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Responsibility of flag States
with regard to marine
biodiversity on the high seas

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Foreword

This thesis was submitted as part of the requirements for the degree of Master of Laws (LL.M.) at the Faculty of Law, University of Oslo, and carries 30 ECTS credits. It is published substantially in the form in which it was submitted and examined. The only changes made since submission are the correction of a small number of grammatical and typographical errors. The thesis examines flag State responsibility for the protection of marine biodiversity in areas beyond national jurisdiction, with particular emphasis on environmental impact assessment obligations under the United Nations Convention on the Law of the Sea ('*UNCLOS*') and the Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction ('*BBNJ Agreement*'). It further considers the due diligence responsibilities of flag States, including their role in determining whether reliance may be placed on a previous assessment under the BBNJ Agreement's equivalence mechanism. Situated at the interface between the law of the sea and international environmental law, the thesis examines an evolving area of public international law at a time of significant legal and institutional development. Increasing human activity continues to place growing pressure on marine ecosystems, further highlighting the importance of these issues.

I would like to express my sincere gratitude to my supervisor, Professor Alla Pozdnakova, for her encouragement and support throughout this process. Her expertise, constructive guidance, and insight have been instrumental in shaping this thesis. I would also like to thank my husband for his patience and understanding during the preparation of this thesis, and for his continued belief in me.

Bergen, July 2026

Mathilde Louise Raa Lie-Nielsen

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1 Introduction

1.1 High seas and marine biodiversity

This thesis analyses the obligations of flag States concerning the protection of marine biodiversity in the areas beyond national jurisdiction ('ABNJ'). The topic is particularly interesting as the obligations are aimed at addressing the complex and evolving role of flag States in managing and safeguarding marine biodiversity in an area that has been largely unregulated and vulnerable to over-exploitation. For the purposes of this thesis, the terminology of the United Nations Convention on the Law of the Sea ('UNCLOS')¹ and 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')² is followed. References to "State Party" describe States legally bound by UNCLOS. Where the BBNJ Agreement is concerned, the term "Parties" is used in accordance with its text. References to "flag States" refer to State Parties to UNCLOS acting in their capacity as flag States, exercising jurisdiction and control over vessels flying their flag.

Flag States can play a critical role in mitigating impacts on marine biodiversity in ABNJ by ensuring that their vessels adhere to international agreements. Understanding the obligations and responsibilities of flag States is critical, as the flag States and the shipping industry play a central role in enforcing international regulations and ensuring compliance with conservation measures. Shipping activities have a significant impact on marine biodiversity in many ways³, such as through the introduction of invasive species transported by ballast water, destruction of habitats, pollution caused by oil spills, noise pollution, invasive non-native species, and sewage discharge. Notably, the Arctic Council has highlighted a range of impacts on the high seas in the Arctic, including vessel strikes affecting whales and other marine mammals, and atmospheric emissions from shipping that contribute to climate change and indirectly intensify pressures on marine life⁴.

UNCLOS defines the high seas as "*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State*"⁵. In general terms, the high seas comprise ocean areas beyond the limits of national jurisdiction, outside territorial seas and, where established, exclusive economic zones that may extend up to 200 nautical miles from the coastal baseline; as a whole, the high seas account for approximately 95 per cent of the ocean's volume and nearly half of the Earth's surface⁶. ABNJ encompass both the high seas and the seabed beyond national jurisdiction and are referred to as a part of the global commons, requiring collective management and protection for the benefit of all⁷.

¹ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994, Montego Bay) 1833 UNTS 3 (UNCLOS)

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, entered into force 17 January 2026, New York) (BBNJ Agreement)

³ Casey O'Hara, Melanie Frazier, Benjamin Halpern, 'At-risk marine biodiversity faces extensive, expanding, and intensifying human impacts' (02.04.2021) *Science*, vol. 372, Issue 6537

⁴ Arctic Council, 'Arctic Marine Shipping Assessment 2009 Report' ('Protection of the Arctic Marine Environment' (PAME'), Arctic Council 2009), page 152-153

⁵ Article 86 UNCLOS

⁶ Directorate-General for Maritime Affairs and Fisheries, 'A win for the ocean: High Seas Treaty signed at United Nations' (20.09.2023), A win for the ocean: High Seas Treaty signed at United Nations - European Commission (europa.eu) accessed 14.05.2026

⁷ United Nations Environment Programme, 'Making Peace With Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity, and Pollution Emergencies' (2021) <https://www.unep.org/resources/making-peace-nature> accessed 14.05.2026

The significance of the high seas is further reflected in the United Nations' description of the ocean as the “*planet's life support*”⁸, given its important role in regulating the global climate and sustaining human life⁹. Human dependency on the oceans is evident in the variety of functions that the ocean performs, including the absorption of carbon dioxide, storage of heat, facilitation of international trade, provision of food and employment, and supplying minerals and energy resources. The high seas have been described by the Natural Resources Defense Council (‘NRDC’) as a significant repository for the world’s biodiversity¹⁰. However, despite their undisputed importance to life on Earth, scientific reports suggest that significant challenges remain in ensuring the effective protection of biodiversity in ABNJ¹¹. In 2016, the *First Global Integrated Marine Assessment ‘World Ocean Assessment I’* stated that the oceans are subject to pervasive impacts of human activities¹², while the *Sustainable Development Goals Report 2023: Special Edition* has gone so far as to characterise the ocean as being in a state of emergency¹³.

The Convention on Biological Diversity (‘CBD’)¹⁴ defines biological diversity as “*the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*”¹⁵. When applied to the high seas, marine biodiversity thus refers to the variety of ecosystems, species, and genetic resources present in the ABNJ¹⁶. This marine biodiversity is essential to maintaining a healthy ocean, including its ability to provide ecosystem services such as climate regulation¹⁷ and to sustain the provision of food through fishing activities¹⁸. More broadly, marine biodiversity underpins global environmental stability and human life, as its degradation risks undermining both ocean ecosystems and the vital services they provide. The pressures affecting the marine biodiversity are stated to generally be cumulative¹⁹ and transboundary in character, creating governance challenges that are difficult to effectively address

⁸ United Nations, ‘Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources’ *UN Sustainable Development Goals*, <https://www.un.org/sustainabledevelopment/oceans/> accessed 13.05.2026

⁹ Ibid n8

¹⁰ Brian Palmer and Jeff Turrentine, ‘Finally, a High Seas Treaty to Protect the World’s Oceans’ (09.10.2025) *Natural Resources Defense Council website*, <https://www.nrdc.org/stories/finally-high-seas-treaty-protect-worlds-oceans> accessed 10.05.2026

¹¹ Brondizio, Eduardo; Diaz, Sandra; Settele, Josef; Ngo, Hien T, “ *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services*”, IBPES, (2019), *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (zenodo.org) , accessed the 14.09.2024

¹² United Nations, ‘The First Global Integrated Marine Assessment (World Ocean Assessment I) ’ (2016) UN, <https://www.un.org/regularprocess/content/first-world-ocean-assessment> accessed 02.05.2026 (part II, chapter 1, page 11)

¹³ United Nations, ‘The UN Sustainable Development Goals Report 2023, Special edition’ (2023) UN DESA, <https://unstats.un.org/sdgs/report/2023/The-Sustainable-Development-Goals-Report-2023.pdf> accessed 19.04.2026, page 40

¹⁴ Convention on Biological Diversity (adopted 22 May 1992, entered into force 29 December 1993, Nairobi) 1760 UNTS 79 (CBD)

¹⁵ Ibid n14, Article 2

¹⁶ Alex D Rogers, Heather M Koldewey, Jennifer J Meeuwig and others, ‘*The High Seas and Us: Understanding the Value of High-Seas Ecosystems*’ (2014) 23 *Global Ecology and Biogeography* 1, <https://fisheries.sites.olt.ubc.ca/files/2023/01/high-seas-and-us.pdf> accessed the 10.05.2026

¹⁷ Intergovernmental Panel on Climate Change (IPCC), ‘ *Special Report on the Ocean and Cryosphere in a Changing Climate (SROCC): Technical Summary* (IPCC 2019), https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/02_SROCC_TS_FINAL.pdf accessed the 10.05.2026, page 58

¹⁸ Ibid n16, page 43

¹⁹ Ibid n11, page 24

solely through sectoral or unilateral action²⁰. Accordingly, international cooperation is necessary to mitigate such global threats.

It has previously been argued that the legal framework for the protection and conservation of marine biodiversity is fragmented²¹, particularly with respect to the protection of the environment and marine biodiversity in the ABNJ²². Fragmentation stems from the fact that the legal framework consists of various international agreements and conventions addressing different aspects of marine conservation, with insufficient coordination and gaps in the legal protection of the marine biodiversity in the high seas²³. The protection of the marine environment has evolved through the adoption of both non-binding instruments and international conventions. UNCLOS established a legal framework that subjects State Parties to a positive obligation to protect and preserve the marine environment. Article 87 of UNCLOS sets out the freedom of the high seas, emphasizing that the high seas are for all to use, while Article 192 subjects all States to a general duty to protect and preserve the marine environment²⁴. In 2023, the historic BBNJ Agreement was adopted. The BBNJ Agreement supplements UNCLOS, aiming to protect marine biodiversity specifically in the ABNJ.

This thesis argues that the BBNJ Agreement can strengthen and further specify the responsibilities of flag States in relation to marine biodiversity in ABNJ. While the BBNJ Agreement does not impose new obligations on flag States, it gives concrete form to existing obligations under UNCLOS, including those relating to environmental impact assessments ('EIAs') on the high seas. As the obligations relevant to the protection of marine biodiversity in ABNJ extend beyond the scope of a single thesis, the analysis is necessarily selective and focuses on EIAs as a mechanism through which existing flag State obligations are implemented and given concrete effect. In the context of the high seas, where regulatory oversight is more limited than within areas of national jurisdiction, the significance of EIAs lies in their role in structuring the exercise of flag State due diligence under both UNCLOS and the BBNJ Agreement. EIAs therefore provide an interesting lens for examining how due diligence is operationalised in a regulatory context characterised by limited external oversight.

Responsibility for the enforcement of these obligations under the BBNJ Agreement, building upon the framework established by UNCLOS, rests primarily with the flag States exercising jurisdiction or control over the relevant vessel conducting activities in the ABNJ. For the purposes of this thesis, the concept of the flag State is understood in accordance with UNCLOS, which governs the attribution of nationality to ships and the scope of flag State jurisdiction and control. Flag States are the States in which vessels are registered and whose nationality they are entitled to fly. The BBNJ Agreement follows UNCLOS and does not alter the allocation of flag State jurisdiction. In this respect, UNCLOS confers upon flag States exclusive jurisdiction over their vessels on the high seas²⁵ and imposes a

²⁰ See Cathryn C Murray, Megan E Mach and Rebecca G Martone, 'Cumulative Effects in Marine Ecosystems: Scientific Perspectives on its Challenges and Solutions' (2014) *WWF-Canada and Center for Ocean Solutions*, https://awsassets.wwf.ca/downloads/cumulativeeffects_updated_forwebupload_singlepages.pdf, accessed 12.03.2026, page 11

²¹ Robin Warner, 'Conserving marine biodiversity in areas beyond national jurisdiction: co-evolution and interaction with the law of the sea' (2014), *Frontiers in Marine Science*, https://www.researchgate.net/publication/273515702_Conserving_marine_biodiversity_in_areas_beyond_national_jurisdiction_co-evolution_and_interaction_with_the_law_of_the_sea accessed 25.03.2026, page 3

²² 'Marine verneområder på åpent hav i Arktis' (Master's thesis, University of Bergen, 2020), <https://nva-resource-storage-75592382223.s3.eu-west-1.amazonaws.com/13d0e700-47e4-4667-8769-43a9d594b101> accessed 10.05.2026, page 4

²³ Ibid n21

²⁴ Article 192 UNCLOS

²⁵ Article 92 UNCLOS

duty to effectively exercise jurisdiction and control over administrative, technical, and environmental matters²⁶.

The jurisdictional allocation from Article 92 places flag States at the centre of the regulation of vessel-based activities on the high seas. The general rule of exclusive flag State jurisdiction entails responsibilities with respect to environmental protection, and in the context of international shipping, these responsibilities are exercised primarily through the implementation and enforcement of generally accepted international rules and standards developed by the International Maritime Organization ('IMO') as the competent international organization under UNCLOS²⁷. However, while the IMO has produced detailed regulation concerning vessel-source pollution and maritime safety, the IMO's engagement with the protection of marine biodiversity in ABNJ has traditionally been indirect and fragmented, which is a part of the regulatory gaps which the BBNJ Agreement seeks to fill.

