Sustainable Development Goal 14's Marine Protected Area Target — Is it 'SMART' Enough to Conserve Marine Biodiversity in Areas Beyond National Jurisdiction?

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ABSTRACT

UN Sustainable Development Goal 14's fifth target (SDG14.5) aims to conserve at least 10% of marine and coastal areas by 2020. SDG14.5 applies to both to marine areas under national jurisdiction and in areas beyond national jurisdiction (ABNJ).

Several unique marine biodiversity hotspots exist within ABNJ that could benefit from measures afforded by a Marine Protected Area (MPA) designation. However, significant challenges preclude effective implementation of MPAs within ABNJ due to gaps and fragmentation within the international legal framework that governs activities and environmental impacts within these areas.

Assessing progress towards any target, regardless of its subject, requires specific, measurable, achievable, realistic, and time bounded (SMART) parameters to be defined, otherwise the success of its implementation cannot be evaluated.

SDG14.5's target is only somewhat SMART; it includes a percentage for MPA coverage to be achieved and a time-bound element for when it must be completed by. Limited details applicable to ABNJ are provided within SDG14.5's associated indicator. The UN Environment-WCMC have been tasked with clarifying the measures for the indicators to track SDG14.5's progress. It has been determined that, in meeting the requirement of SDG14.5, ICUN's definition for MPA shall apply, with all such defined MPAs to be recorded within the World Database on Protected Areas (WDPA). At time of writing, only 1% of ABNJ was covered by MPAs.

This paper outlines the challenges that are limiting progress in establishing MPAs within ABNJ as well as recommendations for addressing the issues working towards SDG14.5's aim of 10% MPA coverage by 2020, including ocean areas within ABNJ.

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I INTRODUCTION

In 2015, the United Nations General Assembly (UNGA) adopted by consensus 17 Sustainable Development Goals (SDGs) and 169 associated targets as its blueprint for ensuring economic, social, and environmental balance is achieved for all global development – the *2030 Agenda for Sustainable Development* ('*SDG-Agenda'*).[1] Goal 14, SDG14, calls for the conservation and sustainable use of the oceans and

[1] UNGA, *The 2030 Agenda for Sustainable Development*, Res 70/1, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015), goal 14 ('*SDG-Agenda*').

their resources.[2] SDG14's inclusion highlights the importance placed on maintaining healthy oceans due to the vast resources and ecosystem services it provides.[3]

The fifth of SDG14's ten targets, SDG14.5, aims to conserve, by 2020, at least 10% of marine and coastal areas, to be tracked as a percentage of Marine Protected Areas (MPAs) in relation to total area.[4] SDG14.5 applies to marine areas both within and in areas beyond national jurisdiction (ABNJ).[5]

In order to achieve progress towards any target, regardless of subject, it needs to be specific, measurable, achievable, realistic, and time bounded (SMART), otherwise its success cannot be assessed.[6] But SDG14.5's target is only somewhat SMART, in that it includes the time bound element, of 2020, and that at least 10% of oceans need to be conserved.[7] SDG14.5 does not specify the level to which this is to be met, and there is an absence of globally agreed scientific standards under international law (IL) regarding MPAs, which further complicates this matter.[8] There are several

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[2] *Ibid.*

[3] See further, UNGA, *A Regular Process for Global Reporting and Assessment of the State of the Marine Environment, Including Socio-Economic Aspects (Regular Process): The First Global Integrated Marine Assessment: World Ocean Assessment I*, (Group of Experts of the Regular Process, 2016), cpt 55 <https://www.un.org/depts/los/global_reporting/WOA_RegProcess.htm> ('*World Ocean Assessment*'); Sebastian Unger et al, *Achieving the Sustainable Development Goal for the Oceans* (IASS Policy Brief No 1/2017, Institute for Advanced Sustainability Studies (IASS), February 2017) 4 ('*Achieving the SDG for the Oceans*').

[4] UNGA, *SDG-Agenda* (n 1) goal 14.5; UNGA, *Resolution Adopted by the General Assembly on Work of the Statistical Commission Pertaining to the 2030 Agenda for Sustainable Development*, Res 71/313, UN Doc A/RES/71/313 (10 July 2017, adopted 6 July 2017) annex, indicator 14.5.1 ('*Global Indicator Framework*').

[5] *SDG-Agenda* (n 1) goal 14.5; UNGA, *Global Indicator Framework* (n 4) indicator 14.5.1.

[6] Sustainable Development Solutions Network Secretariat, *Principles for Framing Sustainable Development Goals, Targets, and Indicators*, Issue Brief (Sustainable Development Solutions Network Secretariat, February 2014), 4–5 ('*Principles for Framing SDGs, Targets, and Indicators*').

[7] *SDG-Agenda* (n 1) goal 14.5.

[8] Ibid; Laura Recuero Virto, *A Preliminary Assessment of Indicators for SDG 14 on " Oceans "* (Issue Paper No 2017 GSSD Forum, OECD, 2017) 13 <https://hal.archives-ouvertes.fr/hal-01639008/document> ('*Preliminary Assessment of SDG14 Indicators*'); Alexander Mackie et al, *Indicators on Terrestrial and Marine Protected Areas: Methodology and Results for OECD and G20 Countries* (OECD Environment Working Papers No No. 126, OECD, 16 November 2017) 21–2

known hotspots of marine biodiversity within ABNJ that would benefit from measures afforded by a MPA designation.[9] However, challenges implementing effective MPAs within ABNJ exist due to such shortcomings under IL.[10]

('*Indicators on Terrestrial and Marine Protected Areas*'); UNGA, *Background Note of the Secretary-General for the Preparatory Process of the United Nations Conference to Support the Implementation of Sustainable Development Goal 14: Conserve and Sustainably Use the Oceans, Seas and Marine Resources for Sustainable Development*, 71st sess, Agenda items 19 and 74 (a) of the provisional agenda, Un Doc A/71/50 (16 January 2017), 9–10 ('*Secretary-General SDG14 Background Note*'); Lisa M Campbell and Noella J Gray, 'Area Expansion versus Effective and Equitable Management in International Marine Protected Areas Goals and Targets' (2019) 100 *Marine Policy* 192, 194–8.

[9] *World Ocean Assessment* (n 3) cpts 42, 45, 51.

[10] Henrick Ringbom and Tore Henriksen, *Governance Challenges, Gaps and Management Opportunities in Areas Beyond National Jurisdiction* (Information Paper, Global Environment Facility – Scientific and Technical Advisory Panel, 2016) ('*Governance Challenges, Gaps and Management Opportunities in ABNJ*'); High Seas Alliance, *Lessons Learned from Regional and Sectoral Organizations for Conservation in ABNJ* (31 May 2019) ('*ABNJ Lessons Learned*'); Jeff A Ardron et al, 'The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?' (2014) 49 *Marine Policy* 98, 105–6; David Freestone, 'An Unfinished Agenda: Governance of Areas beyond National Jurisdiction' in *Global Commons and the Law of the Sea* (Brill Nijhoff, 2018) 209, 223–5wri ('An Unfinished Agenda'); Glen Wright, Julien Rochette and Thomas Greiber, 'Sustainable Development of the Oceans: Closing the Gaps in the International Legal Framework' in *Legal Aspects of Sustainable Development* (Springer, 2016) 549, 1; Robin Warner, 'Oceans of Opportunity and Challenge: Towards a Stronger Governance Framework for Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction' (2018) 3(2) *Asia-Pacific Journal of Ocean Law and Policy* 157, 159 ('Oceans'); G Wright and J Rochette, *Regional Ocean Governance of Areas Beyond National Jurisdiction: Lessons Learnt and Ways Forward* (STRONG High Seas Project, 2019) 23–4 ('*Regional Ocean Governance of ABNJ*'); David Freestone, 'Governing the Blue: Governance of Areas Beyond National Jurisdiction in the Twenty-First Century' in *The Limits of Maritime Jurisdiction* (Brill Nijhoff, 2014) 727, 750–1 ('Governing the Blue'); Elizabeth M De Santo, 'Implementation Challenges of Area-Based Management Tools (ABMTs) for Biodiversity beyond National Jurisdiction (BBNJ)' (2018) 97 *Marine Policy* 34, 42; Glen Wright et al, *The Long and Winding Road: Negotiating a Treaty for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction* (Study No No 08/18, L'Institut du Développement Durable et des Relations Internationales (IDDRI), August 2018) 31–40 ('*Long and Winding Road*'); Kristina M Gjerde, Nichola A Clark and Harriet R Harden-Davies, 'Building a Platform for the Future: The Relationship of the Expected New Agreement for Marine Biodiversity in Areas beyond National Jurisdiction and the UN Convention on the Law of the Sea' (2019) 33(1) *Ocean Yearbook Online* 1, 4, 42; Kristina M Gjerde et al, 'Protecting Earth's Last Conservation Frontier: Scientific, Management and Legal Priorities for MPAs beyond National Boundaries' (2016) 26 *Aquatic Conservation: Marine and Freshwater Ecosystems* 45, 47–8; Margaret A Young, *Regime Interaction*

Thus, it is difficult to declare SDG14.5 a SMART target.[11] However, SDG14.5's target can be further clarified by its indicators, for which there is currently one, SDG14.5.1.[12]

The United Nations Environment-World Conservation Monitoring Centre (UNE-WCMC) has been tasked with clarifying the indicator for SDG14.5, and has commenced this process, though it has made only minimal progress with regards to its application within ABNJ.[13] The process is hamstrung, predominantly, by the lack of clarity within IL with respect to implementing effective MPAs within ABNJ.[14]

This paper provides details of the *SDG-Agenda*, specifically, its goal and corresponding target regarding the conservation of marine biodiversity through the use of MPAs, SDG14.5, and how it applies to ABNJ. It reviews whether the target contains sufficient elements to be considered SMART. It provides an overview of IL framework for implementing MPAs within ABNJ, discussing current gaps and progress being made to address its shortcomings per a new proposed international agreement — the Biodiversity Beyond National Jurisdictions (BBNJ).[15] Examples are provided of the limited progress implementing ABNJ MPAs, detailing: the process of designating Ecologically or Biologically Significant Areas (EBSA)[16]

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in International Law: Facing Fragmentation (Cambridge University Press, 2012) ('*Regime Interaction*').

[11] *SDG-Agenda* (n 1) goal 14.5; Virto (n 8) 13; Mackie et al (n 8) 21–2; UNGA, *Secretary-General SDG14 Background Note* (n 8) 9–10; Campbell and Gray (n 8) 194–8.

[12] *Global Indicator Framework* (n 4) indicator 14.5.1.

[13] UN Statistics, 'E-Handbook on SDG Indicators: Indicator 14.5.1' (1 December 2019) <https://unstats.un.org/wiki/display/SDGeHandbook/Indicator+14.5.1> ('*E-Handbook on SDG14.5.1*'); Jon Day et al, *Guidelines for Applying the IUCN Protected Area Management Categories to Marine Protected Areas* (IUCN, 2012) 19–23 ('*IUCN MPA Guidelines*').

[14] See above, (n 10).

[15] UN IGE BBNJ, *Revised Draft Text of an Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction: Advance, Unedited Version*, (27 November 2019) annex, ('*BBNJ Revised Draft Text*').

