MACQUARIE
University

AUSTRALIA'S MARINE PROTECTED AREA PRACTICE: EXPLORING INTERACTIONS BETWEEN NATIONAL AND INTERNATIONAL LAW AND POLICY

Ethan Cale Beringen

[redacted]

Macquarie Law School

Faculty of Arts

Submitted in partial fulfillment of the requirements of the degree of Master of Research

Supervised by Dr Nengye Liu and Dr Michelle Lim

22 October 2021

Contents

Abstract:

Australia has positioned itself as a world leader in Marine Protected Area (MPA) practice through its significant national MPA network as well as its heavy involvement in the creation of high seas MPAs in the Antarctic. Meanwhile, negotiations are currently ongoing for a new implementing agreement to the United Nations Convention on the Law of the Sea (UNCLOS) to conserve and sustainably utilise marine biodiversity beyond national jurisdiction (BBNJ). High seas MPAs are explicitly highlighted as a key component of one of the four "package elements" to be agreed upon within this new instrument. It follows then that Australia would seek to shape this emerging regime due to its perceived expertise and interest in this area. However, little research exists which highlights how national and international policy may interact on the issue of MPAs. The aim of this research is therefore to critically evaluate Australia's existing MPA practice and the consequences this may have for the BBNJ negotiations. The overarching question to be resolved is: "What are the implications of Australia's MPA practice for the BBNJ regime?" This will be addressed by the following sub-questions: "How does Australia's domestic and international MPA practice interact?" and "What implications does this have for the BBNJ negotiations on MPAs?" To answer these questions, Australia's historic and ongoing MPA practice, both within national waters and within international fora, such as the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), will be explored.

Statement of Originality:

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

_____ Date: 22/10/2021

Ethan Cale Beringen

List of Acronyms and Abbreviations

ABMTs	Area-Based Management Tools
ABNJ	Areas Beyond National Jurisdiction
BBNJ	Biodiversity Beyond National Jurisdiction
CAR Standard	Comprehensive, Adequate and Representative Standard
CBD	Convention on Biological Diversity
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
COP	Conference of the Parties
EEZ	Exclusive Economic Zone
IGC	Intergovernmental Conference
IMO	International Maritime Organisation
ISA	International Seabed Authority
MPA	Marine Protected Area
NRSMPA	National Representative System of Marine Protected Areas
RFMOs	Regional Fisheries Management Organisations
RMP	Research and Monitoring Plan
UNCSD	United Nations Conference on Sustainable Development
UNCLOS	United Nations Convention on the Law of the Sea
WSSD	World Summit on Sustainable Development 2002

1. Introduction

The United Nations Convention on the Law of the Sea (UNCLOS) is a wide-ranging treaty which attempts to create an international regime that balances jurisdictional claims within the world's oceans with the establishment of common areas with various freedoms. UNCLOS is often described as the "constitution for the oceans" given its broad acceptance and comprehensive nature.[1] However, while UNCLOS is widely regarded as the overarching treaty governing the oceans, there are significant regulatory gaps within the regime.[2]

To address some of these gaps, a process has been ongoing at the United Nations to develop a new implementing agreement to UNCLOS. This implementing agreement aims to govern the sustainable utilisation and conservation of marine biodiversity beyond national jurisdiction (BBNJ). That is, biodiversity which is found on the high seas outside of the national waters of states. These areas beyond national jurisdiction (ABNJ) make up approximately two-thirds of the world's oceans but are subject to a scattered and fragmented legal regime.[3] As such, a United Nations working group began to examine the issue of biodiversity protection in ABNJ in 2004 to explore the need for an international legally binding instrument to address the lack of environmental protection in these ocean commons.[4] In 2015 the decision was made by the United Nations General Assembly to begin negotiations towards this instrument, firstly through a series of preparatory committees,[5] before four intergovernmental conferences (IGC) were scheduled from 2018-2020 aiming to reach a final agreement on a treaty text.[6] However, the fourth and potentially finally IGC has been postponed due to the COVID-19 pandemic.[7] It is currently scheduled to reconvene in early 2022.[8]

The negotiations of this BBNJ instrument have emphasised the need for four distinct "package elements" to be addressed. One of the package elements, Area-Based Management Tools (ABMTs),

---

[1] See e.g, Tommy Koh, 'A Constitution for the Oceans' Remarks by Tommy B. Koh, of Singapore President of the Third United Nations Conference on the Law of the Sea' (1982) <https://www.un.org/depts/los/convention_agreements/texts/koh_english.pdf> (accessed 11 August 2021).
[2] 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' (2018) 8 *Institut du développement durable et des relations internationals* 1-82, at pp.31-40, available at: https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/Etude/20180830-The%20long%20and%20winding%20road.pdf.
[3] International Union for the Conservation of Nature, *Governing areas beyond national jurisdiction* (2019) <https://www.iucn.org/resources/issues-briefs/governing-areas-beyond-national-jurisdiction> (Accessed 14 May 2021).
[4] United Nations General Assembly (UNGA) Res.59/24 (4 February 2005) Fifty-ninth session, agenda item 49(a) (73).
[5] UNGA Res.69/292 (6 July 2015) Sixty-ninth session, agenda item 74(a) (1).
[6] UNGA Res.72/249 (24 December 2017) Seventy-second session, agenda item 77, at (1)- (3).
[7] UNGA Res.74/L.41* (9 March 2020) Seventy-fourth session, agenda item 74(a).
[8] UNGA Res.75/L.96 (9 June 2021) Seventy-fifth session, agenda item 76(a).

explicitly includes Marine Protected Areas (MPAs) as a key tool for biodiversity protection on the high seas.[9]

MPAs have been defined by the International Union for Conservation of Nature as "…a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values."[10] They have historically been a high-profile conservation measure, generating attention within the media,[11] and will play a significant role in the final regime.

It is difficult to overstate the importance of the ABMTs package element to the effectiveness of the final BBNJ instrument. It is the usage of these ABMTs which will become the main restriction on human activities as a part of the biodiversity protection regime. As such, the process to negotiate and create this regime is deserving of significant attention.

ABMTs, including MPAs, have in fact been dubbed the most complex of the package elements to be agreed upon at the BBNJ negotiations.[12] This is because much of the discussion around ABMTs has focused on how the creation of these tools will be facilitated at the international level. The mandate that the new instrument "should not undermine" existing bodies and instruments has been particularly difficult given the range of ABMTs that exist across a number of sectors in the high seas.[13] Approximately 265 international instruments exist to manage marine living resources,[14] while 12 high seas MPAs have been established by both the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention).[15] Meanwhile area-based measures such as those established under the International Maritime Organisation, for example particularly sensitive sea

---

[9] UNGA Res.72/249 (n 6), at (2).
[10] Jon Day et al., *Guidelines for applying the IUCN protected area management categories to marine protected areas* (International Union for Conservation of Nature, 2nd Edition, Gland, Switzerland, 2019), at p.2.
[11] See e.g., Conor Duffy, *World's largest marine reserve network unveiled* (June 2012) ABC, <https://www.abc.net.au/news/2012-06-14/burke-announces-marine-parks-reserve/4069532> (accessed 15 June 2021); The Guardian, *Australia creates world's largest marine reserve network* (June 2012), <https://www.theguardian.com/world/2012/jun/14/australia-largest-marine-reserve> (accessed 15 June 2021).
[12] Karen Scott, 'Area-Based Protection beyond National Jurisdiction Opportunities and Obstacles' (2019) 4(2) *Asia-Pacific Journal of Ocean Law and Policy* 158-180, at p.174. https://doi.org/10.1163/24519391-00402004
[13] UNGA Res.69/292 (n 5) at (3).
[14] Dalal Al-Abdulrazzak, et al., 'Opportunities for Improving Global Marine Conservation through Multilateral Treaties' (2017) 86 *Marine Policy* 247–252, at p.247. https://doi.org/10.1016/j.marpol.2017.09.036.
[15] Commission for the Conservation of Antarctic Marine Living Resources, *Conservation Measure 91-03 (2009) Protection of the South Orkney Islands southern shelf* (2009) 91-03 <https://www.ccamlr.org/en/measure-91-03-2009> (accessed 23 April 2021); Commission for the Conservation of Antarctic Marine Living Resources, *Conservation Measure 91-05 (2016) Ross Sea Region Marine Protected Area* (2016) 91-05 <https://www.ccamlr.org/en/measure-91-05-2016> (accessed 23 April 2021); OSPAR Commission, *Status of OSPAR Network of Marine Protected Areas in 2018* (OSPAR Commission, 2019) <https://www.ospar.org/site/assets/files/40996/assessment_sheet_mpa_status_2018.pdf> (accessed 5 October 2021).

areas,[16] and the International Seabed Authority also need to be taken into account.[17] Finally, the role for Regional Fisheries Management Organisations (RFMOs) as potential implementing bodies of high seas ABMTs and MPAs has also been a key debate.[18] These issues highlight the fragmentation of regimes in the existing BBNJ governance space and the necessity of a coordinating instrument, but also the difficulty inherent in achieving this.

