

ARTICLE

THE PARTICIPATION OF NON-STATE ACTORS  
IN THE BBNJ AGREEMENT'S AREA-BASED  
MANAGEMENT TOOLS REGIME:

SUCCESSSES AND ROADBLOCKS

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ABSTRACT

*The recently adopted BBNJ Agreement creates a multilateral framework for the establishment of Area-Based Management Tools (ABMTs) in marine areas beyond national jurisdiction. Part of the process for establishing ABMTs under the new Agreement is the consultation of non-State actors (NSAs). ABMTs such as marine protected areas can negatively impact various NSAs, such as Indigenous Peoples that may rely on fishing in ABMTs for subsistence or cultural practices. At the same time, NSAs possess unique knowledge that can be instrumental in the design and management of ABMTs. The Article explores the theoretical and practical justifications for involving NSAs in the ABMT process. Comparing the BBNJ Agreement's provisions to other international ABMT instruments, this article identifies what the Agreement adds (or fails to add) to the legal landscape of NSA participation in international marine conservation measures. The article then reflects on the practical challenges that may arise in the future implementation of those consultation provisions.*

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## ABBREVIATIONS

ABMT:	Area-based management tool
ABNJ:	Areas beyond national jurisdiction
APEI:	Areas of particular environmental interest
BBNJ:	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
CBD:	Convention on Biological Diversity
CCZ-EMP:	Clarion-Clipperton Zone Environmental Management Plan
COP:	Conference of Parties
ILO:	International Labour Organization
ISA:	International Seabed Authority
LMMA:	Locally Managed Marine Area
LTC:	Legal and Technical Commission (of the ISA)
MPA:	Marine protected area
NSA:	Non-State Actor
REMP:	Regional Environmental Management Plan
RFMO:	Regional fisheries management organization

UNDRIP:	United Nations Declaration on the Rights of Indigenous Peoples
UNEP:	UN Environment Programme

### I. INTRODUCTION

On June 19, 2023, UN member States adopted a “historic” pact to protect marine biodiversity in the high seas and the deep seabed:<sup>1</sup> 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” or the “Agreement”).<sup>2</sup> During the adoption of the Agreement, many States emphasized the crucial role of area-based management tools (ABMTs), to which one of the Agreement’s substantive parts is dedicated, in the conservation and sustainable use of marine biodiversity.<sup>3</sup>

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1. *See Nearly 70 Countries Sign Historic UN Treaty to Protect High Seas*, FRANCE24 (Sept. 20, 2023), <https://www.france24.com/en/live-news/20230920-high-seas-treaty-moves-closer-to-reality-with-first-signatures>; *UN Adopts First ‘Historic’ Treaty to Protect High Seas*, AL JAZEERA (June 19, 2023), <https://www.aljazeera.com/news/2023/6/19/un-adopts-historic-high-seas-treaty> [<https://perma.cc/8M6V-TXKH>].

2. Intergovernmental Conference on an International Legally Binding Instrument 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, 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, UN Doc. A/CONF.232/2023/4 (June 19, 2023) [hereinafter BBNJ Agreement], <https://documents-dds-ny.un.org/doc/UNDOC/LTD/N23/177/28/PDF/N2317728.pdf?OpenElement> [<https://perma.cc/E8P6-TEDY>].

3. *See* Intergovernmental Conference on an International Legally Binding Instrument 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, Compilation of Statements Made by Delegations under Item 5, “General exchange of views”, at the Further Resumed Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument 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, as submitted by 30 June 2023, UN Doc. A/CONF.232/2023/INF.5, at 8 (African Group), 32 (China), 69 (Federated States of Micronesia), 70 (Morocco), 74 (Norway), 71 (Nauru), 95 (South Africa), 100 (Thailand), 109 (Uganda), 113 (United States).

ABMTs can be defined as “regulations of human activity in a specified area to achieve conservation or sustainable resource management objectives.”<sup>4</sup> The establishment of an ABMT entails the identification and designation of a specific geographical area in the sea where certain activities, like fishing, shipping, or mining, are prohibited or restricted. Marine Protected Areas (MPAs) are a subset of ABMTs whose only objective is conservation.<sup>5</sup> MPAs can be “no-take areas” where fishing is prohibited across the board, or “multiple use areas” divided into different management zones with different restrictions on human activities.<sup>6</sup>

Various MPAs have been established within national jurisdictions under regional conventions for the protection of biodiversity such as the Barcelona Convention (covering the Mediterranean),<sup>7</sup> the Nairobi Convention (covering the Eastern African region),<sup>8</sup> and the Cartagena Convention (Wider Caribbean).<sup>9</sup> A few MPAs have been established in areas beyond national jurisdiction (ABNJ) as well, including two High Seas MPAs under the OSPAR Convention,<sup>10</sup> and thirteen “areas of

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4. INTERNATIONAL UNION ON THE CONSERVATION OF NATURE [IUCN], MEASURES SUCH AS AREA-BASED MANAGEMENT TOOLS, INCLUDING MARINE PROTECTED AREAS 1, 2, [https://www.un.org/depts/los/biodiversity/prepcom\\_files/area\\_based\\_management\\_tools.pdf](https://www.un.org/depts/los/biodiversity/prepcom_files/area_based_management_tools.pdf) [<https://perma.cc/93J7-W56L>].

5. The IUCN defines a protected area as “[a] clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.” *Id.* at 4.

6. Danielle Smith, *A Global Network of MPAs: an Important Tool in Addressing Climate Change*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, OCEANS AND COASTS 425, 429 (Jan McDonald et al. eds., 2020) [hereinafter RESEARCH HANDBOOK ON CLIMATE CHANGE].

7. *See* Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, June 10, 1995, 1999 O.J. (L 322) 3 [hereinafter the Protocol Concerning SPAs in the Mediterranean].

8. *See* Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region, June 19, 1985, 1986 O.J. (C 253) 10 [hereinafter Protocol Concerning Protected Areas in the Eastern African Region].

9. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Mar. 24, 1983, 1506 U.N.T.S. 158 [hereinafter Protocol Concerning SPAs in the Wider Caribbean Region].

10. The OSPAR maritime area encompasses extensive areas in the Wider Atlantic (OSPAR Region V) and the Arctic Waters (OSPAR Region I) that are beyond the limits of national Exclusive Economic Zones (EEZs). This Area Beyond National Jurisdiction

particular environmental interest” (APEIs), ABMTs established by the International Seabed Authority (ISA) where deep-sea mining is completely prohibited.<sup>11</sup> But the BBNJ Agreement would be the first multilateral treaty to create a comprehensive international framework for the designation of ABMTs in all ABNJ. By doing so, it could contribute to the UN Biodiversity Conference’s goal of having MPAs cover thirty percent of the ocean by 2030.<sup>12</sup>

ABMTs are typically established by States, and sometimes by intergovernmental organizations.<sup>13</sup> But ABMTs directly affect a wide range of non-State actors (NSAs),<sup>14</sup> in particular, Indigenous

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(ABNJ) covers approximately forty percent of the OSPAR maritime area. *MPAs in Areas Beyond National Jurisdiction*, OSPAR, <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction> [https://perma.cc/PPR5-BH6F] (last visited Apr. 18, 2024).

11. See International Seabed Authority Council [ISA Council], Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone, ¶ 6, ISBA/17/C/19 (July 21, 2011).

12. As of now, only an estimated 7.65% of the ocean is covered by MPAs. *MPA Congress to Chart Path to Protecting 30% of Global Ocean by 2030*, INT’L INST. FOR SUSTAINABLE DEV. [IISD] (Jan. 25, 2023), [https://sdg.iisd.org/news/mpa-congress-to-chart-path-to-protecting-30-of-global-ocean-by-2030/#:~:text=hunger%20and%20poverty,-.The%20world%27s%20leading%20ocean%20conservation%20professionals%20and%20high%20level%20officials,marine%20protected%20areas%20\(MPAs\)](https://sdg.iisd.org/news/mpa-congress-to-chart-path-to-protecting-30-of-global-ocean-by-2030/#:~:text=hunger%20and%20poverty,-.The%20world%27s%20leading%20ocean%20conservation%20professionals%20and%20high%20level%20officials,marine%20protected%20areas%20(MPAs)) [https://perma.cc/FEG2-PBAD].

13. For example, “Particularly Sensitive Sea Areas” (PSSAs), which are designated by the International Maritime Organization. See Int’l Maritime Organization, *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas*, Resolution A.982(24), at 4 (Feb. 6, 2006).

14. There is no authoritative definition of “non-State actors,” a term liberally used to describe all actors that are not sovereign States. Charles-Emmanuel Côté, *Non-state Actors, Changing Actors and Subjects of International Law*, in *CHANGING ACTORS IN INTERNATIONAL LAW* 1, 2 (Karen N. Scott et al. eds., 2020); INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON NON-STATE ACTORS ¶ 21, at 4 (2016) [hereinafter ILA Final Report on Non-State Actors]. This Article adopts the International Law Association’s definition of NSAs, i.e., actors that are neither States nor “bodies comprised of and governed or controlled by States or groups of States,” which therefore excludes intergovernmental organizations. ILA Final Report on Non-State Actors ¶ 18(a), at 4. The BBNJ Agreement does refer to “global, regional, subregional and sectoral bodies,” as “relevant stakeholders” in the ABMT section. See BBNJ Agreement, *supra* note 2, arts. 19(2), 21(2)(b). But the BBNJ provisions themselves distinguish between these organizations and the rest of actors that are not States, including in their participatory rights. See *id.* art. 21(2). This is notably because the Conference of Parties may take ABMT measures only if they are compatible with measures adopted by other international organizations or instruments, and may only propose, not impose, measures when they

Peoples and local communities that may rely on fishing in designated areas for subsistence or cultural practices. The shipping and fishing industries are also directly targeted by ABMT restrictions on their activities. Yet NSAs' formal participation in the process of establishing ABMTs has been inconsistent, and oftentimes nonexistent. Some conservation initiatives have been criticized for their lack of NSA participation, leading commentators to coin the term "ocean grabbing" for MPAs that infringe on local populations' rights and sometimes lead to their physical displacement.<sup>15</sup> Other NSAs like the scientific community and civil society organizations have played a key role in proposing and managing ABMTs, but mostly in informal and non-transparent ways.

As a result, many commentators agree that more formal involvement of NSAs in ocean governance is needed<sup>16</sup> not only to

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are within the competence of other organizations or instruments. *Id.* art. 22(1). Such other organizations have indeed the power of creating ABMTs or taking other legally binding conservation measures, which other non-State actors do not. The inclusion of intergovernmental organizations in the process therefore follows a different logic than the inclusion of other non-State actors, i.e., coordination and complementarity, rather than pure provision of information or views. Moreover, certain international organizations, i.e., regional economic integration organizations (such as the European Union) are allowed to become parties to the Agreement, which means they would have a voting power in par with that of State parties. *See id.* art. 66. Intergovernmental organizations' participation in the ABMT process differs both in magnitude and purpose, which, along with their separate law-making abilities, justifies IGOs' exclusion from the scope of this paper.

15. Nathan J. Bennett et al., *An Appeal for a Code of Conduct for Marine Conservation*, 81 MARINE POL'Y 411, 412 (2017).

16. *See, e.g.*, Bianca Haas et al., *The Future of Ocean Governance*, 32 REVS. IN FISH BIOLOGY FISHERIES 253, 256 (2022); Nathan J. Bennett & Philip Dearden, *Why Local People Do Not Support Conservation: Community Perceptions of Marine Protected Area Livelihood Impacts, Governance and Management in Thailand*, 44 MARINE POL'Y 107, 114 (2014); Sue Farran, *Marine Protected Areas and Indigenous Rights*, in THE RIGHTS OF INDIGENOUS PEOPLES IN MARINE AREAS 319, 319 (Stephen Allen et al. eds., 2019); Convention on Biodiversity Subsidiary Body on Scientific, Technical and Technological Advice, Identifying Specific Elements for Integrating the Traditional, Scientific, Technical and Technological Knowledge of Indigenous and Local Communities, and Social and Cultural Criteria and Other Aspects for the Application of Scientific Criteria for Identification of Ecologically or Biologically Significant Areas (EBSAs) as Well as the Establishment and Management of Marine Protected Areas, at 5, U.N. Doc. UNEP/CBD/SBSTTA/16/INF/10 (Apr. 3, 2012) [hereinafter UNEP/CBD/SBSTTA/16/INF/10] ("It has been long acknowledged that for conservation and management measures to be successful, they will require the early involvement of all stakeholders, as well as indigenous and local communities, in the design and management processes.").

prevent rights violations, but also for a host of regime-serving reasons. One reason is to obtain all the relevant knowledge and information necessary for optimal decision making. NSAs possess unique and specific knowledge, information, and perspectives that feed into the design and management of ABMTs: First, the scientific community possesses scientific knowledge. Second, conservation NGOs possess relevant data on species or ecosystems. Third, the private sector possesses technical capabilities. And finally, some Indigenous Peoples and local communities possess traditional knowledge about the ocean and migratory species. The participation of all these NSAs in the ABMT process would thus ensure that measures are taken on the basis of the best available information.<sup>17</sup>

Another reason for including NSAs in the establishment of conservation measures would be to ensure compliance and successful implementation.<sup>18</sup> Management is generally most effective when it involves actors whose daily lives depend on it, especially when those actors already have experience in conservation measures, as is the case for many Indigenous Peoples and local communities.<sup>19</sup> Moreover, NSA participation is more likely to lead to decisions that account for NSA interests, do not antagonize them or marginalize them, and that are thus more likely to be respected.<sup>20</sup>

The inclusion of NSAs in environmental measures and in international law-making more generally has also often been justified as a means of increasing the legitimacy or fairness of decisions or the broader legal system itself.<sup>21</sup> This rationale stems from the view that (democratic) legitimacy arises from deliberative decision making that accounts for the different

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17. See Irini Papanicolopulu & Armando Rocha, *Oceans, Climate Change and Non-State Actors*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, OCEANS AND COASTS, *supra* note 6, at 193, 197.

