The Implementation and Compliance Committee of the ABBNJ: a Legal Prospection on Potential Modalities and Procedures

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Abstract 151
Keywords 152
I. Introduction 152
II. Implementation Techniques in Treaties 154
1. Implementation and Compliance Techniques in the LoSC 156
2. Implementation and Compliance Techniques in MEAs and Shared Resources Agreements 158
3. Techniques in the ABBNJ 161
III. The Implementation and Compliance Committee of the ABBNJ 162
1. Composition of the IC 164
2. Modalities and Procedures 165
a) Submission Procedure 167
b) Procedure Triggered by the IC 168
c) Advisory Procedure 169
3. Standing to Trigger Non-Compliance Procedures 170
a) State Parties and Non-State Parties 170
b) Relevant Stakeholders Identified in the ABBNJ 171
IV. The IC and the Dispute Settlement Mechanism 173
1. Obligation to Cooperate to Prevent Disputes 174
2. Value of the ICs Decisions in a Judicial or Arbitral Proceeding 177
3. Implementation of Judicial and Arbitral Decisions Through the Committee 179
V. Conclusion 180

Abstract

The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (ABBNJ) stands for the new generation of agreements implementing the United Nations

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Convention on the Law of the Sea. Among the novelties of the ABBNJ is the sophisticated implementation process supported by an institutional framework and a dispute settlement mechanism. This paper zooms in on one of the implementing bodies established in the Agreement, the Implementation and Compliance Committee (IC). While the modalities and rules of procedure of the IC are to be determined by the Preparatory Commission and the first Conference of the Parties, some questions arise. What type of functions and procedures is the IC expected to perform? What degree of participation may the stakeholders of the ABBNJ enjoy in such procedures? What is the relationship between the IC and the dispute settlement mechanism of the ABBNJ? In addressing these and other issues, the paper proceeds as follows. In a first section, the paper situates the implementation and compliance techniques of the Agreement by looking at the approaches followed in the United Nations Convention on the Law of the Sea Convention (LoSC) and other agreements. A second section delves into procedural aspects of the IC, such as the composition of the IC, the most suitable non-compliance procedures and the question of standing to trigger them. In a third section, the paper examines the complementary role of the IC to the dispute settlement mechanism. It examines the role of the IC in preventing disputes, the value of the IC's decisions in contentious and advisory proceedings, and the role of the IC in facilitating the implementation of judicial and arbitral decisions.

Keywords

BBNJ – implementation – compliance – cooperation – treaty bodies – dispute settlement mechanism

I. Introduction

The Agreement on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (ABBNJ or Agreement) promises a complementary framework to manage and conserve marine resources in areas beyond national jurisdiction.[1] Overall, the ABBNJ, as an implementation treaty of the United Nations Convention on the Law

[1] Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (adopted 19 June 2023, not yet into force) UN Doc. A/CONF.232/2023/4, Article 1 (2). (ABBNJ).

of the Sea (LoSC), covers four thematic areas: marine genetic resources, area-based management tools (ABMTs), environmental impact assessment (EIA), and marine technology transfer. When it comes to implementation and compliance techniques, the Agreement follows the practice of existing multilateral environmental agreements (MEAs) by fostering cooperation and facilitative frameworks. Indeed, the Agreement creates a comprehensive institutional framework to facilitate its implementation and to manage compliance. However, the ABBNJ also contains a dispute settlement mechanism inspired by that of the LoSC, with some procedural adaptations though.

Within this bigger picture of the ABBNJ, this paper zooms in on one of the treaty bodies established in the Agreement, the Implementation and Compliance Committee (IC or the Committee) established in Article 55. As explained below, similar bodies operate under other MEAs, through which for example Parties and members of the public can initiate non-compliance proceedings against another Party. These bodies, usually staffed by legal and technical experts, provide technical and legal assistance to Parties on issues where a Party is or may be in non-compliance. Similarly, the ABBNJ sets out the contours of the IC as a body intended to facilitate the implementation of and promote compliance with the Agreement, in a facilitative, non-adversarial and non-punitive framework.[2] However, the particular modalities and rules of procedures of the IC will be decided in the first meeting of the Conference of the Parties (COP).[3] In preparation for this, in 2024, the United Nations General Assembly established a Preparatory Commission for the entry into force of the ABBNJ and the convening of its First Meeting of the COP (PreCom).[4] Two meetings of the PreCom will take place in April and August 2025.[5] Among the issues to be discussed will be the terms of reference and modalities of operation and rules of procedure for the Implementation and Compliance Committee, as well as the selection process for its members.[6]

In light of the above, a question arises regarding the added value of a treaty body, such as the IC, in a multilateral treaty that aims to protect and govern activities on a global scale, by reconciling the interests of multiple stakeholders. Depending on the competences granted to the IC, its role may range

2 ABBNJ, Article 55 (1).

3 The rules and procedures will be discussed in the first conference of the parties, pursuant Article 56 (4).

4 UNGA Res 78/272 of 24 April 2024, A/RES/78/272, para. 3. See also UNGA Res 78/560 of 13 August 2024, A/78/L.102.

5 UNGA Res 78/560 of 13 August 2024, A/78/L.102.

6 UNGA, 'Annex to the Statement by the Co-Chair of the Preparatory Commission at the closing of the organizational meeting' of 1 July 2024, UN Doc. A/AC.296/2024/4, 3, I (2) and (3).

from a passive treaty body, responsible only for monitoring the periodic reporting obligations established by the treaty, to a proactive entity entrusted with facilitative procedures, open to the stakeholders identified in the Agreement. The purpose of this paper is to inform delegations and stakeholders participating in the upcoming sessions of the PreCom. To this end, the paper reflects on two fundamental questions. Firstly, what kind of IC is the most suitable to address and manage compliance with the ABBNJ? Secondly, whether and to what extent the IC complements the dispute settlement mechanism established in the Agreement.

The paper proceeds as follows: *First,* it examines the implementation techniques envisaged in the ABBNJ by drawing on the approaches followed in LoSC, MEAs, and shared resources agreements. *Second,* the paper reflects on the benefits of the composition, modalities and procedures to be ascribed on the IC in the rules of procedure. *Third,* the paper closes by reflecting on the relationship between the IC and the dispute settlement mechanism and proposes a complementarity approach.

II. Implementation Techniques in Treaties

The BBNJ Agreement, far from being a 'High Seas Treaty', as it is sometimes erroneously referred to,[7] is rather an implementation agreement to certain provisions of the LoSC. In fact, it is a multifaceted treaty[8] which expands on the conservation and sustainable use of biodiversity beyond national jurisdiction by addressing four topics: marine genetic resources, area-based management tools, environmental impact assessment and capacity-building, and marine technology transfer. At the outset, the BBNJ Agreement is a treaty concerning the management and conservation of natural resources located in areas beyond national jurisdiction, over which no state has sovereignty or sovereign rights, but are of common concern for humankind.[9] While the treaty follows a state-centred approach, just as the LoSC,

7 This author considers that it is inaccurate and misleading for the public to refer to the BBNJ Agreement as the 'High Seas Treaty'. The BBNJ Agreement is a treaty whose object and purpose are to regulate a particular aspect of the high seas, namely biodiversity. It does not regulate other aspects of the high seas, such as navigation, fishing, submarine cables and pipelines, underwater cultural heritage, human rights at sea, or other legitimate uses. The only treaties with such a broad scope are the 1958 Convention on the High Seas and Part VII of the LoSC.

8 Daniel Bodansky, 'Four Treaties in One: The Biodiversity Beyond National Jurisdiction Agreement', AJIL 118 (2024), 229-323 (300).

9 Nico Schrijver, 'Managing the Global Commons: Common Good or Common Sink?', TWQ 37 (2016) , 1252-1267 (1253).

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the Agreement seems to expand the meaning of common concern of mankind by recognising the interests of non-state actors, such as Indigenous People, local communities, the scientific community, civil society, and other relevant stakeholders. In concrete, under certain provisions of the Agreement, states now have duties of public notification and consultation owed to other states and relevant non-state actors.[10] In this regard, Parties to the treaty have a common interest in ensuring compliance with relevant treaty obligations. However, the inclusion of non-state actors within the scope of procedural obligations of the Agreement, may increase the degree of transparency and accountability over the implementation and compliance with the Agreement.