Article 91 of UNCLOS requires the existence of a genuine link between a vessel and its flag State. This is a requirement that has brought about extensive debate²⁸, particularly in relation to flags of convenience, flags of deceit, and the effectiveness of flag State control. Questions concerning the adequacy of the genuine link requirement, as well as related enforcement or compliance gaps within the flag State system, while highly relevant to the effectiveness of international maritime regulation, fall outside the scope of this thesis. This thesis focuses on the development of flag State obligations under the BBNJ Agreement, understood as elaborating and operationalising existing obligations under UNCLOS in relation to the protection of marine biodiversity in ABNJ.

1.2 Research problem

This thesis seeks to contribute to international law by examining the responsibility of flag States in relation to the protection of marine biodiversity in ABNJ. The analysis is grounded in the existing legal framework, where UNCLOS - often described as the '*constitution for the oceans*'²⁹ - and relevant rules of customary international law are the starting point. The thesis then considers the regulatory role of the IMO and its relevance for vessel-based activities affecting marine biodiversity, before turning to the BBNJ Agreement's adoption as an implementing agreement under UNCLOS.

The BBNJ Agreement is examined as developing and operationalising pre-existing duties under UNCLOS, and it has been referred to as further specifying and strengthening requirements relating to EIAs for activities carried out under a State Party's jurisdiction or control that may affect marine biodiversity in ABNJ³⁰. Through this analysis, the thesis aims to clarify the scope and content of flag State responsibilities with respect to the protection of marine biodiversity in ABNJ.

²⁶ Article 94 UNCLOS

²⁷ Article 211 UNCLOS

²⁸ See Eduardo Cavalcanti de Mello Filho, 'From 'Flags of Convenience' to 'Flags of Deceit': The Future of the Law Governing the Nationality of Ships' (2025), Cambridge University Press, *International & Comparative Law Quarterly* 121; and Nivedita Hosanee, 'A critical analysis of flag State duties as laid down under Article 94 of the 1982 UNCLOS' (2009) *UN Division for Ocean Affairs and the Law of the Sea* https://www.un.org/depts/los/nippon/unnnff_programme_home/fellows_pages/fellows_papers/hosanee_0910_mauritius.pdf accessed the 25.03.2026

²⁹ Peter Tzeng, 'Jurisdiction and Applicable Law Under UNCLOS' (2016) *Yale Law Journal* Vol. 126, Number 1, page 245

³⁰ Warwick Gullett and Neil Craik, 'Precautionary Environmental Impact Assessments under the BBNJ Agreement: More than a Minor or Transitory Effect on the Marine Environment?' (2025) *Ocean Development & International Law* <https://doi.org/10.1080/00908320.2025.2563269> accessed 25.03.2026

1.3 Methodology and sources

This thesis adopts a qualitative doctrinal legal method. The analysis examines the content, scope, and development of flag State obligations relating to the protection of marine biological diversity in the ABNJ, with particular attention to the EIA regime under the BBNJ Agreement. The analysis is grounded in recognised sources of international law and proceeds through a reading of treaty texts, relevant customary rules, and international jurisprudence, rather than through the study of domestic implementation or practice. Interpretation of the BBNJ Agreement and UNCLOS is undertaken in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties ('VCLT')³¹, which has been referred to as being a codification of existing customary international law in international jurisprudence³². The analysis applies the ordinary meaning of treaty terms in their context and in light of their object and purpose, and approaches the BBNJ Agreement as an implementing agreement that must be read in harmony with UNCLOS. As a treaty governed by international law, the BBNJ Agreement is subject to this general interpretative framework. While it does not expressly refer to the VCLT, the reference in the BBNJ Agreement's Preamble's to "*rules of the law of treaties*"³³ implicitly engages these customary international rules, which are consistently applied by international courts and tribunals³⁴.

Emphasis is placed on the object and purpose of the BBNJ Agreement as reflected in its preamble, which seeks to ensure the conservation and sustainable use of marine biological diversity in ABNJ through enhanced international cooperation and effective implementation of UNCLOS, while respecting the balance of rights, obligations, and interests established under UNCLOS³⁵. In applying this framework, the analysis recognises that the wording of the BBNJ Agreement reflects a negotiated compromise³⁶ and may, in certain respects, appear more progressive than the level of regulatory commitment that States were willing to expressly codify during negotiations³⁷.

In several areas, the BBNJ Agreement employs open-textured formulations, indeterminate standards, and deliberately flexible language, while (currently) remaining largely unaccompanied by consolidated preparatory materials, subsequent practice for this thesis to consult, or institutional guidance. This is particularly the case in relation to the operation of the EIA regime, where the obligation to conduct an assessment is triggered by evaluative standards³⁸ and where existing assessment frameworks must be evaluated for equivalency³⁹. These features give rise to interpretative uncertainty. Similar difficulties also arise in relation to the relationship and non-undermining clauses, which are framed in accommodating rather than hierarchical terms⁴⁰, and in the articulation of flag State obligations,

³¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980, Vienna) 1155 UNTS 331 (VCLT), articles 31–32

³² *Arbitral Award of 31 July 1989* (Guinea-Bissau v Senegal) [1991] ICJ Rep 53, paragraph 48.

³³ Preamble BBNJ Agreement

³⁴ Makane Moïse Mbengue, 'Rules of Interpretation (Article 32 of the Vienna Convention on the Law of Treaties)' (2016) 31 *ICSID Review – Foreign Investment Law Journal*, volume 31, issue 2, page 388

³⁵ *Ibid* n33

³⁶ Pascale Ricard, 'The Advent of the 2023 "BBNJ" Agreement: A Preliminary Legal Analysis' (2023) *Environmental Policy and Law*, Vol.53, Issue 5–6

³⁷ See Position paper of the International Chamber of Shipping, 'Textual proposals submitted by delegations by 20 February 2020, for consideration at the fourth session of the intergovernmental conference' (2020) https://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf, accessed 29.04.2026, page 222

³⁸ Articles 28–29 BBNJ Agreement

³⁹ Article 29 BBNJ Agreement

⁴⁰ Article 5 BBNJ Agreement

which rely on standards of conduct rather than precise regulatory specification⁴¹. In these situations, interpretation therefore relies primarily on the treaty text, its context, and its object and purpose, given the limited availability of sources and the absence of settled implementation or consistent State practice.

This interpretative approach is especially relevant in relation to the EIA regime, which was a contested element of the negotiations⁴². The thesis examines how the BBNJ Agreement operates within the law of the sea framework, including its interaction with existing sectoral regulation. Instead of assuming that the BBNJ Agreement neatly solves all conflicts with existing ocean governance regimes, the thesis examines how specific provisions of the BBNJ Agreement are designed to allow it to operate alongside those regimes.

Where relevant, the thesis considers subsequent agreements and subsequent practice under Article 31(3) of the VCLT, while recognising that such practice remains limited given the recent adoption of the BBNJ Agreement. For the same reason, the existing academic literature addressing the BBNJ Agreement, particularly its environmental impact assessment obligations, remains relatively limited, as the treaty has only recently been ratified. Supplementary means of interpretation under Article 32, including preparatory work and the circumstances of conclusion, are relied upon where the treaty text is ambiguous or where a strictly literal reading would be inconsistent with the negotiated balance reflected in the instrument.

The primary materials analysed include UNCLOS, the BBNJ Agreement, relevant IMO instruments, and the jurisprudence of the International Court of Justice ('ICJ'), International Tribunal for the Law of the Sea ('ITLOS'), and arbitral tribunals concerning due diligence, environmental assessment, and flag State obligations. These sources are read alongside travaux préparatoires, official negotiating and explanatory documents, and selected academic commentary. The preparatory work of the BBNJ Agreement does not consist of a single consolidated set of travaux préparatoires, but rather of a distributed body of official negotiating materials, including successive draft texts and the formal reports of the Intergovernmental Conference. These materials are treated as supplementary means of interpretation under Article 32 of the VCLT and are relied upon with caution to confirm the meaning derived from the text, context, and object and purpose of the BBNJ Agreement.

This analysis is subject to certain limitations. It does not engage in a comparative evaluation of domestic environmental legislation or national approaches to treaty interpretation. While the thesis engages with the development of environmental assessment in international public law leading up to UNCLOS and the adoption of the BBNJ Agreement, this discussion is intended to provide contextual and doctrinal background rather than a comprehensive assessment of the EIA regime. The substantive analysis remains concerned with flag State obligations relating to the protection of marine biological diversity in ABNJ. Considering this focus, the thesis also accords limited attention to elements of the BBNJ Agreement that are less directly connected to the examination of flag State obligations through the lens of EIA, such as for example, the parts dedicated to marine genetic resources or capacity-building and the transfer of marine technology.

1.4 Structure of the thesis

This section briefly outlines the structure of the remainder of the thesis. Chapter II establishes the jurisdictional and institutional framework for flag State jurisdiction under UNCLOS. It examines the legal status of the high seas, the scope of flag State jurisdiction, and the obligation to exercise effective control, before identifying the

⁴¹ Articles 16 and 28(1) BBNJ Agreement read together with Articles 94 and 192 UNCLOS

⁴² Ibid n36

legal basis for EIAs in ABNJ. The chapter further situates flag State environmental obligations within a due diligence framework and considers the role of the IMO as a competent organisation under UNCLOS.

Building on this framework, Chapter III turns specifically to EIA obligations. It analyses the development and content of environmental assessment under international environmental law before examining the EIA obligation under UNCLOS, confirming its preventive function and characterisation as an obligation of due diligence. Against this background, Chapter IV addresses the BBNJ Agreement. It provides an overview of the BBNJ Agreement and examines EIA as a flag State responsibility under the BBNJ Agreement, with particular emphasis on the evaluative role of the flag State and the interaction between the EIA regime under the BBNJ Agreement and existing obligations under UNCLOS. In the end, Chapter V offers concluding remarks.

2 Flag State jurisdiction

This chapter establishes the jurisdictional and institutional foundations for the assessment of flag State obligations with respect to environmental protection in the ABNJ. The chapter first outlines the allocation of authority under UNCLOS, before examining how flag State jurisdiction - when read together with Part XII obligations - provides the jurisdictional basis for EIA of vessel-based activities. The chapter concludes by clarifying the role of the IMO as the competent international organisation through which these obligations are operationalised.

2.1 The United Nations Convention on the Law of the Sea ('UNCLOS')

When turning to consider the legal framework for flag State obligations, a natural starting point is UNCLOS. UNCLOS' important role in establishing a legal framework governing the oceans and maritime activities is widely acknowledged⁴³. UNCLOS, coming into force in 1994, is almost universal in its application, with 172 parties having ratified the treaty⁴⁴. While UNCLOS addresses a broad range of maritime issues, this thesis focuses on its provisions relating to the protection and preservation of the marine environment, particularly as they apply to activities on the high seas. While UNCLOS provides binding obligations in this respect, it is widely regarded as a framework convention rather than a self-contained regulatory regime, meaning that many of its provisions are written in general terms and are intended to be supplemented by subsequent agreements and general rules of international law⁴⁵.

UNCLOS divides the ocean into maritime zones, each governed by distinct legal regimes. Of relevance to this thesis are the ABNJ, in particular the high seas, which are defined as all parts of the sea not included in a State's internal waters, territorial sea, or exclusive economic zone. Since the high seas are characterised by the absence of territorial sovereignty⁴⁶, the responsibility for regulating environmentally relevant vessel-based activities is primarily channelled through flag State jurisdiction⁴⁷, making this the central jurisdictional basis for assessing environmental protection obligations, including EIA.

2.2 The high seas in UNCLOS

As set out in the introduction of this thesis, UNCLOS defines the high seas as "*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State*"⁴⁸. Activities in the ABNJ are governed by Part VII of UNCLOS. Declaring the fundamental principle of the freedom of the high seas, Article 87 occupies a central place within UNCLOS. It affirms that the high seas are open to all States, a principle further reinforced by Article 89, which establishes that no State can subject any part of the high seas to its sovereignty. The high seas have been referred to as having "*a somewhat anomalous status in an international system based*

⁴³ Ibid n29, page 245

⁴⁴ United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), 'Chronological lists of ratifications, accessions and successions to the United Nations Convention on the Law of the Sea' https://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm accessed 10.05.2026.