18. *See id.*

19. UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 6; Farran, *supra* note 16, at 340 (“Were [conservation] to be the primary concern, it would be a logical first consideration to consult with those who are closest to the sea and its resources, and who over decades and generations have experienced changes in the marine environments in which they live: Indigenous peoples and coastal communities.”).

20. Yuko Osakada, *Indigenous Peoples as Actors in International Law-Making: Focusing on International Environmental Law*, in CHANGING ACTORS IN INTERNATIONAL LAW, *supra* note 14, at 101.

21. Papanicolopulu & Rocha, *supra* note 17, at 197.

interests and perspectives of those subject to the norm.<sup>22</sup> In other words, a decision is more likely to be perceived as fair and legitimate if those who are affected by it have had a say in it. The increasing participation of NSAs is seen as a means to mitigate international law's "democratic deficit"<sup>23</sup> by giving a voice to the underrepresented<sup>24</sup> and "shorten[ing] the gap between those who make decisions and those who are affected by them."<sup>25</sup>

Ultimately, increasing legitimacy is linked to the goal of ensuring compliance. Research shows that the effectiveness of international regimes rests upon their legitimacy.<sup>26</sup> This applies to conservation management measures.<sup>27</sup> Local communities and other NSAs are more willing to comply if they are included in decision making.<sup>28</sup> Practically, local communities may complain about or challenge a measure they deem to be unjust or unlawful—including before human rights bodies—which may impede progress and implementation.<sup>29</sup>

The literature also notes that including NSAs in conservation decision making can educate local communities and raise public awareness of the benefits of conservation management.<sup>30</sup> Involving local communities in conservation management may also give them a sense of ownership and empower them, in turn

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22. STEVEN WHEATLEY, *THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW* 2 (2010).

23. Ruth Houghton, *A Puzzle for International Law: NGOs at the United Nations*, 2 *NEW ENG. L. REV.* 1, 2 (2014); Joy Twemlow, *Non-governmental Organisations and International Environmental Law: The Search for Legitimacy*, 1 *PUB. INT. L.J.N.Z.* 18, 29 (2014); WHEATLEY, *supra* note 22, at 85.

24. José L. Martí, *Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law*, in *OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW* 724, 742 (Jean d'Aspremont & Samantha Besson eds., 2017).

25. Papanicolupulu & Rocha *supra* note 17, at 197.

26. Elizabeth A. Kirk, *The Role of Non-State Actors in Treaty Regimes for the Protection of Marine Biodiversity*, in *RESEARCH HANDBOOK ON BIODIVERSITY AND LAW* 95, 122 (Michael Bowman et al. eds., 2016).

27. Bennett & Dearden, *supra* note 16, at 114.

28. Gustavo S. M. Andrade & Jonathan R. Rhodes, *Protected Areas and Local Communities: An Inevitable Partnership Toward Successful Conservation Strategies?*, *ECOLOGY & SOC'Y*, Dec. 2012; Alice B. M. Vadrot, *Experts, Scientific Knowledge for Ocean Protection*, in *ROUTLEDGE HANDBOOK OF MARINE GOVERNANCE AND GLOBAL ENVIRONMENTAL CHANGE* 87, 94 (Paul G. Harris ed., 2022); Bennett & Dearden, *supra* note 16, at 114; Kirk, *supra* note 26.

29. Bennett et al., *supra* note 15, at 412.

30. Haas et al., *supra* note 16, at 256, 261.

making them more protective of the resource to be managed.<sup>31</sup> Thus, this goal also can be folded under the umbrella of ensuring compliance and the success of conservation measures.

The participation of NSAs in marine conservation would also accord with a more general trend in environmental law. NSAs, such as Indigenous Peoples,<sup>32</sup> have participated in the development and implementation of environmental law, albeit in an ancillary and indirect way.<sup>33</sup> Ultimate decision-making power, however, is still in the hands of States, due to the State-centric nature of international law.<sup>34</sup> But environmental issues challenge this traditional paradigm as NSAs become directly affected by environmental decisions,<sup>35</sup> and environmental law requires specific knowledge and data that States do not necessarily possess.<sup>36</sup>

Given these numerous theoretical and practical justifications, several international instruments recognize the need for NSA participation in environmental decisions at least at the national level.<sup>37</sup> Principle 10 of the Rio Declaration notably States that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.”<sup>38</sup> But few instruments create direct participatory rights for NSAs in international decision making in areas beyond national jurisdiction. The BBNJ Agreement is one of those few.

The Agreement emphasizes its goal of “inclusiveness” throughout.<sup>39</sup> It seeks to be inclusive not only of all States, but also

31. Nicole Mohammed, *Participatory Resource Management: a Caribbean Case Study*, in RESEARCH HANDBOOK ON BIODIVERSITY AND LAW, *supra* note 26, at 78, 81, 88.

32. WHEATLEY, *supra* note 22, at 248–49; Dorothee Cambou, *Enhancing the Participation of Indigenous Peoples at the Intergovernmental Level to Strengthen Self-Determination: Lessons from the Arctic*, NORDIC J. INT’L L., Mar. 2018, at 54.

33. Papanicolupulu & Rocha *supra* note 17, at 194.

34. *Id.* at 193.

35. Twemlow, *supra* note 23, at 24, Cambou, *supra* note 32, at 34.

36. See Papanicolupulu & Rocha *supra* note 17, at 194.

37. See *e.g.*, Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, Sept. 27, 2018, 3397 U.N.T.S. (establishing participatory rights in national environmental decisions for citizens in the EU and the OAS, respectively).

38. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development Principle*, U.N. Doc. A/CONF.151/26, at 10 (Aug. 12, 1992).

39. See BBNJ Agreement, *supra* note 2, arts. 21(1), 24(5), 32(4), 40(b), 43(1).

of non-State actors, heeding to the new consensus that ABMTs ought to be established with more NSA involvement. Most notably, the Agreement provides that, in developing proposals for ABMTs, States “shall collaborate and consult, as appropriate, with relevant stakeholders, including . . . civil society, the scientific community, the private sector, Indigenous Peoples and local communities.”<sup>40</sup>

This Article seeks to assess how innovative the BBNJ Agreement is in terms of inclusion of NSAs in the ABMT establishment process, as well as the practical implications of NSA participation. To do so, Section I will first give an overview of how the various groups of NSAs listed in the Agreement are affected by, or impact the establishment of, ABMTs, shedding light on why they ought to be included. Section II takes stock of existing NSA inclusiveness by surveying other international instruments on ABMTs. The review focuses on two aspects of “inclusiveness”: a qualitative component (the extent to which NSAs are included, i.e., their participatory rights), and a quantitative component (how many types of NSAs are included).

Based on this survey, Section III presents the BBNJ Agreement’s provisions on NSA participation in the ABMT process and compares them to the existing legal landscape. It finds that the BBNJ Agreement makes a significant contribution to NSA participation in marine conservation by creating a mandatory framework for their consultation in the development of ABMTs in ABNJ, and by inviting a wide breadth of NSAs to give their views. However, in some ways the Agreement still disappoints in terms of NSA inclusiveness, especially as it concerns Indigenous Peoples. After this theoretical assessment, Section IV identifies the practical roadblocks to inclusion of NSAs in the BBNJ ABMT process and proposes solutions for the BBNJ Conference of Parties (COP) to consider in order to overcome these obstacles once the Agreement has entered into force.

## II. MAPPING OUT THE “RELEVANT STAKEHOLDERS”

The Agreement lists five categories of NSAs as “relevant stakeholders” in the ABMT section: civil society, the scientific

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40. *Id.* art. 19(2).

community, the private sector, and “Indigenous Peoples and local communities.”<sup>41</sup> This section gives an overview of the various (and sometimes opposed) stakes these actors hold in the establishment of ABMTs, and the input they may bring to it.

#### A. *Civil Society*

“Civil society” is a rather amorphous concept that does not have a single, universally accepted definition. Within the UN system, “civil society” is usually represented by NGOs,<sup>42</sup> to the point that the two concepts may seem to have become synonymous. But NGOs are by definition only a form of entity that is content-neutral and can represent various groups and interests. Scientists can be organized in NGOs and so can Indigenous Peoples. Of course, because the scientific community and Indigenous Peoples are separately listed as “relevant stakeholders,” what is meant by “civil society” in the Agreement is a narrower type of NGOs that represent other kinds of common interests, such as protection of the environment or species, social needs or the general interest.<sup>43</sup>

In the context of ABMTs, civil society organizations typically advocate for conservation. Certain NGOs have been instrumental in the establishment of some MPAs, including by raising public awareness of conservation objectives,<sup>44</sup> agenda setting,<sup>45</sup> pressuring governments to act,<sup>46</sup> and by providing necessary knowledge for the identification and designation of MPAs.<sup>47</sup> This is also true at the multilateral level. For example, in the OSPAR context, observer NGOs have been significantly more active in proposing ABMTs than States.<sup>48</sup> In the ISA regime, the

41. *Id.* arts. 19(2), 21(1).

42. Houghton, *supra* note 23, at 2.

43. Andrea Q. Steiner, Elia Elisa Cia Alves & Luís Paulo Santana, *Civil Society, Nongovernmental Organisations, Public Opinion, and Individuals*, in *ROUTLEDGE HANDBOOK OF MARINE GOVERNANCE AND GLOBAL ENVIRONMENTAL CHANGE*, *supra* note 28, at 101.

44. Smith, *supra* note 6.

45. Oran R. Young & Jong-Deog Kim, *Next Steps in Arctic Ocean Governance Meeting the Challenge of Coordinating a Dynamic Regime Complex*, 133 *MARINE POL'Y* 1, 5 (2021).

46. Steiner, Alves & Santana, *supra* note 43, at 102.

47. Smith, *supra* note 6.

48. See Bas Klerk, *Lessons to Be Learned from OSPAR's Network of Marine Protected Areas in Areas Beyond National Jurisdiction*, in *Light of the BBNJ Negotiations*, *NCLOS BLOG* (Dec.

establishment of the ISA's first ABMT, the Clarion-Clipperton Zone Environmental Management Plan (CCZ-EMP) was also an NGO-led initiative. While its proposal originated from researchers, it was heavily supported by the Pew Charitable Trust (an NGO that was also active during the BBNJ negotiations).<sup>49</sup>

As for implementation, research shows that involving NGOs can improve the effective implementation of an environmental policy.<sup>50</sup> They can do so by monitoring and reporting on domestic implementation, urging more governmental action, and building public support for the management tools.<sup>51</sup> Some NGOs even directly manage MPAs. For example, the American NGO Nature Conservancy manages one of Seychelles' MPAs.<sup>52</sup>

### B. Scientific Community

“Scientific community” in this Article refers to scientists external to intergovernmental organizations and treaty bodies, such as scientific or technical committees, which are not considered NSAs. The non-State “scientific community” has played a crucial role in the creation of ABMTs. It participates in priority setting and often designs the content of ABMTs,<sup>53</sup> informing both policy and treaty making.<sup>54</sup> Scientists and research institutes provide the necessary scientific expertise when intergovernmental organizations and States themselves often do not have the internal resources to conduct scientific research.<sup>55</sup>

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18, 2020), <https://site.uit.no/nclos/2020/12/18/lessons-to-be-learned-from-ospars-network-of-marine-protected-areas-in-areas-beyond-national-jurisdiction-in-light-of-the-bbnj-negotiations> [<https://perma.cc/MB5R-AY9S>].

49. Makoto Seta, *The Legitimacy of the international Seabed Authority and the Way It Accepts the Involvement of Non-State Actors in Governing the Area*, in TRANSFORMING THE OCEAN LAW BY REQUIREMENT OF THE MARINE ENVIRONMENT CONSERVATION 329, 335 (Patrick Chaumette ed., 2019).

50. Kirk, *supra* note 26, at 18.

51. Sebastien Duyck, *Participation of Non State Actors in Arctic Environmental Governance*, NORDIA GEOGRAPHICAL PUBL'NS 99, 101 (2012).

52. Farran, *supra* note 16, at 320. The NGO bought \$22 million of Seychelles national debt owed to the developed countries of the United Kingdom, Belgium, and France, with future repayments by the Seychelles to be directed to a trust fund directed at the conservation of the MPAs, *inter alia*. *Id.*

53. Yitong Chen & Huirong Liu, *Critical Perspectives on the New Situation of Global Ocean Governance*, SUSTAINABILITY, July 2, 2023, at 7.