To bring some clarity to the complexity surrounding the emerging ABMT regime, this thesis examines Australia's role in the implementation of MPAs within the BBNJ agreement. Australia makes an informative case study as it is especially interested in fisheries management including the implementation of MPAs.[19] This is evidenced in an extensive history of domestic MPA implementation, as well as work done within international organisations such as CCAMLR.[20] Furthermore, at the BBNJ negotiations so far, the Australian delegation has argued for a "hybrid" approach to ABMTs preserving and enhancing the position of RFMOs and other regional bodies within the regime.[21] This is in contrast to the "global" model which favours the establishment of a single overarching body and the "regional/sectoral" model which leaves ABMT implementation almost entirely to existing bodies.[22] Hence, the case-study of Australia offers a valuable perspective to focus upon due to its considerable MPA practice and advocation for a "middle ground" view of MPAs at the BBNJ negotiations. However, despite the significance of Australia's practice within the MPA arena, there is no prominent research which analyses the connection between Australia's MPA practice and the BBNJ.

Consequently, the ultimate question of the research is: what are the implications of Australia's MPA practice for the BBNJ regime? This will be addressed through answering two sub-questions in dedicated chapters:

---

[16] See e.g., International Maritime Organisation, *Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas* (2006) A 24/Res.982(24) <https://wwwcdn.imo.org/localresources/en/OurWork/Environment/Documents/A24-Res.982.pdf> (Accessed 5 October 2021).
[17] Bethan C O'Leary et al., 'Options for Managing Human Threats to High Seas Biodiversity' (2020) 187 *Ocean & Coastal Management* 105110, at p.5-8. https://doi.org/10.1016/j.ocecoaman.2020.105110
[18] See e.g., Scott (n 12).
[19] See e.g., Australian Government, *2017 Foreign Policy White Paper* (Canberra, 2017), at pp.94-95.
[20] See e.g., James Fitzsimons and Geoff Wescott, *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas*. (CSIRO Publishing, 2016), at p.3; Mark Spalding and Lynne Zeitlin Hale, 'Marine protected areas: past, present and future – a global perspective' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas*, (CSIRO Publishing, 2016), at p.10; Australian Antarctic Program, *Australia and the Antarctic Treaty System*, <https://www.antarctica.gov.au/about-antarctica/law-and-treaty/australia-and-antarctic-treaty-system/> (accessed 1 March 2021).
[21] See e.g. The International Institute for Sustainable Development, 'Summary of the First Session of the Intergovernmental Conference on an Internationally Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction' (2018) 25(179) *Earth Negotiations Bulletin* 1-18, at p.8.
[22] Scott (n 12).

1. How does Australia's domestic and international MPA practice interact?
2. What effect does the interaction between Australia's domestic and international practice have on the BBNJ negotiations on MPAs?

To address these sub-questions, Australia's domestic MPA network will be examined, as well as Australia's practice in negotiating MPAs established by CCAMLR. This analysis will be informed by a middle power theory approach which will be used to investigate and understand the interaction between the international and national law-making spheres. The research sub-questions demonstrate a gap within existing literature as there is no scholarship which explores the interaction between Australia's domestic and international practice in this way on the issue of MPAs. By synthesising the findings of this review, I will identify patterns in Australia's practice in the creation, implementation and management of MPAs and apply these findings to possible outcomes at the BBNJ negotiations and beyond.

The research sub-questions will allow an insight into the direction of MPA negotiations on this vital issue and provide plausible options for the final agreement. As this instrument will be responsible for the protection of a substantial amount of the world's discovered and undiscovered biodiversity, and MPAs are the most well-established conservation tool that it proposes, it is worth emphasising once again the significance of this ABMT package element. The overall goal of the research then is to provide some insight into the ways that the ABMT regime may evolve and how it may be strengthened.

The thesis will be structured with this aim in mind. As such it will commence in Chapter 2 with a critical review of Australia's MPA practice between the two levels of law-making: domestic, and international (specifically CCAMLR). This will examine the common perception that Australia is a world leader when it comes to MPA practice. Specific attention will also be paid to the interaction between these levels of Australia's practice in line with the thesis' theoretical approach. Chapter 3 will elaborate on this by establishing a theoretical approach to address the gaps within the literature surrounding Australia's practice, focusing on middle power theory and the interaction between national and international law and policy making. Chapter 4 will synthesise the findings from the preceding sections to explore how Australia's domestic and international practice interact in order to answer the first sub-question. This will be achieved by analysing significant MPA developments for Australia domestically and internationally in order to examine potential connections between the two levels. Three distinct periods of Australian practice on MPAs will be observed and analysed. It should be noted that the assessments of Australia's domestic law-making will focus on federal government action, rather than any steps taken by the sub-national state governments, as it is anticipated that the interaction between national and international law will be more direct at this level. Finally, Chapter 5 will address the second sub-question through examining the implications of Australia's practice on the

ABMT regime within the BBNJ negotiations and how this may impact the final instrument as well as Australia's potential influence on the creation of high seas MPAs post-BBNJ negotiations. The thesis will conclude with lessons that can be learnt from Australia's MPA practice for the implementation of high seas MPAs.

2. Is Australia Really a Global Leader in MPA Practice? Reviewing the Literature

This chapter seeks to critically examine Australia's self-proclaimed world leader status when it comes to marine protection.[23] While Chapter 4 will highlight the major milestones in Australia's MPA practice, both at a domestic and international level, this chapter will serve as an examination of the numerous assessments that have been made about the *quality* of this practice. While there is no doubt that Australia has engaged in numerous instances of MPA law-making in recent history, it has also been subject to significant criticism which must be addressed. Through this process important themes emerge within the literature surrounding Australia's MPA activities. This chapter will demonstrate key gaps within the literature regarding the interaction between Australia's domestic and international practice on MPAs. While there is considerable critical literature on Australia's domestic MPA policies and its international MPA engagement, there is little examining the connection between these two spheres of law-making. This is likely to have implications for Australia and the BBNJ instrument as this interaction will shape how Australia contributes to the creation of this instrument.

This chapter will first address the literature on Australia's domestic MPA practice and how effective it has been in achieving conservation objectives (Chapter 2.1). Next the scholarship addressing the conduct of Australia as a member of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) will be examined as a key case study of Australia's international practice (Chapter 2.2). Finally, some brief lessons and central themes from the literature will be explored to conclude in Chapter 2.3.

2.1 Literature on Australian Domestic MPA Practice

At a glance, Australia appears to be a global leader when it comes to implementation of MPAs within its national waters. Indeed, approximately 37% of Australia's national waters are currently covered by MPAs with varying levels of protection,[24] well above the 2016 global average of 1.6%.[25] Most MPAs

[23] See e.g. Prime Minister, Minister for the Environment, Minister for Energy and Emissions Reduction, *Australia announces $100 million initiative to protect our oceans* (2021) <https://www.pm.gov.au/media/australia-announces-100-million-initiative-protect-our-oceans> (accessed 24 June 2021).
[24] Calculated from data reported at: Australian Government: Department of Agriculture, Water and the Environment 'CAPAD: protected area data' <http://www.environment.gov.au/land/nrs/science/capad> (accessed 27 April 2021).

were implemented relatively recently, with their establishment ramping up significantly in the 2000s. This increase is partially in response to increasing global targets highlighting the interplay between domestic and international MPA policy.[26] In particular the federal government in 2012 increased MPA coverage significantly as part of their commitment to the National Representative System of MPAs (NRSMPA) plan.[27] Despite Australia's impressive numbers however, when examining the implementation of these MPAs in Australia more closely, it becomes clear that there are a number of criticisms that can be levelled at the quality of Australia's domestic MPA practice, each of which share common themes.