⁴⁵ Morten Ruud and Geir Ulfstein, 'Innføring i folkerett' (2011), 4th edition, *Universitetsforlaget*, page 66

⁴⁶ Article 89 UNCLOS

⁴⁷ Article 92(1) UNCLOS

⁴⁸ Article 86(1) UNCLOS

on territorial States”⁴⁹. Because no State may claim sovereignty over the high seas, they sit uneasily within an international legal system otherwise structured around territorial control. Guilfoyle further explains that this absence of sovereignty can be viewed either positively, as creating a shared global space governed collectively by international law, or negatively, giving the impression of regulatory gaps even though legal obligations exist and operate through different, non-territorial mechanisms such as flag State jurisdiction and due diligence⁵⁰. Guilfoyle ultimately argues that the ABNJ is not “*an unregulated legal vacuum*”⁵¹, illustrating that environmental protection in these areas is primarily pursued through existing legal mechanisms, including procedural obligations such as EIAs, which are given effect through the exercise of flag State jurisdiction.

The freedoms that Article 87 sets out are the cornerstone of the open access to international waters that allows all States to conduct maritime activities uninterrupted. The wording “*inter alia*” from Article 87(1) indicates that the provision does not provide an exhaustive list of freedoms. At the same time, the second sentence makes it clear that the freedoms are exercised under the conditions laid down by UNCLOS and other rules of international law. The freedoms of the high seas are to be exercised in accordance with Article 87(2), which requires “*due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities*”⁵² in the high seas. The interpretation of the general duty of “*due regard*” will not be discussed further during this thesis, but the wording reflects the general and open-textured language found in several of UNCLOS’ provisions. It has been argued that this open-textured language in UNCLOS is partly a reflection of the “*scope, procedure and complexity of the negotiations*”⁵³ that ultimately led to the adoption of UNCLOS⁵⁴. The reference to due regard is used here to illustrate how UNCLOS frames high seas freedoms as qualified and relational, an approach that later finds more concrete expression in UNCLOS’ environmental due diligence obligations.

The freedom of the high seas, most importantly for the purposes of this thesis, includes the freedom of navigation on the high seas for all States⁵⁵. Ships are permitted to travel through international waters, enabling global trade. The main rule on the high seas is that of flag State jurisdiction, entailing that a State Party does not have the right to enforce their national legislation on ships flying under the flag of another State⁵⁶.

It has been argued that Article 87(2) of UNCLOS, when read together with the environmental protection obligations set out in Part XII, conditions the exercise of high seas freedoms by requiring States to have due regard for their obligations to protect and preserve the marine environment⁵⁷. In this way, and in accordance with Article 194(2), State Parties must ensure that activities under their control or jurisdiction do not cause pollution spreading beyond areas of which that State exercises sovereign rights⁵⁸. On this view, a link is emerging between Article 87 and Article 194 in the balancing of the freedoms enjoyed by States on the high

⁴⁹ Douglas Guilfoyle, ‘The Oxford Handbook of the Law of the Sea’ (2016) *Oxford Handbooks*, chapter 10, page 204

⁵⁰ Ibid n49

⁵¹ Ibid n49

⁵² Article 87(2) UNCLOS

⁵³ Julia Gaunce, ‘On the Interpretation of the General Duty of ‘Due Regard’ (March 2017) *Ocean Yearbook* 32, (Leiden, Brill Nijhoff, 2018), page 1

⁵⁴ Ibid n53

⁵⁵ Article 87(1)(a) UNCLOS

⁵⁶ Article 91(1) UNCLOS

⁵⁷ Alla Pozdnakova, ‘The High Seas Treaty and Shipping’ (2023), 570 *MarLus*, page 32

⁵⁸ Article 194(2) UNCLOS

seas and their responsibilities to protect the marine environment. States are granted freedoms enabling activities on the high seas under Article 87, but the due diligence obligation from Article 194 requires that those activities are conducted with due regard for the protection of the marine environment. This balance is important, as it allows for the use of the high seas while ensuring that activities do not compromise the marine environment. This understanding was reaffirmed by ITLOS in its 2024 Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (*'COSIS Advisory opinion'*)⁵⁹, in which ITLOS affirmed that the general obligation to protect and preserve the marine environment under Article 192 UNCLOS has a broad scope⁶⁰.

Article 94 of UNCLOS concerns the jurisdiction of flag States and says that flag States are obliged to ensure that vessels under their flag comply with international regulations such as for the maintenance of vessels, maritime safety, and environmental protection. Flag States must both adopt and enforce regulations aligning with the international standards for maritime safety and environmental protection, such as measures to prevent pollution from ships and ensuring the proper maintenance and operation of ships. To achieve this, the flag State is required to “assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship”⁶¹, and Article 94(2)(a) further explains that exercising jurisdiction and control specifically includes that the flag States maintain a register of ships flying their flag.

For the purposes of this thesis, the above entails that flag States are to exercise due diligence through regulation and enforcement to secure compliance by vessels sailing under their flag with relevant pollution and environmental protection rules⁶². In practical terms, this requires the flag State to exercise due diligence in its regulation of vessel-source pollution in accordance with Article 211 of UNCLOS, and, where relevant, conducting assessment of potential impacts under Article 206 for activities under its jurisdiction or control. Article 206 says that:

*“When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.”*⁶³

The article has several qualifications, that perhaps have played a part in the limited prominence of EIAs for shipping activities seen so far. The first part of Article 206 contains the wording “reasonable grounds for believing”⁶⁴, indicating an objective standard for the determination of this part of the threshold triggering the requirement of an EIA. The Tribunal in the COSIS Advisory Opinion noted that “the arbitral tribunal in the South China Sea Arbitration observed that the ‘terms ‘reasonable’ and ‘as far as practicable’ contain an element of discretion for the State concerned”⁶⁵, but concludes that the precautionary approach restricts the discretion as the State Party must make an objective determination of whether the activity

⁵⁹ Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (COSIS) (ITLOS Advisory Opinion, 21 May 2024) (Case No 31), <https://www.itlos.org/cases/list-of-cases/case-no-31/> accessed 10.05.2026

⁶⁰ Ibid n59, paragraph 385

⁶¹ Article 94(2)(b) UNCLOS

⁶² Article 94 UNCLOS

⁶³ Article 206 UNCLOS

⁶⁴ Article 206 UNCLOS

⁶⁵ Ibid n59, paragraph 361

under its jurisdiction or control “*may cause substantial pollution of or significant and harmful changes to the marine environment*”⁶⁶.

The next qualification to trigger the obligation to conduct an EIA under Article 206 is that the planned activity must be under the State Party’s “*jurisdiction or control*”⁶⁷. The Tribunal in the COSIS Advisory Opinion pointed out that the concept of jurisdiction or control is broad and that it, among other scenarios, may also encompass activities carried out in areas in which a State can exercise its competence or authority, such as activities carried out by ships flying under the flag of a flag State⁶⁸. When addressing the subsequent qualification, namely that the activity may cause “*substantial pollution of or significant and harmful changes to the marine environment*”⁶⁹, the Tribunal in the COSIS Advisory Opinion held the view that the inclusion of the word “*or*” allows for two alternative thresholds for triggering the obligation to conduct an EIA - the first alternative is based on the wording “*substantial pollution*” while the second threshold is based on “*significant and harmful changes*”⁷⁰. Ultimately, the Tribunal highlighted that Article 206 does not outline the contents of an EIA nor a specific procedure, but that the wording “*as far as practicable*”⁷¹ (which comes into play after an activity has met the threshold triggering the requirement that a State conducts an EIA) appears to try to take account of the differing capabilities among states to conduct EIAs.

Considering the broad interpretation adopted by ITLOS in the COSIS Advisory Opinion, Article 206 is, at least in principle, capable of applying to certain ship-related activities. At the same time, the threshold-based and discretionary nature of Article 206, combined with the absence of any detailed procedural requirements, has raised questions as to how this general obligation operates in regulatory contexts where more specific regimes exist⁷². These questions are particularly relevant in relation to shipping, which is subject to a dedicated framework under Article 211, which concerns the prevention, reduction, and control of pollution from vessels and establishes a sector-specific regulatory framework for shipping. Flag States are required to adopt and enforce regulations to prevent pollution from ships flying under their flag or of their registry, and these regulations must be aligned with international standards⁷³. Article 211(1) also requires that States cooperate through the competent international organization, which is the IMO, for the development of these standards. Read in this context, Article 211(1) can be understood as shaping the way the general due diligence obligation from Article 206 is expected to be exercised in the shipping context, particularly in relation to vessel-source pollution regulated through the IMO. As Henriksen has noted, Articles 206 and 211(1) of UNCLOS reflect different regulatory logics which complicate the application of EIA obligations to shipping - Article 206 is directed at “*planned activities*” constituting identifiable environmental risks, a concept which, as Henriksen notes, does not ordinarily capture routine vessel operations⁷⁴. By contrast, Article 211(1) places vessel-source pollution within a sector-specific

⁶⁶ Ibid n59, paragraph 361

⁶⁷ Article 206 UNCLOS

⁶⁸ Ibid n59, paragraphs 247 and 360

⁶⁹ Article 206 UNCLOS; and ibid n59 paragraph 362

⁷⁰ Article 206 UNCLOS

⁷¹ Article 206 UNCLOS

⁷² Alla Pozdnakova, ‘The IMO and Treaties: Appraisal of the IMO’s Contribution to Future Ocean Governance’ (2024) in Laura Carballo Piñeiro and Máximo Q Mejia Jr (eds), *The Elgar Companion to the Law and Practice of the International Maritime Organization* (Edward Elgar Publishing 2024) 86–111, page 22

⁷³ Article 211 UNCLOS

⁷⁴ Tore Henriksen, ‘Regulating shipping under conditions of uncertainty: The Arctic Ocean and knowledge-based decision-making’ (2023) *Research Handbook on International Marine Environmental Law*. 2nd edition, page 5

framework through the IMO. In a similar vein, Pozdnakova observes that the existence of this specialised regime supports the argument that the general EIA obligation under Article 206 may arguably not extend to shipping, which is instead governed primarily through internationally agreed standards developed within the IMO framework⁷⁵. Together, these observations illustrate the different regulatory logics underpinning Articles 206 and 211(1), which has traditionally complicated the application of EIA obligations to shipping.

Viewed holistically, flag States comply with their obligations under UNCLOS by regulating, supervising, and enforcing pollution-related standards for vessels flying their flag, rather than by guaranteeing that no pollution will ever occur from their vessels operating on the high seas. When read together, these provisions illustrate how UNCLOS attempts to accommodate States' exercise of high seas freedoms while also imposing obligations aimed at the protection of the marine environment.

2.3 Flag State jurisdiction under UNCLOS

As a starting point, UNCLOS establishes exclusive flag State jurisdiction as the default rule governing vessels on the high seas⁷⁶. The concept of flag State jurisdiction constitutes a central jurisdictional link for the regulation of vessel-based activities on the high seas and in ABNJ. This means that vessels operating on the high seas are subject to the authority of the State whose flag they are entitled to fly, departing from it only in narrowly defined exceptions provided for in UNCLOS and certain other rules of international law⁷⁷. This way of allocating authority reflects foundational principles of the law of the sea, such as freedom of navigation and respect for State sovereignty⁷⁸. It is this exclusive jurisdictional link that provides the basis for imposing environmental assessment obligations on flag States for vessel-based activities in ABNJ.

The exclusive jurisdiction enjoyed by flag States is often premised on the understanding that the attribution of nationality puts the flag State in the optimal position to regulate and control its vessels⁷⁹. The granting of nationality, which is to be conditioned on the existence of a genuine link between the flag State and the vessel, establishes both a legal and administrative connection capable, in principle, of supporting effective regulatory oversight. Article 92 of UNCLOS reinforces the notion of exclusivity or supremacy of flag State jurisdictions through establishing that ships shall sail only under one flag⁸⁰. By conferring exclusive jurisdiction on the flag State, UNCLOS makes it clear that in ABNJ, the flag State bears the central role in governing vessel conduct, which includes ensuring compliance with international rules, and taking enforcement action where necessary⁸¹.