54. Vadrot, *supra* note 28, at 87.

55. Seta, *supra* note 49, at 338.

Scientists are typically pro-conservation, as their interests usually lie in the protection of biodiversity and endangered species—but not always. In the context of deep-sea mining for example, scientific institutions might support contractors because they share interest in advancing exploration of the deep-sea bed and exploitation of its resources for scientific purposes.<sup>56</sup>

### C. *Private Sector*

The private sector is directly affected by ABMTs as they regulate and sometimes prohibit activities typically carried out by private businesses, such as fishing, shipping, deep-sea mining,<sup>57</sup> or the laying and maintenance of submarine telecommunications cables.<sup>58</sup> But the private sector sometimes also participates in the establishment and management of ABMTs by providing expertise.<sup>59</sup> In recent years, private companies have provided surveillance technology to monitor MPAs, often in partnership with NGOs. For example, a partnership between Google and NGOs Oceana and SkyTruth called “Global Fishing Watch” was launched to monitor fishing vessel activity in the Phoenix Islands Protected Area in Kiribati.<sup>60</sup>

The private sector pursues its own commercial interests, which are often, but not always, antagonistic to conservation objectives. With the growing importance of environmental, social, and governance concerns, an increasing number of companies are willing to forgo potentially harmful activities. As a recent example, several fashion and shipping companies signed the “Arctic Shipping Corporate Pledge,” an initiative launched by the NGO Ocean Conservancy and the company Nike, committing to

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56. Seta, *supra* note 49, at 339.

57. Chen & Liu, *supra* note 53.

58. See generally INT’L CABLE PROT. COMM., SUBMARINE CABLES AND BBNJ (2016), [https://www.un.org/depts/los/biodiversity/prepcom\\_files/ICC\\_Submarine\\_Cables\\_&\\_BBNJ\\_August\\_2016.pdf](https://www.un.org/depts/los/biodiversity/prepcom_files/ICC_Submarine_Cables_&_BBNJ_August_2016.pdf) [<https://perma.cc/6VM4-7QJY>].

59. Papanicolupulu & Rocha, *supra* note 17, at 196.

60. Elizabeth M. De Santo, *Implementation Challenges of Area-Based Management Tools (ABMTs) for Biodiversity Beyond National Jurisdiction (BBNJ)*, 97 *MARINE POL’Y* 34, 41 (2018); see also Young & Kim, *supra* note 45, at 5.

avoid shipping through the Arctic due to concerns about the impacts on fragile marine systems.<sup>61</sup>

#### D. *Indigenous Peoples and Local Communities*

Last, but certainly not least, the BBNJ recognizes Indigenous Peoples and local communities as important stakeholders in the establishment of ABMTs. During the negotiation of the Agreement, the terms “Indigenous Peoples and local communities” were largely treated as a single unit, although the two groups may have distinct legal definitions. The Agreement does not define either group, but the difference could be that local, non-Indigenous communities have not necessarily suffered invasion or colonization. Indeed, while there is no single, universally accepted definition of “Indigenous Peoples,” one of the two definitions in the International Labour Organization (ILO) Convention on Indigenous and Tribal Peoples defines them in relation to a past “conquest” or colonization.<sup>62</sup> Like Indigenous Peoples, however, “local communities” may be defined as having “cultural values, practices, and systems developed through multiple generations and poised to be passed to future generations.”<sup>63</sup> Arguably, this definition of “local communities” could be included in the other definition of Indigenous Peoples in the ILO Convention, which focuses on social, cultural, and economic distinctiveness of a tribal group.<sup>64</sup>

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61. See Young & Kim, *supra* note 45, at 5; Malte Humpert, *Nike and Ocean Conservancy Call on Companies to Join Pledge Against Arctic Shipping*, HIGH NORTH NEWS (Oct. 31 2019), <https://www.highnorthnews.com/en/nike-and-ocean-conservancy-call-companies-join-pledge-against-arctic-shipping> [<https://perma.cc/8RTN-BHYH>].

62. See International Labour Organization [ILO] Indigenous and Tribal Peoples Convention (No. 169), June 7, 1989, art. 1(b), 1650 U.N.T.S. 383 [hereinafter ILO Convention on Indigenous and Tribal Peoples] (Indigenous Peoples are defined as “peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”).

63. Violeta Radovich, *Indigenous Peoples and Local Communities’ Participation Provisions in Negotiations on Conservation of Marine Areas Beyond National Jurisdiction*, in SUSTAINABILITY THROUGH PARTICIPATION? 406, 417 (Brigit Peters & Eva J. Lohse eds., 2023).

64. ILO Convention on Indigenous and Tribal Peoples, *supra* note 62, art. 1(a).

It could be argued that lumping Indigenous Peoples together with local communities may avoid difficulties stemming from the lack of universally accepted definition of “Indigenous Peoples,” especially since the BBNJ Agreement itself offers no definition to settle the debate. And in many ways, even non-Indigenous local communities using the sea for traditional, cultural, or subsistence reasons, whether Indigenous or not under any definition, may face similar consequences arising from the establishment of ABMTs. But this Article posits that the two groups should be distinguished because Indigenous Peoples (regardless of how they are defined) have specific rights under international law that non-Indigenous local communities do not have, especially to the extent that non-Indigenous communities’ relation to the marine environment is not traditional or cultural.<sup>65</sup>

Indigenous Peoples are uniquely affected by the establishment of ABMTs, including in ABNJ. Seventy percent of all protected areas worldwide are inhabited, and most of these inhabitants are Indigenous Peoples.<sup>66</sup> And it is “often in the areas where Indigenous coastal peoples live or around the marine resources that they traditionally use that the biodiversity is greatest and the attraction of declaring an MPA is strongest.”<sup>67</sup>

Many Indigenous Peoples’ livelihoods and nutrition depends on the ocean,<sup>68</sup> where they harvest traditional resources.<sup>69</sup> They depend on the ocean not only for subsistence, but also for cultural, spiritual, and social values and practices. Migratory marine species have special cultural values for many Indigenous Peoples, especially in the Pacific, where whales and dolphins are considered sacred.<sup>70</sup> The use of ocean space and

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65. See further discussion on this issue under Section III.

66. Felipe K. Moreira, *The Fishing Rights of Indigenous Peoples in the context of the Global Governance of the Seas*, 34 *OCEAN Y.B. ONLINE* 136, 157 (2020).

67. Farran, *supra* note 16, at 328.

68. Mario K. Vierros et al., *Considering Indigenous Peoples and Local Communities in Governance of the Global Ocean Commons*, 119 *MARINE POL’Y* 1, 2 (2020).

69. Natalie C. Ban & Alejandro Frid, *Indigenous Peoples’ Rights and Marine Protected Areas*, 87 *MARINE POL’Y* 180, 180 (2018).

70. Vierros et al., *supra* note 68, at 2; UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 25; Endalew L. Enyew, *International Human Rights Law and the Rights of Indigenous Peoples in Relation to Marine Space and Resources*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN MARINE AREAS*, *supra* note 16, at 45.

resources is indispensable for the continued existence of certain Indigenous Peoples as culturally distinct peoples.<sup>71</sup>

It would be misguided to assume that the impact of ABMTs under the BBNJ Agreement on coastal Indigenous Peoples would be minimal because coastal communities do not reside in ABNJ. Some Indigenous Peoples have strong and diverse cultural, spiritual, and economic ties to the deep and high seas beyond national jurisdiction.<sup>72</sup> First, some Indigenous Peoples rely on the subsistence fishing of species that migrate through the high seas.<sup>73</sup> More generally, the unsustainable use of high seas marine biodiversity negatively impacts biodiversity within national jurisdiction, including species and resources important to some Indigenous Peoples.<sup>74</sup> Second, some Indigenous Peoples are connected to the high seas through currents and other oceanographic features that transport nutrients and pollution.<sup>75</sup> Finally, Indigenous Peoples of the Pacific in particular practice traditional voyaging and navigation in the high seas.<sup>76</sup>

Indigenous Peoples and local communities are not merely passive objects of ABMTs. They are often also crucial actors in their establishment and management. Some Indigenous Peoples possess traditional knowledge, the role of which is now well recognized in conservation and protection of biodiversity, including in international instruments.<sup>77</sup> Some Indigenous

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71. Enyew, *supra* note 70, at 45.

72. Vierros et al., *supra* note 68, at 2; UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 25.

73. Vierros et al., *supra* note 68, at 2.

74. Mana Tugend, *What Role for Traditional Knowledge in the Conservation of Marine Biodiversity in the Arctic High Seas?*, NCLOS BLOG (Apr. 26, 2021), <https://site.uit.no/nclos/2021/04/26/what-role-for-traditional-knowledge-in-the-conservation-of-marine-biodiversity-in-the-arctic-high-seas> [https://perma.cc/T2BR-5BKM].

75. Vierros et al., *supra* note 68, at 2.

76. *Id.*

77. Convention on Biological Diversity, art 8(j), June 5, 1993, 1760 U.N.T.S. 79; *Rio Declaration on Environment and Development Principle*, *supra* note 38, at 22 (“Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”); UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 6 (“More recent thinking in regards to MPAs has come to view communities as important custodians of

Peoples have developed oceanographic and biodiversity-related knowledge through both generations of observation of the migratory species they traditionally harvest, and traditional voyaging.<sup>78</sup> Traditional knowledge related to highly migratory species is seen as crucial to understanding the species' "life cycles and migratory patterns, prey and predator relationships, and habitat preferences," and therefore plays an important role in identifying areas to be protected.<sup>79</sup>

Indigenous Peoples and some local communities also hold worldviews on, and have experience in, conservation measures that can be integrated in the design and management of ABMTs. Indigenous Peoples are credited for the concepts of stewardship, intergenerational responsibility, and ecosystems approach, all of which have found their way into the BBNJ Agreement and other international instruments.<sup>80</sup> Further, some Indigenous Peoples and local communities have been effectively managing common ocean spaces through marine customary tenures for centuries, well before modern States became involved.<sup>81</sup> For example, Melanesian and Polynesian Indigenous Peoples have used

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ecosystem and species diversity, and part of the solution rather than the problem."); *see also* Tugend, *supra* note 74; Vierros et al., *supra* note 68, at 7; Moreira, *supra* note 66, at 156.

78. Vierros et al., *supra* note 68, at 2.

79. Clement Y. Mulalap et al., *Traditional Knowledge and the BBNJ Instrument*, 122 *MARINE POL'Y* (2020); UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 27.

80. *See* BBNJ Agreement, *supra* note 2, pmb. ("Desiring to act as stewards of the ocean in areas beyond national jurisdiction on behalf of present and future generations by protecting, caring for and ensuring responsible use of the marine environment, maintaining the integrity of ocean ecosystems and conserving the inherent value of biological diversity of areas beyond national jurisdiction,"), art. 7(f) ("In order to achieve the objectives of this Agreement, Parties shall be guided by the following principles and approaches: *An ecosystem approach* . . ."), art. 19(3) ("Proposals shall be formulated on the basis of the best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities, taking into account the precautionary approach and *an ecosystem approach*."), art. 26(5) ("Following the review, the Conference of the Parties shall, as necessary, take decisions or recommendations on the amendment, extension or revocation of area-based management tools, . . . on the basis of the best available science and scientific information and, . . . taking into account the precautionary approach and *an ecosystem approach*." (emphases added)); Vierros et al., *supra* note 68, at 8 ("Indigenous worldviews generally place humans in the context of an interconnected web of life, rather than in a position of dominance over other life, and this understanding may be one of the key components of a holistic, ecosystem-based approach.").

81. Vierros et al., *supra* note 68, at 8; UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 7; Moreira, *supra* note 66, at 156.

“periodically harvested closures” where extractive activities are banned except for fishing on special occasions, such as feasts or funerals.<sup>82</sup> Indigenous Peoples and local communities thus possess valuable experience that can inform the establishment and management of protected areas.<sup>83</sup>

The impacts, both positive and negative, of ABMTs on Indigenous Peoples and local communities are well documented. Some “no-take” MPAs have been labelled as “ocean grabbing” because they deprive Indigenous and small-scale fishers of resources or prevent their access to historically or culturally important areas. Doing so undermines indigenous rights,<sup>84</sup> threatens their very existence as Indigenous Peoples and generates socio-economic marginalization and conflict.<sup>85</sup> This is often the case when Indigenous Peoples and local communities have not had an opportunity to participate in the establishment of the ABMTs. For these reasons, some MPAs are considered “biological successes and social failures,” which ultimately jeopardizes the long-term effectiveness of the ABMT.<sup>86</sup>

On the other hand, some ABMTs can benefit Indigenous Peoples and local communities. ABMT measures can improve the stocks of fish traditionally harvested by Indigenous Peoples<sup>87</sup> and therefore ensure that they can continue practicing their culture and transferring traditional knowledge to future generations.<sup>88</sup> Additionally, some MPAs can also formalize Indigenous customary tenures and “catalyze indigenous claims to preserve their traditional rights.”<sup>89</sup>

This disparity in outcomes may be explained partially by different levels of involvement of Indigenous Peoples and local communities in ABMT establishment and management. Involvement has varied greatly at the domestic levels, going from

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82. Ban & Frid, *supra* note 69, at 180.

83. Tugend, *supra* note 74.

84. Dorothee Cambou *et al.*, *Marine Protected Areas and Indigenous Peoples' Rights: A Case Study of the National Park of the Coral Sea in New Caledonia*, in *THE RIGHTS OF INDIGENOUS PEOPLES IN MARINE AREAS*, *supra* note 16, at 191, 193.

85. UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 5.

86. Bennett & Dearden, *supra* note 16, at 107; UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 5.

87. Bennett & Dearden, *supra* note 16, at 107.

88. Ban & Frid, *supra* note 69, at 180.

89. Cambou *et al.*, *supra* note 84.

total exclusion and marginalization<sup>90</sup> to hybrid mechanisms where Indigenous Peoples or local communities share some management powers with governments, and rare instances in which local communities fully manage MPAs, such as Locally Managed Marine Areas (LMMAs).<sup>91</sup>

#### *E. Summary*

While all these NSAs have interests in ABMTs, they are not equally impacted by them. Only Indigenous Peoples and local communities, and the private sector are likely to be subject to management measures and to directly and concretely suffer or benefit from them in a way that may affect their very existence. In a way, only these groups can be considered “stakeholders” in the strictest sense, meaning that they have economic, social, and cultural stakes in the existence or absence of ABMTs. Scientists and civil society, by contrast, possess an interest in the broadest sense, but the establishment of an ABMT will not affect their existence or livelihood in such a direct way.

But these five types of NSAs do have a common trait: they all possess specific knowledge or expertise that can be leveraged in the establishment of ABMTs, which, as the next Section will show, appears to be the main driver behind their involvement in most ABMT instruments.

### *III. NSA INVOLVEMENT IN ABMT INSTRUMENTS*

The BBNJ Agreement is not the first international instrument governing the establishment of ABMTs. It follows a long line of regional and multilateral treaties and soft-law instruments creating processes to establish and manage ABMTs, in particular MPAs. To assess whether the BBNJ Agreement innovates, or merely builds on, existing trends relating to NSA involvement, this Section surveys other main international instruments, including non-binding instruments, that govern ABMT procedures and precede the BBNJ Agreement.

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90. Farran, *supra* note 16, at 336, 338.

91. See Ban & Frid, *supra* note 69; Farran, *supra* note 16 (describing a Hawaiian MPA).

### A. *Instruments reviewed*

A total of seventeen instruments were reviewed, eleven of which are binding treaties and six of which are guidelines or other instruments associated with a particular treaty regime or international organization, which do not necessarily impose obligations binding upon States. These instruments were selected for their similarity in function to the BBNJ Agreement provisions analyzed in this Article, i.e., the establishment and implementation of ABMTs in marine areas. While some of these instruments are exclusively focused on ABMT procedures, such as the IMO's Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas,<sup>92</sup> most of them, like the BBNJ Agreement, are broader instruments on biodiversity and conservation that have specific provisions on ABMTs, like the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.<sup>93</sup> The list of instruments reviewed is provided in Table 1 below.

### B. *Findings*

Of the seventeen reviewed instruments, the majority makes at least one reference to NSAs in its provisions governing ABMTs. Only three treaties, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971,<sup>94</sup> the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region 1981 (Abidjan Convention) and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986 (Noumea Convention) do not provide for any kind of NSA involvement in the ABMT procedure, perhaps because they were adopted before the 1990s at a time when NSA participation was less prevalent in environmental law (for example, they predate the Rio Declaration, which, as

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92. Int'l Maritime Org. [IMO], A.982 (24), *Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas* (Feb. 6, 2006) [hereinafter the IMO Revised Guidelines on PSSAs], <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/A24-Res.982.pdf> [<https://perma.cc/F3MM-M7VL>].

93. Protocol Concerning SPAs in the Mediterranean, *supra* note 7.

94. Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971, Feb. 2, 1971, 996 U.N.T.S. 245 [hereinafter the Ramsar Convention].

explained above, enshrines the principle of citizen participation in environmental decision making). The OSPAR Guidelines for the Identification and Selection of MPAs in the OSPAR Maritime Area,<sup>95</sup> the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)'s General framework for the establishment of CCAMLR Marine Protected Areas,<sup>96</sup> and the IMO Revised Guidelines on PSSAs also do not refer to NSAs.

The other instruments all provide for some kind of NSA involvement in ABMTs, though to different extents and at different stages of the process. To make a critical assessment of the degree of NSA participation provided, the provisions were analyzed through the lens of Arnstein's Ladder of Citizen Participation, a typology of eight levels of citizen participation in decision making ranked according to the degree of citizen power.<sup>97</sup> This typology can be extrapolated at the international level to analyze NSA participation in intergovernmental decision making.<sup>98</sup> At the bottom rungs of the ladder are "manipulation" and "therapy," whose goals are to educate and gain public support for the decision, and which Arnstein regards as non-participative.<sup>99</sup> Next is "informing," but in a top-down manner only (from the government to the citizens), "consultation," and "placation" (the selection of a few citizens onto committees), which Arnstein generally views as tokenism. Finally, "partnership" between citizens and power holders, "delegation" of power to citizens, and "citizen control" make up the last three levels and together constitute, according to Arnstein, forms of citizen control.<sup>100</sup>

Applying this typology to the reviewed instruments as a starting point, the following six types of NSA participation were

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95. OSAPR Comm'n, Agreement 2003-17, *Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area* (2003) [hereinafter OSPAR Guidelines on the Identification and Selection of MPAs].

96. Comm'n on the Conservation of Antarctic Marine Living Res., *Conservation Measure 91-04 (2011) General framework for the establishment of CCAMLR Marine Protected Areas* (2011), <https://cm.ccamlr.org/en/measure-91-04-2011> [<https://perma.cc/D348-ZFHK>].

97. Sherry R. Arnstein, *A Ladder of Citizen Participation*, 35 J. AM. PLAN. ASS'N 216 (1969).

98. See Mohammed, *supra* note 31, at 81 (using the Arnstein's Ladder in the context of biodiversity management in the Caribbean).

99. Arnstein, *supra* note 97, at 217.

100. *Id.* at 216.

identified in the reviewed ABMT instruments and ranked from least to most qualitatively participative.

### 1. Education

A first level of NSA involvement can be found in some ABMT instruments providing for education of the public on the value of protected areas or of conservation, including through school programs. For example, the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region provides that “[t]he Contracting Parties shall endeavour to inform the public as widely as possible of the significance of protected areas and the protection of wild fauna and flora and the scientific knowledge which may be gained from them,” and specifies that “[s]uch information should have an appropriate place in education programmes concerning the environment, archaeology and history.”<sup>101</sup> While most instruments do not identify which NSAs should be “educated,” suggesting that those education measures target the broader public, the Protocol for the Conservation of Biological Diversity to the Framework Convention for the Protection of the Marine Environment of the Caspian Sea (“Caspian Sea Biodiversity Protocol”) specifies that “local communities, wider population and organizations” should be “train[ed] and educat[ed]” for the management of protected areas.<sup>102</sup>

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101. Protocol Concerning Protected Areas in the Eastern African Region, *supra* note 8, art. 15; *see also* Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 19(2); Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 16(2); Protocol Concerning the Conservation of Biological Diversity and the Establishment of Network of Protected Areas in the Red Sea and Gulf of Aden, art. 22(2), (Dec. 12, 2005) [hereinafter Red Sea Protocol], <https://persga.org/wp-content/documents/Conservation-Biodiversity-Protocol.pdf> [<https://perma.cc/YYZ4-6PKK>]; Black Sea Biodiversity and Landscape Conservation Protocol, arts. 9(1), 9(3), Apr. 21, 1992 [hereinafter Black Sea Biodiversity Protocol], <http://www.blacksea-commission.org/Official%20Documents/The%20Convention/full%20text> [<https://perma.cc/6KAP-PGMA>]; Convention on Conservation of Nature in the South Pacific, art. VII(5), July 5, 1976 [hereinafter Apia Convention], <https://www.sprep.org/convention-secretariat/apia-convention> [<https://perma.cc/75RJ-2S76>]; Protocol on Integrated Coastal Zone Management in the Mediterranean, art. 15, Feb. 4, 2009, 2009 O.J. (L 34) 19 [hereinafter Protocol on Integrated Coastal Zone Management in the Mediterranean].

102. Caspian Sea Biodiversity Protocol, art. 10(2)(c), 10(2)(d) (May 30, 2014), <https://tehranconvention.org/system/files/tc-interim->

This is the lowest form of NSA involvement. Since its aim is to “improve” NSAs, this can be equated to the “manipulation” or “therapy” rungs, which, as Arnstein observed, are not actually participative. It conceives NSAs as by-nature hostile to, or at least ignorant of ABMTs. It suggests that NSAs must be educated on the value of protected areas to promote their adherence to ABMT or conservation measures.<sup>103</sup> Communication between State and non-State actors goes only one way (from the educator to the educated) and does not allow input from NSAs.

## 2. Information

A second and closely related form of NSA involvement is through provisions relating to publicizing or informing about ABMTs measures. As with the education provisions, this form of involvement is also top-down and does not allow NSA input. However, it seeks not to educate about the value of ABMTs broadly, but rather to inform the public about the specific ABMT decisions taken. For example, the Red Sea Protocol provides that “[c]ontracting Parties shall give appropriate publicity to the establishment of protected areas, their boundaries, applicable regulations, and to the designation of protected species, their habitats and applicable regulations.”<sup>104</sup> Informing is the most common form of NSA involvement in the ABMT instruments reviewed, as it appears in nine out of seventeen instruments, often in conjunction with education provisions. Provisions on publicity and transparency of ABMT decisions also appear in instruments providing for consultation procedures.<sup>105</sup> As Arnstein notes,

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secretariat/protocol\_on\_the\_conservation\_of\_biological\_diversity\_en.pdf  
[<https://perma.cc/CF4C-PA6M>].

103. See Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 15(2) (specifying that educational programmes on integrated management of coastal zones is to “ensur[e] their sustainable development”).

104. Red Sea Protocol, *supra* note 101, art. 22(1); see also Protocol Concerning Protected Areas in the Eastern African Region, *supra* note 8, art. 14; Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 19(1); Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 16(1); Black Sea Biodiversity Protocol, *supra* note 101, art. 9(1); Caspian Sea Biodiversity Protocol, *supra* note 102, art. 18(a).

105. See BBNJ Agreement, *supra* note 2, art. 20; Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 14(2); International Seabed Authority Council, Guidance to Facilitate the Development of Regional Environmental Plans, ¶ 16, ISBA/27/C/37 annex (Aug. 10, 2022) [hereinafter the ISA

informing is an important first step to participation.<sup>106</sup> And that NSAs are adequately informed is a prerequisite for higher forms of participation such as consultation. For this reason, in accordance with Arnstein's ladder, "information" is considered a higher form of participation.

### 3. Exemptions for Traditional Use

Review of the seventeen instruments led to the identification of a recurring category of NSA involvement specific to Indigenous Peoples and local communities, that is, exemptions for traditional or cultural uses. This category hardly fits in any of Arnstein's Ladder rungs. Such provisions allow States to grant exemptions from ABMT measures to certain local populations for traditional subsistence or cultural activities like fishing or harvesting of certain protected species. These exemptions were identified in five regional ABMT instruments. The Protocol Concerning SPAs in the Mediterranean, for example, provides that "[i]n formulating protective measures, the Parties shall take into account the traditional subsistence and cultural activities of their local populations. They shall grant exemptions, as necessary, to meet such needs."<sup>107</sup>

This is still a low form of participation as it does not incorporate any NSA input in ABMT establishment (*ex ante*), but it does formally account for NSA interests at the implementation stage of ABMT measures (*ex post*). This Article argues that this is a higher form of participation than the previous two categories because it is a form of indirect bottom-up communication between NSAs and State actors (NSA interests communicated to

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Draft Standardized Procedure]; OSPAR Comm'n, *General Consultation Procedures for Establishing Marine Protected Areas in Areas Beyond National Jurisdiction of the OSPAR Maritime Area (OSPAR Agreement 2019-09)*, § 3.3 (Sept. 2019) [hereinafter *OSPAR General Consultation Procedures*], <https://www.ospar.org/documents?v=40965> [<https://perma.cc/DYQ3-7HYB>].

106. Arnstein, *supra* note 97, at 219.

107. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 18(1); *see also* Apia Convention, *supra* note 101, art. VI; Protocol Concerning Protected Areas in the Eastern African Region, *supra* note 8, art. 12(1) (It does not explicitly mention exemptions but provides that States shall "in promulgating protective measures, *take into account the traditional activities of their local populations* in the areas to be protected") (emphasis added); Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 14(1).

States rather than the other way around). But this form of involvement also paints certain NSAs, i.e., Indigenous Peoples and local communities, as enemies of ABMTs, having practices antithetical to conservation objectives. Tellingly, none of the instruments that provide for the consultation of NSAs in establishing ABMTs contain provisions on exemptions. Perhaps this is because the need for *ex post* exemptions is reduced if Indigenous Peoples and local communities initially have a say in the establishment and management of ABMTs *ex ante*.