[16] CBD COP, *Decision Adopted By The Conference Of The Parties To The Convention On Biological Diversity; Decision IX/20. Marine and Coastal Biodiversity*, UN Doc No

under the *Conservation on Biological Diversity* ('*CBD*');[17] and an overview of an ABNJ MPA developed under the Convention for the Protection of the Marine Environment of the North-East Atlantic ('*OSPAR*').[18]

Based on this review, the paper outlines SDG14.5's progress to date, and avenues for its future development. It presents that SDG14.5, even including requirements of its indicator, is not yet a SMART-enough target to be able to comprehensively determine if 10% of the oceans' biodiversity has been conserved by 2020. However, it also poses that SDG14.5 has supported momentum towards a ten-fold increase of MPA coverage within waters under national jurisdiction within the last decade.[19] The paper concludes that SDG14.5 has assisted towards achieving some improvements in ensuring the sustainable development of the oceans,[20] therefore is worth pursuing, with some refinements.

II SDG AND MARINE BIODIVERSITY

A *SDG-Agenda*

In adopting the *SDG-Agenda* in 2015, the UNGA provided clear global goals and targets for the subsequent 15 years as the international community's primary agenda

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UNEP/CBD/COP/DEC/IX/20 (9 October 2008), ('*CBD COP Decision IX/20 (EBSA)*'); 'Ecologically or Biologically Significant Marine Areas', *CBD Secretariat* (1 December 2019) <https://www.cbd.int/ebsa/>.

[17] *Convention on Biological Diversity* (signed 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993)) ('*CBD*').

[18] *Convention for the Protection of the Marine Environment of the North-East Atlantic* (signed 22 September 1992, 32 ILM 1069 (entered into force 25 March 1998)) ('*OSPAR*').

[19] Note, SDG14.5's progress has been achieved alongside progress towards the MPA-related target of the Aichi Biodiversity Targets ('Aichi Target 11'), however noting Aichi Target 11's limited applicability within ABNJ; 'Protected Planet: The World Database on Protected Areas (WDPA)', *World Database on Protected Areas* (1 December 2019) <https://livereport.protectedplanet.net> ('*World Database on Protected Areas*'); 'Aichi Biodiversity Targets', *CBD Secretariat* (1 December 2019) <https://www.cbd.int/sp/targets/rationale/target-11/>; CBD Secretariat, *Progress towards the Aichi Biodiversity Targets: An Assessment of Biodiversity Trends, Policy Scenarios and Key Actions: Global Biodiversity Outlook 4 (GBO-4) Technical Report*, CBD Technical Series No. 78, Secretariat of the CBD, 2014 ('*Global Biodiversity Outlook 4 (GBO-4)*').

[20] Ibid.

for achieving balance for all three dimensions of sustainable development — economic, social, and environmental.[21] The *SDG-Agenda*, building on the *Millennium Development Goals*,[22] and seeking to address what they did not achieve,[23] reaffirms the outcomes of all major United Nations conferences and summits that have laid a foundation for sustainable development within international law (IL).[24] Sustainable development is generally defined as:[25]

> *development that meets the needs of the present without compromising the ability of future generations to meet their own needs*.[26]

The *SDG-Agenda* highlights the need for integrated solutions to address the interrelatedness of the challenges and commitments required to achieve its goals;[27] and necessitates a transformative global approach.[28] The *SDG-Agenda* establishes

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[21] *SDG-Agenda* (n 1) preamble paras 1-4, paras 18-38, 54-9, goals 1-17; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 2018) 48–50 ('*Principles of IEL*').

[22] UNGA, *United Nations Millennium Declaration*, Res 55/2, UN Doc A/RES/55/2 (adopted 18 September 2000), ('*Millennium Development Goals*').

[23] *SDG-Agenda* (n 1) paras 10, 16-7.

[24] *Ibid para 11.*, citing, UNCED, *Report of the United Nations Conference on Environment and Development: Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26 (Vol I) (12 August 1992) resolution i, annex i, ('*Rio Declaration*'); WSSD, *Report of the World Summit on Sustainable Development*, Un Doc A/CONF.199/20 (4 September 2002) resolution 2, annex, ('*Johannesburg Declaration*'); WSSD, *Report of the World Summit for Social Development*, Un Doc A/CONF.166/9 (6-12 March 1995), cpt 1, annex i, ('*Copenhagen Declaration*'); UN, *Report of the International Conference on Population and Development*, UN Doc Sales No. E.95.XIII.18 (5–13 September 1994), cpt I, resolution 1, annex, ('*Programme of Action of the International Conference on Population and Development*'); UN, *Report of the Fourth World Conference on Women*, UN Doc Sales No. E.96.IV.13 (4–15 September 1995), cpt 1, resolution 1, annex ii, ('*Beijing Platform for Action*'); UNGA, *The Future We Want*, GA Res 66/288, UN Doc no A/Res/66/288 (11 September 2012, adopted 27 July 2012), ('*Resolution 66/288*').

[25] Sands and Peel (n 21) 218–29.

[26] World Commission on Environment and Development, *Our Common Future* (1987) 43 ('*Brundtland Report*').

[27] *SDG-Agenda* (n 1) para 13.

[28] Ibid preamble para 2, paras 2, 13, 60, 62.

that protecting the planet from degradation is of critical importance, and that essential action is required in order to meet its goals through:[29]

> *sustainable consumption and production [practices], sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations*.[30]

The *SDG-Agenda* prescribes that each goal is to be afforded equal priority for implementation and monitoring.[31] Progress towards achieving each goal is to be: tracked according to corresponding targets and parameters as set by a global indicator framework;[32] reported annually within a *SDG-Report*;[33] and reviewed annually at the High-Level Political Forum for Sustainable Development, under the auspice of the UNGA.[34]

B *SDG14.5 – Objective*

The objective SDG14 is ensuring the conservation and sustainable use of the oceans and their resources.[35] Its inclusion as a dedicated goal highlights the importance of maintaining healthy oceans for, not only environmental, but also social and economic reasons, due to the countless resources and ecosystem services it provides.[36]

SDG14 comprises ten targets, with its fifth, SDG14.5,[37] aiming:

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[29] Ibid preamble para 4, paras 2-5.

[30] Ibid preamble para 6.

[31] Ibid para 61.

[32] Ibid paras 48, 75; *Global Indicator Framework* (n 4).

[33] *SDG-Agenda* (n 1) para 83; UN, *The Sustainable Development Goals Report 2019*, (United Nations, 2019), ('*2019 SDG-Report*').

[34] *SDG-Agenda* (n 1) paras 84-90.

[35] Ibid goal 14.

[36] See further, *World Ocean Assessment* (n 3) cpt 55; Unger et al (n 3) 4.

[37] *SDG-Agenda* (n 1) goal 14.

> *[b]y 2020, [to] conserve at least 10 per cent of coastal and marine areas [including ABNJ], consistent with national and international law and based on the best available scientific information*.[38]

Per the *SDG-Agenda*, supporting indicators for each target are to be a progressive component of the targets, developed by an inter-agency body, based on scientific inputs.[39]

SDG14.5's associated indicator (SDG14.5.1), tasked to UNE-WCMC,[40] requires the target to be tracked as a percentage of protected areas in relation to marine areas.[41] It also requires the average proportion of each marine Key Biodiversity Area (KBA)[42] designated as MPAs, as calculated according to internationally agreed methods (noting, KBA measure is currently only required for MPAs within national jurisdictions, with aspirations for it to expand to ABNJ MPAs).[43]

SDG14.5 is evidence that ecosystem-based management of the world's oceans is now a mandate,[44] and a transition away from the traditional fragmented sector-based,

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[38] Ibid goal 14.5; Mackie et al (n 8) 21–2.

[39] *SDG-Agenda* (n 1) paras 48, 75.

[40] UN Statistics (n 13); Day et al (n 13) 19–23.

[41] *Global Indicator Framework* (n 4) indicator 14.5.1.

[42] Where Key Biodiversity Area (KBA) is defined as '*sites contributing significantly to the global persistence of biodiversity. and are identified following globally standard criteria for the identification of KBAs (IUCN 2016) applied at national levels*' (n 13)., referencing IUCN, *A Global Standard for the Identification of Key Biodiversity Areas*, (IUCN, 2016).

[43] UN Statistics (n 13); 'Protected Planet; WDPA Manual', *World Database on Protected Areas* (1 December 2019) <https://www.protectedplanet.net/c/wdpa-manual>; (n 8) 22; *Secretary-General SDG14 Background Note* (n 8) 2(e).

[44] UNGA, *Oceans and the Law of the Sea*, Res 59/24, UN Doc A/RES/59/24 (4 February 2005, adopted 17 November 2004), para 14, 66 ('*UNGA Res 59/24*'); UNGA, *Our Ocean, Our Future: Call for Action*, Res 71/312, UN Doc A/RES/71/312 (14 July 2017, adopted 6 July 2017), para 14 ('*Our Ocean, Our Future*'); CBD COP, *Decision Adopted By The Conference Of The Parties To The Convention On Biological Diversity; Decision 14/5. Biodiversity and Climate Change; Voluntary Guidelines for the Design and Effective Implementation of Ecosystem-Based Approaches to Climate Change Adaptation and Disaster Risk Reduction*, CBD COP 14, UN Doc CBD/COP/DEC/14/5 (30 November 2018) annex, ('*CBD COP Decision 14/5 Annex (Voluntary CC Guidelines)*'); Charles Ehler and Fanny Douvere, *Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-*

State-centric approach is required in order to meet it.[45] It reaffirms a previously-set 10% quantitative target for MPAs under the *Convention on Biological Diversity* ('*CBD*'),[46] and places further emphasis on an ecological approach per *SDG-Agenda*'s overarching requirement that all three pillars of sustainable development be addressed in meeting its objective.[47]

Evaluating SDG14.5 for its SMART elements (a requirement for any target to be effective),[48] focusing on its relevance within ABNJ, reveals it includes the time bound element — '[*by] 2020*'[49] — and one other aspect of specificity — '*at least 10[%]*'.[50] However, the other components of the target — '*conserve'*, '*national and international law*', and '*best available scientific information*'[51] — are not specified.[52] Thus, it is difficult to declare SDG14.5 a measurable, achievable, and realistic target.[53] The ambiguous components are: clarifying what it means to conserve the ocean; identifying which specific national and international laws are applicable; and identifying what specific scientific standards are to be met and for what particular parameter of measurement.[54] Though, *SDG-Agenda* clarifies part of the above, stating that the *United Nations Convention on the Law of the Sea* ('*UNCLOS'*):[55]

Based Management, IOC Manual and Guides No. 53, ICAM Dossier No. 6 (UNESCO, Intergovernmental Oceanographic Commission and Man and the Biosphere Programme, 2009), ('*MSP Step By Step Approach*').

[45] *SDG-Agenda* (n 1) preamble.

[46] *CBD* (n 17); 'Aichi Biodiversity Targets' (n 19) Target 11.

[47] Sian E Rees et al, 'Bridging the Divide: Social–Ecological Coherence in Marine Protected Area Network Design' (2018) 28(3) *Aquatic Conservation: Marine and Freshwater Ecosystems* 754, 756.

[48] Sustainable Development Solutions Network Secretariat (n 6) 4–5; *SDG-Agenda* (n 1) goal 14.5.

[49] *SDG-Agenda* (n 1) goal 14.5.