The question then arises as to how to ensure a balance between the interests of states and non-state actors in the high seas, and how to reconcile such interests with the sustainable use of biodiversity beyond national jurisdiction. One should recall that the Agreement is grounded on the fundamental principles of cooperation and sovereign equality, as indicated in the preamble,[11] the object and purpose[12] and some other provisions.[13] For instance, each of the four main sections of the treaty entails procedural obligations calling for notification, consultation and transparency among Parties and relevant stakeholders. In other words, Parties are instructed to actively operationalise the principle of cooperation in implementing and complying with the Agreement. In order to achieve this objective, the Agreement establishes a novel system comprising obligations owed to states and non-state actor and treaty bodies to facilitate the functioning of the treaty system. This new system indeed has been the result of combining the foundations and principles of the LoSC with the cooperative frameworks established in other multilateral environmental agreements. Within this context, it is pertinent to briefly underscore how implementation and compliance work in the LoSC and MEAs, and which elements of each one are now present in the Agreement.

At the outset, the International Law Commission (ILC) has defined implementation as to include the 'measures that states may take to make treaty provisions effective at the national level, including implementation in their national laws'.[14] Article 53 of the ABBNJ introduces a similar word-

10 See, for example, Articles 21 (2)(c) and 32 (3).

11 ABBNJ, Preamble, para. 2.

12 The object and purpose of the treaty is: 'to ensure the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, for the present and in the long term'. BBNJ Agreement, Article 2.

13 ABBNJ Article 8 (1).

14 ILC, 'Draft Guidelines on the Protection of the Atmosphere, with Commentaries', (2021) Report of the International Law Commission on the 72nd Session, UN Doc. A/76/10, 13-51, Guideline 10, Comment 1.

ing.[15] For its part, compliance comprises the 'mechanisms or procedures at the international level that verify whether states in fact adhere to the obligations of an agreement or other rules of international law'.[16] In the context of environmental agreements, Viñuales and Dupuy consider that implementation is a process integrated by four main stages: information, facilitation, management, and reparation.[17]

In order to establish a foundation for the subsequent discussion of the implementation and compliance techniques of the ABBNJ, it is first necessary to examine, in summary, the approaches that have been followed in the LoSC and among MEAs, which in turn provided the inspiration for the implementation techniques in the ABBNJ.

1. Implementation and Compliance Techniques in the LoSC

When it comes to implementation and compliance techniques, the LoSC relies on the good faith of states to implement and comply with their treaty obligations.[18] In instances where a Party is found to be in non-compliance with its treaty obligations, the pool of tools available under the LoSC appears to be somewhat limited but effective. This is not to say that the approach of the LoSC is incorrect, but rather to understand this treaty in the context and the time in which it was negotiated. The negotiation process probably favoured those implementation techniques with which they were more familiar and which had been already accepted in practice. As noted by Galindo Pohl, the LoSC is as 'an illustrative reflection of the status of the society of states in its period of transition to a community of states'.[19] Within this context, this section will elaborate on two features of the LoSC which are relevant to understand how the Agreement innovates

15 Article 53 reads as follows:
'Article 53 Implementation
Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to ensure the implementation of this Agreement.'

16 ILC, Draft Guidelines on the Protection of the Atmosphere, with Commentaries (n. 14), 13-51, Guideline 11, Comment 1. See also the definition of implementation and compliance provided by UN Environment Programme (UNEP). UNEP, Manual on Compliance with and Enforcement of Multilateral Environmental Agreements (UNEP 2006), 59.

17 Jorge Viñuales and Pierre Marie-Dupuy, *International Environmental Law* (Cambridge University Press 2018), 294.

18 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, Article 26.

19 Reynaldo Galindo Pohl, 'The Exclusive Economic Zone in the Light of Negotiations of the Third United Nations Conference on the Law of the Sea' in: Francisco Orrego Vicuña, The Exclusive Economic Zone: A Latin American Perspective (Routledge 2019), 31-59 (59).

in the implementation and compliance techniques. Namely, the lack of an institutional framework in the LoSC and its impact in managing non-compliance issues; and the presence of a robust dispute settlement mechanism.

As to the facilitation and management of non-compliance issues, the LoSC is more limited from an institutional perspective. As is well known, the LoSC created three main institutions: First, the International Tribunal for the Law of the Sea, which can assist in managing non-compliance and addressing reparation claims. Second, the Commission on the Limits of the Continental Shelf, to provide recommendations on how to delineate a potential continental shelf beyond 200 NM, and to provide scientific and technical advice if requested.[20] And third, the International Seabed Authority, as the regulatory body to organise and control activities in the Area.[21] Beyond these institutions, the LoSC lacks an institutional framework, such as a COP or a Secretariat. The United Nations (UN) Secretary General performs functions of a Secretariat, such as convening necessary meetings of States Parties.[22] More precisely, these functions are performed through the Division for Ocean Affairs and the Law of the Sea (DOALOS).[23] With respect to facilitation, DOALOS, for example, is entrusted with providing advice and assistance upon request of States, through capacity-building (training, fellowships), technical assistance, and financial support.[24] However, Parties are not obliged to periodically report to DOALOS on the implementation of the LoSC. A particular exception on the reporting stage may be the obligation of prospectors and contractors to submit an annual report to the Secretary-General of the International Seabed Authority (ISA) regarding the activities carried out along the year.[25] Similarly, the contractor and the ISA shall undertake a periodic review of the implementation of the plan of work at intervals

20 LoSC, Article 76, Annex II, Article 3(1); On the nature of the CLCS as an implementation mechanism, see Rukmini Das, 'Compliance with Science-Based Treaties' in: Christina Voigt and Caroline Foster (eds), *International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation* (Cambridge University Press 2024), 145-169.

21 LoSC, Articles 137 (1) and 157 (1).

22 LoSC, Article 319 (2); Serguei Tarassenko and Ilaria Tani, 'The Functions and Role of the United Nations Secretariat in Ocean Affairs and the Law of the Sea', IJMCL 27 (2012), 683-699.

23 UNGA Res 49/28 'Law of the Sea' of 6 December 1994, A/RES/49/28, para. 15; UNSG, 'Organization of the Office of Legal Affairs' (18 January 2021) UN Doc. ST/SGB/2021/1, Section 9; Tarassenko and Tani (n. 22), 686-687.

24 UNGA Res 49/28 'Law of the Sea', para. 15(e); UNSG, 'Organization of the Office of Legal Affairs', para. 9.2(i).

25 For example, see International Seabed Authority (ISA), 'Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area' of 22 July 2013, ISBA/19/C/17, Regulation 6.

of five years.[26] Yet, beyond Part XI, the LoSC does not establish an international organisation, body, or equivalent process that addresses the governance of the high seas.[27]

The LoSC includes a dispute settlement mechanism comprising diplomatic means and compulsory mechanisms. Thus, a Party being affected by a non-compliance issue can either resort to negotiations or voluntary conciliation, or rather trigger a compulsory procedure under Part XV of the Convention (adjudication, arbitration, or compulsory conciliation). In the particular case of areas beyond national jurisdiction, a Party to the LoSC may 'claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area'.[28] According to McCreath, enabling the international community such standing may enhance implementation and compliance with *erga omnes* obligations.[29] However, it has been suggested that communitarian disputes under the LoSC should be managed through mechanisms as those included in many MEAs.[30] Whilst the dispute settlement mechanism is a crucial feature of the LoSC and the Agreement, the need for cooperative frameworks to manage non-compliance issues as a complement to the dispute settlement mechanism may be useful. It is within this context that the practice among MEAs has been relevant for the development of the ABBNJ.

2. Implementation and Compliance Techniques in MEAs and Shared Resources Agreements

As noted, the implementation and compliance with the ABBNJ requires operationalising the principle of cooperation. In this respect, the principle of cooperation and its goals remain defined by the regime within which the objectives exist.[31] In the context of MEAs, the fundamental objective of the

26 For example, see International Seabed Authority (n. 25), Regulation 28.

27 Tara Davenport, Ruth Mackenzie and Neil Craik, *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023), 19.

28 ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10, para. 180.

29 Millicent McCreath, 'Community Interests and the Protection of the Marine Environment within National Jurisdiction', ICLQ 70 (2021), 569-603 (601).

30 Eirini-Erasmia Fasia, 'No Provision Left Behind – Law of the Sea Convention's Dispute Settlement System and Obligations Erga Omnes', The Law and Practice of International Court and Tribunals 20 (2021), 519-547 (545-546); Natalie Klein and Kate Parlett, *Judging the Law of the Sea* (Oxford University Press 2022), 339.

31 Laurence Boisson de Chazournes and Jason Rudall, 'Co-Operation' in: Jorge Viñuales (ed.), *The UN Friendly Relations Declaration at 50: An Assessment of the Fundamental Principles of International Law* (Cambridge University Press 2020), 105-132 (113).