#### 4. Consideration of Scientific or Traditional Knowledge in the Establishment of ABMTs

This next form of participation is also fairly indirect, as it does not create any forum for NSA input generally, but rather utilizes knowledge possessed by certain groups of NSAs, namely the scientific community (scientific knowledge) and Indigenous Peoples (traditional knowledge). For example, Decision IX/20 of the Conference of the Parties to the Convention on Biological Diversity (CBD) on Marine and Coastal Biodiversity called on parties to “integrate the traditional, scientific, technical and technological knowledge of indigenous and local communities” in the establishment of MPAs.<sup>108</sup> While this form of input is arguably more likely to account for scientific and Indigenous interests, its stated goal is not NSA representation but rather gathering specific expertise for informed decision making. Moreover, while most of the instruments that refer to scientific or traditional knowledge provide for some form of consultation of NSAs, at least one instrument, the Red Sea Protocol, envisioned the use of “indigenous and traditional technologies,” without

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108. Convention on Biological Diversity, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Ninth Meeting, ¶ 27, UNEP/CBD/COP/DEC/IX/20 (October 9, 2008) [hereinafter CBD COP Decision IX/20 on Marine and Coastal Biodiversity]; *see also* Caspian Sea Biodiversity Protocol, *supra* note 102, art. 17(a); OSPAR General Consultation Procedures, *supra* note 105, § 3.1 (“The objective of the Consultation Procedures is to collect as much relevant information as possible to ensure that OSPAR has the best available knowledge before establishing MPAs in an area beyond national jurisdiction in the OSPAR maritime area, and to draw attention of users, coastal states and other stakeholders to the proposed MPA in order for them to provide relevant *scientific information* and express possible concerns”) (emphasis added); ISA Draft Standardized Procedure, *supra* note 105, ¶¶ 9, 21.

providing for the consultation of these actors,<sup>109</sup> leaving open the question of how States are to gather such knowledge and technologies.

##### 5. Participation in the Implementation of ABMT Measures

This next type of participation of NSAs that expressly provides for NSA participation, but only at the implementation stage, i.e., *ex post*, and not at the establishment stage, *ex ante*. For instance, the Protocol Concerning SPAs in the Mediterranean provides that planning and management measures for protected areas should include “the active involvement of local communities and populations, as appropriate, in the management of specially protected areas,”<sup>110</sup> and that the parties “shall also endeavour to promote the participation of their public and their conservation organizations in measures that are necessary for the protection of the areas and species concerned.”<sup>111</sup> This Protocol also envisages some cooperation with NGOs in managing ABMTs.<sup>112</sup> Some instruments, such as the Red Sea Protocol, also consider the existing participation of stakeholders in the process of planning and managing the area as a criterion for the identification of protected areas.<sup>113</sup> This form of involvement, while undoubtedly participative, does not enable NSAs to impact the outcome of decision making on the establishment of ABMTs.

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109. Red Sea Protocol, *supra* note 101, art. 20(4).

110. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 7(2); *see also* Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 6(2)(e); Red Sea Protocol, *supra* note 101, art. 11(1)(d); Caspian Sea Biodiversity Protocol, *supra* note 102, art. 10(2)(c).

111. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 19(2); *see also* Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 16(2); Red Sea Protocol, *supra* note 101, art. 22(2); Black Sea Biodiversity Protocol, *supra* note 101, art. 9(2); Caspian Sea Biodiversity Protocol, *supra* note 102, art. 19(c); Protocol Concerning Protected Areas in the Eastern African Region, *supra* note 8, art. 15.

112. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 25(1); *see also* Caspian Sea Biodiversity Protocol, *supra* note 102, art. 18(d).

113. Red Sea Protocol, *supra* note 101, annex 3, ¶ 4; *see also* Protocol Concerning SPAs in the Mediterranean, *supra* note 7, annex I, § B(4)(b).

## 6. Consultation

Moving up Arnstein's ladder of participation, several reviewed instruments provide for the formal consultation of NSAs in the establishment of ABMTs. This form of participation was identified in four out of seventeen instruments, but only one of which was a binding convention (see Table 1 below). The Protocol on Integrated Coastal Zone Management in the Mediterranean indeed provides that the Parties:

[S]hall take the necessary measures to ensure the appropriate involvement in the phases of the formulation and implementation of coastal and marine strategies, plans and programmes or projects, as well as the issuing of the various authorizations, of the various stakeholders, including: the territorial communities and public entities concerned; economic operators; non-governmental organizations; social actors; the public concerned [including through] consultative bodies, inquiries or public hearings, and . . . partnerships.<sup>114</sup>

But consultation does not extend to the establishment of the ABMT itself, only to the formulation of ABMT measures. This is because the Protocol concerns only an already-established ABMT, the "integrated coastal zone management" in the Mediterranean.<sup>115</sup>

The processes for consultations vary among instruments. The CBD COP Decision IX/20 on Marine and Coastal Biodiversity remains vague on the procedure for the consultation of "indigenous and local communities."<sup>116</sup> But the OSPAR General Consultation Procedures are more detailed: the OSPAR Secretariat is in charge of publishing the MPA nomination on the OSPAR website with relevant background material. It makes a

114. Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 14(1).

115. A mention could also be made to the Protocol Concerning SPAs in the Mediterranean, *supra* note 7, which considers "the existence of a body representing the public, professional, non-governmental sectors and the scientific community involved in the area" as a criterion for the designation of Specially Protected Areas of Mediterranean Importance (SPAMI), *id.* annex I, § B(4)(c). While this does not create a consultation mechanism per se, it makes it more likely that the designated SPAMI will de facto have a representative mechanism permitting NSA consultation.

116. CBD COP Decision IX/20 on Marine and Coastal Biodiversity, *supra* note 108 ¶ 26.

“general invitation for comments” notified through press release,<sup>117</sup> on issues such as “information of relevance on the species, habitats and ecosystems in the proposed MPA.”<sup>118</sup> It is not clear which actors are to be consulted through this “general invitation,” though the Procedures also provide that “[t]he Secretariat will, upon the advice of the Contracting Parties, also invite relevant competent . . . non-governmental organisations to give their comments on the proposal.”<sup>119</sup> Consultations are to last three months.<sup>120</sup>

The ISA’s Draft Standardized Procedure for the development, approval and review of regional environmental management plans (ISA Draft Standardized Procedure) being developed by the ISA’s Legal and Technical Commission (LTC) similarly provides for “stakeholder consultation,” for the development of regional environmental management plans (REMPs), which can include the identification of APEIs.<sup>121</sup> It provides that a draft REMP is to be made available for stakeholder comment for a minimum of forty five days on the ISA’s website and requires the publishing of all comments received.<sup>122</sup> But the ISA Draft Standardized Procedure does not specify how inclusive the consultation will be or which stakeholders will be able to provide comments.

The ISA Draft Standardized Procedure is also the only reviewed instrument that provides for the consultation of NSAs at the review and monitoring stage. It requires the LTC to review the implementation of the REMP by “engaging external experts” and revise the regional environmental assessment report by “incorporating any significant new available scientific data from contractors and other stakeholders.”<sup>123</sup> The Draft Standardized Procedure further allows the LTC to reconvene an expert workshop to reassess and revise the REMP and organize new stakeholder consultations.<sup>124</sup>

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117. OSPAR General Consultation Procedures, *supra* note 105, § 3.3.

118. *Id.* § 3.2(i).

119. *Id.* § 3.3.

120. *Id.* § 3.4.

121. ISA Draft Standardized Procedure, *supra* note 105, ¶ 9.

122. *Id.* ¶ 16.

123. *Id.* ¶ 21.

124. *Id.*

Consultation is a high form of participation as it allows NSAs to share their knowledge and views about the establishment of an ABMT *ex ante*. This gives NSAs an opportunity to affect the decision-making process to better account for their interests. However, as Arnstein warns, consultation can constitute tokenism or window-dressing if it is merely performative and views are not actually taken into account in decision making.<sup>125</sup> Some provisions in the reviewed instruments acknowledge this risk by providing that views shared during consultations are to be considered during decision making. For example, the ISA Draft Standardized Procedure specifies that the LTC should consider the draft REMP, “taking into account the comments received during the stakeholder consultation,”<sup>126</sup> before making a recommendation for the ISA Council to adopt the REMP. Similarly, the OSPAR General Consultation Procedures indicate that “[a]ll views and information provided through the Consultation Procedure will be considered in the subsequent internal OSPAR processes.”<sup>127</sup> Still, these provisions cannot guarantee the weight decision-makers will give to NSAs’ views.

Some instruments go further by providing for participation of NSAs in the *making* of ABMT proposals, not just by collecting views on proposals after they are made. The ISA Draft Standardized Procedure is the best example.

REMPs are to be developed by the ISA for each region that has activities in the Area, ideally before any exploitation contracts are signed.<sup>128</sup> But the development of REMPs is heavily reliant on the participation of NSAs. The ISA Draft Standardized Procedure, which is largely based on the process used during the development of the CCZ-EMP and other REMPs still under development,<sup>129</sup> provides that, in developing the REMP, the LTC should facilitate the compilation of data and information such as, most notably “(a) [c]ontractor data and information submitted to the Authority that pertain to the region . . . (b) [d]ata and information, in particular from scientific projects, initiatives in the region, peer-reviewed articles and publicly accessible

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125. Arnstein, *supra* note 97, at 219.

126. ISA Draft Standardized Procedure, *supra* note 105, ¶ 17.

127. OSPAR General Consultation Procedures, *supra* note 105, § 4.

128. ISA Draft Standardized Procedure, *supra* note 105, ¶¶ 4, 6.

129. *Id.* ¶¶ 5–7, 14–17.

databases; (c) [t]raditional knowledge of indigenous peoples . . . “<sup>130</sup> The data and information collected is to be compiled and made public in a regional environmental assessment and data report.<sup>131</sup> The ISA Draft Standardized Procedure thus provides a specific process for the compilation of information from NSAs, and not just from the scientific community or Indigenous Peoples, but also from contractors (which can be private entities). It also envisages that the development of the ABMT is based on scientific information and traditional knowledge of Indigenous Peoples—though it fails to formally name Indigenous Peoples as relevant stakeholders, as they are only mentioned in relation to the traditional knowledge they possess.

In addition to collecting information from NSAs, the ISA Draft Standardized Procedure provides for the convening of workshops of scientific experts tasked with, among other things, defining the appropriate REMP area, reviewing, analyzing, and synthesizing scientific data, describing current exploration activities, conducting a cumulative impact assessment, and describing potential APEIs.<sup>132</sup> The results of that scientific workshop are meant to provide input for a second workshop, this time composed of policy experts. This second workshop is tasked with identifying management goals in the region, management measures, priorities for research and monitoring, and implementation strategies.<sup>133</sup> The LTC is then tasked with preparing a draft REMP based on the results of those workshops.<sup>134</sup> In short, the Draft Standardized Procedure makes the development of REMPs wholly reliant on the work of NSAs, in particular the scientific community, through the convening of workshops. This may stem from the fact that the development of REMPs is an LTC-led process. While the LTC is composed of experts in marine science, *inter alia*, its research capabilities do not compare to some developed States’ research institutes.<sup>135</sup>

Also of note, the CBD COP Decision IX/20 on Marine and Coastal Biodiversity provides for the convening of an expert

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130. *Id.* ¶ 9.

131. *Id.* ¶ 10.

132. *Id.* ¶ 11.

133. *Id.* ¶ 12.

134. *See id.* ¶ 15.

135. Seta, *supra* note 49, at 338.

workshop “including scientific and technical experts from different Parties, other Governments and relevant organizations, with balanced regional and sectoral participation and using the best available information and data at the time,” to provide guidance on the identification of marine protected areas, *inter alia*.<sup>136</sup> While this does not amount to a consultation on the making of an MPA proposal directly, the ability for expert workshops to impact the very criteria used for the identification of MPAs will necessarily affect MPA proposals made on the basis of such criteria.

### C. Summary of the Review

The reviewed instruments provide for different degrees of NSA inclusiveness in the establishment of ABMTs. The presence of different types of NSA participation in each instrument, as categorized above, is summarized in Table 1 below.

Table 1 – Different Levels of Qualitative Inclusiveness in ABMT Instruments						
ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
Ramsar Convention						
Abidjan Convention						
Noumea Convention						
Apia Convention	X		X			
Protocol Concerning Protected Areas in the Eastern African Region	X	X	X		X	

136. CBD COP Decision IX/20 on Marine and Coastal Biodiversity, *supra* note 108, ¶ 19.

Table 1 – Different Levels of Qualitative Inclusiveness in ABMT Instruments						
ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
Protocol Concerning SPAs in the Mediterranean	X	X	X		X	(Only as criterion for identification)
Protocol Concerning SPAs in the Wider Caribbean Region	X	X	X		X	
Red Sea Protocol	X	X		X	X	
Protocol on Integrated Coastal Zone Management in the Mediterranean	X	X				X
Black Sea Biodiversity Protocol	X	X			X	
Caspian Sea Biodiversity Protocol	X	X		X	X	
OSPAR Guidelines for the Identification and Selection of MPAs						
IMO Revised Guidelines on PSSAs						

Table 1 – Different Levels of Qualitative Inclusiveness in ABMT Instruments						
ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
CCAMLR General framework for the establishment of CCAMLR Marine Protected Areas						
CBD COP Decision IX/20 on Marine and Coastal Biodiversity				X		
OSPAR General Consultation Procedures				X		X
ISA Standardized Procedure				X		X

This analysis reveals that NSA inclusiveness in ABMT instruments has until now been largely limited. NSAs are more often portrayed as obstacles to the establishment of ABMTs that must be dealt with. Of the reviewed instruments, there are more that contain education or exemption provisions viewing NSA interests as contrary to conservation objectives than instruments containing provisions incorporating scientific or traditional knowledge, or providing for consultations of NSAs. Very few of the instruments provide for consultations, and among those that do, they are mostly soft-law instruments that do not create binding legal rights for NSAs. Even in binding instruments, often provisions related to NSA participation are couched in non-

mandatory terms such as “should” or impose duties to merely “promote” NSA participation.<sup>137</sup>

It is also worth noting that, out of the six types of NSA involvement identified, only two of them are actually “participative” in the sense that they entail the active participation of NSAs, either in the implementation or planning of ABMT measures, or in consultations on ABMT proposals, where NSAs can voice views capable of affecting decision making. Education and information provisions only passively involve NSAs, and exemptions by default exclude NSAs from the ABMT regime altogether, without affecting the general design of ABMTs. The inclusion of specific expertise or knowledge, for its part, does increase the likelihood that NSA interests are accounted for in the ABMT regime but does not create any rights for NSAs as active participants. This can be particularly problematic for traditional knowledge, as it leaves open the possibility for State actors to obtain Indigenous Peoples’ traditional knowledge without their consent, let alone their participation.

