

The likely impact of the BBNJ Agreement on the architecture of ocean governance

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ABSTRACT

In June 2023, governments agreed to a new treaty on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction (BBNJ). Unlike most other multilateral environmental agreements that typically emerge in response to newly identified transboundary environmental issues, the BBNJ Agreement steps into an already crowded institutional landscape as a global authority with broad objectives. The challenge facing this new legal instrument is unique. It must transform the architecture of ocean governance by harmonizing existing institutions, frameworks, and bodies (IFBs) while respecting their autonomy. This study examines the numerous references to IFBs in the treaty text to shed light on how the BBNJ Agreement might affect the dynamics with and among existing IFBs. The findings suggest that the BBNJ Agreement represents a new model for multilateral environmental agreements. It relies on its capacity to orchestrate incumbent IFBs and forge a new polycentric order centered around its treaty objectives. Its institutional power is likely to be constrained by the obligation to involve relevant IFBs in its decision-making processes. But the primary strength of the BBNJ Agreement lies in the normative authority it has established. Its objectives are effectively promoted within IFBs, potentially taking precedence in the event of serious or irreversible harm to marine biodiversity. When fully implemented, the BBNJ Agreement has the potential to redefine the relationships among existing IFBs and improve their coherence for more holistic ocean governance.

1. Introduction

The governance of marine areas beyond national jurisdiction is generally considered to be overly fragmented along both regional and sectoral dimensions [45,54,8,25,21]. The ocean is divided into the high seas (i.e., water column) and the seabed (i.e., seafloor and subsoil), with responsibilities dispersed among numerous institutions with competing interests, including the International Seabed Authority (ISA) and regional fisheries management organizations (RFMOs). The consequences of excessive fragmentation have not been positive. An illustrative example is the balloon effect, a phenomenon where international regulations aimed at reducing regional fishing effort for specific species inadvertently shift pressure onto other stocks rather than curbing global overfishing as a whole [6]. In response to such challenges, critics have called for, for example, a global fisheries management organization [5] or more generally “some sort of centralized or coordinating regime” that would operate across regional and sectoral bodies to enhance overall effectiveness [23].

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), adopted and opened for signature in 2023, is a response to this pressing issue with the fragmented architecture of ocean governance. However, claiming global authority is no small challenge for the new legal instrument. Ocean governance occupies a densely populated institutional landscape, replete with established authorities. By one estimate, the BBNJ Agreement is poised to interfere with no fewer than 52 institutions [38], making overlaps inevitable and resistance likely from incumbents whose rights and interests are at stake. For that matter, it was emphasized from the outset of the negotiations that “relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”, or IFBs in short, should not be undermined [61]. Nevertheless, it remains imperative to harmonize these IFBs with the objectives of the BBNJ Agreement. The inherent tension that the BBNJ Agreement seeks to resolve is evident in its preamble [42]. While stressing the need to respect the existing order, including the balance of rights, obligations, and interests set out in the Law of the Sea Convention, the parties also recognize the need for a comprehensive global regime founded on a

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coherent and cooperative approach.

As the BBNJ Agreement gathers signatures and ratifications, critical questions arise regarding its impact on the architecture of ocean governance [50]. Central to this debate is whether the BBNJ Agreement will enhance coherence or intensify competition among the myriad IFBs involved. While it carries the promise of establishing a new authoritative regime that brings them together, some scholars have expressed concern that it may instead lead to further fragmentation if boxed into the gaps between IFBs [15]. How does the BBNJ Agreement position itself in relation to existing IFBs? What relationships does it define and promote among them? To address these questions, I analyzed 24 articles of the BBNJ Agreement that directly refer to IFBs, supported by some initial responses from key IFBs. This study aims to go beyond the conventional analytical focus on how the BBNJ Agreement might interact with other individual agreements [4] or regional governance frameworks [13], and consider its landscape-level implications for ocean governance.