[50] Ibid.

[51] *Ibid.*

[52] Ibid.

[53] Ibid; Virto (n 8) 13; Mackie et al (n 8) 21–2; *Secretary-General SDG14 Background Note* (n 8) 9–10; Campbell and Gray (n 8) 194–8.

[54] Virto (n 8) 13.

[55] *SDG-Agenda* (n 1) goal 14.c., citing *United Nations Convention on the Law of the Sea* (signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994)) ('*UNCLOS*').

> *provides the legal framework for the conservation and sustainable use of oceans and their resources, as recalled in paragraph 158 of "The future we want".*[56]

As previously mentioned, *SDG-Agenda* states that the indicators are to be progressively developed by an inter-agency body with expertise in the field.[57] This could be why the target's measures are not yet fully-SMART; although it is the targets (not indicators) that were intended to be designed SMART for inclusion within the *SDG-Agenda*.[58] Another question regarding this target is why it included partial prescriptive components — those being, the 10% and timing — if it is not specific about the remainder of its content,[59] especially considering the 10% target was considered by many to be not ambitious enough.[60] It has been widely commented that the 10% measure was adopted within the target based on a similar well-established MPA target, that of *CBD* Aichi Biodiversity Target 11 (noting its limited applicability to ABNJ),[61] which states:

> *By 2020, at least ... 10 per cent of coastal and marine areas,* ***especially areas of particular importance*** *for biodiversity and ecosystem services, are conserved through* ***effectively and equitably managed****,* ***ecologically representative*** *and* ***well-connected*** *systems of protected areas* ***and other effective area-based conservation measures****, and* ***integrated into the wider landscape and seascape****.*[62]

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[56] *SDG-Agenda* (n 1) goal 14.c., citing UNGA, *The Future We Want*, Res 66/288, UN Doc A/66/288 (11 September 2012, adopted 27 July 2012), ('*The Future We Want*').

[57] See above, (n 32).

[58] Sustainable Development Solutions Network Secretariat (n 6) 4–5; Virto (n 8) 13.

[59] Virto (n 8) 13.

[60] Ibid; UNGA, *Secretary-General SDG14 Background Note* (n 8) 9; IUCN WCPA, *Applying IUCN's Global Conservation Standards to Marine Protected Area (MPA): Delivering Effective Conservation Action through MPAs, to Secure Ocean Health & Sustainable Development*, (IUCN WCPA, 2018), 1; Mackie et al (n 8) 21–2; Campbell and Gray (n 8) 193–8.

[61] Virto (n 8) 13; Campbell and Gray (n 8) 193–4; Mackie et al (n 8) 21.

[62] 'Aichi Biodiversity Targets' (n 19) Target 11 (emphasis added).

The Sustainable Development Solutions Network Secretariat's principles document, utilised in developing the SDGs, recommended the targets be consistent with '*existing … frameworks, such as the Aichi Biodiversity Targets … without fully replicating them*'.[63] SDG14.5's target does not fully replicate the Aichi target, but it also omitted all except two (the 10%, and by 2020) of its specific measures.[64] It is also worth noting, at the time *SDG-Agenda* was drafted there was another existing framework with a MPA target that had been in place since 2003 under the International Union for Conservation of Nature (IUCN) World Parks Congress, that called for protected area '*networks*' covering '*at least 20-30[%] of each habitat*' where activities would be '*strictly prohibited*'.[65] This target was increased to 30% with '*no extractive activities*' in 2014.[66] Comparing these two frameworks, the Aichi Target has more of a global normative character to it, with the *CBD* binding in nature and having near-universal adoption by States,[67] so it logically follows that this was the chosen framework's target to reflect within SDG14.5.[68] A final note on this, SDG14.5's 10% area target is only quantified within the indicator, so this provides potential for alternative measures to be applied over time as science-knowledge, capacity, and ambition of stakeholders increases.[69]

Given the significance of ABNJ biodiversity to the livelihood and wellbeing of the worlds' population and its economy, highlighting SDG14.5's importance, it does not appear to be a SMART-enough target. A review of other international law related to ABNJ biodiversity is provided below, also noting their inadequacies. This is

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[63] Sustainable Development Solutions Network Secretariat (n 6) 4.

[64] 'Aichi Biodiversity Targets' (n 19) Target 11 (emphasis added).

[65] IUCN WCPA, *Benefits Beyond Boundaries: Report of the Vth IUCN World Parks Congress*, (IUCN, 2005), 191; Campbell and Gray (n 8) 193–4.

[66] IUCN, *Increasing Marine Protected Area Coverage for Effective Marine Biodiversity Conservation*, IUCN, WCC-2016-Res-050-EN (2016), <https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2016_RES_050_EN.pdf>; Campbell and Gray (n 8) 193–4.

[67] 'List of Parties: CBD', *CBD Secretariat* (1 December 2019) <https://www.cbd.int/information/parties.shtml>.

[68] Campbell and Gray (n 8) 193–4; Sustainable Development Solutions Network Secretariat (n 6) 4–5.

[69] Ibid 5.

followed by a discussion outlining why, even though SDG14.5's target is not SMART, it should be considered a solid starting point for tracking progress towards improving critical ocean conservation issues that have been largely overlooked within IL to date.

III 'CONSTITUTION FOR THE OCEANS'

Any discussion regarding IL and issues relating to the world's oceans should commence with the treaty coined the 'constitution of the oceans'[70] — *UNCLOS* —[71] as it provides the overarching framework for States' sovereign rights over different areas of the ocean, together with their corresponding duties and obligations.[72]

A *Defining ABNJ*

UNCLOS divides the world's oceans into segregated zones based on sovereign rights, the various sectoral activities undertaken within them, and the living and non-living resources they contain.[73] Given their differing jurisdictional purposes, the zones all have differing legal regimes.[74] Two such zones fall within ABNJ — the

[70] Tommy TB Koh, 'A Constitution for the Oceans' in *Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea, with Annexes and Index: Final Act of the Third United Nations Conference on the Law of the Sea; Introductory Material on the Convention and the Conference* (St. Martin's Press, 1983) xxiii ('Constitution for the Oceans').

[71] *United Nations Convention on the Law of the Sea*, *UNCLOS* (n 55).

[72] Ibid; Global Ocean Commission, *From Decline to Recovery-A Rescue Package for the Global Ocean* (2014) 33 ('*From Decline to Recovery*'); Sands and Peel (n 21) 457; Ringbom and Henriksen (n 10).

[73] *UNCLOS* (n 55) parts ii-xi.

[74] See further, Donald R Rothwell and Tim Stephens, 'High Seas' in Donald R Rothwell and Tim Stephens (eds), *The International Law of the Sea* (Hart Publishing, 2016) 154, 154–5 ('High Seas'); Donald R Rothwell and Tim Stephens, 'Deep Seabed' in Donald R Rothwell and Tim Stephens (eds), *The International Law of the Sea* (Hart Publishing, 2016) 127, 127–8 ('Deep Seabed'); Ringbom and Henriksen (n 10) 20.

'high seas'[75] and 'the Area',[76] which together contain the waters and the '*seabed and ocean floor and subsoil thereof*'[77] in areas of the world's oceans beyond national jurisdiction.[78]

B *ABNJ Biodiversity Conservation*

'Biological diversity', also termed 'biodiversity', is commonly defined as stated within *CBD* Article 2,[79] as meaning:

> *the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems*.[80]

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[75] The 'high seas' includes the water column beyond territorial waters of all coastal States and their economic exclusive zones (EEZ) out to 200 nautical miles (nm), if claimed; *UNCLOS* (n 55) part vii; *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* (signed 4 August 1995, 2167 UNTS 3 (entered into force 11 December 2001)) ('*Fish Stocks Agreement*'); Rothwell and Stephens, 'High Seas' (n 74).

[76] '[T]he Area' incorporates the resources (solid, liquid, or gaseous minerals) of the seabed and ocean floor and subsoil thereof within marine areas beyond the limits of national jurisdiction, excluding super adjacent waters, and includes some living resources of the seabed (sedentary species, which are immobile or those which maintain a constant physical connection to the seabed) above an extended continental shelf (ECS), excluding the non-living resources of an extended ECS. *UNCLOS* (n 55) part xi; *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982* (signed 28 July 1994, 1836 UNTS 42 (entered into force 28 July 1996)) ('*1994 Implementation Agreement*'); Rothwell and Stephens, 'Deep Seabed' (n 74) 127–42; Joanna Mossop, 'The Relationship between the Continental Shelf Regime and a New International Instrument for Protecting Marine Biodiversity in Areas beyond National Jurisdiction' (2017) 75(1) *ICES Journal of Marine Science* 444, 455.

[77] *UNCLOS* (n 55) part xi, art 1(1); *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, *1994 Implementation Agreement* (n 76).

[78] See above, (n 75-76).

[79] *World Ocean Assessment* (n 3) cpt 33; IUCN (n 42) 19.

[80] *CBD* (n 17) art 2.

Thus, biodiversity involves three key elements — the diversity of genetics, species, and ecosystems.[81] Biodiversity is the foundation for the functioning of an ecosystem and the provision of its services.[82] Therefore, the loss of biodiversity can have far-reaching consequences.[83]

The obligation to protect and preserve the marine environment, including its biodiversity, is a fundamental principle of *UNCLOS*;[84] and one that has been reaffirmed by UNGA and international courts.[85] *UNCLOS* also contains corresponding general duties to conserve and manage high seas living resources, and take measures to protect and preserve fragile and rare ecosystems, depleted habitats, threatened and endangered species, and other marine life.[86]

The current ocean governance and regulatory regime contains gaps with regards to biodiversity conservation of numerous ABNJ hotspots,[87] including features such as

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[81] Ibid; Sands and Peel (n 21) 384.

[82] *CBD* (n 17) preamble; *World Ocean Assessment* (n 3) cpt 33.

[83] *CBD* (n 17) preamble; *World Ocean Assessment* (n 3) cpt 55.

[84] *UNCLOS* (n 55) arts 76-7, 116-20, 145; *Fish Stocks Agreement* (n 75); *1994 Implementation Agreement* (n 76); Ringbom and Henriksen (n 10) 21, 24, 38–40, 88; Mossop (n 76) 445.

[85] *Our Ocean, Our Future* (n 44); *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*, Res 72/249, UN Doc A/RES/72/249 (19 January 2018, adopted 24 December 2017), ('*BBNJ (UNGA Res 72/249)*'); *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan) (Provisional Measures Order)* (International Tribunal for the Law of the Sea, Case Nos 3 and 4, 27 August 1999) para 70 ('*Southern Bluefin Tuna Cases (Provisional Measures)*'); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Case No 21, Advisory Opinion of Apr 2, 2015 (Advisory Opinion)* (International Tribunal of the Law of the Sea, Seabed Disputes Chamber, Case No 21, 2 April 2015) para 120, 129-40, 145, 148 ('*SRFC Advisory Opinion*'); *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* (Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea, PCA Case No. 2011-03, 18 March 2015) para 538 ('*Chago Islands Marine Protected Area*'); *re Arbitration Between the Republic of the Philippines and the People's Republic of China (Philippines v China) (Jurisdiction and Admissibility)* (Permanent Court of Arbitration, PCA Case No. 2013-19, 29 October 2015) para 945 ('*South China Sea Arbitration*').