Parties of the treaty is to protect the environment or utilise natural resources in a sustainable manner. In order to facilitate this, a series of mechanisms have been established with the aim of ensuring that all parties contribute to this shared objective. This section comments on these features in the context of MEAs and shared resources agreements.

The main objective of cooperation in MEAs is the protection and sustainable use of the environment, taking into account the potential risks posed by human activities[32] and their impact on human health and other human rights.[33] To that aim, cooperation should be read and implemented in conjunction with other rules of international law, such as the prevention principle, the obligation to conduct an environmental impact assessment, the precautionary approach, or the obligation to inform, notify and consult.[34] MEAs create treaty bodies aimed at facilitating and monitoring the implementation and compliance of the treaty through cooperation.[35] For example, MEAs tend to establish a Secretariat, COPs, scientific and technical bodies, or an implementation committee, among others.[36] The institutional framework of MEAs also facilitates transparency and public participation, both of which are necessary for the legitimate implementation of cooperation.[37] As stated by Antonia and Abram Chayes 'Transparency influences strategic interaction among parties to the treaty in the direction of compliance' by facilitating coordination and reassurance.[38] In some cases, members of the

32 For example, the object and purpose of: United Nations Framework Convention on Climate Change of 9 May 1992, 1771 UNTS 107, Article 2.

33 For example, the object and purpose of: Minamata Convention on Mercury of 10 October 2013, 3202 UNTS 54669; Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018, 3388 UNTS 56654, Article 1.

34 ICJ, Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), judgment of 16 December 2015, ICJ Reports 2015, 665, para. 104.

35 See Draft Guidelines on the Protection of the Atmosphere, with Commentaries (n. 14), 13-51, Guideline 11, para. 3; UNEP-University of Jeonsu, *Multilateral Environmental Agreement: Negotiator's Handbook* (University of Jeonsu 2007), 2.18-2-22.

36 UNEP, Compliance Mechanism under Selected Multilateral Environmental Agreements (UNEP 2007), 20-21; Malgosia Fitzmaurice, 'Environmental Compliance Control' in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2021), para. 52.

37 Malgosia Fitzmaurice, 'The New Generation of Environmental Non-Compliance Procedures and the Question of Legitimacy' in: Christina Voigt and Caroline Foster (eds), International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation (Cambridge University Press 2024), 49-70 (51); Boisson de Chazournes and Rudall (n. 31), 122.

38 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995), 22 and 23.

public are also entitled to initiate a non-compliance procedure against a Party of a treaty.[39]

The implementation of cooperation regarding shared resources treaties follows a similar trend, as their objective is to ensure the equitable use and the protection of the shared resource.[40] Mainly, there are two obligations reflecting this aim: the obligation to prevent transboundary environmental harm and the principle of equitable and reasonable use.[41] Under the principle of equitable and reasonable use, states shall use and develop watercourses with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of other states.[42] In these treaties, the principle of cooperation functions as an umbrella under which states are to achieve optimal use and adequate protection of watercourses.[43] On this point, McCaffrey noted that 'experience suggests that such cooperation is most effective when it is institutionalized'.[44] In practice, this is done through the establishment of river basin commissions, such as those for the Uruguay, Indus, the Nile, and Colorado Rivers, to name a few. For example, in the *Pulp Mills* case, the ICJ stressed the suitability of the Administrative Commission of the Uruguay River to implement 'in good faith the consultation and co-operation procedures'.[45] Even multilateral treaties on watercourses, such as the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, rely on an institutional framework to foster cooperation among Parties and other stakeholders.[46]

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39 UN Economic Commission for Europe, *Decision 1/7: Review of Compliance* of 2 April 2014, Doc. ECE/MP. PP/2/Add.8, para. 18; UN Economic Commission for Latin America and the Caribbean, Decision I/3 – Rules relating to the Structure and Functions of the Committee to Support Implementation and Compliance of 22 April 2022, Doc. 22-00344, Rule V (1).

40 ILC, 'Draft Articles on the Law of Transboundary Aquifers, with Commentaries', (2008) ILCYB Vol II, Part Two, A/CN.4/SER.A/2008/Add.l (Part 2), 22-43, Article 1, para. 1 and 3; ILC, Draft Guidelines on the Protection of the Atmosphere, with Commentaries (n. 14), 13-51, Guidelines 2, 5 and 6.

41 Convention on the Law of the Non-Navigational Uses of International Watercourses of 21 May 1997, entered into force 17 August 2014, 2999 UNTS 52106, Articles 5 and 7 (UN Water Convention); Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269, Article 2(1) and (2)(c) (UNECE Water Convention).

42 UN Water Convention (n. 41), Articles 5 and 6; UNECE Water Convention (n. 41), Article 2 (2)(c).

43 UN Water Convention (n. 41), Article 8.

44 Stephen C. McCaffrey, *The Law of International Watercourses* (Oxford University Press 2019), 463.

45 ICJ, *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Provisional Measures, Order of 13 July 2006, ICJ Reports 2006, 113, para. 82.

46 Laurence Boisson de Chazournes, *Fresh Water in International Law* (Oxford University Press 2013), 30-31.

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In sum, the implementation and compliance techniques among MEAs and shared resources agreements depend on the institutionalisation of cooperation, either by creating treaty bodies or by establishing organisations to that aim. Moreover, transparency and public participation are fostered as a technique to foster compliance. In some cases, stakeholders, such as non-state actors, have an active role in monitoring compliance. These features, as will be explained in the next section, are incorporated in the ABBNJ.

3. Techniques in the ABBNJ

The ABBNJ opens a new chapter in the LoSC treaty system by introducing a complete implementation process that addresses reporting, facilitation, management, and reparation. As stated by Bodansky, the ABBNJ 'is intended to be a dynamic agreement that evolves in response to new information and circumstances'.[47] In this respect, the ABBNJ institutionalises cooperation by creating an institutional framework to ensure transparency and to provide technical and facilitative assistance to the Parties. The Agreement establishes a Secretariat, a Clearing-House Mechanism managed by the Secretariat, a Conference of the Parties (COP), a technical and scientific body, a financial resources mechanism, and an implementation and compliance committee. Of these bodies, the Secretariat and the Clearing-House Mechanism are key to ensuring the necessary transparency, as Parties are required to share information on activities undertaken under the Agreement.

Part IX of the Agreement includes a dispute settlement mechanism mainly rooted in the system established under Part XV of the LoSC. Part IX includes diplomatic means and compulsory dispute settlement mechanism (adjudication, arbitration, and conciliation) with certain adjustments. For instance, certain categories of disputes are excluded from the compulsory dispute settlement, including dispute concerning the concurrent titles to sovereignty, jurisdiction, or other rights over continental or insular land territory.[48] Moreover, the Agreement allows the Conference of the Parties to request an advisory opinion from ITLOS.[49] In previous drafts of the treaty, advisory opinions formed part of the provisions on the dispute settlement mechanism,

47 Bodansky (n. 8).

48 ABBNJ Agreement, Article 60 (9) and (10). Joanna Mossop, 'Dispute Settlement Provisions in the Agreement for Biodiversity Beyond National Jurisdiction', Portuguese Yearbook of the Law of the Sea 1 (2024), 112-113.

49 ABBNJ, Article 47 (7).

but they were finally moved to the part on the functions of the Conference of the Parties. Advisory opinions in the ABBNJ can be a useful legal tool for the clarification of legal issues in the implementation of the agreement. Thus, the advisory function of ITLOS may reflect the intention to create a solid facilitating mechanism for the implementation of the treaty, backed up, if necessary, by an authoritative legal opinion from ITLOS.

All in all, the ABBNJ introduces a complete implementation and compliance scheme composed of treaty bodies and a dispute settlement mechanism. While many things beg for further discussion and research on the implementation and compliance techniques in the ABBNJ, this paper will zoom in on one of the treaty bodies which will be responsible to facilitate and manage compliance among Parties, but which may also complement the dispute settlement mechanism, namely the IC.

III. The Implementation and Compliance Committee of the ABBNJ

Within the implementation and compliance techniques followed by MEAs, ICs can be created in a treaty provision or through a decision adopted by the COP.[50] Overall, the main objective of ICs is to foster the implementation of and compliance with an MEA, and prevent environmental damage.[51] In practice, ICs have four main features. The first is their non-judicial and non-confrontational nature. Second, these mechanisms aim at facilitating compliance under a cooperative approach rather than stigmatising the concerned party with measures or sanctions. A third common feature is the relevance of the duty to cooperate between the Parties and the treaty bodies as a cornerstone of these mechanisms.[52] A fourth feature is the idea that the IC represents the interests of the community of states Party to

50 Fitzmaurice, 'New Generation' (n. 37), 58.

51 Viñuales and Dupuy (n. 17), 343-351; Fitzmaurice, 'Environmental Compliance Control' (n. 36), paras 52-55; Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018), 172-178; Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, Oxford University Press 2021), 254-260.