The findings suggest that the BBNJ Agreement represents a significant departure from previous multilateral environmental agreements, signaling a shift towards a more system-oriented treaty with a primary focus on fostering cooperative relationships. Despite the requirement not to undermine IFBs operating in a densely populated institutional landscape, the BBNJ Agreement has introduced innovative approaches to working with and through these IFBs. Its objectives are advanced within relevant IFBs, thereby establishing a degree of normative hierarchy in the governance architecture. Additionally, it stands out for its consideration of relationships not only with IFBs but also among IFBs. The BBNJ Agreement promotes polycentricity and functions by mobilizing and encouraging multiple authorities to mutually adjust and pursue the overarching objectives it sets for marine biodiversity. Overall, while the BBNJ Agreement is not intended to centralize ocean governance, it has the potential to bring various elements together through its normative authority.

This article is organized as follows. First, I introduce the framework used to analyze the treaty text. Next, I present the findings, which are organized into three main insights. I then delve into policy implications, using the ISA and RFMOs as illustrative examples.

2. Framework

International institutions (or IFBs in the context of BBNJ) are integral components of larger structures in global governance [34,11], commonly referred to as regime complexes or governance architectures [7]. The configuration of these structures varies considerably, exhibiting different levels of fragmentation, polycentricity, and complexity, depending on the patterns of connections among the constituent parts [32]. Understanding these structural nuances is important because they can facilitate or impede the functioning of individual institutions, influence their relationships, and ultimately determine overall performance [2]. In the context of ocean governance, this architectural framework is particularly decentralized along regional and sectoral lines, often leading to challenges such as problem shifting [35] or cross-media pollution [27,55]. Addressing these systemic challenges requires a comprehensive approach to global governance coordination [43].

The introduction of a new global authority such as the BBNJ Agreement has the potential to create a shift in the governance architecture. This shift can be analyzed along two main dimensions. The first dimension is institutional, which relates to the question of whether the governance architecture would become more or less centralized. Centralization in this context refers to the institutional hierarchy created by placing a decision-making authority above or below other existing authorities [36]. The focus of the analysis here is on the power and competence of the institutional arrangements established by the BBNJ Agreement, including the Conference of the Parties (COP), in relation to other decision-making bodies within existing IFBs, such as the Assembly of the ISA [50,59,12]. During the negotiation process, this issue was a

focal point of the debate pertaining to the choice between a global framework with a robust COP as a central authority in ocean governance on the one hand, and a regional framework that relies more on existing regional and sectoral IFBs on the other [12].

The second dimension concerns the normative aspect, which revolves around the prioritization or ordering of issues and values according to their relative perceived importance [36]. The question at hand is to what extent the objectives of the BBNJ Agreement are deemed more important than those of existing IFBs. In the event of a normative conflict or inconsistency, would the BBNJ Agreement be given precedence and prevail over an IFB? The answer to this question may be straightforward in some cases, but more complex in many others [37]. Consider, for example, conflicts arising from the use of the oceans for climate mitigation through marine geoengineering [44] or for the extraction of deep-sea minerals for the energy transition [41]. In both cases, the risk to marine biodiversity increases. Yet the law of treaties is of limited utility here, as the resolution of such normative conflicts is primarily a matter of balancing values. In the context of BBNJ, a new normative hierarchy could emerge through a self-organized recalibration of priorities, where existing IFBs are bound or otherwise compelled to adhere and contribute to the objectives of the BBNJ Agreement.