[86] *UNCLOS* (n 55) arts 116-9, 145, 194-6, 197, 242-4; Ringbom and Henriksen (n 10) 26.

[87] *World Ocean Assessment* (n 3) cpts 34, 37-41; Wright et al (n 10) 4, 26; High Seas Alliance (n 10) 7; Gjerde et al (n 10) 47; Gjerde, Clark and Harden-Davies (n 10) 4; Sands and Peel (n 21) 563–4.

seamounts, cold-water coral reefs, cold seeps, and hydrothermal vents.[88] This has arisen due to: the 'freedoms'[89] *UNCLOS* affords to States for certain activities on the high seas; a lack of a cross-sectoral coordination and decision-making authority with mandate over all ABNJ activities;[90] and lack of clear overarching environmental principles that apply ABNJ-wide to guide objective-setting, such as for the design and management of MPAs.[91] Thus, there is a current lack of IL mechanisms within which to create an effective cross-sectoral, ecosystem-wide MPA within ABNJ, hindering SDG14.5's progress.

Recognising these gaps,[92] UNGA have commenced negotiations towards a new internationally legally binding implementing agreement to *UNCLOS* on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National

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[88] *World Ocean Assessment* (n 3) cpts 42, 45, 51.

[89] *UNCLOS* (n 55) part vii, arts 81(1)-(2), 87–120. See further, Rothwell and Stephens, 'High Seas' (n 74) 155; Kristine Dalaker Kraabel, 'The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach' in Myron H Nordquist, John Norton Moore and Ronán Long (eds), *The Marine Environment and United Nations Sustainable Development Goal 14* (Brill Nijhoff, 2018) 137, 139; De Santo (n 10) 34, 35–7..

[90] Wright et al (n 10) 4, 26; High Seas Alliance (n 10) 7; Gjerde, Clark and Harden-Davies (n 10) 4; Sands and Peel (n 21) 563–4.

[91] Alex G Oude Elferink, 'Governance Principles for Areas beyond National Jurisdiction' (2012) 27(2) *The International Journal of Marine and Coastal Law* 205; Ringbom and Henriksen (n 10) 4, 27–40, 84–5; UNGA, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment: Report of the Secretary-General,* 73rd sess, Agenda item 14, UN Doc A/73/419 (30 November 2018), paras 60-1, 107 ('*Global Pact for the Environment*'); Global Ocean Commission (n 72) 18, 33; IUCN, *An International Instrument on Conservation and Sustainable Use of Biodiversity in Marine Areas beyond National Jurisdiction: Exploring Different Elements to Consider: Series of Policy Briefs on Scope, Parameters and Feasibility*, Policy Brief (IUCN, 2014), 65; Robin Warner, 'Conserving Marine Biodiversity beyond Boundaries: Developing Environmental Assessment Frameworks' in Robin Warner and Simon Marsden (eds), *Transboundary Environmental Governance: Island, Coastal and Marine Perspective* (Ashgate, 2012) 297, 316 ('Conserving'); Elisabeth Druel, *Environmental Impact Assessments in Areas beyond National Jurisdiction* (Study No 1/13, L'Institut du Développement Durable et des Relations Internationales (IDDRI), 2013) 6, 31 ('*2013 IDDRI*'); IUCN 66, 77–81.

[92] *BBNJ (UNGA Res 72/249)* (n 85); Wright et al (n 10) 4, 26; High Seas Alliance (n 10) 7; Gjerde, Clark and Harden-Davies (n 10) 4; Sands and Peel (n 21) 563–4.

Jurisdiction —[93] the BBNJ.[94] One of the agreement's four key elements to be addressed within the BBNJ are ABMT, that includes MPA.[95]

C *MPAs in ABNJ*

As previously mentioned,[96] ABNJ does have some (extremely minimal) MPA coverage, with 1.2% of ABNJ covered by MPAs and only 0.8% highly protected.[97] The first ABNJ MPA was created in 2010 under *OSPAR*,[98] and it has been a very slow process establishing others since.[99]

The biggest issue preventing the development of MPAs within ABNJ has been IL governance and regulatory gaps, as mentioned above,[100] making it extremely difficult (until the BBNJ is finalised, if it contains such requirements)[101] to 'effectively' design, implement, manage, monitor, and enforce a MPA with mandates over multi-sector activities/impacts within its bounds.[102] Not only that, but the definition of what an MPA is varies depending on the legal system under which it has been established.[103] For example, the following are all 'MPA-like'

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[93] UNGA, *Letter from the Co-Chairs of the Ad Hoc Open Ended Informal Working Group to the President of the General Assembly*, 66th sess, Pre item 77(a), UN Doc A/66/119 (30 June 2011), ('*Package Deal*').

[94] UN IGE BBNJ, *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 (General Assembly Resolution 72/249)* <https://www.un.org/bbnj/content/documents> ('*BBNJ IGE*').

[95] *Package Deal* (n 93). The four key elements are referred to as the 'package deal'. See further, Wright et al (n 10).

[96] See above, (n 159-161).

[97] See above, (n 159-161).

[98] *OSPAR* (n 18); *Global Biodiversity Outlook 4 (GBO-4)* (n 19) 261.

[99] See further, *Governing Areas beyond Jurisdiction*, Issues Brief (IUCN, March 2019).

[100] See above, (n 87-95).

[101] Wright et al (n 10).

[102] *Global Biodiversity Outlook 4 (GBO-4)* (n 19) 261.

[103] See further, CBD COP, *Decision Adopted By The Conference Of The Parties To The Convention On Biological Diversity: Decision VIII/24. Protected Areas*, UN Doc UNEP/CBD/COP/DEC/VIII/24 (15 June 2006) paras 35-47, ('*CBD COP Decision VIII/22*'); IUCN

ecologically sensitive ocean areas that have been designated under different international instruments with applicability within ABNJ,[104] where specific conservation measures are required:[105] Ecologically or Biologically Significant Areas (EBSA) under *CBD*;[106] Vulnerable Marine Ecosystem (VME) under Food and Agriculture Organization of the United Nations;[107] Area of Particular Environmental Interest (under International Seabed Authority);[108] Particularly Sensitive Sea Area under the International Maritime Organization;[109] and specially protected area and

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WCPA (n 60); IUCN WCPA, *Guidelines for Recognising and Reporting Other Effective Area-Based Conservation Measures*, (IUCN WCPA, 2019), ('*IUCN WCPA OECM Guidelines*'); UNE-WCMC, *The Contributions of Marine and Coastal Area-Based Management Approaches to Sustainable Development Goals and Targets*, UN Regional Seas Reports and Studies No. 205 (UNE-WCMC, 2018), 11–13; *Marine Conservation Institute: Atlas of Marine Protection* (1 December 2019) Glossary of Terms <http://mpatlas.org/> ('*Global MPAs*').

[104] Ardron et al (n 10) 99–103; Freestone, 'An Unfinished Agenda' (n 10) 215–224; Wright, Rochette and Greiber (n 10) 553–5; Wright and Rochette (n 10) 21–22; Freestone, 'Governing the Blue' (n 10) 745–51; Wright et al (n 10) 57–8; Gjerde, Clark and Harden-Davies (n 10) 17–20, 39–40.

[105] Note, not intended to be comprehensive list — does not include biodiversity conservations afforded under non-governmental organization initiatives, other effective area-based conservation measures (see above, *IUCN WCPA OECM Guidelines* (n 103).), nor those under various single-species, wildlife, or migratory species agreements, wetlands convention, pollution conventions, bi-lateral agreements, or heritage conservation agreements. Although, the latter has been mentioned as a potential future avenue for designating protected areas within ABNJ as sites of Outstanding Universal Value, which would require amendment of the World Heritage Convention. See further, Dan Laffoley and David Freestone, 'A World of Difference-opportunities for Applying the 1972 World Heritage Convention to the High Seas' (2017) 27 *Aquatic Conservation: Marine and Freshwater Ecosystems* 78.

[106] *CBD COP Decision IX/20 (EBSA)* (n 16); 'Ecologically or Biologically Significant Marine Areas' (n 16); CBD Secretariat, *Azores Scientific Criteria and Guidance for Identifying Ecologically or Biologically Significant Marine Areas and Designing Representative Networks of Marine Protected Areas in Open Waters and Deep Sea Habitats*, (2009), ('*EBSA Azores Scientific Criteria and Guidance*').

[107] 'Vulnerable Marine Ecosystems', *Food and Agriculture Organization of the United Nations* (1 December 2019) <http://www.fao.org/in-action/vulnerable-marine-ecosystems/en/>.

[108] 'Protecting Deep-Sea Biodiversity', *International Seabed Authority* (1 December 2019) <https://www.isa.org.jm/biodiversity-0>.

[109] 'Particularly Sensitive Sea Area', *International Maritime Organization* (1 December 2019) <http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>.

MPAs under various conventions and action plans of the Regional Seas Programmes (RSP).[110]

The fragmentation caused by these differing IL regimes creates extreme challenges for designing ABNJ MPAs and networks of MPAs (to ensure global ecological coverage and connectiveness, as required for MPAs to be effective).[111]

The section below contains a select review of these current regimes as they apply within ABNJ. In includes an overview the value of EBSAs for informing BBNJ and lessons learned from North-east Atlantic ABNJ MPAs to be (hopefully) incorporated within the BBNJ, thereby creating future clarity for the governance and regulations of ABNJ MPAs,[112] forming the legal basis as required for SDG14.5 to become more specific.

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[110] '5. Specially Protected Areas Protocol / SPA and Biodiversity Protocol', *Coordinating Unit for the Mediterranean Action Plan Secretariat to the Barcelona Convention and its Protocols* (1 December 2019) <https://web.unep.org/unepmap/5-specially-protected-areas-protocol-spa-and-biodiversity-protocol>; 'MPAs in Areas beyond National Jurisdiction', *OSPAR Secretariat* (1 December 2019) <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>; 'Marine Protected Areas (MPAs)', *Commission for the Conservation of Antarctic Marine Living Resources* (1 December 2019) <https://www.ccamlr.org/en/science/marine-protected-areas-mpas>; United Nations Environment Programme, *Regional Seas Programmes and Other UNEP Activities Relevant to Marine Biodiversity in Areas beyond National Jurisdiction: Written Submission by the United Nations Environment Programme (UNEP)*, (26 August 2016), <https://www.un.org/depts/los/biodiversity/prepcom_files/UNEP_and_BBNJ_PrepCom2.pdf> ('*Regional Seas Programmes and Other UNEP Activities Relevant to Marine Biodiversity in Areas beyond National Jurisdiction*').

[111] Kelsey E Roberts, Rebecca S Valkan and Carly N Cook, 'Measuring Progress in Marine Protection: A New Set of Metrics to Evaluate the Strength of Marine Protected Area Networks' (2018) 219 *Biological conservation* 20, 24–7; Kirsten Grorud-Colvert et al, 'High-Profile International Commitments for Ocean Protection: Empty Promises or Meaningful Progress?' (2019) 105 *Marine Policy* 52, 52; Campbell and Gray (n 8) 195–7; Bethan C O'Leary and Callum M Roberts, 'Ecological Connectivity across Ocean Depths: Implications for Protected Area Design' (2018) 15 *Global ecology and conservation* e00431; Day et al (n 13) 3–4; David Rodríguez-Rodríguez, 'Marine Protected Areas: Attempting the Sustainability of the Seas' in *World Seas: An Environmental Evaluation* (Elsevier, 2019) 475, 475 ('MPAs Sustainability of the Seas').