52 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Azerbaijan v. Armenia), Preliminary Objections, Judgment of 12 November 2024 (unreported), para. 54; Attila Tanzi and Cesare Pitea, 'Non-Compliance Mechanisms: Lessons Learned and the Way Forward' in: Tullio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009), 569-570; Viñuales and Dupuy (n. 17), 343-344.

the treaty.[53] However, in contrast to a dispute settlement mechanism, ICs cannot determine State responsibility.[54]

Within this context, Article 55 of the ABBNJ establishes an IC to facilitate the implementation and compliance with the provisions of the treaty. This provision reads as follows:

> **'Article 55 Implementation and Compliance Committee**
>
> 1. An Implementation and Compliance Committee to facilitate and consider the implementation of and promote compliance with the provisions of this Agreement is hereby established. The Implementation and Compliance Committee shall be facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.
>
> 2. The Implementation and Compliance Committee shall consist of members possessing appropriate qualifications and experience nominated by Parties and elected by the Conference of the Parties, with due consideration given to gender balance and equitable geographical representation.
>
> 3. The Implementation and Compliance Committee shall operate under the modalities and rules of procedure adopted by the Conference of the Parties at its first meeting. The Implementation and Compliance Committee shall consider issues of implementation and compliance at the individual and systemic levels, inter alia, and report periodically and make recommendations, as appropriate while cognizant of respective national circumstances, to the Conference of the Parties.
>
> 4. In the course of its work, the Implementation and Compliance Committee may draw on appropriate information from bodies established under this Agreement, as well as relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies, as may be required.'

The nature and scope of the IC follows the trend among MEAs to ascribe to them a facilitative function which is to be fulfilled in a transparent, non-adversarial, and non-punitive process.[55] Particularly, the Committee will consider issues of implementation and compliance at the individual as well as a systemic level.[56] Notably, the IC can draw on information from other bodies, including global, regional, subregional and sectoral bodies,[57] a relevant feature to coordinate the relationship between the IC and the International Seabed Authority. However, the modalities and rules of procedures of the IC

53 Justine Bendel, Litigating the Environment: Process and Procedure Before International Courts and Tribunals (Edward Elgar 2023), 247.

54 ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (n. 52), para. 54.

55 ABBNJ, Article 55 (1).

56 ABBNJ, Article 55 (3).

57 ABBNJ, Article 55 (4).

are to be discussed and adopted during the first COP, once the agreement enters into force.[58] As noted above, a PreCom will start discussions on *inter alia* the terms of reference and modalities for the operation of, and rules of procedures of the Implementation and Compliance Committee, and the selection process for the members of the IC.[59] Thus, at this stage, there is a need for reflection and consideration on the type of IC that the parties to the ABBNJ would like to have.

Against this backdrop, this section will address three considerations. Firstly, the composition of the IC. Secondly, the modalities and procedures that may be suitable for the IC to facilitate and manage non-compliance. Thirdly, the question of standing to trigger a non-compliance procedure before the IC, given the multiple stakeholders referred to in the Agreement.

1. Composition of the IC

As noted above, Article 55(2) of the ABBNJ refers to the members of the IC as persons 'with appropriate qualifications and experience', without clarifying the type of expertise necessary or requiring their impartiality. At the outset, the members of the IC should act with impartiality and act independently from their country of nationality. These features, for instance, may be relevant in determining whether a decision adopted by the IC can be considered as a subsequent agreement or practice in the interpretation of a treaty.[60] With respect to qualifications and experience, the practice among MEAs seems to follow a hybrid composition of legal and technical experts.[61] The Agreement concerns legal aspects which require scientific and technical knowledge for its proper implementation. The determination of what constitutes the best available science and scientific information is a task where the expertise of other disciplines is necessary. In this regard, it is advisable for the IC to have a mixed composition. The legal experts should, at least, possess expertise and experience in general international law, law of the sea and environmental law. As to other scientific and technical experts, the list of required experts can only be non-exhaustive. Obviously, scientists with expertise in marine sciences, biology, or oceanography are required. Yet, also

58 ABBNJ, Article 55 (3).

59 UNGA, 'Annex to the Statement by the Co-Chair of the Preparatory Commission at the closing of the organizational meeting' of 1 July 2024, A/AC.296/2024/4, 3, I (2) and (3).

60 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries', (2018) ILCYB, Vol. II, Part Two, Conclusion 13 (1), Comment (1).

61 On the question experts among ICs, Bendel (n. 53), 222-224.

other experts like anthropologists, economists, historians may be relevant to provide inputs when it comes to the activities concerning Indigenous People and local communities.

2. Modalities and Procedures

ICs' procedures can be seen as a public interest process where great attention is paid to due process and independence as a guarantee of legitimacy, and the Parties' common interest in protecting the object of the treaty.[62] Let us reiterate the facilitative function of the IC and its role in identifying the root causes of non-compliance with a treaty. The reasons for non-compliance can range from intentional non-compliance to a lack of financial or technical capacity of the Party.[63] Whereas the former can be addressed through non-compliance procedures and dispute settlement, the latter can benefit from a facilitative procedure through which concrete co-operation solutions can be devised by the IC in coordination with the COP and other Parties. The functions and procedures of ICs differ among MEAs. Yet, for the purposes of illustrating the potential non-compliance procedures that Parties may wish to ascribe to the IC of the ABBNJ, it is worth noting the main procedures:

- **Reporting/Monitoring procedure**. This procedure draws on the obligation of states to periodically report on the measures they have adopted to implement their obligations under the MEA in question.[64] Periodic reports enable the IC to engage in a fact-finding quest on the implementation of the treaty, and, if non-compliance issues arise, the IC can then trigger one of the below explained procedures against the concerned Party.[65] For example, Article 54 of the ABBNJ obliges Parties to periodically report on the measures they have adopted to implement the treaty.

- **Procedure triggered by the IC**. The IC can initiate *motu propio* a compliance procedure against a member state when it has knowledge that the Party is failing to comply with its obligations under an MEA. As a basis for its decisions, the committee can rely on the national reports submitted by the Parties under the monitoring procedure explained above, or on information submitted by other treaty bodies of an MEA or by relevant stakeholders (e. g. members of the public).

62 Boyle and Redgwell, (n. 51), 255; Jutta Brunnée, 'International Environmental Law and Community Interests' in: Eyal Benvenisti, Georg Nolte and Keren Yalin-Mor (eds), Community Interests Across International Law (Oxford University Press 2018), 172-174; Viñuales and Dupuy (n. 17), 347.

63 Fitzmaurice, 'New Generation' (n. 37), 57.

64 UNEP, Compliance Mechanism (n. 36), 9-10; Viñuales and Dupuy (n. 17), 294-296.

65 Bendel (n. 53), 224-226.

- **Submission procedures.** In practice, a submission procedure can be triggered by a Party with respect to its own non-compliance issues; by a Party regarding the performance of another Party; by the COP; or by members of the public.[66] The outcome of a submission procedure generally entails facilitative measures such as technical and financial assistance to enhance compliance by the Party concerned. In a few cases, MEAs allow punitive measures, such as the suspension of rights and prerogatives.[67] However, new IC bodies, such as the Paris Agreement IC shows a preference for less intrusive measures which rather aim at facilitating compliance with the agreement.[68]

- **Advisory or consultative procedure.** The advisory procedure enables a Party to request an advisory opinion from the IC on a legal or technical point which may cause a non-compliance situation. This procedure results in legal and technical advice with recommendations tailored to the needs of the Party, or Parties, concerned, but without measures stigmatizing any Party, as may be the perceived result of a submission procedure.[69]

Bearing in mind the above-mentioned procedures, the COP of the ABBNJ will have to determine how many and what type of procedures it will ascribe to the IC. This is a task of great importance because the type of procedures foreseen will set the IC's margin of action. For example, the IC may move from being a body responsible for monitoring the periodic reporting requirement under Article 54 of the Convention to being an active body that investigates and addresses non-compliance issues through technical and legal recommendations.