A significant study by Devillers et al. in 2015 posited that, despite the dramatic recent expansion of MPAs in 2012, Australia's MPA network could be best described as 'residual'.[28] That is, the network was established in areas where it had less chance of interfering with human activities such as fishing and oil and gas extraction.[29] This is despite the fact that areas with significant human activity are most likely to be in need of protection. Devillers et al. find that shallower waters tend to have significantly less MPA coverage, as do areas with productive fisheries and the potential for oil and gas exploitation respectively.[30] Essentially, the Australian federal government, in forming the MPAs, aimed to place them in an area which cause as little political opposition as possible from stakeholder groups.[31] In implementing these MPAs it seems Australia aimed to both be seen as a leader in the marine conservation space by racing to meet international standards, while also sacrificing as little economically and politically as possible.

Devillers et al. are not alone in their criticism of Australia's MPA network. It has been shown to be ineffective at protecting threatened species despite, or even perhaps because of, revisions to the network in 2015 and 2018.[32] In fact, the revisions in 2018 represented a massive "Systematic Downgrade" in which 26 of Australia's MPAs were subjected to "downgrading, downsizing, and

---

[25] Wescott and Fitzsimons, (n 20); Spalding and Hale (n 20).
[26] *Ibid*.
[27] Australia and New Zealand Environment and Conservation Council, *Strategic Plan of Action for the National Representative System of Marine Protected Areas: A Guide for Action by Australian Governments* (Canberra, 1999) <https://parksaustralia.gov.au/marine/pub/scientific-publications/archive/nrsmpa-strategy.pdf> (accessed 5 October 2021).
[28] Rodolphe Devillers et al., 'Reinventing Residual Reserves in the Sea: Are We Favouring Ease of Establishment over Need for Protection?' (2015) 25 *Aquatic Conservation: Marine and Freshwater Ecosystems* 480–504, at p.483. https://doi.org/10.1002/aqc.2445.
[29] *Ibid*., at pp.487-491.
[30] *Ibid*.
[31] *Ibid*., at p.499.
[32] Karen R Devitt et al., 'Australia's Protected Area Network Fails to Adequately Protect the World's Most Threatened Marine Fishes' (2015) 3 *Global Ecology and Conservation* 401–11. https://doi.org/10.1016/j.gecco.2015.01.007

degazettement" affecting 31% of the network.[33] This did not reduce the size of Australia's protected area network but did reduce the level of protection in these areas.[34] It has also been argued that Australian MPAs are not well suited to addressing a variety of environmental threats,[35] and unable to adequately protect biodiversity despite reaching internal coverage targets.[36] In two revealing papers Kearney et al. draw attention to the problematic nature of Australia's tendency to push for MPA implementation even where other options may be more effective.[37] In particular, the structural features of Australia's system result in these outcomes. Namely, Australia's definition of the precautionary principle and usage of the "Comprehensive, adequate and representative" (CAR) standard for MPAs are both argued to result in these ineffective outcomes.[38] Finally, in designing a system for the evaluation of MPA effectiveness, Roberts et al. find Australia's MPA practice is overly focused on off-shore and partially protected areas, instead recommending an increase in "no-take" MPAs in coastal zones.[39]

The common thread throughout these critiques is the focus of the Australian decision-makers on implementing wide-ranging MPAs, with little regard for their effectiveness. It seems the Australian policy has total area coverage targets firmly in mind, rather than effective outcomes for biodiversity conservation. Indeed, the revision in 2018 represented a significant downgrade in protection while not affecting coverage, indicating the image-centric approach to MPAs.[40] The motivation behind Australia's approach to meeting these targets appears to be driven by international reputational considerations. Lightfoot, highlights that Australia as a middle power has often historically been motivated by the desire to appear to be a good international citizen, especially on marine environmental matters.[41] More specifically, at the World Summit on Sustainable Development

---

[33] Renee Albrecht et al., 'Protected area downgrading, downsizing, and degazettement (PADDD) in marine protected areas' (2021) 129 *Marine Policy* 10437, at p.6. https://doi.org/10.1016/j.marpol.2021.104437
[34] *Ibid*.
[35] Robert Kearney et al., 'Australia's No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?' (2012) 36 *Marine Policy* 1064–71. https://doi.org/10.1016/j.marpol.2012.02.024.
[36] Brayden Cockerell et al., 'Representation Does Not Necessarily Reduce Threats to Biodiversity: Australia's Commonwealth Marine Protected Area System, 2012–2018' (2020) 252 *Biological Conservation* 108813, at p.2. https://doi.org/10.1016/j.biocon.2020.108813
[37] Robert Kearney et al., 'Questionable Interpretation of the Precautionary Principle in Australia's Implementation of 'No-Take' Marine Protected Areas' (2012) 36 *Marine Policy* 592–97. https://doi.org/10.1016/j.marpol.2011.10.018; Robert Kearney et al., 'How Terrestrial Management Concepts Have Led to Unrealistic Expectations of Marine Protected Areas' (2013) 38 *Marine Policy* 304–11. https://doi.org/10.1016/j.marpol.2012.06.006
[38] *Ibid*.
[39] Kelsey E Roberts et al., 'Measuring progress in marine protection: A new set of metrics to evaluate the strength of marine protected area networks' (2018) 219 *Biological Conservation* 20-27, at pp.24-25. https://doi.org/10.1016/j.biocon.2018.01.004
[40] Albrecht et al. (n 33).
[41] Simon Lightfoot, 'A Good International Citizen? Australia at the World Summit on Sustainable Development' (2006) 60(3) *Australian Journal of International Affairs* 457–471, at pp.458-459. https://doi.org/10.1080/10357710600865713

Australia "successfully export[ed] a 'world-leading policy'" on ocean management.[42] Hence it is likely that Australia values this status as what could be dubbed a "good international *ocean* citizen" highly and is driven to maintain this reputation. In fact, despite a noticeable downturn in MPA enthusiasm post-2012,[43] domestic action has begun to tick up again in 2021, seemingly driven by international momentum towards targets aiming for a 30% MPA coverage.[44] These factors go relatively unexplored in the literature assessing Australian MPA practice and will be expanded upon in Chapter 3.

While it is apparent that percentage-based targets have driven significant expansion of the coverage of protected areas, the flaws in Australia's approach call into question their wisdom for marine conservation.[45] The most relevant international target appears to be the Convention on Biological Diversity's (CBD) Aichi Target 11:

> "By 2020, at least 17 per cent of terrestrial and inland water, and 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 landscapes and seascapes."[46]

Rees et al. point out that while the percentage targets or "quantitative" elements of the Aichi Target 11 are being vigorously pursued, there is little discussion of the target's "qualitative" elements.[47] Especially concerning is that Sustainable Development Goal 14, echoes the 10% coverage target but does not include the qualitative elements at all,[48] highlighting that the focus upon percentage targets is not exclusive to Australia's practice. Furthermore, there seems to be questions over Australia's ability

---

[42] *Ibid*., at p.462.
[43] See, e.g., Cockerell et al. (n 36).
[44] Department of Agriculture, Water and the Environment, *Australia joins Global Ocean Alliance* (Feb 2021) <https://minister.awe.gov.au/ley/media-releases/australia-joins-global-oceans-alliance?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news> (accessed 15 March 2021).
[45] Mark D Spalding et al., 'Building towards the Marine Conservation End-Game: Consolidating the Role of MPAs in a Future Ocean' (2016) 26 *Aquatic Conservation: Marine and Freshwater Ecosystems* 185–99, at p.195. https://doi.org/10.1002/aqc.2686.
[46] Convention on Biological Diversity, *Aichi Biodiversity Targets*, <https://www.cbd.int/sp/targets/> (Accessed 1 March 2021).
[47] Siân Rees et al., 'Defining the Qualitative Elements of Aichi Biodiversity Target 11 with Regard to the Marine and Coastal Environment in Order to Strengthen Global Efforts for Marine Biodiversity Conservation Outlined in the United Nations Sustainable Development Goal 14' (2018) 93 *Marine Policy* 241–50. https://doi.org/10.1016/j.marpol.2017.05.016.
[48] *Ibid*., at p.242.