A closer look at the stated goals of NSA involvement in these instruments may explain the reason it is often limited or merely passive. Even in its most participative form, NSA involvement is more about gathering expertise and ensuring compliance than increasing legitimacy or inclusiveness as an end in itself. The OSPAR General Consultation Procedures expressly state that the main objective of consulting NSAs is to “is to collect as much relevant information as possible to ensure that OSPAR has the best available knowledge before establishing MPAs.”<sup>138</sup> Strikingly, some instruments limit Indigenous Peoples’ input in certain stages of the ABMT process to traditional knowledge,<sup>139</sup> which, as explained above, can prove extremely useful to understand certain marine species and can inspire conservation management

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137. See, e.g., Protocol Concerning SPAs in the Wider Caribbean Region, *supra* note 9, art. 16(2) (“Each Party *should also endeavour to promote* the participation of its public and its conservation organizations in measures that are necessary for the protection of the areas and species concerned.”) (emphasis added); Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 7(2) (“Such measures *should* include for each specially protected area: . . . (c) the active involvement of local communities and populations, as appropriate.”).

138. OSPAR General Consultation Procedures, *supra* note 105, § 3.1.

139. See, e.g., ISA Draft Standardized Procedure, *supra* note 105, ¶ 9.

methods—but does not necessarily convey Indigenous Peoples’ opinion on the soundness or limits of establishing an ABMT in a particular area.

By nature, certain forms of NSA involvement enshrined in these instruments only pursue goals of ensuring compliance by NSAs with ABMT measures, particularly provisions that seek to educate NSAs on the value of conservation and ABMTs. These provisions are explicitly incorporated “with a view to ensuring . . . sustainable development” of the protected areas.<sup>140</sup>

Involving NSAs, in particular NGOs, can also be a means of outsourcing activities to actors that have more capacity and expertise than States or IGOs. This is the case for implementation activities in the Protocol Concerning SPAs in the Mediterranean, which empowers UNEP (United Nations Environment Programme, the organization designated to perform Secretariat functions for the Barcelona Convention) to “cooperat[e] with regional and international . . . non-governmental organizations concerned with the protection of areas and species.”<sup>141</sup> A similar rationale explains the consultation of scientists in expert workshops for the development of proposals under the ISA Draft Standardized Procedure.<sup>142</sup>

Increasing efficiency is also a stated goal of NSA involvement in the reviewed instruments. The Protocol on Integrated Coastal Zone Management in the Mediterranean notably specifies that the consultation of stakeholders in ABMT decisions seeks to “ensur[e] efficient governance throughout the process.”<sup>143</sup> Many instruments’ insistence on promoting participation of local communities in implementation may also stem more from a desire to increase the efficiency of management measures than a wish to share decision-making power with NSAs.

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140. Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 15(2); *see also* Apia Convention, *supra* note 101, art. VII(5) (“*With a view to attaining the objectives of this Convention* the Contracting Parties shall examine the possibility of developing programmes of education and public awareness relating to conservation of nature.”) (emphasis added).

141. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 25(1)(g).

142. *See* Seta, *supra* note 49, at 338 (explaining that the LTC’s research capabilities are limited in both human and financial resources).

143. Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 14(1).

By contrast, a minority of the instruments explicitly seek to involve NSAs for transparency, representativeness, or legitimacy's sake. The Caspian Sea Biodiversity Protocol seems to be concerned with involving local populations because they "might be affected by the establishment of" protected areas.<sup>144</sup> And the OSPAR General Consultation Procedures indicate that States seek "views on proposals" because they "value increased transparency and acceptance of the nomination process and the establishment of MPAs."<sup>145</sup> But as stated above, NSA participation can increase at least the perceived legitimacy of decision making, which in turn can foster acceptance and compliance with the decisions made. Thus, legitimacy goals ultimately serve compliance goals.

Quantitative inclusiveness is also far from uniform among instruments that provide for NSA participation. While "local communities" or "local populations" and civil society or NGOs are most often listed as relevant stakeholders. Indigenous Peoples, the private sector and the scientific community are explicitly mentioned in only a minority of instruments. None of the reviewed instruments specifically refer to all five groups of NSAs listed in the BBNJ Agreement. The types of NSAs mentioned in each instrument are summarized in Table 2 below.

Table 2 – Different Levels of Quantitative Inclusiveness								
ABMT Instruments	Stakeholders generally	Indigenous Peoples	Local communities	Civil society or NGOs	General public	Private Sector	Scientific Community	Others
Apia Convention		X <sup>146</sup>	X <sup>147</sup>		X			

144. Protocol Concerning SPAs in the Mediterranean, *supra* note 7, art. 7(2); Caspian Sea Biodiversity Protocol, *supra* note 102, art. 10(c).

145. OSPAR General Consultation Procedures, *supra* note 105, § 3.1.

146. This is indirectly included in the concept of "traditional cultural practices," *see* Apia Convention, *supra* note 101, art. VI.

147. *Id.*

Table 2 – Different Levels of Quantitative Inclusiveness								
ABMT Instruments	Stakeholders generally	Indigenous Peoples	Local communities	Civil society or NGOs	General public	Private Sector	Scientific Community	Others
Protocol Concerning Protected Areas in the Eastern African Region			X	X	X			
Protocol Concerning SPAs in the Mediterranean			X	X	X	X		
Protocol Concerning SPAs in the Wider Caribbean Region			X	X	X			
Red Sea Protocol	X	X	X		X			
Protocol on Integrated Coastal Zone Management in the Mediterranean			X	X	X	X		X <sup>148</sup>
Black Sea Biodiversity Protocol	X				X			
Caspian Sea Biodiversity Protocol			X	X	X			

148. See Protocol on Integrated Coastal Zone Management in the Mediterranean, *supra* note 101, art. 14(1) (“Territorial communities and public entities affected, social actors.”).

ABMT Instruments	Stakeholders generally	Indigenous Peoples	Local communities	Civil society or NGOs	General public	Private Sector	Scientific Community	Others
CBD COP Decision IX/20 on Marine and Coastal Biodiversity		X	X				X	
OSPAR General Consultation Procedures	X			X	X			
ISA Standardized Procedure	X	X				X	X	

#### IV. NSA PARTICIPATION IN ABMTS UNDER THE BBNJ AGREEMENT: INNOVATIONS AND MISSED OPPORTUNITIES

##### A. NSAs in the BBNJ ABMT Regime

The BBNJ Agreement sets out a five-stage process for the governance of ABMTs in ABNJ: (1) proposals for the establishment of ABMTs, (2) consultations on such proposals, (3) decision making on the establishment of ABMTs, (4) implementation, and (5) review and monitoring. The text of the Agreement itself provides for the direct or indirect involvement of NSAs in four out of five stages—all except the implementation stage. This section details the nature of NSA involvement, highlighting the differences in inclusiveness with other reviewed instruments.

##### 1. Proposals for ABMTs

Article 19 governs the submission process for proposals on the establishment of ABMTs. Proposals can be submitted to the secretariat only by State parties, either individually or

collectively.<sup>149</sup> The Agreement also provides that, to develop proposals, States “shall collaborate and consult, as appropriate, with relevant stakeholders, including States and global, regional, subregional and sectoral bodies, as well as civil society, the scientific community, the private sector, Indigenous Peoples and local communities, for the development of proposals, as set out in this Part.”<sup>150</sup> But this seems to be a cross-reference to the consultation stage and does not explicitly provide for other types of involvement of NSAs at the proposal stage.

Indigenous Peoples and local communities and the scientific community will be involved, at least indirectly, in the development of the proposals, as Article 19(3) of the Agreement provides that proposals “shall be formulated on the basis of the best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities . . . .”<sup>151</sup> Moreover, proposals must include a description of “[h]uman activities in the area, *including uses by Indigenous Peoples and local communities*, and their possible impact, if any” as well as “[r]elevant scientific input and, where available, traditional knowledge of Indigenous Peoples and local communities.”<sup>152</sup> As stated above, the consideration of traditional knowledge and scientific input in developing proposals, although non-participative as such, makes it more likely that such proposals

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149. BBNJ Agreement, *supra* note 2, art. 19(1).

150. *Id.* art. 19(2). Indigenous Peoples and local communities differ in that local communities that are not Indigenous have not necessarily suffered invasion or colonization. “Indigenous Peoples” are indeed typically defined in relation to a past “conquest” or colonization. See ILO Convention on Indigenous and Tribal Peoples, *supra* note 62, art. 1(b) (“[P]eoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.”). Like Indigenous Peoples, however, “local communities” have Indigenous Peoples “cultural values, practices, and systems developed through multiple generations and poised to be passed to future generations.” Radovich, *supra* note 63, at 417.

151. BBNJ Agreement, *supra* note 2, art. 19(3) (emphasis added).

152. *Id.* art. 19(4) (emphasis added). See also *id.* art. 24(3) (“Measures adopted on an emergency basis shall be based on the best available science and scientific information and, where available, *relevant traditional knowledge of Indigenous Peoples and local communities* and shall take into account the precautionary approach . . . .”) (emphasis added).

accord with Indigenous Peoples and the scientific community's interests.

Annex I of the Agreement provides an indicative list of criteria for the identification of ABMTs.<sup>153</sup> The Scientific and Technical Body can further develop and revise the criteria, and may elaborate further requirements for the proposals' content.<sup>154</sup> The Scientific and Technical Body will be composed of experts nominated by State parties and elected by the COP, "taking into account the need for multidisciplinary expertise, including . . . expertise in relevant traditional knowledge of Indigenous Peoples and local communities."<sup>155</sup> The potential presence of these experts in traditional knowledge on the Scientific and Technical Body would further ensure that traditional knowledge is taken into account in the development of proposals.

After a proposal is submitted, the secretariat will make the proposal publicly available and submit it to the Scientific and Technical Body for a preliminary review to ascertain whether the proposal contains the information required at Article 19, including indicative criteria described in Annex I.<sup>156</sup> The outcome of that review is then made public, after which the proponent must submit a proposal revised in accordance with the Scientific and Technical Body's preliminary review. The revised proposal is also made public before consultations begin.<sup>157</sup>

## 2. Consultations on Proposals

The consultation process is set out in Article 21, which states that "[c]onsultations on proposals submitted under article 19 shall be inclusive, transparent and open to all relevant stakeholders, including states and global, regional, subregional and sectoral bodies, as well as civil society, the scientific community, Indigenous Peoples and local communities."<sup>158</sup> It should be noted that the explicit reference to "the private sector" as a relevant stakeholder does not appear in this formulation, though it refers generally to "*all* relevant stakeholders." Thus,

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153. *Id.* art. 19(5).

154. *Id.* art. 19(6).

155. *Id.* art. 49(2).

156. *Id.* art. 20.

157. *Id.*

158. *Id.* art. 21(1).

Article 21 could fairly be read in conjunction with the list of relevant stakeholders in Article 19(1), which does include the private sector.

Article 21 then provides a detailed list of the kind of input that would be sought from NSAs, namely “Indigenous Peoples and local communities with relevant traditional knowledge, the scientific community, civil society and other relevant stakeholders.” This includes “(i) views on the merits of the proposal; (ii) [a]ny other relevant scientific input; (iii) [a]ny relevant traditional knowledge of Indigenous Peoples and local communities; [and] (iv) [a]ny other relevant information.”<sup>159</sup> This provision indicates that the consultation process not only allows the listed NSAs to provide their opinions on the proposals, but also to participate in improving or revising the proposals by contributing relevant information they possess. Contributions made by NSAs during the consultations process are to be made public.<sup>160</sup>

The Scientific and Technical Body will be tasked with further elaborating the modalities of the consultation process to be subsequently adopted by the COP.<sup>161</sup>

### 3. Decision Making on the Establishment of ABMTs

Article 22(1) provides that

[t]he Conference of the Parties, on the basis of the final proposal and the draft management plan, taking into account the contributions and scientific input received during the consultation process established under this Part, and the scientific advice and recommendations of the Scientific and Technical Body . . . shall take decisions related to ABMTs.<sup>162</sup>

While this provision ensures that the contributions made by NSAs during the consultation process will affect the COP’s decision making, the Agreement leaves significant discretion on how exactly the COP is to “take into account” that input. It is therefore unclear how NSA participation will impact the establishment of

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159. *Id.* art. 21(2)(c).

160. *Id.* art. 21(3).

161. *Id.* art. 21(8).

162. *Id.* art. 22(1).

ABMTs, and the text provides no mechanism to ensure that it does.