Besides these structural changes that may result from the interplay between the BBNJ Agreement and existing IFBs, the new agreement could also be instrumental in systematizing the relationships among IFBs [36] and enhance inter-regime cooperation [3]. Systematization in this context would imply a shift towards a polycentric form of governance, which respects the autonomy of IFBs while encouraging mutual adjustments in pursuit of shared goals [43]. From the outset of the negotiations, there was indeed a broad consensus that the BBNJ Agreement should promote greater cooperation and coordination among regional and sectoral IFBs. For this to happen, however, the parties to the BBNJ

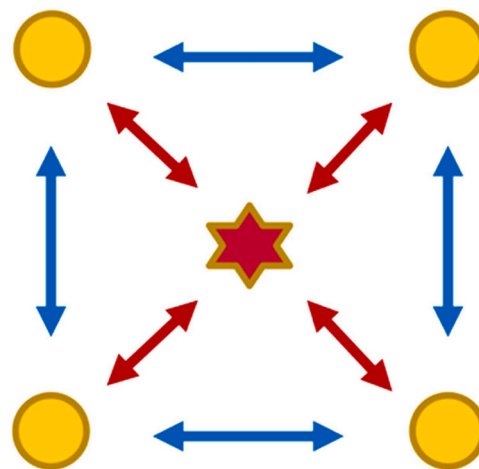


Fig. 1. A schematic diagram showing two types of relationships that a new institution (star) may impact: (1) the relationships *with* existing institutions (in red) and (2) the relationships *among* existing institutions (in blue).

Agreement would need to empower the Secretariat and the COP as orchestrators of ocean governance [1,26]. From an analytical standpoint, it is essential to examine whether and how the BBNJ Agreement expands its focus beyond immediate relationships with existing IFBs and seeks to mobilize and orchestrate interactions among them.

The framework discussed above is visualized in Fig. 1 and serves as the basis for my analysis of the likely impact of the BBNJ Agreement on the ocean governance architecture. I conducted a systematic

examination of all references to IFBs in the final treaty text adopted on 19 June 2023. A total of 24 articles contain such references,¹ which play a significant role in shaping the relationships with and among IFBs, potentially leading to the structures and processes discussed above. The analysis focused on the direction of the flow of power or authority created by these references. This was determined by examining, for example, whether the BBNJ Agreement or its treaty body makes recommendations to IFBs, consults with IFBs, respects the mandate of IFBs, or draws upon the expertise of IFBs [39]. I also paid particular attention to the type of relationship these references promote (e.g., coherence, coordination, and cooperation) and how this is to be achieved according to the BBNJ Agreement. It is important to note that the analysis of the treaty text assumes that these provisions will be implemented as written by the parties. But their actual impact will depend on the political dynamics within and between states, which are largely outside the scope of this analysis. To address this limitation, insights from previous research scrutinizing the BBNJ treaty negotiation processes have informed the interpretation and analysis of the references [14,16,28,40,46,47,48,56,57,58].

3. Findings

The analysis yields several key findings regarding the likely impact of the BBNJ Agreement on the ocean governance architecture. The BBNJ Agreement does not create a hierarchy with no decision-making authority clearly positioned above or below others. The institutional landscape will remain largely decentralized. The power of the COP appears to be limited by, among others, the requirement to consult with other relevant IFBs in its key decision-making. However, the BBNJ Agreement introduces a high-level policy goal into the system, compelling existing IFBs to contribute to its work. The BBNJ Agreement relies on its normative authority to mobilize and orchestrate IFBs, and its effectiveness will depend on the extent to which this goal is internalized by them. I elaborate on these findings below.

3.1. Decision-making authority remains decentralized

The BBNJ Agreement has established a comprehensive global regime, including a COP. However, this regime operates within certain institutional constraints that are typical of most other multilateral environmental agreements. These include the standard conflict clause, which underscores the need to align the BBNJ Agreement with existing international legal frameworks and institutions, while addressing issues of sovereignty and jurisdiction (arts. 6 and 60(7)). In addition, as the BBNJ Agreement serves as an implementing agreement to the United Nations Convention on the Law of the Sea, it is explicitly stated that the “Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention” (art. 5(1)).