to adhere to the qualitative elements of targets given the criticisms of the residual nature of its MPA network.[49]

Jones and De Santo note this pattern more broadly regarding "very large MPAs", which are remote areas designated as highly protected MPAs in order to boost states' contribution towards quantitative conservation targets, while failing to meet the 'qualitative' targets discussed above.[50] Meanwhile, Spalding et al. critique the accepted usage of MPAs stating that "Too much attention is often given to the expansion of protected areas coverage, to the detriment of management effectiveness."[51] Agardy et al. also highlight the nature of MPA targets as a "double-edged sword" stating that while they may sometimes be useful, they often offer "a false illusion of progress or even success".[52] In the BBNJ context, Crespo et al. have questioned the viability of static area-based management entirely in the context of the high seas, instead envisioning dynamic ocean management which will adjust to changes occurring throughout an ecosystem subject to climate change upheavals.[53]

These flaws seem to be again mirrored in recent declarations by Australia of its intention to expand its MPA network into the sea surrounding Christmas Island and the Cocos (Keeling) Islands.[54] In media releases these proposed MPAs have been sold on the fact that they will cover 740,000km^2 and will increase Australia's MPA coverage percentage from 37% to 45%.[55] The announcement of such large MPAs again indicates an awareness of the visual element of MPA establishment.

Hence Australian domestic MPA practice seems to be influenced by quantitative international obligations and commitments. It will be theorised more fully in Chapter 3 that Australian domestic actions are driven by international developments in MPA practice. Furthermore, it appears that the demonstrable element of the target, the percentage coverage, receives inordinate focus by Australia. This is possible due to its convenience as an indicator of progress towards obligations. Yet there is little within the literature which explores this Australian behaviour in any depth.

---

[49] Devillers et al. (n 28)
[50] PJS Jones and EM De Santo, 'Viewpoint – Is the Race for Remote, Very Large Marine Protected Areas (VLMPAs) Taking Us down the Wrong Track?' (2016) 73 *Marine Policy* 231–34. https://doi.org/10.1016/j.marpol.2016.08.015.
[51] Spalding et al. (n 45), at p.190.
[52] Tundi Agardy et al., ''Dangerous Targets' Revisited: Old Dangers in New Contexts Plague Marine Protected Areas' (2016) 26(2) *Aquatic Conservation: Marine and Freshwater Ecosystems* 7–23. https://doi.org/10.1002/aqc.2675.
[53] Guillermo Ortuño Crespo et al., 'Beyond Static Spatial Management: Scientific and Legal Considerations for Dynamic Management in the High Seas' (2020) 122 *Marine Policy* 104102.
[54] See e.g., Department of Agriculture, Water and the Environment, *Joint media release: Australia to expand Marine Parks* (May 2021) <https://minister.awe.gov.au/ley/media-releases/australia-expand-marine-parks> (accessed 15 June 2021); Department of Agriculture, Water and the Environment, *Joint media release: Protecting our unique marine environment* (October 2021) <https://minister.awe.gov.au/ley/media-releases/protecting-our-unique-marine-environment> (accessed 5 October 2021).
[55] *Ibid*.

These interactions between national and international law and policy are significant for the BBNJ negotiations on ABMTs. It is possible that the effectiveness of the instrument would be considerably enhanced by the rejection of coverage for coverage's sake and instead focused on effective solutions for marine biodiversity protection in ABNJ. It is yet to be explored whether this phenomenon within Australia's domestic practices may provide a greater understanding of its policy and behaviours in the BBNJ context. Chapter 5 will explore these implications in greater depth.

2.2 Literature on Australian International MPA Practice at the Commission for the Conservation of Antarctic Marine Living Resources

Australia has also been heavily involved in the establishment of MPAs on the high seas. Specifically, Australia is a key member (as an Antarctic claimant state) of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).[56] Two high seas MPAs have been designated by CCAMLR, to this point being the South-Orkney Islands Southern Shelf MPA in 2009 and the Ross Sea Region MPA in 2016,[57] by far the biggest high seas MPA in the world.[58]

Much can be determined from the process behind these Southern Ocean MPAs which may be of value to the BBNJ negotiations, as both deal with MPAs in high seas areas. Australia is currently proposing another MPA in the East Antarctic (along with France and the European Union (EU)), but to this point has been unable to secure consensus, despite its introduction in 2012.[59] Examining this process will be a valuable case study for gaining a greater understanding of Australia's international MPA practice especially when considering links with its domestic regime.

A key commonality across analyses of the CCAMLR system is that of consensus. Each of CCAMLR's 26 members must agree upon a measure before it is implemented.[60] Authors including

---

[56] Australian Antarctic Program, *Australia and the Antarctic Treaty System* (April 2016) <https://www.antarctica.gov.au/about-antarctica/law-and-treaty/australia-and-antarctic-treaty-system/> (accessed 1 March 2021).
[57] Commission for the Conservation of Antarctic Marine Living Resources (n 15).
[58] Katharina Teschke et al., 'Planning Marine Protected Areas under the CCAMLR Regime – The Case of the Weddell Sea (Antarctica)' (2021) 124 *Marine Policy* 104370, at p.2. https://doi.org/10.1016/j.marpol.2020.104370
[59] Delegations of Australia, France and the European Union, *Proposal for a conservation measure establishing a representative system of marine protected areas in the East Antarctica planning domain* (2012) CCAMLR-XXXI/36 Agenda Item Nos 5.5, 7.2 <https://www.ccamlr.org/en/ccamlr-39/07-rev-1> (accessed 2 June 2021).
[60] Commission for the Conservation of Antarctic Marine Living Resources, *Basic Documents Part 3: Rules of Procedure of the Commission* (1982), Part 2 Rule 4(a) <https://www.ccamlr.org/en/system/files/e-pt3_0.pdf> (accessed 5 October 2021).

Teschke et al.,[61] Nilsson et al.,[62] and Constable,[63] all express concerns about the consensus system, with Nilsson et al. arguing it may lead to a "lowest common denominator" attitude among member states. Also, Russia and China in particular are cited as being obstacles to MPA implementation.[64] However, it is worth considering whether the obstinance of objecting states, or even the consensus system itself, rightly bears all of the blame for the slow implementation of MPAs under CCAMLR. Specifically, Australia's own practice in managing these stakeholder interests is worth examining within the context of its East Antarctica MPA proposal, especially in conjunction with the flaws in its domestic practice.

Firstly, Brooks et al. highlight that Australia and France's East Antarctic proposal caused some distrust amongst states due to its greater alignment with "historic sovereignty claims" than threatened biodiversity.[65] This resulted arguably in a natural resistance to the proposal from certain states who saw the proposal as an attempt to strengthen sovereignty claims.[66] Another significant stumbling block to Australia's proposals has been the "data poor" nature of the areas where the MPAs were to be implemented.[67] This has been a point of objection for states that argue that Australia's proposal is not supported by a scientific need for conservation.[68] It is clear from these critiques that Australia has not done enough to build trust and confidence in its proposal. It should also be noted that Australia has built the proposal upon the CAR principle,[69] that was criticised in reference to Australia's domestic MPAs as unsuitable for marine environments.[70]

A further commonality between national and international practice seems to be Australia's disinclination to adversely affect their own fisheries with MPA measures. It has been demonstrated that Australia and its MPA proposal partner France have fished small proportions of the total catch in

