to 'operationalise'[83] the due regard obligations by detailing 'criteria, priorities, and mechanisms'.[84] While the final provisions concerning due regard obligations in the BBNJ Agreement might not have lived up to their expectations, the BBNJ Agreement has clarified some of the ambiguities of the obligation regarding MGR (Article 11) and expanded the scope of the obligation to the COP and IFBs (Article 22).

The due regard obligation in Article 11 serves as the balancing provision in relation to possible conflicts arising between MGR collection and other rights or interests. The State with jurisdiction over the collection of MGR is obliged to notify the Clearing-House Mechanism prior to collection,[85] but the BBNJ Agreement is ambiguous as to whether the State must provide additional notifications to relevant States to ensure that due regard is exercised. Cooperation and consultation with IFBs, such as the ISA, is required, even though Part II on MGR makes little mention of the relationship with IFBs. Nevertheless, under Article 5 BBNJ Agreement, MGR collection is subject to the 'not undermining' principle in respecting the competences of the IFBs.[86] In addition, the due regard obligation owed to other States indirectly includes cooperation with IFBs.

Article 22(5) on area-based management tools is expected to be concerned more with the multilateral relationship between the COP and the IFBs. First, the COP needs to pay due regard to other rules of international law, including those created by IFBs. This inevitably links with the obligation to not undermine the competences of the IFBs. Considering the complex web of area-based management tools in ABNJ, the COP and IFBs are expected to exercise separate competences but also are expected to closely cooperate and consult in the future. Second, the issues with the outer limits of the continental shelf will likely mean cooperation with the CLCS is required. Arguably, Part III requires an active involvement of the COP in interactions with IFBs. With the BBNJ Agreement being silent on the mechanisms of cooperation, how the COP interprets the meaning of 'mechanism' under Article 22(4) will be crucial to how the COP fulfills its due regard obligation.

The role of due regard obligations is pivotal in the multifaceted dynamics in ABNJ because of the 'adversarial nature' of dispute settlement mechanisms.[87] States will have to consider multiple actors and activities in ABNJ when conducting future activities. Rather than a bilateral relationship between a coastal State and a flag State, multilateral relationships between States, non-State actors, the COP and IFBs are expected to surface

[82] Mossop and Schofield (n 1) 3.

[83] AG Oude Elferink, 'Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC' (2018) 33 International Journal of Marine and Coastal Law 437, 464–65.

[84] Mossop and Schofield (n 1) 3.

[85] BBNJ Agreement (n 2) art 12(1)–(2).

[86] ISA Secretariat, 'A Review of the Contribution of ISA to the Objectives of the 2023 Agreement under UNCLOS on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdictions' (2024) 29.

[87] Oude Elferink (n 83) 465.

in ABNJ under the BBNJ Agreement. Given these multifaceted dynamics and the plurality of actors involved, due regard obligations will play a significant role in managing future conflicts.

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