What has received particular attention and scrutiny in the BBNJ context is the provision that the BBNJ Agreement shall be interpreted and applied in a manner that does not undermine relevant IFBs (art. 5(2)). Whether it is the effectiveness or the competences of these IFBs that should not be undermined has been the subject of considerable debate [16,47,53]. However, greater clarity emerged during the fourth session

of the Intergovernmental Conference [46], when the reference to the term “effectiveness” was removed from Article 5(2). Although the term “competences” does not appear in this article either, a reading of the treaty text as a whole suggests that it is rather the competences of IFBs that should not be undermined. For example, in the decision-making process related to the establishment of area-based management tools (ABMTs) and related measures, the COP “shall respect the competences of and, not undermine” relevant IFBs (art. 22(2)). The reference to “effectiveness” is used only to prevent the COP from undermining measures adopted in areas *within* national jurisdiction (art. 22(5)). Furthermore, the BBNJ Agreement restricts the COP from seeking an advisory opinion from the International Tribunal for the Law of the Sea “on a matter within the competence of other global, regional, sub-regional or sectoral bodies” (art. 47(7)). The commitment not to undermine existing IFBs has prevented the COP from being given strong decision-making powers that could potentially interfere with the decisions of other IFBs.

In areas of inevitable overlap, one of the primary means established to avoid undermining existing IFBs is consultation. The COP and other decision-making bodies created under the BBNJ Agreement are required to consult, recognize, respect, or invite IFBs. This obligation is not always mandatory, as is the case for the access and benefit-sharing committee, the Scientific and Technical Body, and the Implementation and Compliance Committee, which may consult and facilitate information exchange with (art. 15(5)), or draw on advice or information provided by, IFBs (arts. 49 and 55). However, consultation with relevant IFBs becomes mandatory when their consent is required. This is the case for the establishment of ABMTs under the BBNJ Agreement (art. 19(4)), for example, where the Secretariat would notify and invite relevant IFBs to submit their views on, among others, the merits of the ABMT proposal and any measures falling within their competence (art. 21(2)(b)). The COP may then decide, in cooperation and coordination with these IFBs, on measures *compatible with* those already adopted by them (art. 22(1)(b)). Where proposed measures fall within the competence of IFBs, the COP may make recommendations to those IFBs to promote the adoption of relevant measures *through* them (art. 22(1)(c)). These requirements are intended to ensure that existing ABMTs implemented under IFBs are fully respected. However, the emphasis on compatibility of measures with those of existing IFBs risks reducing governance efforts to the lowest common denominator.

The analysis suggests that prior concerns among certain stakeholders regarding the possibility of the BBNJ Agreement undermining the autonomy of existing IFBs seem to have been effectively resolved [24]. The COP and other treaty bodies formed under the BBNJ Agreement will extensively engage with IFBs. Consequently, IFBs have the potential to wield considerable influence over the BBNJ Agreement if they choose to adhere strictly to their own narrow mandates. In essence, decision-making authority in ocean governance is expected to stay decentralized, with the power of the COP restrained amidst competition from incumbents with conflicting interests.

3.2. New normative authority is established

The obligation not to undermine IFBs may seem to imply no interference. However, it is important to note that the BBNJ Agreement is also to be interpreted and applied in a manner that “promotes coherence and coordination with” those IFBs (art. 5(2)). The theme of cooperation with IFBs is a recurring and central element throughout the treaty text (e.g., arts. 5(2), 8(1), 22(1)(b), 22(3), 22(4), 22(7), 47(6)(c), 50(4)(d)). In fact, the BBNJ Agreement relies heavily on IFBs to produce intended effects. For example, the general objective of the BBNJ Agreement is to be achieved “*through* effective implementation of the relevant provisions of the [Law of the Sea] Convention and further international cooperation and coordination” (art. 2, emphasis added). The meaning of international cooperation is further elucidated in Article 8, which emphasizes cooperation with and among relevant IFBs (art. 8(1)). Importantly, the

¹ Articles 5, 8, 15, 17, 19, 21, 22, 23, 24, 25, 26, 29, 32, 41, 42, 45, 47, 48, 49, 50, 51, 52, 55, and 60. The majority of these references are made to a general category of non-specific IFBs: Article 4(2), for example, obligates the parties to interpret and apply the BBNJ Agreement “in a manner that does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and that promotes coherence and coordination with those instruments, frameworks and bodies”. A smaller subset of references is specific, naming international organizations such as the International Seabed Authority, the International Maritime Organization, and the Food and Agriculture Organization (e.g., art. 51(4)).