---

[61] Teschke et al. (n 58), at pp.7-8.
[62] Jessica A Nilsson et al., 'Consensus Management in Antarctica's High Seas – Past Success and Current Challenges' (2016) 73 *Marine Policy* 172–80, at p.179. https://doi.org/10.1016/j.marpol.2016.08.005.
[63] Andrew J Constable, 'Lessons from CCAMLR on the Implementation of the Ecosystem Approach to Managing Fisheries' (2011) 12 *Fish and Fisheries* 138–51. https://doi.org/10.1111/j.1467-2979.2011.00410.x.
[64] Teschke et al. (n 58), at p.8.
[65] Cassandra M Brooks et al., 'Reaching Consensus for Conserving the Global Commons: The Case of the Ross Sea, Antarctica' (2020) 13(1) *Conservation Letters* e12676, at p.6. https://doi.org/10.1111/conl.12676
[66] *Ibid*.
[67] See e.g., Cassandra M Brooks, 'Competing Values on the Antarctic High Seas: CCAMLR and the Challenge of Marine-Protected Areas' (2013) 3(2) *The Polar Journal* 277–300, at p.286. https://doi.org/10.1080/2154896X.2013.854597
[68] *Ibid*.
[69] Australian Antarctic Program, *A Marine Protected Area for East Antarctica* (Aug 2018) <https://www.antarctica.gov.au/about-antarctica/law-and-treaty/ccamlr/marine-protected-areas/> (accessed 23 February 2021).
[70] Kearney et al. (n 37).

the CCAMLR area but have extracted significant value.[71] Brooks demonstrates through a survey of fishing from 2008-2012 that although Australia and France were responsible for only 2% and 4% of the total catch respectively, they received an outsized economic benefit of 9% and 20% of the total value from Southern Ocean fishing.[72] This is because both countries focus largely on toothfish, the more valuable catch than krill, which is another common fisheries target.[73] The East Antarctica MPA proposal also includes a specific prohibition against the fishing of krill in the D'Urville Sea-Mertz area.[74] However, toothfish fisheries are mostly avoided within the proposal with the lack of measures in Prydz Bay, being especially conspicuous given it is both a valuable fishery, as well as a nursery ground for toothfish.[75] Furthermore, while Australia fished a small amount in the CCAMLR area, it is worth noting that it has fished quite extensively, up to 2500t a year, within the Southern Ocean Australian territory of the Heard and McDonald Islands' Exclusive Economic Zone (EEZ).[76] Furthermore, France has fished 5000t a year in the same period in their Kerguelen Islands EEZ.[77] Again, this is not likely to engender great trust from other members of CCAMLR who see their current and potential fisheries being affected by MPA proposals, without Australia and others willing to make a commensurate sacrifice.

Turning to recent developments at CCAMLR, the 2020 meeting provided the latest chance to discuss these proposals. Russia and China continued to object to all MPA proposals in CCAMLR.[78] Each state highlighted their opinion that there needed to be a balance between conservation and "rational" use of Antarctic resources.[79] This supports the suggestion that member states tend to have differing views about the purpose of CCAMLR, with some seeing it more akin to a regional fisheries management organisation (RFMO) while others understand its goals as purely conservation-based.[80] Russia went on in its submission to argue for a unified process for establishing an MPA, which currently does not exist within CCAMLR.[81] Nilsson et al. suggest that such proposals are a stalling tactic for states opposed to conservation goals due to the time that such a framework would take to

---

[71] Brooks (n 67), at pp.290-294.
[72] *Ibid*., at pp.293-294.
[73] *Ibid*.
[74] Australian Antarctic Program (n 69).
[75] Brooks (n 67), at p.290.
[76] NB: Between 2008-2012. Brooks (n 67), at p.294.
[77] *Ibid*.
[78] Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), *Report of the Thirty-Ninth Meeting of the Commission*, (Virtual Meeting, 27-30 October 2020), <https://www.ccamlr.org/en/system/files/e-cc-39-rep.pdf> at p.41-43.
[79] *Ibid*.
[80] See, e.g., Nengye Liu, 'The Rise of China and Conservation of Marine Living Resources in the Polar Regions' (2020) 121 *Marine Policy* 104181, at pp.2-3. https://doi.org/10.1016/j.marpol.2020.104181; Brooks et al. (n 65), at pp.6-7.
[81] *Ibid*.

negotiate.[82]

Meanwhile China referenced the need for greater information on Research and Monitoring Plans (RMPs) and baseline data.[83] Liu argues that China indeed views CCAMLR as a RFMO, hence its reluctance to compromise fisheries interests.[84] China has also focused particularly upon the need for more effective RMPs to inform the establishment of MPAs.[85] While it is possible to allege this is simply a stalling tactic as above, such dismissals should not occur out of hand. After all, China and Russia's objections are born out of fundamentally different understandings of the purpose of CCAMLR. If Australia wants to involve all members of CCAMLR in its MPA process, then informally engaging with Russia and China's suggestions would go a long way to achieving this. Furthermore, Tang suggests that bilateral connections with reluctant countries, especially China, may assist pending MPA proposals.[86] Meanwhile, McGee et al argue that Australia may consider a "logrolling" strategy in which they may cooperate to support each other's stalled proposals within the CCAMLR system.[87] However, Australia's insistence on the inherent value of MPAs, as opposed to other forms of conservation measures, may be impeding these possible solutions.

Indeed, it appears that Australia is striving for similar goals in the Antarctic as domestically. That is cultivating an image as a "good international ocean citizen" by implementing MPAs to reach coverage targets when other measures may be more effective. The fact that these domestic measures are arguably driven by international targets and commitments further highlights the interaction between the national and international levels of MPA policy and law-making. It seems likely then that some of the flaws of Australia's domestic practice have made their way into international practice at CCAMLR, a contention which has not been fully examined. This is significant for Australia's approach to the BBNJ negotiations which are substantially more complex and involve a larger number of stakeholders.

---

[82] Nilsson et al. (n 62).
[83] CCAMLR (n 78), at p.43.
[84] Liu (n 80), at pp.2-3.
[85] *Ibid*.
[86] Jianye Tang, 'China's Engagement in the Establishment of Marine Protected Areas in the Southern Ocean: From Reactive to Active' (2017) 75 *Marine Policy* 68–74, at p.73. https://doi.org/10.1016/j.marpol.2016.10.010.
[87] Jeffrey McGee et al., '"Logrolling" in Antarctic governance: Limits and opportunities' (2020) 56(e34) *Polar Record* 1-11. https://doi.org/10.1017/S003224742000039X

2.3 Lessons from the Literature on Australia's MPA Practice

This examination of the literature surrounding Australia's MPA practice has revealed lacunae regarding the interaction between Australia's domestic and international practice on MPAs. Specifically, while there is significant critical literature on Australia's domestic MPA network (discussed in Chapter 2.1 above) and its CCAMLR performance (Chapter 2.2), there is little linking the two.

The interaction between domestic and international law should be a key point of analysis when attempting to understand policy areas relevant to both levels. This interaction will be theorised in Chapter 3 and has been demonstrated through the above criticisms of Australian practice. For example, it has been shown that Australia is driven to take a coverage focused approach to MPAs domestically by international targets and reputational motivations. In turn, Australia then proposes similar practices in the CCAMLR system in an attempt to leverage reputational influence. This cyclical interaction between levels of governance is yet to be explored in this context, hence the need for further examination. Furthermore, understanding this interaction represents a potentially informative way to analyse the MPA negotiations at the BBNJ. How Australia's BBNJ practice is influenced by its experience internationally at CCAMLR, as well as domestically are key questions which are yet to be answered. As such, this chapter has illuminated the presence of these multi-level interactions within the literature on Australia's MPA policy while demonstrating pressing questions for the thesis going forward. Chapter 3 will draw these lessons out further with the use of middle power theory which will help to illuminate the interaction between Australia's domestic and international MPA law and policy.

3. Theoretical Framework

Australia can best be characterised as a classic example of a middle power.[88] Middle power theory is a school of international relations thought which attempts to categorise and explain the actions of states that fall somewhere in between established great and small powers.[89] Hence, middle power theory is a useful starting point for understanding the interactions between Australia's foreign and domestic policy regarding MPAs. While there are debates over how a middle power should be defined and what characteristics result from this status, it will be argued here that Australia's middle power nature is best understood as the pursuit of a series of strategic choices which allow for the best realisation of Australia's policy interests in the international sphere. Such choices are made necessary by Australia's lack of material power on the international stage. It is essentially argued that Australia as a middle power seeks strategies to enhance its ability to influence international law-making, especially in areas it considers particularly relevant to its national interest. This is in line with the findings from Chapter 2's review of the literature, which highlighted that Australia sought to project a strong reputation as an MPA leader, despite flaws in its historic and ongoing practice.