[112] *Report of the Expert Workshop on Scientific and Technical Aspects Relevant to Environmental Impact Assessment in Marine Areas beyond National Jurisdiction*, SBSTTA, 14th mtg, item 3.1.4

1 *CBD-EBSA*

The *CBD* calls on States to mainstream biodiversity conservation within their policies and management measures, but lacks any authority to adopt binding regulations within and beyond national jurisdictions.[113] Its mandate only covers ABNJ if applied consistently under *UNCLOS* and only to human '*processes and activities*'[114] under State control.[115] Thus, its ability to regulate is severely restricted within ABNJ, needing to rely on other organisations and State-parties to implement its decisions, targets, and guidance.[116]

CBD's EBSA process systematically identifies and records ocean areas of ecological importance, both within and beyond national jurisdiction, based on a well-documented and supported scientific evaluation process.[117] Its database provides a repository of scientifically identified ecologically sensitive areas that would benefit from additional conservation measures.[118] There is notable potential for the EBSA process to inform how the SDG14.5 target should be implemented within ABNJ by providing the mechanism for designating area to be protected. Therefore, regardless of *CBD*'s currently restricted ABNJ regulatory role,[119] the scientific-robustness and

provisional agenda, UN Doc UNEP/CBD/SBSTTA/14/INF/5 (8 March 2010) annex iii para 27(a), ('*UNEP/CBD/SBSTTA/14/INF/5*'); Ardron et al (n 10) 99–103; Freestone, 'An Unfinished Agenda' (n 10) 215–224; Wright, Rochette and Greiber (n 10) 553–5; Wright and Rochette (n 10) 21–22; Freestone, 'Governing the Blue' (n 10) 745–51; Wright et al (n 10) 57–8; Gjerde, Clark and Harden-Davies (n 10) 17–20, 39–40; Rodríguez-Rodríguez (n 111) 475.

[113] *CBD* (n 17) art 4(b), 22; Ardron et al (n 10) 100–1; Gjerde et al (n 10) 17–20.

[114] *CBD* (n 17) art 4(b).

[115] Ibid art 4(b), 22; *UNCLOS* (n 55); Ardron et al (n 10) 100–1; Gjerde et al (n 10) 17–20.

[116] *CBD* (n 17) art 4(b), 22; *UNEP/CBD/SBSTTA/14/INF/5* (n 112); *UNCLOS* (n 55); Ardron et al (n 10) 100–1; Gjerde et al (n 10) 17–20.

[117] CBD COP, *CBD COP Decision IX/20 (EBSA)* (n 16); 'Ecologically or Biologically Significant Marine Areas' (n 16); CBD Secretariat, *EBSA Azores Scientific Criteria and Guidance* (n 106).

[118] Ibid.

[119] CBD Secretariat, *UNEP/CBD/SBSTTA/14/INF/5* (n 112); Freestone, 'Governing the Blue' (n 10) 745–8, 750.

normative character of its EBSA process makes it a tool well worth considering for use within BBNJ. [120]

2 *OSPAR-MPA*

The *OSPAR* Commission is tasked with protecting and conserving the marine environment and its resources within the North-east Atlantic Sea.[121] Part of the convention's area include ABNJ, however, it has no authority over human activities that impact these areas.[122] The North-east Atlantic Fishing Commission (NEAFC),[123] whose jurisdictional area partially overlaps with *OSPAR*'s area, has the objective of ensuring the long-term conservation and optimisation of fisheries under its jurisdiction.[124]

NEAFC have previously closed some of their jurisdictional areas within ABNJ to fishing activities (bottom trawling) due to VME designation as recommended by their supporting scientific organisation, the International Council for Exploration of the Seas (ICES);[125] although they have not agreed to closing all VME areas.[126]

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[120] 'List of Parties: CBD' (n 67); CBD COP, *CBD COP Decision IX/20 (EBSA)* (n 16); CBD Secretariat, *EBSA Azores Scientific Criteria and Guidance* (n 106); CBD Secretariat, *UNEP/CBD/SBSTTA/14/INF/5* (n 112); Freestone, 'Governing the Blue' (n 10) 745–8, 750; Ardron et al (n 10) 99–103; Wright, Rochette and Greiber (n 10) 553–5; Gjerde, Clark and Harden-Davies (n 10) 1, 17–20, 39–40.

[121] 'North East Atlantic', *UN Environment Regional Seas Programmes* (1 December 2019) <https://www.unenvironment.org/explore-topics/oceans-seas/what-we-do/working-regional-seas/regional-seas-programmes/north-east>. Note, *OSPAR* is an 'independent RSP', see further, Raphaël Billé et al, *Regional Oceans Governance. Making Regional Seas Programmes, Regional Fishery Bodies and Large Marine Ecosystem Mechanisms Work Better Together* (Working Paper No 196, UNEP, 2016) 24–5.

[122] *OSPAR* (n 18); High Seas Alliance (n 10) 4–5.

[123] 'North-East Atlantic Fishing Commission', *North-east Atlantic Fishing Commission* (1 December 2019) <https://www.neafc.org/>.

[124] Ibid.

[125] 'Vulnerable Marine Ecosystems' (n 107).

[126] 'VME and Closures Maps and Coordinates', *North-east Atlantic Fishing Commission* (1 December 2019) <https://www.neafc.org/managing_fisheries/vmec>.

OSPAR and NEAFC have had a collective arrangement in place since 2008.[127] Under the agreement, *OSPAR* designates MPAs within areas based on scientific advice, also gained from ICES, proposing measures that are complementary to the MPA for NEAFC to adopt.[128] However, NEAFC is under no binding obligation to implement these measures, and often does not if it is not in the best interests of their members.[129]

This example provides evidence of challenges implementing MPAs within ABNJs. In this case, the organisations have overlapping areas, a history of coordination, and receive similar scientific input on their MPA processes. Yet in the absence of an organisation with an overarching mandate for all activities within the area, requiring a precautionary approach to be applied based on scientific advice, it can be seen that MPAs within ABNJ areas cannot be effectively implemented.

3 *BBNJ*

Following UNGA's Resolution 59/24 in 2004,[130] where it called on States to establish a working group to study issues relating to the conservation and sustainable use of marine biodiversity within ABNJ,[131] BBNJ's preparatory work commenced.[132] Based on the progress of nine working group meetings held during 2006-2015,[133] four preparatory committee meetings during 2016-2017,[134] three

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[127] 'OSPAR/NEAFC Collective Arrangement', *North-east Atlantic Fishing Commission* (1 December 2019) <https://www.neafc.org/collective-arrangement>.

[128] Ibid.

[129] High Seas Alliance (n 10).

[130] *UNGA Res 59/24* (n 44).

[131] Ibid 73.

[132] UN DOALOS, *Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction: Outcomes of the Meetings of the Ad Hoc Open-Ended Informal Working Group (2006-2015)* <https://www.un.org/depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm> ('*Ad Hoc Open-Ended Informal Working Group Documents*').

[133] Ibid.

[134] UNGA, *Report of the Preparatory Committee Established by General Assembly Resolution 69/292: Development of 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*

Intergovernmental Conferences (IGEs) during 2018-2019,[135] and a multitude of side events,[136] a draft text of the BBNJ has been prepared by the President of the conference, last revised in November 2019.[137]

Given the serious lack of a definitive definition for an ABNJ MPA under current international framework, it is disappointing the BBNJ revised draft text still does not provide any further clarity for MPAs.[138] Within the revised draft, the term MPA is simply referred to as (with the brackets indicating proposed text needing further decision to include/exclude):[139]

> *a geographically defined marine area that is designated and managed to achieve specific [long-term biodiversity] conservation and sustainable use objectives [and affords higher protection than the surrounding areas].*[140]

At the third IGE for BBNJ,[141] points of convergence regarding MPAs included the need for MPAs to be based on best scientific information, with streamlined outcome-oriented objectives set, based on an open, inclusive, and transparent consultation and

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Diversity of Areas beyond National Jurisdiction, UN Doc A/AC.287/2017/PC.4/2, 4th sess (31 July 2017), ('*July 2017 BBNJ PrepCom Report*').

[135] *BBNJ IGE* (n 94).

[136] UN IGE BBNJ, *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 (General Assembly Resolution 72/249): Side Events* <https://www.un.org/bbnj/content/side-events> ('*BBNJ IGE Side Events*').

[137] *BBNJ Revised Draft Text* (n 15).

[138] Ibid art 1(10). However, there is fourth (and final, as currently planned) BBNJ IGE convened for 23 March - 3 April 2020.

[139] Ibid.

[140] Ibid.

[141] UN IGE BBNJ, *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 (General Assembly Resolution 72/249): Third Substantive Session* <https://www.un.org/bbnj/content/third-substantive-session> ('*BBNJ IGE-3*').

assessment process.[142] Points of divergence included: MPA standards and criteria, including modality for their scientific criteria; institutional roles, consultation mechanisms, and monitoring provisions; and whether the process for Area Based Management Tools (ABMT)[143] should be different to that for MPAs.[144]

It is clear that more work is needed within the BBNJ negotiations to clarify the international governance and regulations for MPAs in ABNJ.[145] Thus, this process is not going to be of assistance, at least in the near term, in clarifying specifics for SDG14.5's target. But the lessons learned from other ABNJ MPA efforts and the *CBD*'s work on MPAs, specifically EBSAs, could potentially fill this void in the meantime.[146]

IV SDG14.5 — PROGRESS AND DEVELOPMENT

A *Achievements*

Global MPA coverage has substantially increased over the last decade, with 7.63% of ocean areas covered under some form of protected area status; up from 0.7% in 2000.[147] The expansion of MPAs within waters under national jurisdictions has

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[142] IISD Reporting Services, 'Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19-30 August 2019' (2019) 25(218) *Earth Negotiations Bulletin* 8–10, 22 <https://enb.iisd.org/download/pdf/enb25218e.pdf> ('ENB Summary BBNJ IGE-3').

[143] 'Area Based Management Tool' is defined as '*a tool including a marine protected area, for a geographically defined area through which one or several sectors or activities are managed with the aim of achieving particular conservation and sustainable use objectives [and affording higher protection than that provided in the surrounding areas]*; *BBNJ Revised Draft Text* (n 15) art 1(3).

[144] Noting, the terms ABMT and MPA are connected throughout the whole BBNJ revised draft text as 'area-based management tools, including marine protected areas', other than when defined in Article 1; *BBNJ Revised Draft Text* (n 15).

[145] Ibid; IISD Reporting Services (n 142) 8–10, 22.

[146] *UNEP/CBD/SBSTTA/14/INF/5* (n 112); Wright and Rochette (n 10) 13–24, 27–8; Gjerde et al (n 10) 50–2; Gjerde, Clark and Harden-Davies (n 10) 17–28, 39–40; Freestone, 'Governing the Blue' (n 10) 745–8, 750.