BBNJ Agreement creates an obligation for the parties to “promote, as appropriate, the objectives of this Agreement when participating in decision-making under other relevant” IFBs (art. 8(2)). The mobilization of existing IFBs to achieve own treaty objectives is a significant innovation in the design of multilateral environmental agreements.

This is also evident in the promotion of the adoption of necessary measures within IFBs to achieve the objectives of the BBNJ Agreement (art. 25(4)). In the context of ABMTs, even non-parties to IFBs are not discharged from the obligation to cooperate in the conservation of marine biodiversity beyond national jurisdiction (art. 25(6)). When it comes to environmental impact assessments (EIAs), the parties are obliged to promote the use of EIAs under the BBNJ Agreement as well as the adoption and implementation of EIA standards and guidelines in relevant IFBs (art. 29(1)). To address the overlap, the BBNJ Agreement does not require an EIA if “the potential impacts of the planned activity or category of activity have been assessed in accordance with the requirements of other relevant” IFBs (art. 29(4)(a)). Importantly, however, this assessment must be *equivalent* to the one required under the BBNJ Agreement or “the regulations or standards of the relevant [IFBs] arising from the assessment were designed to prevent, mitigate or manage potential impacts *below* the threshold for [EIAs] and they have been complied with” (art. 29(4)(b), *emphasis added*). Therefore, the COP has the power to establish a *de facto* threshold for triggering the EIA process across IFBs.

Furthermore, the COP is empowered to take decisive action when it becomes critical for the conservation of marine biodiversity beyond national jurisdiction. It can institute emergency measures “when a natural phenomenon or human-caused disaster has caused, or is likely to cause, serious or irreversible harm ... to ensure that the serious or irreversible harm is not exacerbated” (art. 24(1)). This is a further operationalized version of Article 22(1) of the Convention on Biological Diversity, which effectively reverses the conflict clause in the event of serious damage or threat to biodiversity, but one that has faced criticism due to its lack of practical utility [37,49,63,64]. In five paragraphs, the emergency measures provision in the BBNJ Agreement details, among others, who can propose and adopt such a measure, on what basis, and for how long it would last (art. 24). A key limitation in the BBNJ context, however, is that these emergency measures are to be considered necessary only if the harm cannot be managed in a timely manner by a relevant IFB (art. 24(2)), a situation that would practically not exist. Nevertheless, what this emergency mechanism underscores is the shared consensus among the parties on the paramount importance of protecting marine biodiversity beyond national jurisdiction. In other words, while its practical significance remains to be seen, the ability of the COP to put a stop to a destructive activity is consequential. It is a clear reflection of the strong normative authority of the BBNJ Agreement, which is its key strength.

3.3. Polycentric order is promoted by orchestrating cooperation among IFBs

In addition to the dyadic relationship between the BBNJ Agreement and IFBs, there is a strong emphasis on fostering a polycentric approach to ocean governance. Central to this is the focus on “cooperation”, “coordination”, and “coherence” among relevant IFBs, which are mentioned nearly 40 times throughout the treaty text. For example, one of the general obligations of the parties is not only to strengthen and enhance cooperation with relevant IFBs, but also to promote cooperation among them (art. 8(1)). The same language is used for the COP, which is mandated to promote cooperation and coordination with and among IFBs and improve coherence in efforts towards the conservation and sustainable use of marine biodiversity beyond national jurisdiction (art. 47(6)(c)). A key objective of Part III of the agreement on ABMTs is to strengthen cooperation and coordination in the use of ABMTs among relevant IFBs (art. 17(b)). To facilitate this, the COP is tasked with organizing regular consultations with and among relevant IFBs (art. 22

(3)). The importance of strengthening cooperation and coordination between relevant IFBs is also emphasized in the context of capacity building and marine technology transfer (art. 41(2)).