It is deemed important to emphasise that, under UNCLOS, flag State jurisdiction is not exclusively permissive. Rather, it is accompanied by a positive obligation requiring that the flag State exercises “*effective jurisdiction and control*”⁸² over the vessels that are flying its flag. By allocating jurisdiction and control over a vessel to its flag State, UNCLOS provides the juridical basis on which the flag State's international responsibility is engaged, particularly where the State Party fails to exercise due diligence in regulating and enforcing applicable obligations. In envi-

⁷⁵ Ibid n72, page 22

⁷⁶ Article 92(1) UNCLOS

⁷⁷ Articles 92(1) and 100-110 UNCLOS

⁷⁸ Articles 87 and 89 UNCLOS

⁷⁹ Ibid n57, page 33

⁸⁰ Article 92 UNCLOS

⁸¹ Article 92 UNCLOS

⁸² Article 94 UNCLOS

ronmental matters, this means that a flag State cannot simply claim jurisdiction as a formal right, but the flag State must use that jurisdiction to regulate, supervise, and control the conduct of vessels to prevent environmental harm⁸³.

While UNCLOS does not provide an explicit definition of a flag State⁸⁴, a starting point is Article 90's definition that "Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas"⁸⁵. Article 91(1) further establishes that a ship has the nationality of the State whose flag it is entitled to fly, and it requires each State to determine the conditions for granting its nationality to ships⁸⁶. This discretion placed upon the flag State is paired with the requirement that there must be a "genuine link between the State and the ship"⁸⁷. The requirement of a genuine link underscores that flag State jurisdiction is intended to be accompanied by substantive regulatory responsibility rather than being a purely formal registration, and it has also been argued to have been included as "a means of tackling the use of 'flags of convenience'"⁸⁸. UNCLOS does not define what constitutes a genuine link, and it has been the topic of many scholarly articles⁸⁹, but it can be argued to reflect an expectation that the attribution of nationality should support some sort of meaningful regulatory control by the flag State.

Although UNCLOS does not define what constitutes a ship, ITLOS has interpreted this concept broadly. In the case of *M/V Saiga (No 2)*⁹⁰, ITLOS held that "the ship, everything on it, and every person involved or interested in its operations"⁹¹ is a unit linked with the flag State. This interpretation has subsequently been confirmed in later jurisprudence⁹², and the expansive definition confirms that flag State jurisdiction attaches to the ship as a legal unit constituted through nationality, rather than solely to the geographic location of the vessel and its activities.

Flag State obligations are further reinforced by Part XII of UNCLOS, containing the responsibilities with respect to the environment. In Article 192, UNCLOS subjects all State Parties to an obligation to protect and preserve the marine environment⁹³. Article 194 requires State Parties to take all measures necessary to prevent, reduce, and control pollution of the marine environment from any source⁹⁴. Of particular relevance for the ABNJ is Article 194(2), which requires that State Parties ensure that activities under their "jurisdiction or control" are conducted so as not to cause damage by pollution to other States and their environment, and to prevent pollution from spreading beyond areas where they exercise sovereign rights⁹⁵. With regards to vessel-source pollution, Article 194(3)(b) underscores that measures must include those designed to minimise pollution from vessels, while

⁸³ Article 94(1) UNCLOS

⁸⁴ Nguyen, Lan Ngoc., 'Flag States' Rights and Obligations under the Law of the Sea' (2023), Cambridge University Press, Chapter 3.1, page 67

⁸⁵ Article 90 UNCLOS

⁸⁶ Article 91(1) UNCLOS

⁸⁷ Article 91(1) UNCLOS

⁸⁸ Richard Barnes, R., chapter 14 'Flag States' (June 2016) *The Oxford Handbook of the Law of the Sea*, Donald Rothwell (ed.) et al., page 306

⁸⁹ See Moira L McConnell, 'Business as Usual: An Evaluation of the 1986 United Nations Convention on the Conditions for Registration of Ships' (1987) 18 *Journal of Maritime Law and Commerce*, page 435; and see also Robin Churchill and Christopher Hedley, 'The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships' (International Transport Workers' Federation, 2000), <https://orca.cardiff.ac.uk/id/eprint/45062/1/ITF-Oct2000.pdf> accessed the 19.04.2026

⁹⁰ *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v Guinea) (Judgment)* ITLOS Reports 1999, paragraph 106

⁹¹ Ibid n90

⁹² See *M/V "Virginia G" Case (Panama v Guinea-Bissau) (Judgment)* (International Tribunal for the Law of the Sea, Case No 19, 14 April 2014), paragraph 120

⁹³ Article 192 UNCLOS

⁹⁴ Article 194 UNCLOS

⁹⁵ Article 194(2) UNCLOS

Article 211 requires States to adopt laws and regulations relating to vessel-source pollution that are at least as effective as “*generally accepted international rules and standards*”⁹⁶ formulated through IMO as the competent international organisation. Seen together, these provisions establish that flag State jurisdiction in the shipping context is expected to be exercised through domestic implementation and enforcement of internationally agreed standards.

In the context of international shipping, these obligations are most directly engaged in relation to vessel-source pollution. UNCLOS treats pollution from vessels as a distinct category of marine pollution, encompassing “*measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels*”⁹⁷. While UNCLOS does not elaborate technical discharge standards itself, it establishes the normative framework within which vessel-source pollution must be prevented, reduced, and controlled. Regulatory authority is accordingly channelled through generally accepted international rules and standards developed within the IMO. The International Convention for the Prevention of Pollution from Ships (‘MARPOL’)⁹⁸ constitutes the principal instrument through which these standards are operationalised, while Articles 211, and 217 of UNCLOS locate primary responsibility for their implementation, supervision, and enforcement with the flag State⁹⁹. UNCLOS further makes it clear that the flag State’s role is not limited to rulemaking but extends to enforcement. Article 217 requires flag States to ensure that vessels flying their flag comply with applicable international rules and standards for the prevention, reduction, and control of pollution from vessels¹⁰⁰. The combined effect of Articles 94, 211 and 217 is therefore that rules on vessel-source pollution are primarily overseen by the flag State, which has exclusive authority, and the flag State must control its vessels effectively and enforce the international standards.

2.4 Flag State obligations with respect to environmental protection and due diligence

While flag State jurisdiction provides the jurisdictional basis for regulating vessel-based activities on the high seas, the content of the obligations attaching to the flag State jurisdiction is further shaped by Part XII of UNCLOS. As seen earlier, Article 192 establishes a general obligation for all States to protect and preserve the marine environment¹⁰¹, while Article 194 requires States to take all necessary measures to prevent, reduce, and control pollution from any source¹⁰². Of relevance is Article 194(2), which requires that States must ensure that activities under their jurisdiction or control are conducted in a manner that does not cause pollution damage to other States or to ABNJ¹⁰³.

Importantly for the purposes of this thesis, the obligations under Part XII have been interpreted as obligations of due diligence rather than as obligations of

⁹⁶ Article 211 UNCLOS

⁹⁷ Article 194(3)(b) UNCLOS

⁹⁸ International Convention for the Prevention of Pollution from Ships (adopted 2 November 1973; entered into force 2 October 1983, London) 12 ILM 1319 (MARPOL)

⁹⁹ Articles 211 and 217 UNCLOS

¹⁰⁰ Article 217 UNCLOS

¹⁰¹ Article 192 UNCLOS

¹⁰² Article 194 UNCLOS

¹⁰³ Article 194(2) UNCLOS

results¹⁰⁴. Due diligence can be described as a standard of conduct, where compliance is not dependent on the outcome but on the efforts and the conduct of the State Party¹⁰⁵. As seen earlier, under Article 206 of UNCLOS, there is an obligation on State Parties to assess the potential effects of planned activities under their jurisdiction or control when they have “*reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment*”¹⁰⁶. While Article 206 defines (although arguably with open-textured language) when State Parties shall assess the potential effects of activities within their jurisdiction or control, it does not define the content or form of the assessment. The application of Article 206 does not guarantee that no harm will come to the environment from activities that have been subject to assessment by the relevant State Party, but it does ensure that State Parties make informed decisions when exercising their jurisdiction. Advisory opinions by ITLOS support such an understanding of the due diligence obligations under UNCLOS¹⁰⁷. In the SRFC Advisory Opinion, ITLOS emphasized that flag States must exercise due diligence to prevent harm to the environment, and it also placed emphasis on the need for a precautionary approach. In the SRFC Advisory Opinion it was stated that “*The flag State is under the “due diligence obligation” to take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag*”¹⁰⁸, which it could be argued would also apply to other activities by ships flying under the flag of a flag State. The due diligence obligation from UNCLOS requires flag States to regulate and enforce international standards to prevent activities that could harm the marine environment. For example, the obligation to prevent pollution from ships, ensuring the safe operation of ships¹⁰⁹, and conducting EIAs for activities that potentially could cause significant adverse impacts on the marine environment¹¹⁰.

Accordingly, within the UNCLOS framework, EIAs can be understood as one of the procedural mechanisms through which the due diligence obligations of flag States are operationalised in practice. While UNCLOS does not establish a self-contained EIA regime for shipping, international jurisprudence has been clear that there is an expectation that State Parties will assess environmental risks associated with activities under their jurisdiction or control¹¹¹. This provides the foundation for viewing later developments, particularly the EIA provisions of the BBNJ Agreement, as supplying further procedural content of the pre-existing obligations under UNCLOS.

2.5 IMO’s role as a competent organization under UNCLOS

As noted earlier in this thesis, the oceans are essential to facilitating global trade, which underpins effective supply chains and plays a central role in maritime security. Given the transboundary nature of maritime activities, the regulatory

¹⁰⁴ Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Advisory Opinion) ITLOS Rep 2011, para 110; *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Advisory Opinion) ITLOS Rep 2015, paras 125–129; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, paragraphs 187–197.

¹⁰⁵ Ibid n104

¹⁰⁶ Article 206 UNCLOS

¹⁰⁷ *Request for an Advisory Opinion Submitted by the Sub Regional Fisheries Commission* (Advisory Opinion) ITLOS Rep 2015

¹⁰⁸ Ibid n107, paragraph 129

¹⁰⁹ Article 194(3)(b) UNCLOS

¹¹⁰ Article 206 UNCLOS

¹¹¹ *South China Sea Arbitration* (Philippines v China) (Award) PCA Case No 2013-19, 12 July 2016, paragraphs 947–948

governance of the oceans is necessarily international in character¹¹². UNCLOS assigns a central role to the IMO, which functions as an important forum for the development of global rules and standards applicable to shipping¹¹³.

UNCLOS has been described as a framework convention, and it has been pointed out that it does not constitute a separate or self-contained legal regime¹¹⁴. Rather, UNCLOS is a treaty that operates within a larger legal system, and scholars have argued that “*The Convention was intended to have the flexibility to respond to change*”¹¹⁵. Change can take many forms, such as, for example, negotiated multilateral agreements like the BBNJ Agreement. While not departing from UNCLOS, it can be seen as an evolution and concretisation of the overarching obligations from UNCLOS. In addition to referencing general rules of general international law, UNCLOS also incorporates “*generally accepted international rules and standards established through the competent international organization*”¹¹⁶. The IMO is recognised in UNCLOS as “*the competent international organization*”¹¹⁷, establishing a structural link between UNCLOS and the IMO’s regulatory output. The reliance on generally accepted international rules and standards is not confined to regulation solely concerning shipping activities, but it is a representation of the broader legislative methodology employed across UNCLOS to constitutionalize duties while delegating their more technical elaboration to specialised international regimes¹¹⁸. At the same time, UNCLOS places significant responsibility on the States, requiring them to give effect to internationally agreed rules, standards, and recommended practices and procedures¹¹⁹ through the adoption of appropriate national laws and regulations.

Within the IMO framework, generally accepted international rules and standards relating to maritime safety, navigation, security, and the protection of the marine environment are articulated through a combination of binding conventions and non-binding instruments¹²⁰. These standards acquire legal significance under UNCLOS through their implementation at the national level, as States are required to give effect to them in the exercise of their jurisdiction and control over ships flying their flag, primarily through flag State jurisdiction¹²¹.