[147] *UN Economic and Social Council, High-Level Segment: Ministerial Meeting of the High-Level Political Forum on Sustainable Development, Convened under the Auspices of the Economic and*

doubled since 2010,[148] with current figures showing 17.72% coverage within national waters and a mean of each KBA at 45.7% (noting, however, this measure is currently only calculated for national waters).[149] This significant uptake in protection has been strongly supported by the designation of many large-scale MPAs in remote areas of the oceans.[150] Even so, protected areas within ABNJ are significantly underrepresented, with only 1.18% of its area currently covered.[151] This figure is disappointing considering ABNJ waters include 61% of the global oceans' surface area,[152] encompassing 96.5% of the oceans' habitat volume.[153] These statistics are maintained 'live' within the World Database on Protected Areas (WDPA),[154] which is the official dataset that supports tracking of a range of international policy goals, including those of the *SDG-Agenda*.[155]

Another source of MPA statistics that builds upon the WDPA official dataset, refining the figures further, is the MPA Atlas,[156] which is acknowledged by many

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Social Council; Special Edition: Progress towards the Sustainable Development Goals; Report of the Secretary-General, 2019 sess, Agenda items 5(a) and 6, UN Doc E/2019/68 (May 2019), paras 5, 35; (n 19).

[148] UNESC (n 147) paras 5, 35; 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19) Growth in coverage.

[149] UNESC (n 147) para 35; UNE-WCMC, IUCN, *Joint Workshop on Environmental SDG Indicators*, ROSSTAT/UNECE/UNEP/OECD (20 March 2019), 9 <https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/ge.33/2019/mtg2/S4_1_protected_areas_EN.pdf> ('*Joint Workshop on Environmental SDG Indicators*').

[150] 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19) Size distribution. See further, Bethan C O'Leary et al, 'Addressing Criticisms of Large-Scale Marine Protected Areas' (2018) 68(5) *Bioscience* 359.

[151] UNESC (n 147) para 96; 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19).

[152] 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19) MPA distribution.

[153] *World Ocean Assessment* (n 3) cpt 36f 1.

[154] 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19).

[155] *2018 United Nations List of Protected Areas: Supplement on Protected Area Management Effectiveness.*, (2018), 11; (n 149) (n 13). WDPA also provides the official data tracking in support of CBD Aichi Target 11, Global Biodiversity Outlook (GBO) reports, and Global Environmental Outlook (GEO) reports.

[156] 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19).

scholars as '*the most accurate and widely accepted tally of all MPAs*'.[157] This source provides figures for the same period showing that only 4.8% of the world's oceans are covered with 'implemented'[158] MPAs, and that falls to 2.2% if counting only those 'highly-protected'[159] (no-take) areas.[160] Only 1.2% of ABNJ is protected, with 0.8% no-take coverage.[161]

These refined figures highlight one of the many differences of opinions between what constitutes a MPA as required to be reported by the various countries, and therefore, what type of MPAs count towards the SDG14.5 target, including the protection level, implementation status, management function, monitoring mechanism, effectiveness, and so on.[162]

At its 2019 special edition high-level segment regarding progress towards the SDGs, the United Nations Economic and Social Council (UNESC) commented that the:[163]

> *expansion of protected areas for marine biodiversity and existing policies and treaties that encourage responsible use of ocean resources* ***are still insufficient*** *to combat the adverse effects [on the oceans] due to climate change.*[164]

However, we are not yet at 2020, so this is not a declaration that SDG14.5 has not been met. Rather, the statement is an acknowledgement that the MPA target, as set, together with the existing IL, has shortcomings — a judgement also shared by

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[157] (n 103); Kirsten Grorud-Colvert et al, *The Malta Declaration: Assessing Real Progress towards Effective Ocean Protection; Presented at Our Ocean 2017* (6 October 2017) ('*Malta Declaration*').

[158] With 'implemented' meaning '*[f]ormally created with management plan, regulations and enforcement*', see above, (n 103).

[159] Where 'highly-protected' includes no-take areas according to the IUCN MPA classification system, categories I, II, and III. Day et al (n 13); (n 19) (n 103).

[160] 'Global MPAs' (n 103)..

[161] Ibid.

[162] UNEP-WCMC (n 155) 11; UNE-WCMC, IUCN (n 149); UN Statistics (n 13).

[163] UNESC (n 147) para 35.

[164] Ibid para 35 (emphasis added).

IUCN.[165] Both UNESC and IUCN state that MPA targets should be set with the aim of conserving sufficient areas of the ocean to ensure its resilience to climate change's adverse effects.[166]

B *Review of SMART Elements*

As introduced above,[167] in order for SDG14.5 to be a SMART-er target, the following components (in addition to the 10%, and by 2020) require clarifying: what needs to be conserved; what laws should apply; and what scientific standards should be met. In reviewing the progress of ABNJ MPAs to date, it appears that some of these SMART elements have been clarified, as discussed below.

1 *What is to be conserved?*

There is no universally agreed definition for the term 'marine protected areas'. However, the common features between the most relied-upon definitions is that it is an area that has a special status when compared to its surrounding environment, within which more stringent regulations will apply that prohibit or limit one or more activity by imposing additional protection or conservation measure(s).[168]

For purpose of recording a SDG14.5 protected area, the IUCN definition is to be followed, which states a MPA is:

> *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*.[169]

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[165] IUCN (n 66).

[166] UNESC (n 147) para 35; (n 66); *The Ocean and Climate Change*, Issues Brief (IUCN, November 2017).

[167] See above, (n 53).

[168] Wright, Rochette and Greiber (n 10) 553.

[169] Day et al (n 13) 12–7.

A protected area effectiveness evaluation guide was produced by IUCN in 2004.[170] This guide comprises a set of flexible indicators, specific to MPAs that include: biophysical (biotic, abiotic, and aerial ocean conditions); socioeconomic (value and perceptions); and governance (stakeholder participation, training, management plan) measures.[171] These measures are intended to determine the effectiveness of management actions in attaining the MPA-specific objectives.[172] IUCN have also recently developed a new global standard of best practice for area-based conservation — the Green List Programme —[173] a certification for protected and conserved areas, signaling a certain benchmark for protected area governance, design and planning, and effective management have been met if listed.[174] No ABNJ MPA has yet met the standards for this certification, though it is a tool that is applicable to MPAs both within and beyond national jurisdictions, as well as terrestrial protected areas.[175]

UNE-WCMC, as tasked with clarifying SDG14.5's indicator measures, have determined WDPA will record MPAs according to the IUCN's definition.[176] However, this still does not clarify what type of MPA is to be included within the 10%, SDG14.5 target, as IUCN's definition has five different categories for MPAs based on their objectives and management, ranging from a set-aside area where some activities may be limited or additional measures are implemented, to a fully-protected and no-take area with scientific monitoring plans.[177]

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[170] John E Parks, Robert S Pomeroy and Lani M Watson, *How Is Your MPA Doing?: A Guidebook of Natural and Social Indicators for Evaluating Marine Protected Areas Management Effectiveness*, (IUCN, 2004), ('*How Is Your MPA Doing?*').

[171] Ibid.

[172] Ibid.

[173] 'Green List of Protected and Conserved Areas', *IUCN* (1 December 2019) <https://www.iucn.org/theme/protected-areas/our-work/iucn-green-list-protected-and-conserved-areas>.

[174] Ibid.

[175] Ibid.

[176] Ibid.

[177] UN Statistics (n 13); Day et al (n 13) 19–23.

Given the '*abundant [*scientific*] evidence that fully protected marine reserves are the most effective type of protected area for restoring and protecting biodiversity*",[178] it is argued that only fully-protected MPAs that provide the ecological benefits needed to gain significant biodiversity conservation should count towards the SDG14.5 target.[179] Thus, the lower IUCN MPA categories should be excluded from the SDG14.5 target.[180] However, there is no clarity regarding this within the SDG14.5 indicator.

2 *What laws are applicable?*

As mentioned above,[181] there are various legal frameworks under which different categories of 'MPA-like' areas are currently designated, classified, monitored, and/or enforced within ABNJ.[182] Not many of these can be counted towards SDG14.5 as they do not fully meet the definition of the IUCN categories.[183] UNE-WCMC have not clarified the applicable law(s) that apply, comprehensibly, regarding how SDG14.5's target is to be met. Until BBNJ is finalised, it would be prudent to develop further cross-sector coordination and perhaps develop a memorandum of understanding between the various stakeholders so that some of these gaps can be addressed.[184]

3 *What scientific standards should be met?*

[178] Grorud-Colvert et al (n 157) 1.

[179] 'Global MPAs' (n 103); IUCN WCPA (n 60); Grorud-Colvert et al (n 157).

[180] Ibid.

[181] See above, (n 110).

[182] Ibid.

[183] Day et al (n 13) 12–7; (n 60) 2–3; Grorud-Colvert et al (n 157) 1–4.

[184] Freestone, 'An Unfinished Agenda' (n 10) 222–3; De Santo (n 10) 38–9; Wright et al (n 10) 55–65.

UNE-WCMC has been tasked with setting the scientific standards for SDG14.5's indicator.[185] However, there is not much movement yet regards clarity for ABNJ measures other than that the IUCN categories should be followed for reporting.[186]

4 *Can 10% be reached by 2020?*

It is looking very likely that 10% of the global oceans can by covered by some form of a MPA by 2020. However, if a 10% 'representative' coverage of all of the world's oceans' biodiversity is required to meet this target, then it is unlikely to be achieved, as there is little chance that a 10% target for MPA coverage of ABNJ-specific biodiversity will be met by 2020.[187]

However, SDG14.5's indicator is not (yet) specific about whether this 10% needs to be within each jurisdictional area, or just as a global average. If the latter is understood to be the target, given ABNJ represent 61% of the oceans, to achieve 10% total oceans coverage with highly protected MPAs, this would still require a large uptake of MPAs within national jurisdictions — needing approximately 25% MPA within national waters.[188]

According to the SDG e-Indicator's Handbook,[189] plans for further developments of this indicator include an expansion of current scientific knowledge regarding taxonomic within all marine areas so that KBA can be comprehensively recorded, as well as other improvements for assessing and presenting trends in coverage areas.[190] It is also noted that MPA effectiveness in reducing biodiversity loss is not a required input as it would depend on a range of management and enforcement measures that are not covered by this indicator.[191] This is a disappointing direction, as if MPAs are not effectively managed nor enforced, then the target is only tracking the percentage

[185] UN Statistics (n 13); Day et al (n 13) 19–23.

[186] UN Statistics (n 13); Day et al (n 13) 19–23.

[187] Campbell and Gray (n 8) 197–8 (n 19).

[188] Campbell and Gray (n 8) 195.

[189] UN Statistics (n 13).

[190] Ibid.

[191] Ibid.

coverage of 'paper parks', with no evidence that the MPAs reported are actually contributing to conserving biodiversity.[192]

The ocean's environment, and therefore its biodiversity, is three-dimensional (even more, if you consider direct and indirect impacts on all interconnected ecosystems and ecosystem services as further dimensions). There is not yet sufficient evidence, nor the scientific knowledge, to track if the existing MPAs (including the implementation and effective management of designated MPAs) are an effective method for conserving ABNJ biodiversity.[193]

The above review outlines the limits under current IL, applicable to ABNJ, supporting SDG14.5. Recommendations for bridging the gaps follows.