This paper proposes that the IC should be vested with a submission, triggered by the IC and advisory procedures, as a tool through which the entire treaty system, (institutional framework, Parties, and stakeholders) can actively monitor the implementation of and compliance with the Agreement. As noted, the Agreement seeks to balance multiple interests, including those of non-state actors, through cooperation and transparency. In this regard, Article 55 should be read in the light of the object and purpose of the

66 Particularly, the mechanisms of the Aarhus Convention and the Escazu Agreement provide for this option.

67 For example, the mechanisms of the UNECE Aarhus Convention, Espoo Convention and Water Convention include the suspension of rights and prerogatives as a measure in response to non-compliance.

68 Fitzmaurice, 'New Generation' (n. 37), 64.

69 For example, the UNECE Water Convention and its Protocol on Water and Health provide for an advisory and consultative procedure, respectively. Carlos A. Cruz Carrillo, 'The Advisory Procedure in Non-Compliance Procedures: Lessons from the UNECE Water Convention' in: Christina Voigt and Caroline Foster, International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation (Cambridge University Press 2024), 99-120.

Agreement, and in accordance with the guiding principles established in Article 8. In particular, the guiding principles of common heritage of humankind and equity,[70] support the establishment of non-compliance procedures through which Parties can actively monitor and address non-compliance issues. Let us then share some considerations in connection with the submission, triggered by the IC and advisory procedures.

a) Submission Procedure

A submission and an IC-triggered procedure may be an appropriate venue to resolve a non-compliance issue which a Party may encounter. It should be recalled that the ABBNJ places cooperation at the centre, including compliance with consultation and notification obligations. If a Party fails to comply with such obligations, it may undermine the object and purpose of the Treaty or the interests of other Parties. In this context, a submission procedure entails an exchange of information and observations between the IC and the Party concerned, an assessment by the IC and tailored non-binding recommendations for the Party to implement. In this regard, two types of submission procedure should be considered for the IC of the ABBNJ.

First, a submission procedure can involve a Party with respect to their own non-compliance issues, where a technical or financial obstacle may impede compliance with a provision of the Convention. In fact, relying on this procedure can be a way to implement an obligation to cooperate under the Agreement.

A second type of submission procedure concerns situations where one Party initiates a process against another Party to manage and resolve a non-compliance issue. In the case of the ABBNJ, it is possible to think of a state-to-state submission procedure or a state-to-stakeholder procedure. As further discussed, it may be possible for a submission procedure to be triggered by a relevant stakeholder identified in the ABBNJ, such as Indigenous Peoples, local communities, or members of the public. In general, this type of submission procedure allows the Parties of the Agreement to actively engage in monitoring compliance with the Agreement. In a way, it may be conceived as a way to operationalise the principle of common concern of mankind for the biodiversity beyond national jurisdiction.

Although a state-to-state procedure may be perceived as a confrontational one, the outcome will be of a facilitative nature rather than punitive. In fact, it has been noted that state-to-state procedures before ICs fosters coopera-

70 ABBNJ, Article 8.

tion and solidarity to reach an amicable solution under a conciliatory framework, instead of a contentious process with a binding outcome.[71] The IC established under the Espoo Convention, which operates a submission/notification procedure, may serve as an example of this type of submission procedure. In *EIA/IC/S/2 Romania*, Ukraine triggered a submission to express concerns about Romania's compliance with its obligations regarding inland waterways in the Romanian sector of the Danube Delta. As Ukraine argued, Romania's conduct had significant adverse impacts on the environment of Ukraine, as well as on related ecosystem components.[72] The IC determined that Romania complied with its obligations under the Convention. And yet, the IC prompted Romania to enhance cooperation with Ukraine by submitting information on the concerned activities.[73]

b) Procedure Triggered by the IC

As noted, the IC can initiate *propio motu* proceedings against a Party when it has information about a non-compliance issue related to that Party. This information may be collected by the IC or submitted to it by the COP, other Parties, or other stakeholders. In the context of the ABBNJ, this type of procedure is desirable given the procedural obligation included in the treaty, such as duties of notification and consultation among stakeholders. Having a commission-triggered procedure allows the IC to be more proactive in monitoring and addressing non-compliance issues as soon as it receives knowledge of it.

However, the rules of procedure of the IC should elucidate at least two procedural aspects. First, who may be entitled to submit information concerning non-compliance for the consideration of the IC. On this point, Parties and stakeholders should be entitled to do so, once again, considering

71 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n. 52), Dissenting Opinion of Judge Tladi, para. 20; ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Qatar v. United Arab Emirates), Preliminary Objections, judgment, ICJ Reports 2021, dissenting opinion of Judge Sebutinde, 130, para. 3; Justine Bendel and Yusra Suedi, 'State-to-State Procedures Before Environmental Compliance Committees: Still Alive?' in: Christina Voigt and Caroline Foster, International Courts versus Non-Compliance Mechanisms: Comparative Advantages in Strengthening Treaty Implementation (Cambridge University Press 2024), 131-132.

72 UNECE, *EIA/IC/S/2 Romania*, Findings and Recommendations, UN Doc. ECE/MP.EIA/IC/2010/2, 14-24, para. 1.

73 UNECE, *EIA/IC/S/2 Romania*, Findings and Recommendations, UN Doc. ECE/MP.EIA/IC/2010/2, 14-24, para. 52.

the common interests for the observance of the Agreement. A second aspect concerns the type and the nature of information to be submitted and how should it be assessed by the IC. In this respect, the rules of procedure should also ensure equality of opportunity for the Party concerned to comment on the information submitted.

c) Advisory Procedure

Another viable procedure that may benefit the facilitative approach of the IC in the ABBNJ is an advisory or consultative procedure. The advisory procedure enables a Party to request an advisory opinion from the IC on a legal or technical question related to the implementation of a treaty provision. In contrast to submission and triggered by the IC procedures, an advisory procedure seeks to provide legal or technical advice before a non-compliance issue occurs. The facilitative and preventive approach of an advisory procedure may be attractive for Parties having legal and technical difficulties in implementing the treaty. Moreover, two or more Parties can agree to request an advisory opinion from the IC on how to carry out a particular activity or project within the frame of the Agreement. In other words, the advisory procedure is a conciliatory way to prevent a dispute, and to prevent environmental damage.[74]

In practice, the advisory procedure is available under few MEAs, including the United Nations Economic Commission for Europe (UNECE) Water Convention and the Protocol on Water and Health.[75] For instance, the advisory procedure under the UNECE Water Convention is unequivocal in noting that it 'shall not be regarded as alleging non-compliance'.[76] Under this procedure, two or more Parties can request an advisory opinion.[77] An example is the *Cijevna/Cem River Advisory Procedure*, between Montenegro and Albania. Montenegro requested the involvement of the IC in relation to the construc-

74 For some considerations on conciliation and non-compliance mechanisms, see Malgosia Fitzmaurice, 'The Potential of Inter-State Conciliation within the Framework of Environmental Treaties' in: Christian Tomuschat and Marcelo Kohen, Flexibility in International Dispute Settlement: Conciliation Revisited (Brill/Nijhoff 2020), 95-110.

75 UNECE, 'Consultation Process of the Compliance Committee under the Protocol on Water and Health, as amended by the Committee at Its TenthMeeting', UN Doc ECE/MP.WH/C.1/2014/2, (17 December 2014), para. 1.

76 UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc ECE/MP.WAT/37/Add.2, 2012, paras 18-23. On the UNECE Water Convention's advisory procedure, Cruz Carrillo (n. 69), 99-120.

77 UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc ECE/MP.WAT/37/Add.2, 2012, paras 20.

tion of small hydropower plants on the Cijevna/Cem River in Albania. In its advisory opinion, the IC recommended the Parties to enhance their efforts in conducting a joint monitoring and assessment of the project by establishing a bilateral cooperative framework.[78] Currently, the Parties are working on the establishment of such joint framework with the assistance of the IC.[79]

The IC of the ABBNJ could benefit from an advisory or consultative procedure by providing the Parties with a tool to request advice on how to discharge their obligations. For example, one or more Parties willing to propose an Area-Based Management Tool (ABMT) may request an opinion on legal or technical issues that may arise in the process pursuant to Article 19 of the Agreement, including questions as to the exhaustiveness of the required consultations. An advisory procedure may also be the venue through which relevant stakeholders can interact with the proposing state in a constructive manner under the guidance of the IC. As stated by Elferink when commenting on ABMTs, the institutional framework 'may contribute to the effectiveness of the measures adopted under Part III'.[80]

3. Standing to Trigger Non-Compliance Procedures

As noted, the ABBNJ seeks to balance the interests of Parties and relevant stakeholders for the benefit of the common heritage of humankind. One of the techniques to do so is by providing venues for those stakeholders to actively monitor the implementation and compliance of the ABBNJ. In the context of the IC, this consideration is relevant when drafting the rules of procedure. Concretely, the rules of procedure should clarify who may be entitled to trigger and participate in the above-proposed non-compliance procedures.

a) State Parties and Non-State Parties

The well-established practice among MEAs is that Parties to the treaty are entitled to trigger a non-compliance procedure with respect to itself or

78 UNECE, 'Annex to the Report of the Implementation Committee on Its Twelfth Meeting', UN Doc ECE/MP.WAT/IC/2021/1 (18 March 2021), 6-8.