The active promotion of cooperation and coordination among IFBs is a notable innovation in treaty design in the face of complexity [51]. Although this is not the first time that a multilateral environmental agreement has encouraged cooperation among existing international institutions (e.g., art. 14(4)(d) of the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter), such provisions have been rare. Most multilateral environmental agreements focus primarily on fostering dyadic cooperation and coordination with individual institutions, without paying sufficient attention to the larger regime complexes in which they operate. The emphasis on the broader context in the BBNJ Agreement reflects a shared understanding that its objectives can only be achieved through the concerted efforts of all relevant IFBs. It is in this context a polycentric order is promoted, in which IFBs retain their authority and autonomy while aligning towards achieving common objectives through mutual adjustments. Addressing the complex interdependencies between marine biodiversity loss and other pressing environmental issues such as climate change, ocean acidification, and plastic pollution – all of which are mentioned in the treaty preamble – requires all hands on deck.

For this pursuit of a robust polycentric order, orchestration is a pivotal mode of governance for the institutional arrangements established under the BBNJ Agreement. Given its limited capacity for direct control, the COP will need to rely more modestly on its normative authority to enlist and coordinate IFBs [1]. This entails using various strategies, such as improving transparency through public information sharing in consultation with IFBs, Indigenous Peoples and local communities, the scientific community, civil society, and other relevant stakeholders (art. 48). The Clearing-House Mechanism presents another essential orchestration tool, which could serve as a centralized platform for IFBs to access, provide, and disseminate information (art. 51(3)(a)).

4. Implications

The foregoing analysis suggests that the envisioned model of ocean governance could be described as what Friedman calls “a system oriented towards ‘joint interplay management’” [24]. Rather than favoring a hierarchy, the BBNJ Agreement seeks to mobilize and align existing IFBs. Normative authority is its key strength. While the obligation not to undermine IFBs remains an important aspect that is duly respected, it is balanced by the active promotion of the objectives of the BBNJ Agreement in decision-making within existing IFBs. In other words, the BBNJ Agreement establishes an institutional framework that has the potential to systematize, rather than replace or undermine, the existing ocean governance architecture. Building on this general observation, I explore below more specific opportunities and challenges related to the dynamics with and among IFBs. Two cases are used: the ISA moving forward with its mining plans and the RFMOs passing the buck to each other.

4.1. Will the BBNJ Agreement green the ISA?

The ISA is entrenched in the mindset of a developer for whom not mining the deep sea is not an option [31]. The environmental management measures it has developed to date are also not suited to protect the marine environment from the harmful effects of mining [9]. Will the BBNJ Agreement be able to influence the ISA to prevent deep seabed mining and protect the marine environment? On the one hand, the ISA has expressed a willingness to cooperate and align its decisions with the BBNJ Agreement [18]. In its final statements during the further resumed fifth session of the Intergovernmental Conference, for example, the ISA outlined ways in which it could contribute to the objectives of the BBNJ Agreement. On the other hand, it has repeatedly emphasized that the implementation of the BBNJ Agreement “must fully respect the rights

and obligations of States as outlined in Part XI of [the Law of the Sea Convention] and the 1994 Agreement, particularly concerning the Area and its resources". The ISA firmly asserts its "central position in the global system for ocean governance" [60].