A key aspect of the IMO’s role as the competent international organization under UNCLOS concerns how the standards it develops come to be regarded as “*generally accepted international rules and standards*”¹²² for the purposes of flag State obligations. While UNCLOS itself does not define what level of acceptance is required to achieve general acceptance, the issue has received judicial attention, notably in the *South China Sea Arbitration*¹²³. In that case, the Tribunal was required

¹¹² Min Zhu and Linchi Qu, ‘Text classification of issues concerning implementation of IMO instruments based on deep bidirectional language representation model’ (11.12.2025) Discover Artificial Intelligence, Volume 6 article number 28 (2026), chapter 1

¹¹³ Article 211(1) UNCLOS

¹¹⁴ Alan Boyle, ‘Further Development of the Law of the Sea Convention: Mechanisms for Change’ (July 2005), *The International and Comparative Law Quarterly*, Oxford, Vol. 54 issue 4, page 565

¹¹⁵ Ibid n114, page 584

¹¹⁶ Article 211(2) UNCLOS

¹¹⁷ Articles 211, 217, and 233 UNCLOS

¹¹⁸ Robert Beckman, ‘IMO Seminar on Development of a Regulatory Framework for Maritime Autonomous Surface Ships (MASS)’ (September 2022) Centre for International Law National University of Singapore, https://wwwcdn.imo.org/localresources/en/OurWork/Safety/PublishingImages/Pages/MASS/04_Robert%20Beckman_The%20implication%20of%20MASS%20on%20the%201982%20United%20Nations%20Convention%20on%20the%20Law%20of%20the%20Sea.pdf accessed the 11.05.2026, pages 3 and 10

¹¹⁹ Article 207(1) UNCLOS

¹²⁰ Articles 94 and 211(2) UNCLOS

¹²¹ Articles 94(1)–(4) and 211(2) UNCLOS

¹²² Article 211(2)(5)(6c) UNCLOS

¹²³ Ibid n111, paragraphs 1038-1040

to interpret Article 94 in the context of flag State duties and examined whether the International Regulations for Preventing Collisions at Sea ('COLREGs'), as an instrument adopted under the IMO, satisfied UNCLOS' requirement of general acceptance. While an analysis of the threshold for general acceptance is not a focus of this thesis, the Tribunal's reasoning is deemed relevant for understanding how flag State obligations under UNCLOS can be attributed concrete content through international shipping standards. In the South China Sea Arbitration, the Tribunal placed emphasis not on COLREGs' formal status alone, but on their widespread adoption and consistent application in practice¹²⁴. The COLREGs apply to all vessels on the high seas, meaning a large majority of the world's merchant fleet¹²⁵. The Tribunal concluded that the COLREGs qualified as generally accepted rules and were incorporated into UNCLOS through Article 94 and were therefore legally binding on the parties¹²⁶. This reasoning suggests that general acceptance under UNCLOS does not depend on formal adoption alone, but also on recognition and consistent implementation.

The Tribunal's approach provides guidance on how and when IMO-developed standards could acquire normative force for the purposes of flag State obligations under UNCLOS. The BBNJ Agreement relies on flag State jurisdiction and control, and the intention is that the BBNJ Agreement shall operate in coordination with existing sectoral regimes. Because the BBNJ Agreement itself does not set detailed rules for ship operation on the high seas, flag States are likely to rely on IMO-developed standards. This interaction may also be shaped indirectly by the objectives of the BBNJ Agreement, as States that are simultaneously parties to the BBNJ Agreement and members of the IMO are under an obligation to promote the BBNJ objectives when participating in decision-making within other relevant sectoral bodies¹²⁷. The relevance of IMO standards may in turn depend on similar indicators of general acceptance as identified by the Tribunal in the *South China Sea Arbitration*.

¹²⁴ Ibid n111, paragraph 1081

¹²⁵ IMO, 'Convention on the International Regulations for Preventing Collisions at Sea 1972' <https://www.imo.org/en/about/conventions/pages/colreg.aspx> accessed the 20.04.2026, Rule 1

¹²⁶ Ibid n111, paragraph 1083

¹²⁷ Article 8(2) BBNJ Agreement

3 Environmental impact assessment ('EIA') in the law of the sea and international environmental law

3.1 The international legal basis for environmental impact assessment

EIAs have become an important cornerstone in international environmental law, and they are a formal process used to evaluate the potential environmental effects of a proposed project or activity before it is undertaken¹²⁸. EIAs play a central role in both international environmental law and the law of the sea, providing a framework through which States assess and manage the environmental consequences of activities under their jurisdiction or control. The role of EIAs is not to directly ban environmentally risky activities, and to that extent, the obligation to conduct EIAs does not prescribe specific environmental outcomes to be achieved. The purpose of conducting EIAs is to enable informed decision-making by States, so that the potential environmental consequences of a proposed activity can be taken into consideration when the State considers whether and how to proceed with the activity. Such preventive and anticipatory functions are meant to enable State Parties to make decisions with important scientific awareness. Scholars have highlighted that the Court in the *Pulp Mills* case endorsed the view that conducting an “EIA is a necessary element of the general obligation of due diligence in the prevention and control of transboundary harm”¹²⁹. Against this background, and in the context of an analysis of flag State obligations with respect to marine biodiversity, EIAs can be understood as a manifestation of the due diligence required of flag States.

It is worth noting that EIAs have been incorporated into national law in many jurisdictions, but this national dimension of EIAs falls outside the scope of this thesis, which solely focuses on the EIA obligations that form part of international public environmental law. It is difficult to define EIAs due to their multifaceted nature, and definitions can vary depending on the specific geographical, legal, and environmental context. EIAs comprise both procedural and substantive elements, and their complexity has given rise to extensive academic discussion - as a result, it remains difficult to formulate a single, universally accepted definition of EIAs in international law¹³⁰. Neil Craik writes that “... *international EIA commitments are reflective of a more general trend toward the use of a multiplicity of legal instruments that structure obligations between states, as well as involving sub-state and non-state actors*”¹³¹. Craik goes on to explain how EIAs are adaptable to various contexts and highlight that EIA commitments can be found in persuasive non-binding political declarations (soft law, such as the Rio Declaration¹³²) and formally binding instruments (hard law, such as the CBD)¹³³. Craik also points out that it is important to understand the rationale behind the adoption of the specific EIA commitments by

¹²⁸ Astrid Epiney, ‘Environmental Impact Assessment’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press) page 2, paragraph 1

¹²⁹ Alan Boyle, ‘Developments in International Law of Environmental Impact Assessment and their Relation to the Espoo Convention’ (paper presented at the *UNECE Seminar on Environmental Impact Assessment*, 2011), page 2

¹³⁰ Neil Craik, ‘The International Law of Environmental Impact Assessment’, Chapter 4, (2008) *Cambridge University Press*, *The International Law of Environmental Impact Assessment: Process, Substance and Integration*, page 88

¹³¹ *Ibid* n130

¹³² Rio Declaration on Environment and Development (*Rio Declaration*), adopted at Rio de Janeiro, 14 June 1992.

¹³³ *Ibid* n130

States and highlights that the presence or absence of EIA obligations in certain regimes “*is also informative of the kinds of environmental issues for which EIAs are seen to be relevant*”¹³⁴. This thesis therefore understands EIAs not as a uniform regulatory requirement, but as a flexible governance tool in contexts where there is environmental uncertainty and the risk of harm warrant enhanced procedural oversight.

The obligation on States to conduct EIAs originates from a combination of international treaties, customary international law, and national legislation. This chapter begins by introducing EIAs in international law, including their purpose, legal sources, and the principles underpinning their operation, before turning to the extent to which EIAs feature in relation to shipping activities. While EIAs are a well-established tool of environmental governance, they have thus far played a relatively limited role in the regulation of shipping, notwithstanding the existence of relevant obligations under international law. Against this background, the chapter examines the international legal framework governing EIAs before focusing specifically on flag State obligations under UNCLOS and relevant IMO instruments. Particular attention is paid to the relationship between Articles 206 and 211 of UNCLOS, as well as the role of Article 94, in shaping flag State responsibilities for the protection of the marine environment in ABNJ.

3.2 Environmental impact assessments outside of the UNCLOS regime

This thesis does not solely focus on EIAs, but it is deemed natural and necessary to start this chapter with an overview of the institutionalized EIA processes seen as relevant for a comprehensive understanding of a flag State’s responsibility with respect to marine biodiversity in the ABNJ. The international legal obligation to conduct EIAs reflects the recognition that environmental harm may extend beyond national borders and therefore requires anticipatory evaluation¹³⁵. EIA processes are adaptable to a wide range of contexts, and this adaptability makes it difficult to define international EIA obligations in a uniform manner, given the diversity of international instruments in which such obligations appear. As Craik observes, “*EIA commitments will not occur in a vacuum but will reflect general principles of international environmental law*”¹³⁶, a point that helps explain why EIA obligations have developed differently across international instruments and sectors.

EIAs are incorporated in legally binding international instruments such as the CBD and UNCLOS, but also under non-binding international instruments such as the Rio Declaration from 1992. Craik points out that the persuasive value of the different obligations or commitments varies based on the instruments¹³⁷, in addition to detailing that many treaty-based EIA obligations target specific environmental problems¹³⁸. Article 17 of the Rio Declaration of Environment and Development in 1992 set out that States were to undertake EIAs “*for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.*”¹³⁹ Irrespective of the fact that the Rio Declaration is not a legally binding instrument but rather a political declaration, it has been argued that the inclusion of Article 17 spoke of the relevance of the

¹³⁴ Ibid n130

¹³⁵ Ibid n104, Pulp Mills, paragraph 204

¹³⁶ Ibid n130

¹³⁷ Ibid n130

¹³⁸ Ibid n130, page 102

¹³⁹ Article 17 of the Rio Declaration (1992)

principle¹⁴⁰. This understanding aligns with Craik's argument that the "*prominence and consensus surrounding their adoption have a strong persuasive value*"¹⁴¹, reflecting the idea that the strength of EIA commitments derives not only from their formal legal status, but also from the level of agreement among States and the principles of environmental protection embodied.

Binding international obligations requiring States to conduct a type of EIA are contained in various international legal instruments. The 1972 *Stockholm Declaration*¹⁴² serves as the starting point for the present analysis of international obligations concerning the assessment of the environmental impacts of activities. Although the Stockholm Declaration did not include a direct obligation on States to conduct EIAs, it did recognize the importance of assessing the impacts of human activities on the environment and it created a framework for international cooperation regarding environmental matters. Developing countries raised concerns about the impact of EIA processes on the right to development during the negotiation of the Stockholm Declaration¹⁴³. In the end, the Stockholm Declaration contains a principle affirming the State's "*sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.*"¹⁴⁴. The principle highlights the obligation on States to prevent environmental harm arising from activities within their jurisdiction or control, including harm affecting the environment of other States and ABNJ, and it has played an important role in shaping the evolution of subsequent EIA obligations.

The next significant development in terms of the evolution of international EIA obligations is the *Espoo Convention on Environmental Impact Assessment in a Transboundary Context* ('Espoo Convention')¹⁴⁵ from 1991. The Espoo Convention highlights that harm to the environment tends to transcend national borders and defines EIAs as "*a national procedure for evaluating the likely impact of a proposed activity on the environment*"¹⁴⁶. A key feature of the Espoo Convention is that, through its use of the "*impact*"¹⁴⁷, it distinguishes itself from later EIA obligations. The Espoo Convention's application spans beyond a single/specific environmental problem, qualified by the requirement that the problem must have a transboundary effect. While the provision allows for an application across a variety of environmental problems, some has argued that the wording is so ambiguous as to lack a substantive obligation.¹⁴⁸ Craik goes on to point out that "*divorcing the duty to prevent transboundary harm from liability does not rob the provision of its prescriptive force*"¹⁴⁹, where he is understood as reading the Espoo Convention as a preventive instrument, rather than one aimed at attaching liability for harm that has already occurred. To ensure that all States uphold their responsibilities of notification and consultation, the Espoo Convention sets out minimum requirements through specific requirements. Article 2(1) says that "*The Parties shall, either individually*

¹⁴⁰ Elisa Ruozzi, "The Obligation to Undertake an Environmental Assessment in the Jurisprudence of the ICJ: A Principle in Search of Autonomy" (2017) European Journal of Risk Regulation, vol. 8 issue 1

¹⁴¹ Ibid n130

¹⁴² Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, 16 June 1972 (*Stockholm Declaration*).

¹⁴³ Ibid n130, page 91

¹⁴⁴ Principle 21 Stockholm Declaration

¹⁴⁵ Convention on Environmental Impact Assessment in a Transboundary Context (adopted 25 February 1991, entered into force 10 September 1997, Espoo) 1989 UNTS 309 (*Espoo Convention*)

¹⁴⁶ Article 1 Espoo Convention

¹⁴⁷ Article 2(1) Espoo Convention

¹⁴⁸ Ibid n130, page 103, referencing John Knox "The Myth and Reality of Transboundary Environmental Impact Assessment" (2002) 96 AJIL 291 at 305.