79 UNECE, 'Messages to the Countries Involved in Advisory Procedure WAT/IC/AP/1 (Montenegro and Albania) Regarding the Next Steps in the Implementation of the Committee's Legal and Technical Advice', UN Doc. ECE/MP.WAT/IC/2022/4 (2023), 6-7.

80 Alex Elferink, 'Protecting the Environment of ABNJ Through Marine Protected Areas and Area-Based Management Tools' in: Vito de Lucia, Alex O. Elferink and Lan Nguyen, *International Law and Marine Areas beyond National Jurisdiction* (Brill 2022), 205-241 (215).

against another Party, including an advisory procedure. Similarly, Parties are allowed to submit information for the consideration of the IC, which can assist initiating an advisory procedure or setting the ground for a procedure triggered by the IC. Some MEAs allow the IC to invite non-Parties to participate in a procedure as long as the non-Party consents to do so.[81] Such a feature may be useful for those non-Parties to the ABBNJ that are willing to accept a facilitative procedure under the guidance of the IC, instead of, or before submitting the issue to a dispute settlement mechanism. As explained below, the ABBNJ establishes a general obligation to cooperate to prevent disputes.[82] In this context, states Parties to the ABBNJ may discharge this obligation by engaging in one of the non-compliance procedures before the IC.

b) Relevant Stakeholders Identified in the ABBNJ

The ABBNJ recognises the interests of Indigenous Peoples and local communities, the scientific community, civil society, and other stakeholders for the implementation of certain provisions of the Agreement. For example, under the ABBNJ, a Party is obliged to notify and consult Indigenous Peoples and local communities when developing a proposal to establish an ABMT.[83] However, if a Party fails to do so, or it simply disregards the views of Indigenous Peoples and local communities in the proposal, the question arises as to whether these stakeholders can rely on the IC to ensure that a Party has duly consulted them.

In this context, when negotiating the rules of procedure of the IC, two procedural aspects should be considered. First, whether and to what extent identified stakeholders in the ABBNJ can trigger a non-compliance procedure. And second, whether these stakeholders can submit information for consideration by the IC. In other words, the question to be examined is whether stakeholders are entitled to appear as parties to a non-compliance proceeding or as *amicus curiae* before the IC. At the outset, these issues may be complex, as it would allow identified non-state actors to monitor the performance of states Parties.

The practice of MEAs enabling non-stat actors to trigger non-compliance procedures is limited to treaties following a human rights approach, a feature

81 For example, non-state Parties to the UNECE Water Convention can participate in the advisory procedure upon the invitation of the IC and the consent of that state.

82 ABBNJ, Article 56.

83 ABBNJ, Article 19 (2) and (4)(c).

not reflected in the ABBNJ. For example, under the UNECE Aarhus Convention[84] and the Escazú Agreement[85], members of the public can trigger a submission procedure against a non-complying Party. In fact, submission procedures under the Aarhus Convention have been mainly triggered by members of the public.[86] However, it should be noted that the object and purpose of both MEAs is guaranteeing access rights for individuals of state Parties, including access to information, public participation, and access to justice. In contrast, the ABBNJ introduces notification and consultation as normative components to certain treaty provisions, but it is not the main goal of the treaty. Another example is the Protocol on Water and Health to the UNECE Water Convention, which allows for communications from one or more members of the public.[87] The only communication submitted at the time of writing was filed by Earthjustice against Portugal for failing to comply with its obligation under the Protocol. As a result, the meeting of state parties issued a declaration of non-compliance to Portugal.[88] Once again, the object and purpose of the Protocol is human-rights centred, i. e. concerns the protection of human health and well-being through improving water management, including the protection of water ecosystems, and through preventing, controlling and reducing water-related disease.[89]

With respect to participation in non-compliance procedures, the practice among MEAs supports public participation in submitting information and to take part in non-compliance procedures. For example, the IC of the UNECE Water Convention allows for the submission of information by members of the public and their participation in the discussions of the IC regarding the non-compliance procedure.[90] Under the Protocol on Water and Health, the

84 The Aarhus Convention enables NGOs to initiate a procedure against a Party. UNECE, Decision 1/7: Review of Compliance, Doc. ECE/MP. PP/2/Add.8, 2 April 2014, para. 18.

85 ECLAC, Decision I/3 – Rules Relating to the Structure and Functions of the Committee to Support Implementation and Compliance, Doc. 22-00344 (22 April 2022), Rule V (1).

86 UNECE, Compilation of Findings of the Aarhus Convention Compliance Committee adopted 18 February 2005 to date, Version 14 August 2023. available at: <https://unece.org/sites/default/files/2023-08/Compilation_of_CC_findings_14.8.2023_eng.pdf>, last access 4 February 2025.

87 UNECE, Annex to Decision I/2 Review of Compliance, ECE/MP.WH/2/Add.3 (3 July 2007), para. 16.

88 UNECE, Findings and Recommendations with Regard to Case ECE/MP.WH/CC/CI/1 initiated by the Committee Concerning Compliance by Portugal, ECE/MP.WH/CC/CI/1 (15 July 2015).

89 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 17 June 1999, entered into force 4 August 2005, 2331 UNTS 202, Article 1.

90 UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc. ECE/MP.WAT/37/Add.2, 2012, paras 28, 31 and 37.

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IC may request the services of NGOs or members of the public to gather information to discharge its functions.[91]

Despite these examples, granting standing to non-state actors would mark a new stage in the implementation of the LoSC. However, the potential role that non-state actors could play in IC proceedings may be limited by the nature of the ABBNJ as treaty concerning the law of the sea and biodiversity rather than a human rights treaty. In other words, as an implementing treaty of the LoSC, the ABBNJ follows a state-based approach and contains obligations to consider the interests of identified stakeholders only in some treaty provisions. The role of non-state actors may therefore be limited to monitoring and ensuring compliance with these treaty provisions. However, even if this were the case, non-state actors may urge states to do more to achieve the object and purpose of the treaty. Evidence of such effects can be seen in the publicity surrounding the negotiation of the treaty and the ongoing ratification process. In fact, relevant stakeholders may follow closely the upcoming sessions of the PreCom, which may influence the IC's final rules of procedure.

As explained before, the IC of the ABBNJ may represent an added value to the implementation techniques enshrined in the treaty. Yet, whether the IC is a passive or a proactive treaty body, will depend on the scope and content of the rules of procedure to be discussed during the PreCom and the eventual first COP of the Agreement.

IV. The IC and the Dispute Settlement Mechanism

Part IX of the ABBNJ contains a dispute settlement mechanism that provides for diplomatic and compulsory dispute settlement procedures. As in many MEAs, the dispute settlement mechanism coexists with the institutional framework established in the agreement as part of a comprehensive implementation process.[92] In the specific case of ICs, the practice of MEAs is

91 UNECE, Annex to Decision I/2 Review of Compliance, ECE/MP.WH/2/Add.3 (3 July 2007), para. 23(d).

92 For a punctual discussion on the interlinkage between non-compliance mechanisms and dispute settlement mechanisms, see Bendel (n. 53), 213-248; Philippe Sands, 'Non-Compliance and Dispute Settlement' in: Rüdiger Wolfrum et al. (eds), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia* (Brill 2006), 356-358; Tullio Treves, 'The Settlement of Disputes and Non-Compliance Procedures' in: Tullio Treves et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser Press 2009), 505-511.

clear in that the initiation of a non-compliance procedure is without prejudice to the possibility of using a dispute settlement mechanism.[93]

Furthermore, there are significant differences between ICs and judicial and arbitral bodies, including their nature, functions and the outcome of their proceedings. In *Land and Maritime Boundary between Cameroon and Nigeria*, the ICJ held that 'the Lake Chad Basin Commission cannot be seen as a tribunal. It renders neither arbitral awards nor judgments and is therefore neither an arbitral nor a judicial body.'[94] As such, a decision adopted under a non-compliance procedure does not constitute *res judicata*.[95] Moreover, the purpose of an IC is to assist in managing non-compliance and finding an amicable solution, not to determine state responsibility.[96]

Notwithstanding the aforementioned differences, this section contends that the cooperative and facilitative nature of ICs complement the dispute settlement mechanism in the ABBNJ by preventing disputes and facilitating the implementation of judicial and arbitral decisions as this section will explain regarding three aspects. First, the role of the IC in preventing disputes among Parties through cooperative and facilitative procedures. Second, it considers the role of the decisions adopted by the IC in a judicial or arbitral proceeding. Third, it discusses the role of the IC in facilitating the implementation of judicial decisions.