This chapter will first address the literature on middle powers that the theoretical framework will be relying upon (Chapter 3.1). It will then move to examine some middle power strategies that have been used by Australia in depth, specifically the concepts of good international citizenship and niche diplomacy (Chapter 3.2). Finally, it will synthesise these findings into a theoretical model which will attempt to explain the interaction between Australia's domestic and international practice (Chapter 3.3). This will be applied to Australia's historic and ongoing MPA practice in Chapter 4 in order test its validity, as will be explained in the final subsection (Chapter 3.4).

3.1 The Middle Power Concept in the Literature

As highlighted above, Australia is widely considered within the literature to be a key example of a traditional middle power.[90] However, there has been significant conjecture as to how middle powers should be defined and within this discussion crucial insights may be found. Carr argues that all previous attempted definitions of middle powers broadly fall into the categories of "position",

[88] See e.g., Andrew Carr, 'Is Australia a Middle Power? A Systemic Impact Approach' (2014) 68(1) *Australian Journal of International Affairs* 70–84, at p.71; Carl Ungerer, 'The 'Middle Power' Concept in Australian Foreign Policy' (2007) 53(4) *Australian Journal of Politics and History* 538–51.
[89] See e.g., Carr (n 88).
[90] Carr (n 88) and Ungerer (n 88).

"behaviour" and "identity".[91] A positional approach relies on factors such as gross domestic product, population and other quantitative indicators to place states in a range immediately bellow great powers but ahead of the majority of others.[92] This approach has been argued to be of little explanatory value, however, as it is difficult to find commonalities in foreign policy based purely on these factors.[93] An alternative is to examine the facts of a state's geography which may afford it some strategic importance in international relations and hence greater influence, however Carr ultimately finds that the positional approach is "…a useful step towards indicating the 'middle' in middle power, but can only ever be a necessary and not sufficient definition of middle powers."[94]

On the other hand, a behavioural approach is the process of looking to certain established foreign policy behaviours as indicative of middle power status.[95] This was championed by Cooper, Higgott and Nossal who argued that a middle power can be identified by

> "…their tendency to pursue multilateral solutions to international problems, their tendency to embrace compromise positions in international disputes and their tendency to embrace notions of "good international citizenship" to guide their diplomacy."[96]

While this can certainly be said to apply to Australia, Carr points out the tautological nature of such a method.[97] By defining middle powers as states that act like middle powers there is little surprise when Australia is found to be one, since Australia and Canada's foreign policy behaviours formed the basis of Cooper, Higgott and Nossal's categorisation.[98] He also argues that behavioural approaches may often become too normative in promoting middle powers as "champions" of good international citizenship with little to actual evidence to back this perception up. [99]

Despite this argument, the theoretical understanding of middle powers within this paper will focus on behaviour, while somewhat addressing these critiques. While it is beyond the scope of this research to determine a comprehensive definition for middle powers, it is important to highlight some common underlying characteristics which are present within the literature. The issues with defining middle powers based purely on their behaviour are evident. However, an often under-considered factor is the

---

[91] Carr (n 88).
[92] *Ibid.*, at pp.71-73.
[93] *Ibid.*, at p.72.
[94] *Ibid.*, at p.73.
[95] *Ibid.*, at pp.73-75.
[96] Andrew F Cooper, Richard A Higgott, and Kim R Nossal, *Relocating Middle Powers: Australia and Canada in a Changing World Order* (UBC Press, Vol. 6. Canada and International Relations, 1993), at p.19.
[97] Carr (n 88).
[98] *Ibid*.
[99] *Ibid*., at p.75.

motivation behind state actions and, taking motivation into account, it may be possible for behavioural analyses to hold greater weight. The current theoretical approach understands middle powers as states which have a range of characteristic strategic behaviours available to them that they may utilise to compensate for their limited power on the international stage, without going so far as to suggest that these states will always conform with these behaviours. As such, notions of altruism are misguided when applied to middle powers. The appearance of altruism is instead one possible vehicle through which policy goals can be achieved by these states. Ungerer for example effectively discredits the notion of morally superior middle power states:

> "Ultimately, engaging in middle power diplomacy is no less self-interested than the behaviour of any other state in the international system. That self-interest, however, is filtered through the practical consideration of when and where middle-ranking states can achieve successful diplomatic outcomes in pursuit of national interests."[100]

This is also in line with Beeson and Higgott's work as they conceptualise middle power diplomacy as a "game of skill" in which even less powerful players can be successful in achieving outcomes in their interest.[101] Importantly they argue that middle powers have the greatest opportunity to engage in these "games of skill" when they are "In the context of complex interdependence," such as the BBNJ negotiations.[102] Hence, while not a comprehensive definition of middle powers in general, these strategic behavioural aspects of middle powers will be explored. For the narrow purposes of the theoretical framework, middle powers are conceptualised as states of relatively limited capacity that utilise a number of strategic approaches to influence international law and policy making.

One example of a similar approach to middle power theory in the BBNJ context is developed by the current author in Beringen et al.[103] Again, ultimately the key feature of middle power status here is a collection of strategic approaches taken by certain states to international relations in which they compensate for their lesser capabilities relative to larger powers. Namely a three-pronged; Constructive, Obstructive and Directive approach is used to explain how Australia may exert influence over international multilateral negotiations, specifically the BBNJ (See figure 1).[104] In the authors' reckoning Australia will ally with other middle powers when advocating for something it is

---

[100] Ungerer (n 88), at p.540.
[101] Mark Beeson and Richard Higgott, 'The Changing Architecture of Politics in the Asia-Pacific: Australia's Middle Power Moment?' (2014) 14 *International Relations of the Asia-Pacific* 215-237, at pp.220-221.
[102] *Ibid.*, at p.222.
[103] Ethan Beringen, Nengye Liu and Michelle Lim, 'Australia as a Middle Power: Challenging the Narrative of Developed/Developing States in International Negotiations Surrounding Marine Genetic Resources' (2021) 52(2) *Ocean Development and International Law* 143-168, at pp.7-8. https://doi.org/10.1080/00908320.2021.1886449
[104] *Ibid.*

in favour of (Constructive Approach).[105] Meanwhile if it is against a measure, it will seek the vaster influence of great powers in order to block progress (Obstructive Approach).[106] Finally, if Australia seeks to act against the interests of smaller states it will often eschew cooperation and dictate terms to them (Directive Approach).[107]

This thesis seeks to build upon the fundamental understandings of the author's previous theoretical framework in order to examine the interactions that occur between levels of law and policy making, especially in the area of MPAs. It will be argued that Australia as a middle power uses a pattern of strategic behaviours to amplify its voice and progressively influence the decisions made at an international level on MPAs. As such this thesis represents another example of middle powers being explored in reference to the usage of strategic behaviours in order to achieve desirable outcomes with their limited power. The specific middle power concepts of good international citizenship and niche diplomacy will now be discussed to demonstrate how they are crucially relevant strategies used in this process.