V SDG14.5 — IMPROVEMENTS

A *Near-term Recommendations*

Although many shortcomings have been identified, it is recommended that efforts in working towards SDG14.5 be maintained. In addition, however, the stressors that climate change imposes on the oceans, impacting its biodiversity, should be recognised, acknowledging that such impacts were not as widely realised or so definitively confirmed by science when the initial MPA target was negotiated.[194] Stakeholders should coordinate and collaborate to revise SDG14.5's indicators, ratcheting it up, based on precautionary measures informed by updated scientific evidence.[195]

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[192] See further, Nele Matz-Lück and Johannes Fuchs, 'The Impact of OSPAR on Protected Area Management beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?' (2014) 49 *Marine Policy* 155; Su Jin Park and Ki Hyeon Kim, 'The Legal Framework and Relevant Issues on the Marine Protected Areas in the Areas beyond National Jurisdiction' in *The Marine Environment and United Nations Sustainable Development Goal 14* (Brill Nijhoff, 2018) 173, 192.

[193] O'Leary and Roberts (n 111) (n 66).

[194] See further, IPCC, *Special Report on the Ocean and Cryosphere in a Changing Climate*, (IPCC, 2019), ('*IPCC SR Ocean and Cryosphere*').

[195] Ibid.

An increased MPA target should be relatively easy to meet given the current trajectory of MPAs within EEZs,[196] especially given the size of ABNJ currently not covered by protected area.[197] However, it is also acknowledged that most of the current MPAs are under-resourced and there is an uneven spread of expertise within this field around the world.[198]

In order to achieve an increased target, especially if looking towards ABNJ areas where there are less conflicts between users and lower (perceived) socio-economic values to stakeholders,[199] States will need to actively collaborate in sharing lessons learned regarding the various challenges that have been faced to date when developing MPAs within ABNJ, and formulate best practices from such learnings to be tailored, as appropriate, for each region.[200]

To support development of ABNJ MPAs in the near-term, awaiting finalisation of the BBNJ (hopefully resulting in the establishment of a global, cross-sectoral institution, with appropriate regulations, standards, and oversight to addresses cumulative impacts), States could expanding existing regional arrangements and networks to deal with, as best they can, the current IL deficiencies.[201] Also, further coordination between the various sectoral bodies who operate within ABNJ should be encouraged, to enhance global recognition of the various 'MPA-like' areas that each sector's institution has designated,[202] taking into account impacts from all stressors on the ocean.[203] This would especially be prudent for protected area designations based on the advice of a scientific panel.[204]

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[196] See above, (n 147-148).

[197] See above, (n 151-152).

[198] UNESC (n 147) para 96.

[199] Rees et al (n 47).

[200] Ardron et al (n 10) 106.

[201] Ibid 103–6.

[202] Other effective area-based conservation measures should also be considered; see further, *IUCN WCPA OECM Guidelines* (n 103).

[203] Ardron et al (n 10) 103–6.

[204] Ibid.

In order to achieve SDG14.5, either as it currently stands or a more ambitious version, further clarification of what constitutes an effective MPA must be developed, including the setting of SMART indicators.[205] However, any such indicators must consider the level of resource and capacity that can be met by all parties, otherwise the end goal is almost certain to fall short.[206] Alternatively, a concerted effort is required to secure the additional funding needed to increase level of training and resources to support developing countries so all parties are adequately resourced in order to effectively meet their requirements.[207]

B *Medium to Longer-term Recommendations*

In the longer-term, it is essential BBNJ addresses all current deficiencies under IL, as outlined above, to close the gaps as required to be able to effectively implement MPAs in ABNJ.[208]

In the medium-term, given UNGA is the only global body with a mandate to consider issues of marine biodiversity conservation within ABNJ 'as a whole',[209] a resolution outlining the environmental principles to be applied within ABNJ,[210] that scientific evidence should be used to inform decision making processes across all sectors, to provide clarity and direction.[211] UNGA have already taken steps in this direction, calling on States to implement an integrated ecosystem-based approach to ensure the conservation of marine biodiversity within Resolution 59/24.[212] Further

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[205] See further, *CBD COP Decision VIII/22* (n 103) (n 60); *IUCN WCPA OECM Guidelines* (n 103); (n 103) 11–13; 'Global MPAs' (n 103) Glossary of Terms.

[206] Ardron et al (n 10) 101.

[207] Ibid.

[208] Freestone, 'An Unfinished Agenda' (n 10) 222–3; De Santo (n 10) 38–9; Wright et al (n 10) 55–65.

[209] *Oceans and the Law of the Sea*, Res 67/78, UNGA Doc no A/Res/67/78 (18 April 2013, adopted 11 December 2012), preamble ('*UNGA Res 67/78*').

[210] See further, Elferink (n 91).

[211] *UNGA Res 59/24* (n 44).

[212] Ardron et al (n 10) 106.

clarification, given the lack of consistency, is still regarding objectives and scientific standards.[213]

Regarding more appropriate indicators for SDG14.5, a recommendation is not to set a percentage for ABNJ MPAs. Rather, mimic and build on the *Paris Agreement* progressive goal-setting model of pledge and 'ratchet up',[214] making use of a global oceans scientific institution similar to the Intergovernmental Panel on Climate Change's (IPCC) role supporting the *United Nations Framework Convention on Climate Change* ('*UNFCCC'*).[215] The Intergovernmental Oceanographic Commission may fit this role, especially given their mandate from the UNGA and work ongoing towards the *UN Decade for Ocean Science*),[216] to provide the robust evidence and setting standards assistance required through collaboration and

[213] *UNGA Res 59/24* (n 44).

[214] *United Nations Framework Convention on Climate Change* (signed 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994)) ('*UNFCCC*'); *Adoption of the Paris Agreement*, Dec 1/CP.21, COP, 21st sess, UN Doc FCCC/CP/2015/10/Add.1 annex (29 January 2016), ('*Paris Agreement*'); UNFCCC, *Nationally Determined Contributions (NDCs): The Paris Agreement and NDCs* <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs#eq-2>.

[215] *UNFCCC* (n 214); *Paris Agreement* (n 214); UNFCCC, *Use of the 2006 IPCC Guidelines for National Greenhouse Gas Inventories and Revision of the UNFCCC Reporting Guidelines for Annex I Parties to the Convention* 2019 <https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/greenhouse-gas-inventories-annex-i-parties/reporting-requirements/use-of-the-2006-ipcc-guidelines-for-national-greenhouse-gas-inventories-and-revision-of-the-unfccc> ('*IPCC Guidelines*'); IPCC, *Decision IPCC/XLIII-6. Sixth Assessment Report (AR6) Products. Special Reports* 4 April 2016.

[216] *'The Intergovernmental Oceanographic Commission (IOC) of UNESCO has now been tasked by the [UNGA] to work with all interested stakeholders to design a Decade of ocean science that will help us to deliver the ocean we need for the future we want',* see further, IOC-UNESCO, *The Science We Need for the Ocean We Want: The United Nations Decade of Ocean Science for Sustainable Development (2021-2030)*, IOC Brochure 2018-7, IOC/BRO/2018/7 REV (2019), 4 ('*UN Decade of Ocean Science*'); UNGA, *Oceans and the Law of the Sea*, Res 72/73, UN Doc A/RES/72/73 (4 January, 2018, adopted 5 December 2017) paras 292-5, ('*UNGA Res 72/73 (Decade of Ocean Science for Sustainable Development)*').

education efforts, who could potentially also oversee the accounting for all stressors on the ocean.[217]

In order to successfully implement any of the above recommendations for ABNJ, a world environmental or oceans institution with cross-sectoral and conservation mandates will need to be established.[218] Its function would include coordinating across ABNJ sector activities and keeping track of the cumulative impacts, clarifying environmental principles and objectives, and setting standards for the various planning and assessment activities associated with the MPA process.[219]

C *Continue SDG14.5's Momentum*

SDG14.5 may not be the SMART-est target if it is solely based on a percentage of area 'protected', especially if you consider that it is a two-dimensional target to address a three-dimensional, interrelated, and complex environment. Maintaining SDG14.5's focus on a simple targeted percentage may result in increased politically-determined MPA designations with lower ecosystem-wide value, or, if effectiveness is not tracked, the potential for increased 'paper parks' with negligible benefits.[220]

However, SDG14.5 (and *CBD*'s Aichi Target 11) have significantly motivated global action, as evidenced by the recent surge of MPA implementations by various countries.[221] Such a swift uptake on a global basis of an international environmental protection measure is a big deal for international environmental law.[222] It would be sensible to recognise that for what it is, and thereby in making any future changes,

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[217] Wright, Rochette and Greiber (n 10) 555; De Santo (n 10) 38–9; Wright and Rochette (n 10) 21; Gjerde, Clark and Harden-Davies (n 10) 17–28, 39–40; Freestone, 'Governing the Blue' (n 10) 745–8, 750; IOC-UNESCO (n 216).

[218] Warner (n 10) 172; Wright et al (n 10) 61–2; Ardron et al (n 10) 105–6; Freestone, 'Governing the Blue' (n 10) 733.

[219] Warner (n 10) 172; Wright et al (n 10) 61–2; Ardron et al (n 10) 105–6; Freestone, 'Governing the Blue' (n 10) 733.

[220] See above, (n 175).

[221] UNESC (n 147) paras 5, 35; Sustainable Development Solutions Network Secretariat (n 6) 5–7.

[222] Campbell and Gray (n 8) 192–197; De Santo (n 10) 34–42.

carefully plan them, ensuring full collaboration and communication ensues, so as not to quash current momentum.[223]

There are similarities between the issues being tackled by the *Paris Agreement* and SDG14.5,[224] in that they are both aiming to conserve and restore a global issue, tackle impacts for which the scientific knowledge is either fairly recent or still emerging, and require the collaboration and cooperation from a huge cross-section of stakeholders who have previously seldomly, or never, needed to assemble.[225] Given this, if looking to evolve the SDG14.5 target, it would be worthwhile considering the target setting measures under the *Paris Agreement* as a potential model. This model involves a transparent pledge and review process that respects '*common but differentiated responsibilities and respected capabilities*'[226] with subsequent 'ratchet-up'[227] requirements, together with scientific input provided by an independent scientific body, substantial collaboration, capacity building efforts, and transparent reporting.[228] There are signs that *UNFCCC* are willing to support the efforts towards SDG14's goal to protect the oceans and support its resilience from climate change stressors, with the *Paris Agreement* including a statement regarding the importance of ensuring '*the integrity of all ecosystems, including oceans*',[229] launching its 'Because of the Ocean'[230] declaration at the Conference of

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[223] Sustainable Development Solutions Network Secretariat (n 6).

[224] *Paris Agreement* (n 214).

[225] Sands and Peel (n 21) 932–3.

[226] *Paris Agreement* (n 214) art 2(2).

[227] Ibid art 4.3., which states that each subsequent pledge must 'represent a progression beyond' ('ratchet-up').

[228] UNFCCC, *Reporting Requirements* 2019 <https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/greenhouse-gas-inventories-annex-i-parties/reporting-requirements> ('*Reporting Requirements*'); UNFCCC, *What Is Transparency and Reporting?* 2019 <https://unfccc.int/process-and-meetings/transparency-and-reporting/the-big-picture/what-is-transparency-and-reporting> ('*Transparency and Reporting*'); UNFCCC, *Revision of the UNFCCC Reporting Guidelines on Annual Inventories for Parties Included in Annex I to the Convention*, Dec 24/CP.19, COP, 19th sess, UN Doc FCCC/CP/2013/10/Add.3 (31 January 2014), ('*UNFCCC Revised Reporting Guidelines*'); UNFCCC, *IPCC Guidelines* (n 215).