¹⁴⁹ Ibid n130

or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”¹⁵⁰. Through its references to “proposed activities” and to measures aimed at “prevention, reduction, and control”, the Espoo Convention’s forward-looking and preventive orientation is underscored, while its focus on “significant adverse transboundary environmental impact” confirms the broad application across different categories of activities where a risk of transboundary harm exists¹⁵¹.

The adoption of the *Rio Declaration* marked another important step in the development of international environmental law, notably through its articulation of the principle of sustainable development. Although the Rio Declaration does not impose a legally binding obligation on States to conduct EIAs, Principle 17 affirms the importance of undertaking national EIAs and underscores their role in promoting sustainable development. Subsequent developments in the international legal framework for EIAs include the CBD. While the CBD does not explicitly require the conduct of EIAs as such, it encourages States Parties to integrate considerations relating to biodiversity conservation and sustainable use into environmental assessment processes¹⁵².

Another development came with the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (‘Aarhus Convention’)¹⁵³. However, since its main contribution stems from strengthening procedural rights relating to access to information, public participation, and access to justice, rather than in shaping the substantive content of EIA obligations or flag State responsibilities, it falls outside the core focus of this thesis. But the Aarhus Convention complements the requirement from the Espoo Convention through its focus on informing the public of proposed projects where there is a potential for a large impact on the environment and including public participation¹⁵⁴. A final development deemed worth mentioning, is the Paris Agreement (Paris Agreement on Climate Change) 2015¹⁵⁵. The Paris Agreement, adopted under the United Nations Framework Convention on Climate Change (‘UNFCCC’)¹⁵⁶, brought about another layer of international legal obligations that can be argued to illustrate the importance of EIAs. While the Paris Agreement does not address EIAs directly, its emphasis on mitigation and emissions reduction has contributed to an increased focus at the national level on evaluating the climate implications of proposed activities, which in turn is important to enable informed decision-making by States¹⁵⁷.

This section concludes with the acknowledgement of the role of customary international law in the development of EIA obligations, primarily through the jurisprudence of the International Court of Justice (‘ICJ’). Through its case law, the ICJ has clarified that the obligation to conduct an EIA forms part of States’ due-diligence obligations to prevent significant transboundary environmental harm¹⁵⁸. However, the present thesis does not engage in a detailed analysis of the judicial

¹⁵⁰ Article 2(1) Espoo Convention

¹⁵¹ Article 2(1) Espoo Convention

¹⁵² Article 14(1)(a)-(b) CBD

¹⁵³ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001, Aarhus) 2161 UNTS 447 (*Aarhus Convention*)

¹⁵⁴ Articles 1, 4-9 Aarhus Convention

¹⁵⁵ Paris Agreement to the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79 (*Paris Agreement*)

¹⁵⁶ United Nations Framework Convention on Climate Change, adopted at New York, 9 May 1992 (UNFCCC)

¹⁵⁷ Articles 2, 4 and 9 Paris Agreement, where adaptation is a core objective.

¹⁵⁸ See *Gabčíkovo–Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7 (25 September 1997), and *Pulp Mills* case.

interpretation arising from these cases, given its focus on flag State obligations in relation to marine biodiversity in the ABNJ. Nonetheless, it has been demonstrated that the concept of EIA has evolved over recent decades through a combination of international instruments and judicial interpretation, developing from broadly framed environmental principles into more concrete procedural obligations for States. The increasing incorporation of biodiversity and climate-related considerations reflects a growing recognition of the need to assess long-term and transboundary environmental impacts already at the planning stage. When seen together, these developments indicate that the obligation on States to assess environmental impacts prior to authorising major projects or activities is now a widely recognised element of international environmental law, reflecting a broader commitment to environmental protection and sustainable development.

3.3 Environmental impact assessment under the UNCLOS regime

As detailed earlier in this chapter, EIAs are an important tool across a range of industries. However, it has been highlighted that the holistic assessment of environmental impacts in shipping has remained limited, reflecting the sector's highly international and mobile nature and the fact that its environmental regulation has largely developed reactively through protracted IMO standard-setting processes¹⁵⁹. As environmental concerns related to shipping continue to develop, the importance of EIAs in the sector is likely to increase as a means of addressing its environmental footprint. This chapter explores the current role of EIA in shipping, focusing on the relevant international legal sources and corresponding obligations of flag States.

As established earlier, the shipping industry plays a central role in global trade through its facilitative role enabling the movement of goods across the oceans. At the same time, shipping activities pose a range of environmental risks, including ballast water discharge, underwater noise, and oil pollution. EIA can be an important tool to aid flag States in identifying environmental risks stemming from shipping activities and to develop appropriate mitigation measures, thereby contributing to the promotion of more sustainable maritime practices.

Earlier discussion in this thesis has demonstrated that UNCLOS requires States to assess the potential effects of activities under their jurisdiction or control where there are reasonable grounds for believing that such activities may cause substantial pollution of, or significant and harmful changes to, the marine environment, including pollution from vessels¹⁶⁰. For shipping activities, regulatory competence has primarily been exercised through the IMO, which has developed an extensive framework of technical standards aimed at preventing and controlling vessel-source pollution. However, notwithstanding the breadth of instruments such as MARPOL, the IMO has not formulated a comprehensive EIA regime applicable to shipping as a sector. This regulatory gap has become increasingly relevant in light of the BBNJ Agreement, which operationalises UNCLOS obligations on EIAs for activities in ABNJ, while simultaneously requiring that its implementation do not undermine the mandates of relevant international sectoral bodies such as the IMO¹⁶¹. The absence of a dedicated IMO EIA framework for shipping can raise the question as to whether existing IMO processes are sufficient to fulfil flag

¹⁵⁹ Jana Moldanová and others, 'Framework for the environmental impact assessment of operational shipping' (2021) 51(3) *Ambio* 754–769, page 754

¹⁶⁰ Article 206 UNCLOS

¹⁶¹ Youna L B Lyons, *EIAs under the BBNJ Agreement: Implications for Shipping* (ACOPS, CIL-NUS Workshop, 2024) slides 4–7 <https://cil.nus.edu.sg/wp-content/uploads/2024/12/Session-4-EIA-and-BBNJ-Y-Lyons.pdf>

States' due diligence obligations under Part XII of UNCLOS with respect to the environmental impacts of global shipping.

Before turning to the BBNJ Agreement in detail, it is useful to briefly address how its EIA provisions interact with existing international bodies, particularly the IMO. As discussed, the IMO has not developed a comprehensive EIA framework for shipping activities, beyond the general obligations binding its member States under UNCLOS. Under the VCLT, treaties neither impose obligations nor confer rights on third States without their consent, which also applies to international organizations¹⁶². This does not, however, preclude treaty rules from becoming binding on third States when they attain the status of customary international law¹⁶³. In the present context, this means that while the BBNJ Agreement does not impose EIA procedures on the IMO as an institution, State Parties to the BBNJ Agreement remain bound by its EIA obligations and must act consistently with them when participating in IMO processes and decision-making¹⁶⁴.

¹⁶² Article 34 VCLT

¹⁶³ Article 38 VCLT

¹⁶⁴ High Seas Alliance, 'How could the EIA provisions of the BBNJ Agreement apply to activities and existing bodies' (July 2021) <https://www.highseasalliance.org/wp-content/uploads/2021/07/FINAL-How-would-the-EIA-provisions-of-the-BBNJ-Treaty-apply-in-practice-7.8.21.pdf> accessed the 20.04.2026

4. The BBNJ Agreement

4.1 Introduction to the BBNJ Agreement

Following several years of negotiations, the BBNJ Agreement was adopted as a new international legally binding instrument (*ILBI*) under UNCLOS. The BBNJ Agreement is rooted in both the law of the sea and international environmental law¹⁶⁵, and the BBNJ Agreement has been referred to as a landmark instrument aimed at halting and reversing biodiversity loss in the ABNJ¹⁶⁶. As has been observed,

*“[t]he importance of an effective international treaty to protect and sustainably use marine life and ecosystems cannot be overestimated. The world’s oceans, with their multiple functions, are critical not only to humanity’s wellbeing, but, furthermore, to its survival.”*¹⁶⁷

The BBNJ Agreement has also been referred to as “*the most important ocean agreement to be adopted in more than a quarter century*”¹⁶⁸. This view is compelling, given that the BBNJ Agreement constitutes the first comprehensive, legally binding framework specifically designed to safeguard marine biodiversity in ABNJ, addressing longstanding gaps resulting from a fragmented and sector-based international regulatory landscape.

The BBNJ Agreement, as explained earlier in this thesis, has an extensive scope seeking to ensure the conservation and sustainable use of marine biodiversity in ABNJ. While UNCLOS establishes important general obligations and sector-specific regimes applicable also in ABNJ, it does not provide a comprehensive and integrated framework specifically dedicated to the conservation and sustainable use of marine biodiversity in ABNJ, a gap which the BBNJ Agreement seeks to address. Bodansky characterises the BBNJ Agreement’s coupling of “*conservation*” and “*sustainable use*” as reflecting its overarching attempt to integrate environmental protection with developmental considerations¹⁶⁹. Although the BBNJ Agreement is the first global, legally binding framework specifically for this purpose, it operates alongside a range of existing multilateral and bilateral agreements targeting specific activities and sectors in ABNJ, which, given the thesis’ focus and scope, will not be examined further. This chapter concentrates on the scope of the BBNJ Agreement and the EIA obligation it places upon States with respect to marine biodiversity in ABNJ.

The BBNJ Agreement entered into force on 17 January 2026, following its 60th ratification. The BBNJ Agreement was open for signatures from all States and regional integration organizations between 20 September 2023 and 20 September 2025. On the 19th of September 2025, the BBNJ Agreement reached the threshold of sixty ratifications, approvals, acceptances, or accessions that was needed for it to enter into force¹⁷⁰, and 120 days later the BBNJ Agreement entered into force, and it now constitutes a legally binding framework.

¹⁶⁵ Daniel Bodansky., ‘Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement’ (12.03.2024) *Cambridge University Press*

¹⁶⁶ UN Sustainable Development Goals, ‘Fast Facts – Marine Biodiversity: Landmark Agreement Adopted’ (2023) <https://www.un.org/sustainabledevelopment/blog/2023/08/marine-biodiversity-landmark-agreement-adopted/> accessed the 30.04.2025

¹⁶⁷ Asterios Tsioumanis, ‘UN Marine Negotiations: The Third Intergovernmental Conference and Future Prospects for the Ocean Negotiations’ (2020), *Environmental Policy and Law*, Volume 50, Issue 3, pages 201-206

¹⁶⁸ *Ibid* n165

¹⁶⁹ *Ibid* n165, page 306

¹⁷⁰ 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, entered into force 17 January 2026, New York) (*BBNJ Agreement*)

The BBNJ Agreement has been described as essentially representing “*four treaties in one*”¹⁷¹, a characterization that can be argued to accurately its structural complexity as well as its ambitious scope. Indeed, it has been argued that each of the Agreement’s four thematic areas could have formed the basis of a standalone treaty in its own right¹⁷². The BBNJ Agreement is split into four thematic areas: 1) marine genetic resources including the fair and equitable sharing of benefits¹⁷³, 2) area-based management tools, including marine protected areas¹⁷⁴, 3) environmental impact assessments¹⁷⁵, and 4) capacity-building and the transfer of marine technology¹⁷⁶. The BBNJ Agreement establishes institutional mechanisms to support the implementation of the four thematic areas, each of which contains its own set of objectives, guiding principles, and obligations¹⁷⁷.

The general objective of the BBNJ Agreement, as found in its Article 2, is

*“to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term, through effective implementation of the relevant provisions of the Convention and further international cooperation and coordination.”*¹⁷⁸

This focus on “*long term protection, through effective implementation*”¹⁷⁹ underscores the preventive orientation of the BBNJ Agreement, in which EIAs are a central mechanism for addressing potential risks to marine biodiversity before they materialise. It is within this preventive framework that EIAs under the BBNJ Agreement assume particular relevance, as discussed in the following section.