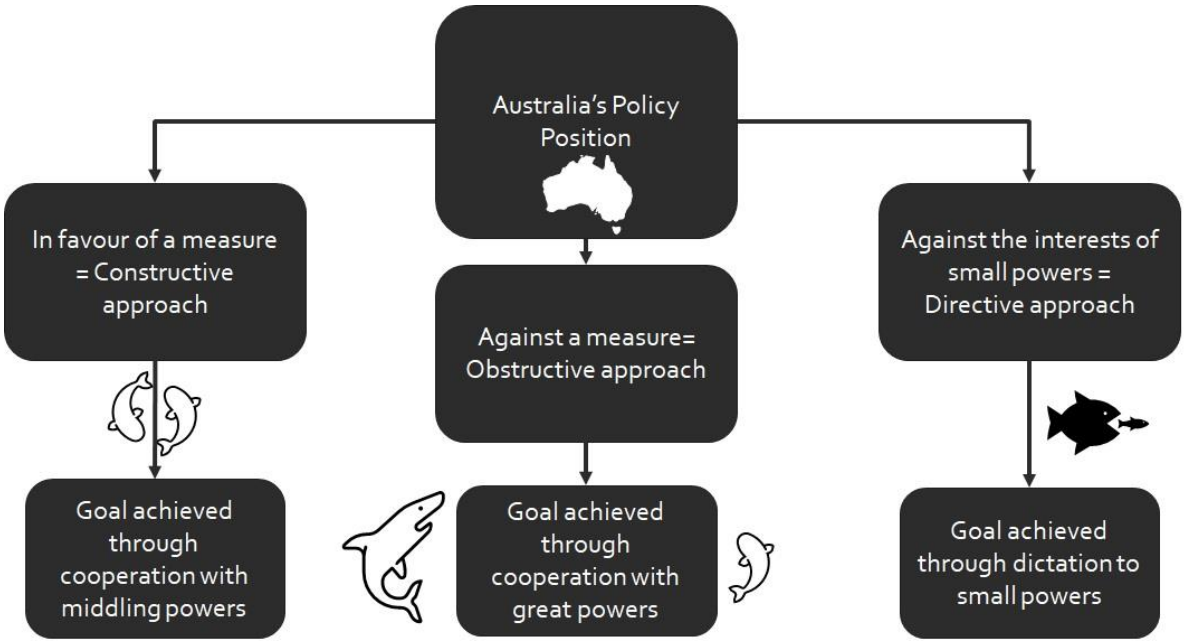

Figure 1: An example of a middle power theoretical framework in the context of BBNJ From: Ethan Beringen, Nengye Liu and Michelle Lim, 'Australia as a Middle Power: Challenging the Narrative of Developed/Developing States in International Negotiations Surrounding Marine Genetic Resources' (2021) 52(2) *Ocean Development and International Law* 143-168, at p.8. https://doi.org/10.1080/00908320.2021.1886449

[105] *Ibid.*
[106] *Ibid.*
[107] *Ibid.*

3.2. Key Middle Power Strategic Behaviours

3.2.1 Good International Citizenship

One of the most prominent characteristics traditionally attributed to middle powers is the notion that they represent "good international citizens".[108] The often nebulous meaning of this term has been consolidated by Abbondanza into "…five criteria for 'good international citizenship': (i) the respect of the international law; (ii) a multilateral attitude to international relations; (iii) the pursuing of humanitarian and idealist objectives; (iv) an active approach towards the maintenance of the rules-based order; and (v) a congruous identity supported by consistent domestic policies."[109] Indeed these criteria encompass most of the commonly held beliefs about what exactly constitutes a good international citizen. The concept in general has been built upon a number of examples of similar past behaviour from traditional middle powers, such as Canada's key role in advocating the Ottawa Convention, an international land mine ban.[110]

The concept has even been extended to the point where it has been considered a possible definitional criterion for middle powers.[111] However, this notion that middle powers somehow represent better or morally upstanding states on the international stage has been subject to convincing criticism. For example, Schultz highlights that in the case of Australia and its relationship with the Pacific Island states, it has proven anything but a good international citizen.[112] The author argues:

> "…Australia has directly opposed Pacific island interests and preferences, owing not to any direct conflict of interest but because the middle power logic of promoting global norms prevailed over that of engaging or respecting Pacific island positions. Such behaviour contradicts the common assumption that middle powers do not engage in bilateral power politics and occupy some kind of moral high ground in the international system. It thus raises questions about the relevance of the concept for describing Australia."[113]

---

[108] See e.g., Cooper et al. (n 96); Lightfoot (n 41), at p.462.
[109] Gabriele Abbondanza, 'Australia the 'Good International Citizen'? The Limits of a Traditional Middle Power' (2021) 75(2) *Australian Journal of International Affairs* 178–96, at p.181. https://doi.org/10.1080/10357718.2020.1831436.
[110] Matthew Bolton and Thomas Nash, 'The Role of Middle Power–NGO Coalitions in Global Policy: The Case of the Cluster Munitions Ban' (2010) 1(2) *Global Policy* 172-184, at pp.174-175. https://doi.org/10.1111/j.1758-5899.2009.00015.x
[111] See e.g., Cooper et al. (n 96).
[112] Jonathon Schultz, 'Theorising Australia–Pacific Island Relations' (2014) 68 *Australian Journal of International Affairs* 548-568.
[113] *Ibid.*, at p.559.

Indeed, most middle power theorists now roundly reject the notion of moral superiority that has historically been attributed to middle powers.[114] For example, Egeland found that when the interests of a middle power, in this case Norway, were at risk, it did not behave any more idealistically than other states.[115] For Egeland it was simply the fact that Norway had less capacity, and therefore fewer interests, than larger powers such as the United States which allowed it to take a more principled stand on some issues.[116] Furthermore, Ungerer similarly posits that middle power states act in their own self-interest rather than in pursuit of any higher ideal and middle power states are simply limited in what they may achieve on their own.[117]

However, that is not to say that the notion of good international citizenship has no relevance to discussions of middle powers. In fact, it was used prominently in the past by Australia's former Minister for Foreign Affairs and Trade, Gareth Evans (1988-1996).[118] Rather, it should be understood not as a trait of middle powers, or even Australia in particular, but a strategic behaviour which allows them to build a reputation of responsible and cooperative conduct, especially on certain issues. Higgott and Cooper for example highlight how Australia was able to build trust within the Cairns group at Uruguay Round of international trade negotiations, due to its reputation of supporting less developed states, especially regarding raw material exports.[119]

This notion of good international citizenship as a strategic approach is further reinforced by the work of Lightfoot who observes a shift in Australian foreign policy surrounding the World Summit on Sustainable Development (WSSD) in 2002.[120] He proposes that Australia has historically been considered a middle power in the way it conducts its foreign policy and that global environmental governance has been an area where it has sought to engage in constructive "niche diplomacy."[121] However, under the Howard government of the time, the author argues that Australia has started to move away from the "good international citizen" model of middle power diplomacy and instead to a "veto state" model, motivated chiefly by economic concerns.[122] Despite this finding however, Lightfoot also observes that in the area of oceans management Australia continued in to act as a good international citizen:

---

[114] See e.g., Schultz (n 112); Ungerer (n 88), at p.540; Carr (n 88), at p.75.
[115] Jan Egeland, *Impotent Superpower – Potent Small State: Potentials and Limitations of Human Rights Objectives in the Foreign Policies of the United States and Norway* (Norwegian University Press, Oslo, 1988) at p.14.
[116] *Ibid*.
[117] Ungerer (n 88).
[118] Gareth Evans, *The Style of Australian Foreign Policy* (Nov 1989) Australian Fabians, <https://www fabians.org.au/the_style_of_australian_foreign_policy> (accessed 13 May 2021).
[119] Richard Higgott and Andrew Cooper, 'Middle power leadership and coalition building: Australia, the Cairns Group, and the Uruguay Round of trade negotiations' (1990) 44(4) *International Organization* 589-632, at p.610.
[120] Lightfoot (n 41).
[121] *Ibid*., at p.458.
[122] *Ibid*., at p.459.

> "A particular success for Australia was the section on oceans management. Here Australia had been able to successfully export a 'world-leading policy'... On this particular issue Australia acted like a middle power, building coalitions to achieve its objectives. As Howard argued, 'globally, we have energetically pursued sustainable management of international oceans'..."[123]

This conclusion illuminates two related phenomena. The first is that Australia's image as a good international citizen is not a necessary part of what makes them a middle power, but a strategic choice. Australia has demonstrated the usage of this image at the WSSD conference on some issues, while at the same time playing a more contrarian role on others.[124] This highlights the agency of Australia in presenting themselves as a good international citizen deliberately in multilateral settings. The sentiment is even noticeable underlying Evans' advocacy for Australia as a good international citizen where he states the following:

> "The concept of good international citizenship is not the foreign policy equivalent of Boy Scout good deeds. It reflects the reality of international interdependence: the fact that global problems such as environmental degradation, AIDS, refugee resettlement, and human rights violations, require worldwide actions to solve them."[125]

This reflects a pragmatism behind the concept which seems to have persisted, especially in the case of Australia. In particular the notion that Australia is not capable of solving these issues on its own is consistent with Australia's ongoing attempts to build influence to deal with particular international problems.