#### 4. Review and Monitoring

The Agreement leaves implementation and most of the review and monitoring of ABMTs in the hands of State parties.<sup>163</sup> Article 26(5) does, however, specify that “the Conference of the Parties shall, as necessary, take decisions or recommendations on the amendment, extension or revocation of [ABMTs] on the basis of the *best available science and scientific information and, where available, relevant traditional knowledge of Indigenous Peoples and local communities . . .*”<sup>164</sup> In sum, the Agreement does not provide for the formal and direct consultation of the scientific community and Indigenous Peoples at the review and monitoring stage, but it does allow the specific knowledge they respectively possess to play a role in review and monitoring decisions.

##### *B. Summary: Comparing the BBNJ Agreement with Other ABMT Instruments*

Comparing the BBNJ Agreement to the other reviewed ABMT instruments allows us to identify what the Agreement adds to the existing legal landscape. First, unlike any other reviewed instrument, it is a binding multilateral convention that creates a mandatory framework for the consultation of NSAs on proposals for the establishment of international ABMTs. It is not the first instrument to provide for the participation of NSAs in ABMT establishment or proposals. The ISA’s Draft Standardized Procedure in particular is more qualitatively inclusive as they provide for the participation of NSAs in the making of proposals and in the review and monitoring of established ABMTs—which the BBNJ Agreement does not. But the ISA Draft Standardized Procedure, even if it were formally adopted by the ISA, would be only guidelines that could easily be modified. While soft law can be just as powerful as “hard” law, it inherently makes NSA involvement more precarious. The BBNJ Agreement, as a binding treaty that imposes an obligation on States to consult NSAs

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163. *See id.* art. 25.

164. *Id.* art. 26(5) (emphasis added).

(“Parties *shall* collaborate and consult . . . with relevant stakeholders”<sup>165</sup>), creates tangible corresponding participatory *rights* for NSAs at the international level.

Second, the Agreement crystallizes the trend in conservation and ocean governance of perceiving NSAs as the solution to, not the problem of conservation of biodiversity.<sup>166</sup> It does not contain paternalizing provisions seeking to “educate” NSAs on the value of ABMTs or conservation, and makes no reference to ensuring compliance with ABMT measures. On the contrary, it formally recognizes that States have much to learn from NSAs about conservation and sustainable use of marine biodiversity, in particular from the scientific community and from Indigenous Peoples and local communities who possess traditional knowledge. It is the only instrument reviewed that indicates proposals must be “on the basis of” traditional knowledge, where available.<sup>167</sup> And it envisages the presence of experts on traditional knowledge of Indigenous Peoples on the Scientific and Technical Committee, which plays a role in every stage of the ABMT process.

Table 3 below adds the BBNJ Agreement in the Qualitative Inclusiveness Table and identifies the different types of NSA participation as outlined above present therein.

Table 3 – Compared Qualitative Inclusiveness of the BBNJ Agreement						
ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
BBNJ Agreement		X		X		X
Ramsar Convention						
Abidjan Convention						
Noumea Convention						
Apia Convention	X		X			

165. *Id.* art. 17 (emphasis added).

166. Mohammed, *supra* note 31, at 83.

167. BBNJ Agreement, *supra* note 2, art. 19(3).

ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
Protocol Concerning Protected Areas in the Eastern African Region	X	X	X		X	
Protocol Concerning SPAs in the Mediterranean	X	X	X		X	(Only as criterion for identification)
Protocol Concerning SPAs in the Wider Caribbean Region	X	X	X		X	
Red Sea Protocol	X	X		X	X	
Protocol on Integrated Coastal Zone Management in the Mediterranean	X	X				X
Black Sea Biodiversity Protocol	X	X			X	
Caspian Sea Biodiversity Protocol	X	X		X	X	
OSPAR Guidelines for the Identification and Selection of MPAs						
IMO Revised Guidelines on PSSAs						
CCAMLR General framework for the establishment of CCAMLR Marine Protected Areas						

ABMT Instrument	Education	Information	Exemptions for traditional use	Consideration of external scientific or traditional knowledge	Role in implementation <i>ex post</i>	Consultation <i>ex ante</i>
CBD COP Decision IX/20 on Marine and Coastal Biodiversity				X		X
OSPAR General Consultation Procedures				X		X
ISA Standardized Procedure				X		X

Third, the Agreement is also unique in its quantitative inclusiveness. Out of the instruments reviewed, it is the only one that explicitly lists civil society, the scientific community, the private sector, Indigenous Peoples and local communities as “relevant stakeholders.” Of note, the private sector is specifically mentioned as a stakeholder in only three other instruments. Table 4 below adds the BBNJ Agreement to the Quantitative Inclusiveness Table for ease of comparison.

ABMT Instruments	Stakeholders generally	Indigenous Peoples	Local communities	Civil society or NGOs	General Public	Private Sector	Scientific Community	Others
BBNJ Agreement	X	X	X	X		X	X	
Apia Convention		X	X		X			
Protocol Concerning Protected Areas in the Eastern African Region			X	X	X			

ABMT Instruments	Stakeholders generally	Indigenous Peoples	Local communities	Civil society or NGOs	General Public	Private Sector	Scientific Community	Others
Protocol Concerning SPAs in the Mediterranean			X	X	X	X		X
Protocol Concerning SPAs in the Wider Caribbean Region			X	X	X			
Red Sea Protocol	X	X	X		X			
Protocol on Integrated Coastal Zone Management in the Mediterranean			X	X	X	X		X
Black Sea Biodiversity Protocol	X				X			
Caspian Sea Biodiversity Protocol			X	X	X			
CBD COP Decision IX/20 on Marine and Coastal Biodiversity		X	X				X	
OSPAR General Consultation Procedures	X			X	X			
ISA Standardized Procedure	X	X				X	X	

But the BBNJ Agreement could have gone further in NSA inclusiveness. While it innovates in certain aspects, it stalls, and even takes a few steps back, in important others.

First, like many existing instruments, the BBNJ Agreement fails to give Indigenous Peoples a sufficient role in ABMT establishment. The Agreement treats Indigenous Peoples at the same level as other “relevant stakeholders.” But unlike the private sector, civil society, the scientific community Indigenous Peoples (and, to a certain extent, local communities) are not just stakeholders, they are *rights* holders. Rights specific to Indigenous Peoples are enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>168</sup> to which the Agreement itself refers.<sup>169</sup> As stated above, the establishment of ABMTs can affect myriad Indigenous Peoples’ rights, including traditional fishing rights,<sup>170</sup> cultural rights,<sup>171</sup> and land rights that extend to marine areas.<sup>172</sup> Indigenous Peoples also have a recognized right to self-determination, which includes a right to “freely pursue their economic, social and cultural development.”<sup>173</sup> Moreover, States have a duty to consult Indigenous Peoples “to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”<sup>174</sup> Yet during BBNJ negotiations, a proposal in the ABMT section to include the requirement that Indigenous Peoples be consulted in view of obtaining their free, prior, and informed consent for the establishment of an ABMT was rejected. Granted, the Agreement’s preamble affirms that “nothing in this Agreement shall be construed as diminishing or extinguishing the existing rights of Indigenous Peoples, including as set out in the United Nations Declaration on the Rights of Indigenous Peoples, or of, as appropriate, local communities.”<sup>175</sup> But recognizing a specific

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168. Ban & Frid, *supra* note 69, at 180; UNEP/CBD/SBSTTA/16/INF/10, *supra* note 16, at 5.

169. BBNJ Agreement, *supra* note 2, pmb., at 2.

170. Moreira, *supra* note 66.

171. Enyew, *supra* note 70, at 51.

172. *Id.* at 50.

173. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples [UNDRIP], art. 3 (Sept. 13, 2007); *see also id.* art. 4.

174. *Id.* art. 19

175. BBNJ Agreement, *supra* note 2, pmb., at 1.

obligation to seek the free, prior, and informed consent of Indigenous Peoples affected in a binding multilateral instrument like the BBNJ Agreement would have given more teeth to the principle and clarified that it applies in the extraterritorial context. The BBNJ Agreement does nothing else to acknowledge Indigenous Peoples' unique situation, i.e., the fact that the establishment of ABMTs can affect Indigenous Peoples' rights recognized under international law, as opposed to merely philanthropic, economic, or scientific interests for other NSAs. This is not to say that other types of NSAs should not have been allowed to participate, but arguably Indigenous Peoples should have been given a more preferential status than other NSAs. Because the establishment of ABMTs can impact the very existence of some Indigenous Peoples as distinct groups, care should be taken that the consultation of other NSAs does not dilute Indigenous Peoples' voices.

For example, the negotiating States could have gone even further by creating a separate category of participants for Indigenous Peoples, as many Indigenous Peoples themselves advocate in other fora.<sup>176</sup> The Arctic Council is often cited as the best example. It is an international forum dealing with environmental issues in the Arctic composed of eight Arctic States and six groups representative of Indigenous Peoples, which are given the status of "permanent participants."<sup>177</sup> The Arctic Council does not have the legal personality of an international organization and does not produce binding instruments, but it does create soft law that can influence decision making in the region.<sup>178</sup> And although Indigenous permanent participants do not have voting power, their influence has been described as a de facto veto right.<sup>179</sup> While a category between mere observer and parties with voting power may be more difficult to imagine in the State-centric context of binding COP decisions, it could be

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176. Osakada, *supra* note 20, at 122; Cambou, *supra* note 32, at 39, 42 ("[I]ndigenous peoples still argue that this is insufficient, and that a new category of participation for indigenous peoples at the un-level should be created.").

177. Cambou, *supra* note 32, at 49; *see also* ARCTIC COUNCIL, <https://arctic-council.org> [<https://perma.cc/6Y3S-H327>] (last visited Apr. 19, 2024).

178. Cambou, *supra* note 32, at 49.

179. Duyck, *supra* note 51, at 7; *see also* Sabaa A. Khan, *Legally Sculpting a Melting Arctic: States, Indigenous Peoples and Justice in Multilateralism*, in *CHANGING ACTORS IN INTERNATIONAL LAW*, *supra* note 14, at 153, 155; Cambou, *supra* note 32, at 47-48.

envisioned at least for the adoption of non-binding decisions or declarations.

Also of concern, the Agreement seems to condition the participation of Indigenous Peoples on their possession of relevant traditional knowledge. Despite the Agreement's insistence that consultations shall be "open to all relevant stakeholders," Article 21, which details the procedure for consultation of NSAs, specifies that input is to be gathered from Indigenous Peoples and local communities "*with relevant traditional knowledge.*"<sup>180</sup> This suggests that Indigenous Peoples' involvement is sought in order to gather traditional knowledge, and not to fulfill their right to self-determination under international law. Guaranteeing the participation of all affected Indigenous Peoples, regardless of their traditional knowledge, to obtain their opinion on the proposed ABMT measures would have gone a long way in implementing the rights enshrined in UNDRIP. It remains to be seen whether the BBNJ Agreement's COP, tasked with adopting the modalities for the consultation process,<sup>181</sup> will broaden consultations to all affected Indigenous Peoples regardless of whether they possess traditional knowledge or not, taking into account the preamble's affirmation that the Agreement shall not diminish Indigenous Peoples' rights under international law.

This treatment of Indigenous Peoples is symptomatic of a broader trend in the BBNJ Agreement's provisions on ABMTs, and a common trait with most surveyed instruments: NSA participation is sought primarily for knowledge, efficiency, and compliance reasons, and not to increase legitimacy or fulfill participation rights inherent to certain actors. As pointed out above, not all "relevant stakeholders" listed are truly stakeholders in the sense that they may be directly affected by the measures<sup>182</sup>—yet they are all treated equally in those provisions because they are all equally likely to possess relevant knowledge. As explained above, norms are perceived as more legitimate if they arise from deliberative decision making that accounts for the interests those affected by the norm.<sup>183</sup> If legitimacy or fairness

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180. BBNJ Agreement, *supra* note 2, art. 21(2)(c) (emphasis added).

181. *Id.* art. 21(8).

182. *See supra* Section II.E.

183. WHEATLEY, *supra* note 22.

was the goal of NSA inclusion, then actors directly and existentially affected by the decisions, like local communities and the private sector, should have had a separate, more important consultative role than other NSAs.

Even taking legitimacy aside, the BBNJ Agreement could have done a better job including NSAs across the board. As noted above, and contrary to several other ABMT instruments, the BBNJ Agreement foresees no involvement of NSAs in the implementation stage of ABMTs, even when research shows that participation of NSAs, in particular local communities and civil society organizations, increases success in implementation and management of ABMT measures.<sup>184</sup> The BBNJ Agreement could also have acknowledged the possibility of ABMTs fully managed by local communities, like LMMAs currently are.<sup>185</sup>

Moreover, as described above, the ISA Draft Standardized Procedure provides for continued consultations of stakeholders at the review and monitoring stage. The BBNJ Agreement, by contrast, does not go as far, as it does not provide for consultation of stakeholders when reviewing and revising ABMTs, but mainly leaves this task to the Scientific and Technical Body.<sup>186</sup> The Agreement's text does not seem to leave room for the COP to decide otherwise.

Finally, returning to Arnstein's ladder of participation, one cannot help but notice that none of the reviewed instruments, including the BBNJ Agreement, provide NSA participation that rises to the highest rung of the ladder, i.e., "partnership," where decision-making power is shared with citizens. Some instruments do provide for collaboration with NSAs in the field of managing or planning ABMT measures,<sup>187</sup> but not in the decision of

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184. See Papanicolopulu & Rocha *supra* note 17.