[229] *Paris Agreement* (n 214) preamble para 2.

[230] *Because the Ocean Declaration* (29 November 2015) <https://www.becausetheocean.org/the-initiative/> ('*Because the Ocean*').

Parties (COP) 21, and COP23 launching its 'Ocean Pathway'[231] initiative which outlines plans to investigate options for implementing ocean issues into the *UNFCCC* process.[232] It remains to be seen if this initiative will result in more than identifying ocean-based solutions for climate change, rather than protecting the oceans to provide more resilience. *UNFCCC*'s 25th Conference of the Parties (COP), dubbed the "Blue COP", is expected to adopt the IPCC special report on the oceans and cryosphere, which will hopefully result in further actions to conserve ocean biodiversity to effectively manage such cumulative impacts.[233]

Another reason for maintaining SDG14.5's simplicity is its ability, based on evidence to date, to raise global awareness of the serious issues facing oceans resulting from human activities and the importance of their ecosystem services to our health and livelihood (although the latter, to a lesser degree). This is especially notable considering that the value of SDG14 is to be considered equitably to the other goals that the world is working towards meeting in order to achieve is 2020 sustainable planet for humanity vision.[234]

As stated within the 2019 *SDG-Report*,

> '*[p]rotected areas play a critical role in sustainable development if they are both effectively managed and located in areas important for biodiversity*'.[235]

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[231] UNFCCC COP, *COP23: The Ocean Pathway: Towards an Ocean Inclusive UNFCCC Process* 16 July 2019 <https://cop23.com.fj/the-ocean-pathway/>.

[232] Because the Ocean (n 230); UNFCCC COP (n 231); CBD Secretariat, *Report of the Subsidiary Body for Scientific and Technological Advice on Its 45th Session*, UN Doc FCCC/SBSTA/2017/7 (31 January 2017) para 54.

[233] IISD Reporting Services, 'Before the Blue COP; 10-11 April 2019; Madrid, Spain' (2019) 186(17) *Before the Blue COP Bulletin* <http://enb.iisd.org/oceans/before-the-blue-cop/html/enbplus186num17e.html>; (n 215) (n 194).

[234] Sustainable Development Solutions Network Secretariat (n 6).

[235] *2019 SDG-Report* (n 33) goal 14.

However, in order for the world to meet its SDG14.5 target to conserve the ocean,[236] governments must decouple environmental degradation from economic growth.[237] Such a transition is only possible if supported by long-term, comprehensive, and science-based targets,[238] which requires adequate capacity and resources at all coordinating levels. But most importantly, a coordinated and collaborative 'whole of society' approach is essential if the world is to meet these goals.[239]

VI CONCLUSION

The UNGA have furthered the development of international environmental law regarding sustainable development with the adoption of the *SDG-Agenda*. Its seventeen goals are aimed at ensuring the sustainable development of the world's planet is managed in a holistic manner, balancing the social and economic needs of its population together with ensuring the sustainability of the earth's ecosystem so it can continue to provide its benefits to both present and future generations.[240]

SDG14 is focused on the conservation and sustainable use of the oceans and their resources, with one of its associated targets calling for 10% of the oceans to be conserved by 2020, to be implemented via the use of MPAs.[241] This target applies to both waters within and beyond ABNJ, thus is an important instrument in mandating the conservation of marine biodiversity within ABNJ.[242] However, this mandate is difficult to achieve due to fragmentation and gaps within the applicable international legal framework governing the world's oceans in ABNJ and regulating the activities within it.[243]

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[236] *SDG-Agenda* (n 1) goal 14.5.

[237] UNESC (n 147) para 83.

[238] Ibid.

[239] Ibid para 67.

[240] *SDG-Agenda* (n 1).

[241] Ibid goal 14.5; UN Statistics (n 13).

[242] Ibid.

[243] Ringbom and Henriksen (n 10); High Seas Alliance (n 10); Ardron et al (n 10) 105–6; Freestone, 'An Unfinished Agenda' (n 10) 223–5wri; Wright, Rochette and Greiber (n 10) 1; Warner (n 10) 159; Wright and Rochette (n 10) 23–4; Freestone, 'Governing the Blue' (n 10) 750–1; De

In meeting the requirement of SDG14.5, the IUCN definition for MPA is to be applied and MPAs,[244] as developed, are to be recorded within the world's official database for protected areas — WDPA.[245] UNE-WCMC have been tasked with clarifying the indicator's measures to track SDG14.5's progress. Currently, these measures for SDG14.5 are not SMART, mostly because they are not specific enough to represent a measure for what the target aims to achieve — conserving the oceans.

One of the issues with the measure is due to the various types of MPAs included under IUCN's definition, ranging from a set-aside area where activities may be limited or additional measures implemented, to a fully-protected, no-take area with scientific monitoring plans.[246] There are arguments that MPAs that are not fully protected by a no-take designation,[247] such as those that could fall under the lower IUCN categories, should not count towards SDG14.5's progress as they provide minimal benefits of conservation to marine biodiversity.[248]

Another issue with SDG14.5 is that it does not specify measures to track effectiveness of the implemented MPAs,[249] and without this measure, the tracking of SDG14.5's progress risks becoming an exercise of monitoring 'paper parks'.[250]

In order for SDG14.5 to be a SMART-er target, the following components require clarification within its indicator: what needs to be conserved; what laws should apply; and what scientific standards should be met. A review of progress of ABNJ MPAs implemented to date shows that some of these elements have been clarified – – IUCN standards are to be followed, and the 10% MPA designation is to be recorded

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Santo (n 10) 42; Wright et al (n 10) 31–40; Gjerde, Clark and Harden-Davies (n 10) 4, 42; Gjerde et al (n 10) 47–8.

[244] Day et al (n 13).

[245] 'Protected Planet: The World Database on Protected Areas (WDPA)' (n 19).

[246] UN Statistics (n 13); Day et al (n 13) 19–23.

[247] 'Global MPAs' (n 103); IUCN WCPA (n 60); Grorud-Colvert et al (n 157).

[248] Ibid.

[249] UNEP-WCMC (n 155) 11; UNE-WCMC, IUCN (n 149); UN Statistics (n 13).

[250] See further, Matz-Lück and Fuchs (n 192); Park and Kim (n 192) 192; Grorud-Colvert et al (n 111).

as a percentage based on total marine areas — but clarification is still minimal, and not sufficient to be deemed SMART.[251]

One of the key reasons progress has been slow with improving SDG14.5's target and indicator to be more specific is that there is a gap under international law regarding the design, establishment, management, and enforcement of MPAs within ABNJ, including a lack of globally agreed scientific methods — though they do exist, as shown by the example of the EBSA process,[252] they are just not consistently used by all stakeholders to inform decisions for activities within ABNJ.[253]

There is also no single institution with overarching mandate for all sector activities within ABNJ to be able to set the standards for scientific methods, as well as clarify what general environmental principles and objectives should be met.[254] Without such an overarching institution, the required coordination between all the various sectors' organisational bodies for activities within ABNJ becomes incredibly difficult, if not, near impossible to achieve the required objective for MPAs —[255] as seen within the example provided of ABNJ MPAs under *OSPAR*.[256] This situation significantly impedes the progress towards SDG14.5's 10% MPA coverage for areas within ABNJ.

UNGA have recognised these issues,[257] and have commenced negotiations towards a new *UNCLOS* implementing agreement specifically focused on the conservation

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[251] Sustainable Development Solutions Network Secretariat (n 6); UN Statistics (n 13); Mackie et al (n 8) 21–2; *Secretary-General SDG14 Background Note* (n 8) 9–10.

[252] 'Ecologically or Biologically Significant Marine Areas' (n 16).

[253] Wright, Rochette and Greiber (n 10) 555; De Santo (n 10) 38–9; Wright and Rochette (n 10) 21; Gjerde, Clark and Harden-Davies (n 10) 17–28, 39–40; Freestone, 'Governing the Blue' (n 10) 745–8, 750.

[254] Freestone, 'An Unfinished Agenda' (n 10) 222–3; De Santo (n 10) 38–9; Wright et al (n 10) 55–65.

[255] Warner (n 10) 172; Wright et al (n 10) 61–2; Ardron et al (n 10) 105–6.

[256] *OSPAR* (n 18); 'OSPAR/NEAFC Collective Arrangement' (n 127); 'MPAs in Areas beyond National Jurisdiction' (n 110).

[257] *UNGA Res 59/24* (n 44) 73.

and sustainable use of biodiversity beyond national jurisdiction — the BBNJ.[258] The current revised draft does not yet clarify the requirements needed to improve this gap under international law,[259] those being the establishment of a global, cross-sectoral institution who can provide appropriate regulations, standards, and oversight that addresses multiple species, habitats, and cumulative impacts on ABNJ biodiversity, including requirements for establishing cross-sectoral and ecosystem-connected MPAs that are monitored and enforced.[260]

Until such time as BBNJ is finalised,[261] and hopefully refined so these ABNJ MPA legal issues are adequately addressed,[262] lessons learned from other ABNJ MPA efforts and the *CBD*'s work on EBSAs could potentially fill some of this void,[263] together with improved cross-sector coordination between the various stakeholders so that some of the gaps can start to be addressed.[264]

Although shortcomings of SDG14.5's SMART elements have been identified within this paper, the fact there is current international momentum between the various stakeholders towards meeting a 10% marine area coverage target using MPA (of varying definitions) is at least a starting point towards the conservation of biodiversity within ABNJ — noting, this could be attributed to the fact that it is a simple target (regardless of the specifics).[265] This is especially noteworthy considering that ABNJ is an area largely ungoverned and unregulated to date under

[258] *BBNJ IGE* (n 94).

[259] IISD Reporting Services (n 142) 8–10, 22.

[260] *Wright et al (n 10).*

[261] *BBNJ IGE* (n 94).

[262] IISD Reporting Services (n 142) 8–10, 22.

[263] *EBSA Azores Scientific Criteria and Guidance* (n 106); *CBD COP Decision IX/20 (EBSA)* (n 16).

[264] Catarina Frazão Santos et al, 'Major Challenges in Developing Marine Spatial Planning' (2018) xx *Marine Policy* 1, 37–8, 39–42; Wright and Rochette (n 10) 13–24, 27–8; Gjerde et al (n 10) 50–2; Gjerde, Clark and Harden-Davies (n 10) 17–28, 39–40; Freestone, 'Governing the Blue' (n 10) 745–8, 750.

[265] 'Global MPAs' (n 103).

IL.[266] However, there is much room for improvement of SDG14.5 and the development of its indicators, with recommendations to address such improvements provided within.

[266] Ringbom and Henriksen (n 10); High Seas Alliance (n 10); Ardron et al (n 10) 105–6; Freestone, 'An Unfinished Agenda' (n 10) 223–5wri; Wright, Rochette and Greiber (n 10) 1; Warner (n 10) 159; Wright and Rochette (n 10) 23–4; Freestone, 'Governing the Blue' (n 10) 750–1; De Santo (n 10) 42; Wright et al (n 10) 31–40; Gjerde, Clark and Harden-Davies (n 10) 4, 42; Gjerde et al (n 10) 47–8.