4.2 EIA as a flag State responsibility under the BBNJ Agreement

4.2.1 The flag State’s EIA obligation under the BBNJ Agreement

This part of the thesis proceeds on the basis that the EIA regime established under the BBNJ Agreement is best understood as an operational development of the general obligation from Article 206 UNCLOS. As Warwick and Craik observe, Article 27 of the BBNJ Agreement plays an important role by articulating the objectives that underpin the EIA regime, affirming its aim to operationalise Articles 204-206 of UNCLOS through clearer processes, thresholds, and procedural requirements¹⁸⁰. Articles 27(a) and 27(b) of the BBNJ Agreement link EIAs to State due diligence by framing it as a preventive and evaluative mechanism through which Parties give effect to their obligations of due diligence in respect of activities under their jurisdiction or control that may affect marine biodiversity in ABNJ, a linkage that is subsequently further operationalised through the EIA obligation set out in Article 28. While Article 27 presents the EIA regime under the BBNJ Agreement as giving effect to existing UNCLOS obligations, Warwick and Craik argue that Part IV of the BBNJ Agreement substantively advances beyond Article 206 of UNCLOS by addressing its reliance on subjective and qualified standards through the establish-

¹⁷¹ Ibid n165

¹⁷² Ibid n165

¹⁷³ Part II BBNJ Agreement

¹⁷⁴ Part IV BBNJ Agreement

¹⁷⁵ Part III BBNJ Agreement

¹⁷⁶ Part V BBNJ Agreement

¹⁷⁷ Ibid n165

¹⁷⁸ Article 2 BBNJ Agreement

¹⁷⁹ Article 2 BBNJ Agreement

¹⁸⁰ Ibid n30

ment of more detailed and enforceable procedural requirements¹⁸¹. Within this framework, the BBNJ Agreement elaborates the procedural elements of the EIA obligation and emphasises the evaluative role of Parties in determining when potential environmental impacts trigger the obligation to carry out an EIA.

Part IV of the BBNJ Agreement specifies how States are to give effect to their assessment obligation in practice, and it structures the process into successive steps of assessment, consultation, determination, and follow-up, thereby making the more broadly framed duty under UNCLOS¹⁸² to conduct EIAs into a more concrete process. An EIA is defined by Article 1(7) as “a process to identify and evaluate the potential impacts of an activity to inform decision-making”¹⁸³. Tanaka observes that the BBNJ Agreement gives rise to obligations in respect of three forms of environmental assessment, namely, an EIA for activities in ABNJ under Article 28(1), a transboundary EIA under Article 28(2), and the obligation to consider conducting strategic environmental assessments (‘SEAs’) under Article 39(1)¹⁸⁴. For the purposes of this thesis, the analysis is confined to the obligation under Article 28(1).

Article 28(1) of the BBNJ Agreement provides that “Parties shall ensure that the potential impacts on the marine environment of planned activities under their jurisdiction or control that take place in areas beyond national jurisdiction are assessed as set out in this Part before they are authorized”¹⁸⁵. The use of the term “shall” makes it clear that Article 28(1) imposes a binding obligation on Parties, under which they are required to ensure that an EIA is undertaken before authorising a planned activity where the other conditions of the article are met.

The first condition set out is that the obligation is limited to planned activities, which emphasises the preventative objective of the BBNJ Agreement, as mentioned earlier in relation to Article 2. Secondly, the activity must fall within the Party’s jurisdiction or control, which anchors the duty to conduct an EIA in the existing State responsibility under the UNCLOS framework. Thirdly, Article 28(1) applies specifically to activities that take place in ABNJ, thereby distinguishing it from the obligation under Article 28(2), which concerns activities taking place within national jurisdiction, but where those activities may nevertheless cause substantial pollution of, or significant and harmful changes to, the marine environment in ABNJ¹⁸⁶. Lastly, the obligation to conduct an assessment is triggered where there is an activity that may affect the marine environment; the wording “potential impact” requires only that the activity may have an impact on the environment in ABNJ, which also reflects a precautionary and preventative approach. In this context, scientific uncertainty assumes particular importance for screening decisions, since the preventive logic underpinning due diligence would be undermined if uncertainty was consistently treated as a sufficient reason not to assess potential environmental impacts¹⁸⁷. Article 28 does not impose an obligation to achieve a particular environmental outcome, nor does it prescribe the form or content of the assessment. Rather, it requires that EIAs are used as a tool for informed decision-making by Parties, and it provides the foundation upon which the more detailed rules governing the implementation and coordination of EIAs in subsequent provisions, including Article 29, are built.

¹⁸¹ Ibid n30

¹⁸² Articles 206 and 211 UNCLOS

¹⁸³ Article 1(7) BBNJ Agreement

¹⁸⁴ Yoshifumi Tanaka, ‘Reflections on the Environmental Impact Assessment in the BBNJ Agreement: Its Implications for the Conservation of Biological Diversity in the Marine Arctic beyond National Jurisdiction’ (2024) 55(1–2) *Ocean Development & International Law* 85, page 95

¹⁸⁵ Article 28(1) BBNJ Agreement

¹⁸⁶ Article 28(2) BBNJ Agreement

¹⁸⁷ Ibid n129, page 3

Draft-stage commentary by the International Union for Conservation of Nature ('IUCN') on the article that later became Article 28 offers a perspective worth mentioning, which suggests that the BBNJ Agreement was conceived as operating under UNCLOS and in the context of existing obligations under the UNCLOS and customary international law such as *Pulp Mills*¹⁸⁸. While articulated from the perspective of an organisation advocating for an ambitious treaty outcome, this commentary may nonetheless be seen as offering a contextual indication of how the EIA obligation was conceived during the negotiations, and especially its emphasis on early assessment of potential environmental effects as a part of a preventative regulatory approach.

4.2.2 Institutional coherence in the EIA regime under the BBNJ Agreement

The BBNJ Agreement demonstrates a clear concern with institutional coherence through the inclusion of its relationship and non-undermining clause in Article 5. Pursuant to Article 5(1), the BBNJ Agreement must be interpreted and applied consistently with UNCLOS, while Article 5(2) requires that the BBNJ Agreement is interpreted and applied 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*"¹⁸⁹. As an implementing agreement adopted under UNCLOS, the existing rights and obligations of Parties are explicitly preserved, and Article 5 establishes that the provisions of the BBNJ Agreement shall not undermine or conflict with other applicable legal obligations. Through its careful wording, the provision underscores the importance of coordination and coexistence with existing sectoral regimes such as the IMO, making it clear that the BBNJ Agreement is intended to complement, rather than displace, other competent legal frameworks and institutions. While the draft-stage commentary by the IUCN reflects an understanding of the BBNJ Agreement as complementing existing regimes¹⁹⁰, it has also been noted in the limited literature on the BBNJ Agreement that the precise meaning of the non-undermining clause remains uncertain, underscoring the interpretive flexibility inherent in its formulation¹⁹¹.

The inclusion of coordination in Article 5(2) underscores that the BBNJ Agreement cannot be applied in isolation, but must be read in its broader legal context, including UNCLOS, which relies on the regulatory competence of specialised international organisations. In the context of international shipping, that competence is exercised primarily through the IMO. Article 5 is carefully crafted to ensure that the BBNJ Agreement functions as an implementing instrument under UNCLOS, reflecting legal caution aimed at preventing duplication or conflict of obligations and at safeguarding against unintended legal consequences through structured interaction with other relevant frameworks and competent bodies. The operation of EIA obligations under the BBNJ Agreement must therefore be understood as situated within an ongoing and coordinated regulatory environment, rather than as isolated procedural acts detached from the wider law of the sea

¹⁸⁸ International Union for Conservation of Nature (IUCN) World Commission on Environmental Law, IUCN Commentary on the 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 (IUCN, 8 August 2022) 16–18 <https://iucn.org/sites/default/files/2022-08/igc5-iucn-commentary-on-bbnj-further-revised-draft.pdf> accessed 13.05.2026

¹⁸⁹ Article 5(2) BBNJ Agreement

¹⁹⁰ Ibid n188

¹⁹¹ Ekaterina Antsygina, 'Interpreting the Non-Undermining Clause of the BBNJ Agreement: Restrictive or Complementary Roles for the COP within RFMO Competences?' (2024) 28 Max Planck Yearbook of United Nations Law 46

framework. The terminology “*not undermine*” has been described scholarly as “*deliberately ambiguous*”¹⁹² but while also pointing out that Article 29 of the BBNJ Agreement provides additional guidance on how the “*not undermine*” obligation operates in relation to EIAs¹⁹³. From the perspective of this thesis, the ambiguity inherent in Article 5 makes the detailed analysis of Article 29 in the next part of this thesis especially important, as it represents one way in which the BBNJ Agreement seeks to translate general coordination objectives into a legal mechanism in the EIA context.

4.2.3 Article 29: Equivalence assessments as an expression of flag State due diligence

The relationship between the EIA regime under the BBNJ Agreement and existing assessment frameworks must be understood in light of the BBNJ Agreement’s provisions on interaction with other legal instruments and competent bodies. In this respect, Article 5 sets out the general non-undermining obligation, while Article 29 gives it concrete expression in the context of EIAs. Article 29 governs the relationship between the EIA obligations under the BBNJ Agreement and assessment procedures adopted under other relevant legal instruments and institutional frameworks, setting out when reliance on existing assessments is permissible. In doing so, it gives practical effect to the BBNJ Agreement’s non-undermining requirement in the context of EIAs.

Rather than functioning as an automatic exemption, Article 29 conditions such reliance on a reasoned determination that the existing assessment is functionally equivalent to the assessment required under Part IV of the BBNJ Agreement. In doing so, Article 29 situates evaluative judgment and due diligence at the centre of flag State responsibility for activities with potential impacts on marine biodiversity in ABNJ. This naturally leads to the question of how to assess equivalency between different assessment processes under different legal frameworks, the scope of State due diligence obligations, and the content of flag State responsibility in this context.

The first issue arising under Article 29 concerns when an environmental assessment undertaken under another legal instrument or framework may be considered as equivalent for the purposes of the EIA regime under the BBNJ Agreement. As mentioned earlier, Article 29 reflects an effort to avoid regulatory duplication by permitting reliance on existing frameworks, where they effectively address the relevant environmental risks, and accordingly adopts a standard of functional equivalence rather than formal identity¹⁹⁴. Article 29(4) provides that:

“4. It is not necessary to conduct a screening or an environmental impact assessment of a planned activity in areas beyond national jurisdiction, provided that the Party with jurisdiction or control over the planned activity determines:

(a) That the potential impacts of the planned activity or category of activity have been assessed in accordance with the requirements of other relevant legal instruments or frameworks or by relevant global, regional, subregional or sectoral bodies;

¹⁹² Karen N Scott, ‘Cold Cooperation: Reconciling the Biodiversity Beyond National Jurisdiction Agreement and the Antarctic Treaty System’ (2025) 74(3) International and Comparative Law Quarterly, page 590

¹⁹³ Ibid n192

¹⁹⁴ Nan Jiang, Jiahui Wang and Xin Pan, ‘Implementing the EIA Provisions of the BBNJ Agreement in the International Seabed Area: Obstacles and Recommendations’ (2026) 13 *Frontiers in Marine Science* 1801291, page 17

(b) *That:*

(i) *the assessment already undertaken for the planned activity is equivalent to the one required under this Part, and the results of the assessment are taken into account; or*

(ii) *the regulations or standards of the relevant legal instruments or frameworks or relevant global, regional, subregional or sectoral bodies arising from the assessment were designed to prevent, mitigate or manage potential impacts below the threshold for environmental impact assessments under this Part, and they have been complied with”*¹⁹⁵

From the wording of Article 29(4), the question is whether the applicable measures are capable, in practice, of preventing, mitigating, or managing environmental harm below the threshold triggering an EIA under BBNJ Agreement. Rather than focusing on formal characterisation or strict adherence to the procedural architecture of the EIA regime under the BBNJ Agreement, the emphasis is on functional comparability with the Part IV assessment and on the Party's consideration of its results. The EU, for example, has taken the view that implementation of the BBNJ Agreement would not impose additional burdens on its Member States due to the consistency with existing EU law and other international obligations¹⁹⁶, thereby reflecting an understanding of the BBNJ Agreement as systematising and coordinating existing assessment obligations rather than displacing them.