185. See Ban & Frid, *supra* note 69.

186. BBNJ Agreement, *supra* note 2, art. 26(3)–(5).

187. See Caspian Sea Biodiversity Protocol, *supra* note 102, art. 10(2)(c) ("In conformity with the applicable international treaties and national legislation, the Contracting Party shall adopt planning, management, supervision and monitoring measures for the protected areas, which should include: . . . The active involvement of local communities and wider populations, as appropriate, in development of a management plan and subsequent management of protected area.").

establishing the ABMT itself.<sup>188</sup> Arguably, for ABMT measures in ABNJ to have the force of binding international law, they may originate only from States or intergovernmental organizations, which have the capacity to create international law, while non-State actors do not. To formally give decision-making power to NSAs could affect the legal status of ABMT decisions. But as Arnstein points out, consultations are a mere “sham” if voices consulted are not truly taken into account.<sup>189</sup> Short of giving a voting power to NSAs, for NSA inclusion to be effective, the COP will have to consider measures to ensure that consultations are not “empty rituals”<sup>190</sup> but have the real power to shape outcomes. This is but one out of several practical challenges of NSA participation that the COP will have to address.

V. *FROM INCLUSIVENESS TO INCLUSION: FUTURE  
CHALLENGES TO NSA PARTICIPATION*

Creating an NSA-inclusive ABMT procedure can be meaningful only if it leads to de facto inclusion of NSAs in the procedure, i.e., if the listed NSAs actually get to participate in consultations and voice their interests. But there are several roadblocks on the path from inclusiveness to inclusion.

First, it remains to be seen how the BBNJ Agreement will include the voice of “civil society” in practice. In multilateral treaty practice, “civil society” is usually understood as referring to NGOs. But civil society is much broader than NGOs, and NGOs alone may be inadequate to represent civil society’s varied voices, such as less institutionalized social movements, public opinion, and individuals.<sup>191</sup> NGOs lack democratic legitimacy and

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188. It is worth noting in this regard that Protocol Concerning SPAs in the Mediterranean, *supra* note 7, provides that “[UNEP] shall be responsible for coordinating the implementation of this Protocol. For this purpose, it shall receive the support of the Centre, to which it may entrust the following functions: . . . (a) assisting the Parties, *in cooperation with* the competent international, intergovernmental and *non-governmental organizations, in [ ] establishing and managing specially protected areas in the area to which this Protocol applies.”* *Id.* art. 25(1)(a). This suggests a potential role of NGOs in establishing specially protected areas, but does not specify the nature of this role.

189. Arnstein, *supra* note 97, at 219.

190. *Id.* at 216-217.

191. Steiner, Alves & Santana, *supra* note 43, at 101-02.

representativeness, as they are not accountable to an electorate,<sup>192</sup> and are often “single-issue political agents” that do not aim to be democratically representative or legitimate at all.<sup>193</sup> Moreover, some NGOs may lack independence and may not even represent civil society interests, but rather act as a conduit for other specific interests. Indeed, some NGOs are wholly financed by industry,<sup>194</sup> and others are funded by States and implement policy goals.<sup>195</sup>

Second, allowing NSA participation may allow some NSAs to have a second bite at the apple. Some NSAs’ interests may be overrepresented and therefore reduce other NSAs’ voices if they are represented through channels other than the formal consultation process established in the Agreement. For example, fishing industry representatives typically seek to influence regional fisheries management organizations’ (RFMOs) policy through lobbying their respective governments, but NGOs typically do not.<sup>196</sup> States typically protect the interests of the fishing industry.<sup>197</sup> It could be expected that the same would occur in the BBNJ ABMT context. This means that fishing industry interests would be doubly voiced, at the national level and at the international level,<sup>198</sup> and thus doubly represented during the ABMT process: once through States, and a second time through their own input during consultations. By contrast, other NSAs that seldom lobby their government, such as NGOs, scientific institutions, and Indigenous Peoples and local communities, would only get one bite at the apple. This would hinder equal inclusion of NSAs. As argued above this would be especially problematic for the realization of Indigenous Peoples’ rights.

Third, certain types of NSAs are more likely to participate than others. In the RFMOs context, studies have shown that companies and industry associations make up the largest share of

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192. Kirk, *supra* note 26; Papanicolopulu & Rocha *supra* note 17, at 197; Houghton, *supra* note 23, at 7; WHEATLEY, *supra* note 22, at 86; Martí, *supra* note 24.

193. WHEATLEY, *supra* note 22, at 85, 86.

194. Kirk, *supra* note 26.

195. Chen & Liu, *supra* note 53.

196. Matilda T. Petersson et al., *Patterns and Trends in Non-State Actor Participation in Regional Fisheries Management Organization*, 104 MARINE POL’Y 146, 152 (2019).

197. *Id.*

198. Kirk, *supra* note 26 (“[T]wo bites at the cherry”).

participants compared to other types of NSAs.<sup>199</sup> Business associations are not only more numerous, but they also participate more frequently than other NSAs. Repeat players are more likely to influence policy making, notably by creating strong relationships with decision-makers over time.<sup>200</sup> These disparities in participation are largely due to a lack of financial and organizational resources, as some NSAs such as NGOs or Indigenous Peoples and local communities may not have the means to travel and attend meetings or workshops.<sup>201</sup> For example, participation of Indigenous Peoples in the identification of ecologically or biologically significant marine areas under the CBD has so far been limited, notably because Indigenous Peoples and local communities do not have the resources to attend workshops or provide traditional knowledge.<sup>202</sup>

Fourth, even if there is representational diversity of different categories of NSAs, the NSAs that participate may internally lack diversity. In the similar context of NSA participation in RFMOs, research has shown that NGOs and research organizations are predominantly from the Northwestern hemisphere.<sup>203</sup> In general, NSAs from high-income countries participate more often than those from low and lower middle-income countries.<sup>204</sup>

In the same vein, international NGOs participate more than national, local, or indigenous associations because they are better funded and better organized.<sup>205</sup> Indigenous Peoples, in particular, face serious financial and material constraints to participation.<sup>206</sup> Even within the private sector, coastal fishing

199. Petersson, *supra* note 196, at 149.

200. *Id.* at 151.

201. Seta, *supra* note 49, at 340; *see also* Vierros et al., *supra* note 68, at 8 (citing financial constraints as a challenge to Indigenous Peoples participation in the UNFCCC, CBD and other UN processes).

202. Radovich, *supra* note 63, at 421.

203. Petersson, *supra* note 196, at 149-50.

204. *Id.* at 151; *see also* Houghton, *supra* note 23, at 7, 14; WHEATLEY, *supra* note 22, at 86.

205. Kirk, *supra* note 26; Houghton, *supra* note 23, at 7.

206. Vierros et al., *supra* note 68, at 8; Khan, *supra* note 179, at 148-49 (citing factors that led to Inuit Circumpolar Council's decision not to engage in Polar Code as financial and human resource limitations and the presence of environmental NGOs that attempted to capitalize on the concerns and agenda of IP in the context of marine

boat crews are rarely represented as compared to bigger industry associations or corporations.<sup>207</sup> These disparities in representation are also largely due to a lack of financial or human resources.

As stated above, the BBNJ Agreement delegated the responsibility for further defining the modalities of NSA consultations to the COP.<sup>208</sup> This leaves an opportunity for the COP to address or prevent some of the challenges to achieving inclusion highlighted above.

For NGOs, the COP could establish independence criteria to limit the participation of NGOs exclusively funded by one State or by industry interests. As for accountability and representativeness of civil society, the COP rules on consultation could draw inspiration from the ECOSOC Resolution 1996/31, which outlines the criteria the UN Committee on NGOs should consider when reviewing NGOs applying for observer status.<sup>209</sup> The Resolution provides that NGOs should have a representative structure, accountability mechanisms, and democratic and transparent decision-making processes.<sup>210</sup> Moreover, the resolution also emphasizes the need to include representation of NGOs from developing countries. This is important as rules on structure and accountability of NGOs may exacerbate the Western bias, because they are often based on Western views of how NGOs should operate.<sup>211</sup> The COP should thus carefully balance the goals of accountability and diversity. And together, these goals should in turn be weighed against the need for expertise of certain NGOs, for which representativeness and broad membership is not needed or desirable.<sup>212</sup>

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environmental protection. As a result, Indigenous knowledge and science on the marine ecosystem were largely ignored in a global rule-making process directly impacting their traditionally occupied lands, cultural integrity and food security).

207. Petersson, *supra* note 196, at 151.

208. BBNJ Agreement, *supra* note 2, art. 21(8) (“[T]he modalities for the consultation and assessment process, including duration, shall be further elaborated by the Scientific and Technical Body, as necessary, at its first meeting, for consideration and adoption by the Conference of the Parties.”).

209. Economic and Social Council Res. 1996/31 (July 25, 1996).

210. *Id.*

211. Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 *BROOK. J. INT’L L.* 139, 201 (2005).

212. Houghton, *supra* note 23, at 2.

As to the issue of overrepresentation of certain interests, the Agreement leaves significant discretion to the COP in deciding how it “tak[es] into account the contributions . . . received during the consultation process.”<sup>213</sup> The COP should consider the fact that certain industry interests, such as fishing, are typically already voiced by States when choosing how to weigh the input of the private sector during consultations, to reduce the potential “second bite at the apple” effect and consequent distortion in representation.

To promote the effective participation of all types of NSAs, the COP could provide capacity building or funding to NSAs that face financial constraints, in particular Indigenous Peoples. Since Indigenous Peoples have the *right* to participate under international law, States should ensure that they have the capacity to effectively enjoy that right.<sup>214</sup> The COP should also provide Indigenous Peoples sufficient time to engage in their own decision-making process and their consultation should be consistent with their cultural and social practices.<sup>215</sup>

The BBNJ Agreement contains extensive capacity-building provisions and a robust financial mechanism, but those provisions are for the benefit of developing States only, not NSAs.<sup>216</sup> Capacity building and funding could also be directed toward NSAs from developing States, so as to remedy the lack of participation of NSAs from those States. The Agreement is conspicuously concerned with geographical representation, in particular the representation of developing countries, in various articles.<sup>217</sup>

213. BBNJ Agreement, *supra* note 2, art. 22(1).

214. Human Rights Council, Final Rep. of the Study on Indigenous Peoples and the Right to Participate in Decision-making, “Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decisionmaking”, ¶ 33, UN Doc. A/HRC/18/42, annex (Aug. 17, 2011).

215. *Id.* ¶ 9.

216. BBNJ Agreement, *supra* note 2, arts. 40–46, 52.

217. *See, e.g., id.* art 46(2):

[The capacity-building and transfer of marine technology committee] shall consist of members possessing appropriate qualifications and expertise, to serve objectively in the best interest of the Agreement, nominated by Parties and elected by the Conference of the Parties, taking into account gender balance and *equitable geographical distribution and providing for representation on the committee from the least developed countries, from the small island developing States and from the landlocked developing countries.*

There is no reason this concern would not apply to NSAs, given the Agreement's stated objective to make their participation "inclusive."

## VI. CONCLUSION

Non-State actors possess diverse expertise and worldviews that are directly relevant to marine biodiversity protection measures like ABMTs. These regimes in turn may impact the livelihood and sometimes the very existence of some of those NSAs, in particular Indigenous Peoples and local communities. The BBNJ Agreement is unique in creating a binding, international consultation framework open to all relevant non-State stakeholders for the establishment of ABMTs in ABNJ. In doing so, it fortifies an existing trend initiated in preceding instruments (mainly soft law) to recognize the value of NSA input in ABMT processes. The integration of NSA knowledge is commendable in itself and is likely to result in decisions that are fairer to NSAs.

But the Agreement missed the opportunity to further protect Indigenous Peoples' rights. It also disappoints by failing to include NSAs further in the review, monitoring, and implementation stages of ABMTs. The Agreement, which has yet to enter into force,<sup>218</sup> leaves significant gaps for the COP to bridge. In deciding the modalities of NSA consultations for

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art. 49(2):

The Scientific and Technical Body shall be composed of members serving in their expert capacity and in the best interest of the Agreement, nominated by Parties and elected by the Conference of the Parties, with suitable qualifications, taking into account ... gender balance and equitable geographical representation.

218. In accordance with Article 68(1) of the BBNJ Agreement, *supra* note 2, it will enter into force 120 days after the sixtieth instrument of ratification, approval, acceptance, or accession has been deposited. At the time of writing, eighty-nine States have signed the Agreement, and four States have ratified it. See UNITED NATIONS TREATY COLLECTION,

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXI-10&chapter=21&clang=\\_en#:~:text=The%20Agreement%20was%20adopted%20in,marine%20biological%20diversity%20of%20areas](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXI-10&chapter=21&clang=_en#:~:text=The%20Agreement%20was%20adopted%20in,marine%20biological%20diversity%20of%20areas) [<https://perma.cc/8XRK-GNJR>] (last visited Apr. 17, 2024).

ABMTs,<sup>219</sup> the COP will have to find a mechanism to ensure that consultations are not mere “window-dressing” but in fact take into account NSA input. It will also have to address practical challenges to inclusion to allow the effective and diverse participation of NSAs. Only then can the real contribution of the BBNJ Agreement to NSA participation be assessed.

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219. The BBNJ Agreement also provides for consultations of NSAs under the environmental impact assessment process it creates. The COP may face the same practical challenges in that context. *See* BBNJ Agreement, *supra* note 2, art. 32.