Consider a hypothetical scenario where an ABMT is proposed under the BBNJ Agreement near potential mining sites. In this situation, the COP is obliged to engage in consultation with the ISA. However, it is unlikely that the ISA would agree to the ABMT as it could conflict with its mining plans. The only option available to the COP would be to encourage the adoption of similar measures by the ISA itself (art. 22(1) (c)). If successful, the ISA would then either integrate the proposed area into one of its regional environmental management plans or develop a separate plan, which does not preclude potential mining activities. Therefore, ABMTs under the BBNJ Agreement may not be an effective means of preventing deep seabed mining activities if they are contrary to the interests of the ISA.

The EIA process under the BBNJ Agreement could serve a role in averting the potential consequences of deep seabed mining. Some analysts point out that the BBNJ Agreement sets higher standards for EIAs compared to current practices [52]. This shift in standards has the potential to reshape how the environmental impacts of deep seabed mining are evaluated in other relevant IFBs, including the ISA. However, EIAs conducted by the ISA may be deemed "equivalent" to those conducted under the BBNJ Agreement, potentially precluding the intervention of the BBNJ Agreement (art. 29(4)). Furthermore, the Scientific and Technical Body established under the BBNJ Agreement is obliged to collaborate with the ISA in the development of standards and guidelines for the conduct of EIAs, thus creating opportunities for the ISA to exert influence if it chooses to do so (art. 29(3)).

However, mining in biodiversity-rich areas like hydrothermal vent systems is likely to become increasingly difficult for the ISA to justify. In line with the BBNJ Agreement, as of April 2024, 25 members of the ISA have announced their support for a moratorium, a precautionary pause, or an outright ban on deep seabed mining [17]. Brazil and Spain, for example, propose that the ISA refrain from considering mining applications until the BBNJ Agreement has led to the adoption of ABMTs covering at least 30% of areas beyond national jurisdiction [18]. While this is cause for optimism, prospective mining states may become more reluctant to ratify the BBNJ Agreement until the Mining Code is fully developed by the ISA and mining sites are secured. The BBNJ Agreement requires 60 ratifications before it can enter into force, and at the time of writing, Palau, Chile, Belize, and Seychelles have ratified the agreement out of 90 signatories.

In the event that deep seabed mining proceeds and results in significant loss of marine biodiversity, the COP may invoke temporary emergency measures. While the specific procedures for implementing these measures are yet to be developed (art. 24(5)), it is unlikely that the COP will be able to enforce effective emergency measures due to the requirement to consult with relevant IFBs, such as the ISA in this case. Nevertheless, this does not imply that the emergency measures will be inconsequential; they could have a whistleblower effect. If the COP triggers the process of consultation, the ISA may feel pressured to cooperate to uphold its institutional legitimacy [22]. Therefore, even if the COP cannot legally compel the ISA to act in a specific manner, it may cultivate a timely response and responsible behavior.

4.2. Will the BBNJ Agreement improve coordination among RFMOs?

RFMOs with separate jurisdictions often lead to issues like the balloon effect, as noted in the introduction. This phenomenon occurs when limiting fish catch in one region causes an expansion of fishing pressure elsewhere [6,10]. Will the BBNJ Agreement enhance coordination among RFMOs and reduce the tendency for problems to merely shift from one region to another? This question is particularly relevant because the balloon effect contradicts a core principle of the BBNJ Agreement that addresses such problem shifting [35]. Article 7(1)

obliges the parties not to transfer damage or hazards from one area to another or to transform one type of pollution into another when taking measures to prevent, reduce, and control pollution of the marine environment. While overfishing is not legally considered "pollution of the marine environment" under the Law of the Sea Convention, holistic ocean governance based on ecosystem, integrated, and resilience approaches (arts. 7(f), 7(g), 7(h)) is at the heart of the BBNJ Agreement.