Article 29(4) establishes a conditional framework under which a Party can determine that a separate EIA under the BBNJ Agreement is not required, provided that the relevant requirements from Article 29(4) are met. Article 29(4) has been described as an ambiguous equivalence exception¹⁹⁷, and the difficulty with the equivalence exception lies in the fact that equivalence is not a binary concept but instead exists along a spectrum¹⁹⁸. Determining whether an existing process is equivalent therefore requires evaluative judgment as to alignment in purpose, scope, and effect. Equivalence in this case means being comparable in effect, not necessarily identical in form. Although developed in the context of seabed mining as an activity in the ABNJ, concerns have been raised about the absence of a clear equivalence standard and that independent oversight may enable unilateral State self-assessment and forum-shopping, potentially undermining the environmental integrity of the regime under the BBNJ Agreement¹⁹⁹. These broader coordination issues may also be relevant for other sectoral regimes subject to the EIA regime under the BBNJ Agreement, and similar concerns may arise as to how reliance on IMO-based regulatory and risk-assessment frameworks may satisfy the equivalence requirements of Article 29 in the shipping context.

In accordance with Article 31 of the VCLT, Article 29(4) must therefore be interpreted in good faith in light of the ordinary meaning of its terms and the object and purpose of the BBNJ Agreement. This interpretive framework therefore supports a reading of ‘*equivalence*’ that gives practical effect to both environmental

¹⁹⁵ Article 29(4) BBNJ Agreement

¹⁹⁶ European Commission, ‘Proposal for a Directive of the European Parliament and of the Council on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’ (24.04.2025) 2025/0090 (COD), page 3, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52025PC0173> accessed the 12.04.2026

¹⁹⁷ Neil Craik and Karen Scott.: ‘Environmental Impact Assessment under the Biodiversity Beyond National Jurisdiction Agreement and the Equivalence Exception’, *One Ocean Science Congress 2025*, conference paper (3–6 Jun 2025), OOS2025-713, <https://doi.org/10.5194/oos2025-713> accessed the 12.04.2026.

¹⁹⁸ Ibid n197

¹⁹⁹ Ibid n194, page 11

protection and regulatory coordination. Scholarly commentary has cautioned that an overly restrictive understanding of equivalence can result in a scenario where only assessment procedures that mirror the BBNJ Agreement's provision in almost all respects would qualify and that this can result in unnecessary duplication or inconsistent outcomes at risk of undermining the environmental objectives of the BBNJ Agreement²⁰⁰. On the other hand, an interpretation of equivalence that is too generous can end up making the EIA process under the BBNJ Agreement redundant²⁰¹, enabling reliance on prior assessments without sufficient scrutiny. The discussion now proceeds to address the conditions attached to the equivalence exception in Article 29(4). A comprehensive assessment of equivalence as an independent concept in the BBNJ Agreement is beyond the scope of this thesis but represents an area meriting more extensive analysis in future research.

Article 29(4) does not remove the obligation on Parties to assess the impacts on the environment simply because some form of assessment has already taken place under another legal regime. Article 29(4)(a) requires that Parties must determine that the potential impacts of the planned activity have already been assessed in accordance with the requirements of other relevant legal instruments, frameworks, or processes, such as under the EU Environmental Impact Assessment Directive (2011/92/EU, amended by 2014/52/EU). Article 29(4)(a) therefore has a gatekeeping function - while it does not in itself exempt a Party from conducting an EIA in accordance with the regime under the BBNJ Agreement, it conditions access to the exemption mechanism available through Article 29(4)(b).

If an assessment has taken place in accordance with the requirements of a relevant legal instrument or framework other than the BBNJ Agreement, then Article 29(4)(b) sets out two ways to exempt a Party from conducting a new EIA under the BBNJ Agreement. Under subparagraph (b)(i), the prior assessment is assessed to be equivalent to that required under Part IV of the BBNJ Agreement and its results have been taken into account²⁰². Under subparagraph (b)(ii) on the other hand, reliance is instead placed on regulations or standards arising from the prior assessment that has taken place, provided that the regulations or standards were designed to prevent, mitigate, or manage impacts from below the EIA threshold from the BBNJ Agreement and the regulations or standards have been complied with²⁰³. When read together, in principle, Article 29(4) permits reliance on substantively effective regimes while maintaining the BBNJ Agreement's EIA obligation as a backstop where they are insufficient – and Article 29 can also be understood to implicitly require States to undertake a sort of substantive benchmarking assessment of “*equivalence*” when having to determine whether reliance on an existing assessment is justified. Such a determination is not a procedural formality, but rather a determination of whether the existing assessment, benchmarked against the requirements and objectives of the BBNJ Agreement, is capable in substance and effect of meeting its environmental aims. A similar preventive understanding underpins the reasoning of the ICJ in the *Pulp Mills* case, in which the Court emphasised that the duty to assess environmental impacts arises once a potential risk of significant transboundary harm can be identified, and that such assessment must be carried out before a decision is made to authorise the activity²⁰⁴.

It can be argued that Article 29(4) reinforces, rather than relaxes, the State's due diligence obligation by transforming reliance on existing assessments from a permission into a responsibility. A Party that relies on an existing assessment without adequately examining its scope, quality, or effectiveness in addressing impacts on

²⁰⁰ Ibid n197

²⁰¹ Ibid n197

²⁰² Article 29(4)(b)(i) BBNJ Agreement

²⁰³ Article 29(4)(b)(ii) BBNJ Agreement

²⁰⁴ Ibid n104, *Pulp Mills*, paragraph 204

biodiversity in ABNJ risks falling short of its duty to ensure that activities under its jurisdiction or control are properly assessed. This thesis therefore finds that the equivalence determination required under Article 29 constitutes a central element of the due diligence owed by State Parties under the BBNJ Agreement and is of relevance for flag States in assessing activities carried out by vessels flying their flag in ABNJ. Where a State Party permits an activity to proceed without conducting a separate EIA under the BBNJ Agreement based on an existing assessment, due diligence is reflected in the way that the State Party has examined and come to the decision to support reliance on the existing assessment.

This argumentation is in line with how ITLOS defines due diligence as an obligation of conduct, not of result²⁰⁵. For the purposes of this thesis, with respect to marine biodiversity in the ABNJ, a flag State is therefore not subject to an obligation of result requiring it to guarantee that all activities carried out by vessels flying its flag fully comply with applicable environmental requirements. Rather, the flag State is required to exercise due diligence by taking reasonable and appropriate measures to ensure that potential impacts are properly identified and assessed before an activity is authorised. In the COSIS Advisory Opinion, ITLOS further confirms that “activities carried out on board ships or aircraft which are registered in a State may be considered activities under the jurisdiction of that State”²⁰⁶, thereby supporting the view that vessel-based activities in ABNJ can fall within the notion of “activities under their jurisdiction or control”²⁰⁷ as defined in Article 194(2) of UNCLOS. Article 29 accordingly functions as a conditional gateway rather than a blanket exemption, limiting State Party discretion by conditioning reliance on existing frameworks to a reasoned and defensible benchmarking of equivalence, rather than to the formal existence of prior regulatory processes.

This understanding gives rise to a further question: on what basis may a State Party legitimately rely on an environmental assessment conducted under another body/legal framework for the purposes of compliance with its EIA obligations under the BBNJ Agreement? The BBNJ Agreement does not specify which bodies’ assessments may be relied upon, nor does it provide guidance as to why reliance may be justified in some cases but not in others²⁰⁸. It is in this context that a capacity-based criterion has been mentioned as a relevant means of giving effect to the coordination logic from Article 5²⁰⁹. Scholarly commentary has suggested that the primary consideration when assessing an entity’s role within the BBNJ Agreement’s institutional framework should be its ability to meet the BBNJ Agreement’s objectives²¹⁰. In that sense, capacity is context-specific and depends on factors such as a body’s mandate and powers, its sectoral focus, its geographic reach, and its practical implementation record²¹¹. Accordingly, the BBNJ Agreement’s implications for existing organisations are difficult to generalise and it has been suggested that the interplay between the organizations might need to be assessed case by case²¹². Such a capacity-based approach is found to be persuasive: it offers a principled basis for differentiating among institutions, and as pointed out by Pozdnakova, it avoids assuming that all existing bodies are similarly situated²¹³.

²⁰⁵ Ibid n104, SRFC advisory, paragraphs 125-131

²⁰⁶ Ibid n59, paragraphs 247, 360–361

²⁰⁷ Article 194(2) UNCLOS

²⁰⁸ Article 29(4) BBNJ Agreement

²⁰⁹ Alla Pozdnakova, ‘The IMO and Treaties: Appraisal of the IMO’s Contribution to Future Ocean Governance’ in Laura Carballo Piñeiro and Máximo Q Mejía Jr (eds), *The Elgar Companion to the Law and Practice of the International Maritime Organization* (Edward Elgar Publishing 2024) 86, page 19

²¹⁰ Ibid n209

²¹¹ Ibid n209

²¹² Ibid n209

²¹³ Ibid n209

Read together with the non-undermining requirement in Article 5, this supports a model of interaction in which reliance on existing frameworks is neither automatic nor excluded in principle, but contingent on their demonstrated capacity to contribute meaningfully to the protection of marine biodiversity in ABNJ. In this sense, the EIA regime under the BBNJ Agreement operates as part of an integrated and coordinated regulatory environment, rather than as a self-contained procedural layer.

5 Conclusion

This thesis has examined the role of the flag State in protecting marine biodiversity on the high seas and in the ABNJ, using EIA as the primary lens. The thesis has demonstrated that the BBNJ Agreement operates within the existing jurisdictional framework of UNCLOS, without creating new or additional substantive environmental duties. Instead, the BBNJ Agreement clarifies and structures the procedural dimensions of the due diligence obligations already established under UNCLOS. As analysed in this thesis, international jurisprudence supports the view that flag States must regulate and oversee activities under their jurisdiction or control in a manner that is proportionate to the potential environmental risk, reinforcing that prevention is an important principle in international environmental law.

Within this framework, EIA functions as a key procedural expression of prevention. UNCLOS establishes the obligation on flag States to assess potential environmental effects where significant harm is foreseeable, but it leaves the content of such assessments largely open. In the shipping context, there has been reliance on sectoral standards, and while this sectoral approach has produced consistent technical standards, it has not traditionally prioritised activity-specific or area-specific assessments. This represents a potential limitation of the current sectoral regime in the shipping context, but it should perhaps be balanced against the risk that a narrowly framed, solely activity-by-activity approach also risks overlooking precisely the forms of harm that the BBNJ Agreement intends to prevent.

The BBNJ Agreement attempts to respond to the abovementioned limitations by strengthening the procedural structure, notably through enhanced screening requirements and the introduction of the equivalency mechanism. Given the continuing centrality of flag State jurisdiction on the high seas, this added procedural structure has the potential to raise assessment standards, enhance transparency, and support EIA as a meaningful component of due diligence rather than as a minimal formality. At the same time, the BBNJ Agreement is designed to operate in coordination with existing regimes rather than to replace them. This thesis supports the view that the BBNJ Agreement reinforces, rather than displaces, sectoral governance. EIA represents an important procedural tool for environmental protection, and future sectoral assessments undertaken within the IMO framework could prove appropriate and clearly preferable to the absence of assessment altogether. However, reliance on such assessments cannot be automatic: their relevance under the BBNJ Agreement framework must depend on whether they substantively engage with biodiversity-related risks in ABNJ, rather than merely satisfying formal procedural criteria.

The effectiveness of the procedural structure under the BBNJ Agreement will depend on how flag States apply screening and equivalency mechanisms in practice. This thesis takes the position that this balance is perhaps both the BBNJ Agreement's principal strength and its central vulnerability. Interpretations that are either too narrow or too permissive risk, respectively, regulatory overlap or weakening the preventive function that EIA is intended to serve – and by extension, environmental protection can become weakened. These challenges are further complicated by differences in flag State capacity, enforcement practices, and political will, particularly in a global shipping context that is characterised by open registries.

On the view adopted in this thesis, an increased focus on procedural requirements is valuable only insofar as it enhances the quality of decision-making; otherwise, it risks reducing EIA to a formal compliance exercise with limited substantive environmental effect. Against this backdrop, the thesis reaches a cautious but affirmative conclusion. The BBNJ Agreement holds genuine potential to strengthen flag State responsibilities for marine biodiversity protection in ABNJ

by clarifying the procedural content of due diligence and providing a safeguard where sectoral regulation falls short. Whether this potential is realised will depend not on the existence of legal obligations, but on their implementation by flag States – through domestic regulation, administrative decision-making, cooperation with existing institutions, and, crucially, the willingness of flag States to apply EIA rigorously where activities under their jurisdiction pose a risk to marine biodiversity on the high seas.

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