1. Obligation to Cooperate to Prevent Disputes

Article 56 of the ABBNJ establishes a general obligation to cooperate with a view to prevent disputes.[97] As a preliminary remark, it should be recalled that a similar obligation to prevent disputes is enshrined in Article 28 of the 1995 Implementation Agreement relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (UNFSA), another implementation treaty of the LoSC. Under this provision, states are

93 For example, the rules of procedure of the ICs under the Barcelona Convention and the UNECE Water Convention, are clear in this respect. See UNEP, Compliance and Reporting, Decision IG.26/1, UN Doc.UNEP/MED IG.26/22 (December 2023), para. 40; UNECE, Support to Implementation and Compliance, Decision VI/1, UN Doc. ECE/MP.WAT/37/Add.2, 2012, para. 45.

94 ICJ, *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, judgment of 11 June 1998, ICJ Reports 1998, 275, para. 69.

95 Fitzmaurice, 'New Generation' (n. 37), 60; Bendel (n. 53), 236-237.

96 ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (n. 52), para. 54; see also Dissenting Opinion of Judge Tladi, para. 20.

97 Article 56 reads as follows:

'Parties shall cooperate in order to prevent disputes.'

under an obligation to agree on 'efficient and expeditious decision-making procedures within sub regional and regional fisheries management organizations and arrangements'.[98] Rayfuse has noted that the intention of this provisions is 'to provide a mechanism for the expeditious but also effective resolution of disputes so as to avoid undermining the conservation and sustainable use objectives of regional Fisheries Management Organizations (RFMOs)'.[99] In contrast to Article 28 of the UNFSA, Article 56 of the ABBNJ does not specify the implementation mechanisms. This raises the question of which mechanisms the parties can rely on to fulfil such obligations under the ABBNJ.

A literal interpretation of Article 56 allows to identify two meanings. First, Article 56 serves as a reminder that Parties shall fulfil with their obligations under the Agreement to achieve its object and purpose, in a spirit of cooperation. If all parties fulfil their obligations, disputes are less likely to occur. As noted, Article 56 of the Agreement may be read as a reminder for Parties to cooperate in achieving the goals of the Agreement. To that aim, the role of the IC is one of monitoring the implementation and compliance with the Agreement among Parties. In this vein, Parties are expected to cooperate among themselves and with the IC in managing a non-compliance issue for the benefit of the whole treaty system.

Secondly, Article 56 encourages the parties involved in a disagreement or non-compliance issue to cooperate in a spirit of defusing a potential legal dispute. On this point, distinguishing a difference or a non-compliance issue from a legal dispute may at times be difficult. In other treaties, a distinction is clear. For instance, the dispute settlement mechanism under the Indus Water Treaty is illustrative on this point because it distinguishes three stages of escalation of a conflict: a question between Parties is submitted to the Permanent Indus Commission; then a difference, when it is submitted to a technical expert; and then a legal dispute subject to a court

98 1995 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 of 4 August 1995, 2167 UNTS 3, Article 28.

99 Rosemary Rayfuse, 'Settling Disputes in Regional Fisheries Management Organisations: Dealing with Objections' in: Helene Ruiz Fabri, Erik Franck, Marco Benatar and Tamar Meshel (eds), *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Brill 2020), 240-276 (249). See also Andrew Serdy, 'Implementing Article 28 of the UN Fish Stocks Agreement: The First Review of a Conservation Measure in the South Pacific Regional Fisheries' Management Organisation', Ocean Development and International Law 47 (2016), 1-28; Valentin Schatz, 'Ad Hoc Experts Panels: Regional Fisheries Management Organization (RMFOs)', in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2022), para. 7.

of arbitration.[100] By contrast, the ABBNJ delineates between non-compliance, technical dispute and legal dispute. Nevertheless, the relevance (or irrelevance) of this distinction is to be examined once the treaty enters into force, when Parties start using the dispute settlement mechanisms and the potential IC procedures.

In the context of the ABBNJ, the obligation to cooperate to prevent disputes may be discharged through diplomatic means such as exchange of views, negotiations and even optional conciliation under Annex V of the LoSC. Similarly, the IC can offer a cooperative and conciliatory framework through which Parties can engage in cooperative procedures and reach a solution to their disagreement. In this respect, some authors have underscored the conciliatory function that ICs may play in preventing disputes.[101] Chayes and Chayes observed that a non-compliance procedure is a mediating process which in many cases has a preventive or anticipatory value.[102] That is to say, states could engage in a facilitative and cooperative procedure to manage a non-compliance issue and – perhaps – prevent a further legal dispute before a judicial or arbitral body. For instance, at the moment, there is no dispute submitted to arbitration or adjudication under the dispute settlement mechanism of the Espoo Convention.[103] Instead, most of the situations that may lead to a dispute have been referred to the IC through a submission procedure.[104] In fact, one should note that the technical and legal composition of the IC may be more attractive to manage potential disputes involving a high degree of scientific and technical issues than resorting to adjudication or arbitration.

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100 The Indus Water Treaty 1960 between the Government of India, the Government of Pakistan and the International Bank for Reconstruction and Development of 19 September 1960, 419 UNTS 125, (Indus Water Treaty), Article VIII (4), Article IX. See also Court of Arbitration Under Indus Water Treaty, *Indus Waters Treaty Arbitration* (Pakistan v. India), Award on the Competence of the Court of 6 July 2023, PCA-2023-01, paras 194-195.

101 Laurence Boisson de Chazournes and Komlan Sangbana, 'Basin Commissions, Dispute Settlement and the Maintenance of Peace and Security – The Case of the Lake Chad Basin Commission' in: Helene Ruiz Fabri, Erik Franck, Marco Benatar and Tamar Meshel (eds), A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and The Law of the Sea (Brill 2020, 220-239 (222-223); Fitzmaurice, 'New Generation' (n. 37), 59-60.

102 Chayes and Handler Chayes (n. 38), 24.

103 Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, 1988 UNTS 309, Article 15(2).

104 UNECE, Submissions overview – Implementation Committee of the Espoo Convention, available at: <https://unece.org/submissions-overview>, last access 4 February 2025; UNECE, Opinions of the Implementation Committee of the Espoo Convention (2001-2020), (2020). Available at: <https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf>, last access 4 February 2025.

Nevertheless, it should be noted that the specific role of the IC in implementing Article 56 is contingent upon the procedural framework to be determined in the IC's rules of procedure, as previously discussed.

2. Value of the ICs Decisions in a Judicial or Arbitral Proceeding

A second consideration to address is the legal value of decisions or recommendations adopted by the IC in judicial or arbitral proceedings. In other words, whether and to what extent the decision of the IC that result from a non-compliance procedure have any legal effect in the course of a contentious or advisory proceeding.

As a preliminary matter, the IC is intended to produce non-binding recommendations aimed as managing a non-compliance issue, whether attributable to a Party's technical and financial capacity or to an erroneous interpretation and implementation of a treaty provision. Likewise, such recommendations or decisions do not entail a determination on state responsibility. Nevertheless, in formulating its decisions, the IC may need to engage in an interpretative exercise of the relevant provisions of the treaty, with a view to elucidate the suitable margin of conduct expected from the Party in the particular context of a non-compliance issue. Thus, the recommendations or decisions adopted by the IC can be characterised as facilitative factual and legal statements related to the interpretation and application of a treaty in a particular context. Their legal value in a judicial or arbitral proceeding may be determined in a case-by-case basis. For example, while interpreting the Agreement, a judicial or arbitral body may consider the decisions of the IC as subsequent agreement or practice among the Parties in the application of the Agreement,[105] or as a supplementary mean to interpret the Agreement.[106] As noted by the ILC, one method of identifying subsequent agreements or practice from decisions of the IC is by looking at the resolutions adopted by the conference of the parties, which may 'explicitly or implicitly' refer to pronouncements of the IC.[107]

105 Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS 331, Article 31 (3)(b). ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13.

106 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13, Comment (16).