The BBNJ Agreement offers a significant opportunity to address the flaws stemming from the lack of effective coordination among RFMOs. At a practical level, the balloon effect occurs because RFMOs do not always share or recognize each other's lists of illegal, unreported, and unregulated fishing vessels. Operators engaged in illicit activities can therefore simply move to the jurisdiction of another RFMO where they may not face the same restrictions [29]. Improving information and data exchange is crucial, and the BBNJ Agreement could be instrumental in this regard [62]. For example, a dedicated entity responsible for compiling a centralized list could be established. In fact, the Review Conference on the United Nations Fish Stocks Agreement has already stressed that the BBNJ Agreement could provide a mechanism or platform for data sharing to facilitate harmonized actions across RFMOs [20]. The BBNJ Agreement itself also emphasizes improving collaboration among RFMOs as a key aspect of institutional capacity building (Annex II, para. (d)(ix)). Moreover, the COP has the capacity to provide more detailed and nuanced recommendations to RFMOs compared to the resolutions adopted to date by the United Nations General Assembly [19].

However, such centralized coordination efforts alone are unlikely to fully mitigate the balloon effect. The underlying issue contributing to this challenge is the lack of "macro-regulation" or rules governing the overall capacity of the fishing industry [5]. Yet, the application of the BBNJ Agreement to fisheries is limited, especially concerning marine genetic resources, as fisheries managed by RFMOs under international law are exempt from the relevant provisions (art. 10(2)). Proposing global catch limits under the BBNJ Agreement could potentially breach the obligation not to undermine IFBs (art. 5(2)). However, the risk of imminent collapse of global fisheries might qualify as a serious or irreversible harm to marine biodiversity, prompting the COP to consider adopting emergency measures. Although the likelihood of such measures being adopted is uncertain, the process would involve consultations with RFMOs, which could stimulate greater cooperation and coordination among them.

5. Conclusion

With high hopes, the BBNJ Agreement is introduced into a complex and crowded ocean governance landscape. This space is marked by powerful incumbents with competing interests, posing significant challenges to the agreement's ability to achieve its intended effects for marine biodiversity beyond national jurisdiction. The commitment not to undermine the autonomy of IFBs remains a formidable principle. Despite the successful establishment of a COP, its decision-making powers are constrained by the extensive requirements to consult with relevant IFBs, which will play a critical role in shaping decisions. These challenges are evident and supported by examples from the ISA and RFMOs.

However, there are also reasons to be optimistic about the future of the BBNJ Agreement. Its potential does not primarily hinge on establishing a hierarchy in ocean governance but rather on its capacity for systematization through orchestration. The BBNJ Agreement, as negotiated and agreed upon, strives for a governance architecture characterized by institutional polycentricity. It incorporates design features optimized to advance its treaty objectives by leveraging decision-making within existing IFBs. This approach seeks to transform the system by intervening at the system-level goal, with a strategic focus on mobilizing IFBs and improving coordination and cooperation among them. The emphasis on institutional orchestration as its primary mode of

operation represents a new paradigm for multilateral environmental agreements [30].

The true strength of the BBNJ Agreement lies in the normative weight it places on the obligation to prevent serious or irreversible harm to marine biodiversity beyond national jurisdiction. This could be viewed and eventually embraced as a foundational norm, akin to a marine sustainability *grundnorm*, upon which all other related norms are based. It holds the potential to function as an overarching goal that IFBs should work towards, as well as the ultimate arbiter for managing normative conflicts between IFBs [33].

The BBNJ Agreement is not just another piece of the institutional puzzle filling a governance gap, nor is it the keystone holding all other institutions in place. Instead, it is a catalyst for transforming the architecture of ocean governance. A new polycentric order is on the horizon. The exact form and shape of this order are not predefined; it will evolve through collaboration with IFBs, which will play an important role in the interpretation and application of the BBNJ Agreement. The extent to which these IFBs would align themselves with the objectives of the BBNJ Agreement will be of utmost importance. Making progress in this regard and overcoming the constraints within which the BBNJ Agreement operates will require innovative thinking on the part of both academics and practitioners.

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Declaration of Competing Interest

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