107 ILC, 'Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries' (n. 60), Conclusion 13, Comment (13).

In practice, the ICJ has relied on the determinations of treaty bodies established under human rights treaties to inform its judicial reasoning. In the *Diallo* case, the ICJ ascribed great weight to the interpretation of the International Covenant on Civil and Political Rights (ICCPR) adopted by the Human Rights Committee, as an independent body that was established specifically to supervise the application of the ICCPR.[108] Yet, the Court is also cautious when assessing such findings by assessing how the treaty body reached its conclusions or recommendations. In a recent case, the Court considered the observations of the Committee on the Elimination of Racial Discrimination,[109] to determine whether Russia discriminated against Crimean Tatar cultural in violation of the Committee on the Elimination of Racial Discrimination (CERD). Although the Committee recommended Russia to investigate reports on the destruction of and damage to Crimean Tatar cultural heritage and adopted measures to prevent such acts, the Court was not convinced as to the accuracy of the first-hand reports relied on by the Committee.[110] Similarly, the Court has also disregarded the determinations of the CERD Committee when interpreting the temporal scope of the compromissory clause to ascertain its jurisdiction. The Court underscored the different nature between the CERD Committee's procedures and a judicial settlement mechanism.[111]

The decisions of the IC can inform the factual background of a legal dispute before a court or tribunal. For example, the IC of the UNECE Water Convention has recognised that: 'the procedure before the Implementation Committee could provide elements of fact-finding that could later be useful in a dispute before ICJ.'[112] Bearing this in mind, the conduct of Parties participating in a non-compliance procedure may be used by a judicial or arbitral body in its reasoning.

Moreover, as noted, the COP of the ABBNJ can request advisory opinions from ITLOS.[113] In this context, the determinations of the IC may also inform

108 ICJ, *Ahmadou Sadio Diallo* (Republic of Guinea v. Democratic Republic of the Congo), merits, judgment of 30 November 2010, ICJ Reports 2010, 639, para. 66.

109 The Committee on the Elimination of Racial Discrimination is a body established under the Convention on the Elimination of All Forms of Racial Discrimination to monitor its implementation.

110 ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation), merits, judgment of 31 January 2024, unreported, paras 333-334.

111 ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (n. 52), para. 54.

112 UNECE, Annex to the Report of the Implementation Committee on Its 14th Meeting, 24 May 2022, ECE/MP.WAT/IC/2022/2, 7.

113 ABBNJ, Article 47 (7).

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the judicial reasoning of ITLOS in an advisory proceeding. For example, the conclusions of similar treaty bodies, such as the Human Rights Committee, has assisted the ICJ in setting points of fact and law in advisory proceedings.[114]

3. Implementation of Judicial and Arbitral Decisions Through the Committee

In certain cases, a judicial decision or an arbitral award may necessitate that the parties involved collaborate to attain a specific objective. For example, in the *Gabcikovo-Nagymaros Project* case, the ICJ invited the Parties to profit from the assistance and expertise of a third party during the bilateral negotiations, in order to give effect to the judgment of the Court.[115] Similarly, orders of provisional measures sometimes require the Parties to cooperate and to enter into consultations.[116] In this context, a further point that merits consideration is whether and to what extent the IC may assist a judicial or arbitral body in implementing a decision between the Parties to the dispute.

In the context of provisional measures, one party to the dispute can suggest or the Tribunal may *propio motu* order the Parties to cooperate with each other under the coordination of a third party. In the context of the ABBNJ, the Tribunal may manage the implementation of such measure, by requesting periodical reports, for example.[117] Or, it may rely on the IC to foster consultations and cooperative channels among Parties. For example, in the *Pulp Mills* case, request for provisional measures, the ICJ relied on the Administrative Commission of the River Uruguay as the forum to engage in consultation and cooperation procedures.[118] Moreover, a request for provisional measures under Part IX of the ABBNJ, may rely on Article 61 of the

114 ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, ICJ Reports 2019, 95, paras 123 and 126; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, 136, paras 109 and 110.

115 ICJ, *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), judgment of 25 September 1997, ICJ Reports 1997, 7, para. 143.

116 See, for example: ITLOS, *MOX Plant* (Ireland v. United Kingdom), provisional measures, order of 3 December 2001, ITLOS Reports 2001, 95, para. 84 and first operative; ITLOS, *Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), provisional measures, order of 8 October 2003, ITLOS Reports 2003, 10, first operative paragraph; ITLOS, *M/T "San Padre Pio"* (Switzerland v. Nigeria), provisional measures, order of 6 July 2019, ITLOS Reports 2018-2019, 375, para. 141.

117 For example, see ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (Ghana/Côte d'Ivoire), judgment of 23 September 2017, ITLOS Reports 2017, 4, 653-657.

118 ICJ, *Pulp Mills* (n. 45), 113, para. 82.

Agreement, which requires that, pending the settlement of a dispute, Parties 'shall make every effort to enter into provisional arrangements of a practical nature'. This obligation can, of course, be discharged by the Parties in good faith on their own or through a monitoring procedure supervised by the judicial or arbitral body.[119]

In the context of a judgment or arbitral award on the merits, the implementation may follow a similar pattern to that of provisional measures, with the IC being integrated in the implementation of the decision. Let us think of *Land Reclamation* where ITLOS ordered Malaysia and Singapore to cooperate and start consultations and exchange information on the land reclamation works.[120] The Parties engaged in consultations and reached a settlement agreement.[121] Also in other cases, the establishment of cooperative arrangements to implement certain aspects of the judgment has been suggested.[122] In this regard, the IC can assist the respective judicial and arbitral body in fostering consultations among Parties reached the requested result.

V. Conclusion

In 1978, Jorge Castañeda[123] reflected on what he referred to as the ideal and rational plan for managing the living resources of the high seas. According to such a plan, a global administration should be established by relying on a complex system of institutions and mechanisms. However, he questioned whether the international community of that time was prepared for such a system and concluded that the international politics and the national interests were the main obstacles to materialise it.[124] Almost five decades later,

119 For example, see ITLOS, *Delimitation of the Maritime Boundary in the Atlantic Ocean* (n. 117), 4, 653-657.

120 ITLOS, *Land Reclamation in and around the Straits of Johor* (Malaysia v. Singapore), provisional measures, order of 8 October 2003, ITLOS Reports 2003, 10, first operative paragraph.

121 LoSC Annex VII Arbitral Tribunal, *Case concerning Land Reclamation by Singapore in and around the Straits of Johor* (Malaysia v. Singapore), Award on Agreed Terms (1 September 2005), 27 RIAA 133-145, paras 18-21. See also *Case concerning Land Reclamation by Singapore* (n. 121), paras 24-25.

122 ITLOS, *Delimitation of the Maritime Boundary in the Bay of Bengal* (Bangladesh/Myanmar), judgment of 14 March 2012, ITLOS Reports 2012, 4, para. 476.

123 Jorge Castañeda was Mexican diplomat and international lawyer actively participating *inter alia* during the United Nations Third Conference on the Law of the Sea. Many of his proposals during the conference are now reflected in the current provisions on the Exclusive Economic Zone of the LoSC.

124 Jorge Castañeda, 'La Zona Económica Exclusiva y el Nuevo Orden Económico Internacional', Foro Internacional 19 (1978), 1-16 (5-6).

the ABBNJ proposes a legal framework based on cooperation among stakeholders (including non-state actors) and an institutional framework to facilitate such cooperation in the management of biodiversity in the high seas. Thus, whether the international community is ready and willing to operate the ABBNJ system is something that only practice, implementation and compliance will tell.

In this regard, this paper has examined the potential of the Implementation and Compliance Committee envisaged in the ABBNJ as an innovative technique to operate cooperation in the realm of the LoSC. This paper has sought to reflect on the potential modalities and functions that the IC can be equipped with in its rules of procedure. The paper reflected as well on the potential interaction between the IC and the dispute settlement mechanism established in Part IX of the Agreement. Such interaction should be characterised by complementarity rather than competition. The IC, as a facilitative and cooperative framework, may be useful in the prevention of disputes. Moreover, the decisions of the IC may assist judicial and arbitral bodies in interpreting the Agreement by shedding light on potential subsequent agreement or practice among Parties, and by informing the fact-finding stages of a proceeding.

Notably, the role of the upcoming sessions of the PreCom and the first COP of the ABBNJ will be crucial in defining the nature of the IC and upon Parties to take advantage of the IC and its procedures. It should be noted, however, that even when the IC is vested with innovative non-compliance procedures, such as submission or advisory procedures, there is no guarantee that Parties to the Agreement will use them. In this regard, the role of counsels, who provide advice to the relevant parties and non-State actors on matters pertaining to the ABBNJ, is significant in highlighting the IC and non-compliance procedures as alternative venues to 'classic' inter-State dispute settlement.