The second piece of information that is brought to light by Australia's actions at the WSSD is the value that Australia placed on its reputation surrounding ocean management.[126] While on other environmental issues including the precautionary principle, targets, timetables and climate change, Australia behaved in a more obstructionist manner, it was cooperative and even a leader on ocean management issues.[127] This indicates that Australia has historically placed a priority on the prestige gained from its reputation surrounding ocean governance. Indeed, the fact that Australia looked to export its own national policy into an international space highlights the interplay between the levels of law-making that this research attempts to characterise. Whether this is still the case will be addressed in the subsequent chapters through the application of the theoretical framework to the analysis.

---

[123] *Ibid.*, at p.462.
[124] *Ibid.*, at pp.461-466.
[125] Evans (n 118).
[126] Lightfoot (n 41), at p.462.
[127] *Ibid.*

In general terms, Abbondanza in 2021 has analysed Australia's "good international citizen" status, arguing that currently Australia can be best described as a "neutral international citizen".[128] This is due to continuing "hard-line policies against seaborne asylum seekers, and the participation in missions that are not sanctioned by the UN," as well as a move away from a more multilateral focus in its foreign relations.[129] This further supports the notion that Australia's international reputation is better considered on a case-by-case basis depending on the issue addressed, rather than one overarching image. Therefore, while Australia's overall reputation may not be in line with good international citizenship, it is still possible that on issues of ocean management it may exert reputational influence. Hence the importance of distinguishing that Australia may be considered a "good international ocean citizen" within the developing theoretical framework.

Good international citizenship then should be considered a tactic used by a state to present itself to the international community in a particular way in pursuit of reputational advantages on discreet issue areas. This sort of reputation building can facilitate diplomatic cooperation, which improves a state like Australia's ability to manoeuvre within a multilateral context. Enhancing a state's reputation for proactive approaches to issues such as environment, human rights and similar causes results in greater trust and influence for the state in each of these particular issue areas. It follows that to build this reputation, commensurate action needs to be undertaken at the domestic level, exceeding or at the very least, rapidly meeting the level of the relevant international obligations. Hence the theoretical framework will address this reputation building by positing that enthusiastic domestic action will effectively result in a greater reputation as a good international ocean citizen. While the notion of good international citizenship has been addressed in general, it is also important to note its compatibility with another middle power concept. This concept is niche diplomacy and will be discussed in the next section.

2.2.2 Niche Diplomacy

Another key strategic concept traditionally associated with middle powers is the exercise of niche diplomacy. In fact, this term was also largely adopted by Evans. He described it as a strategy of 'concentrating resources in specific areas best able to generate returns worth having, rather than trying to cover the field'.[130] Indeed, it is commonly argued that middle power states, given their limited

[128] Abbondanza (n 109), at p.191.
[129] *Ibid.*
[130] Gareth Evans and Bruce Grant, *Australia's foreign relations: In the world of the 1990s* (Melbourne, Melbourne University Press, 1995), at p.345.

capacity, tend to focus on contributing to the resolution of specific international issues.[131] This results in these states being particularly active on issues which they consider to be a part of their national interest and considerably less so on those outside of this area. This is in contrast to larger great power states that have the capacity to play a key role in almost all international developments.

In the case of Australia, it can be argued that it traditionally had significant niche diplomacy interests in ocean management and MPAs in particular.[132] This stems potentially from its geography, as an island state bordered entirely by several major oceans, as well as its commercial and trade interests. These interests include shipping lanes, fishing and the extraction of oil and gas.[133] In fact it was found that the ocean economy for Australia was worth $68.1 billion in 2015,[134] with a projected increase to $100 billion by 2025.[135] It follows that Australia would seek to exert influence over the shaping of the international regime which governs how marine areas will be regulated, regardless of specific environmental concerns that Australia might also hold. As such, one focus of Australia's niche diplomacy is the regulation of the ocean, especially MPAs, due to both its interests and its limited capacity. This is in contrast to Australia's poor record in other forms of environmental regulation, such as climate change,[136] again demonstrating a niche approach even to issues addressing similar and interrelated subject matter.

It may also be argued that it is more efficient for Australia to focus consistently on these niche areas. This is because of the possible reputational advantage, as discussed above, being enhanced by a long-term commitment to a particular issue. If Australia was to jump from one cause to the next, as its middling capacity may dictate, then it may be difficult to get the full benefit of reputational growth on any one issue. Indeed, the effectiveness of Australia's strategy is likely limited by changing domestic priorities which may lead to a different consideration of niche interests. This would then result in a loss of the accrued "reputational advantage". Though, depending on the issue, the door may remain open for a return to the nice diplomacy in future. Despite this possibility, any break from pursing this interest may require a disproportionate amount of effort to build influence to the same level again.

---

[131] See e.g., Andrew Cooper, 'Niche Diplomacy: A Conceptual Overview' In A Cooper ed. *Niche Diplomacy: Middle Powers After the Cold War*, (St. Martin's Press, New York, 1997), 1–24.
[132] Lightfoot (n 41), at p.461.
[133] See e.g., Australian Institute of Marine Science, *The AIMS Index of Marine Industry*, (2018) <https://www.aims.gov.au/sites/default/files/2018%20AIMS%20Marine%20Index.pdf> at p.7 (accessed 9 March 2021); Marcus Haward, and Anthony Bergin *Net Worth Australia's Regional Fisheries Engagement* (2016) Australian Strategic Policy Institute, < https://s3-ap-southeast-2.amazonaws.com/ad-aspi/2017-07/Regional-fisheries.pdf?VersionId=H0SNEP8s92M2ho2bJlMgShdc2.EGaXcD> at pp.6-7 (accessed 9 March 2021).
[134] Australian Institute of Marine Science (n 133) at p.6.
[135] National Marine Science Committee, *National Marine Science Plan 2015-2025: Driving the Development of Australia's Blue Economy* (Canberra, 2015) <https://www.marinescience.net.au/wp-content/uploads/2018/06/National-Marine-Science-Plan.pdf> at p.9 (accessed 9 March 2021).
[136] Climate Transparency, Australia Country Profile (2020) <https://www.climate-transparency.org/wp-content/uploads/2020/11/Australia-CT-2020-WEB2.pdf> (accessed 6 October 2021).

Australia's WSSD conduct also demonstrates the effectiveness of this niche focus as Australia was able to lead international progress on ocean management, due in part to its emphasis on this area as a priority in the lead up.[137] In particular, Australia cited "oceans management, good national governance and sustainable land management" as priorities heading into the meeting and through this narrow focus were able to have an impact particularly on ocean issues, in contrast to other environmental issues.[138]

As such the focus on niche areas of diplomacy is a key part of gaining the credibility that is necessary in order to allow Australia to influence international law and policy in the area of MPAs. In fact, it is contended that, through a combination of niche diplomacy and building an image as a good international citizen, Australia exerts its influence over international law-making. This in turn allows Australia to shape international law to be more in line with its own domestic policy and hence make it easier to meet its obligations. This process is illustrated by the Feedback Loop Model.

3.3 The Feedback Loop of MPA Law and Policy Making

Ultimately it is posited that the interaction between Australia's international and national MPA practice can be characterised as seen in Figure 2. As indicated within the diagram, Australia's international obligations regarding MPAs lead to visible domestic action which, when engaged in enthusiastically by Australia, creates a reputational and credibility boost. This reputational accrual allows Australia to then have greater influence over the next stage of international law-making on this topic. Likewise, if Australia independently takes greater domestic action than required by existing international obligations, this too can spur reputational growth and boost niche diplomacy capabilities, allowing Australia to influence the subsequent stage of international law developments. In this way initial change can be driven from the national or international level and hence starting at either of these two points on the diagram is logically consistent. The colour of each stage on the model is also relevant as the green squares indicate the two levels of law-making, either of which may be the starting point for action on MPA policy. Meanwhile the blue squares indicate the relevant middle power strategies which Australia utilises to its advantage in these scenarios, as discussed above.

Through the usage of the "Feedback Loop Model", the way that Australia can influence the evolution of niche interest areas at international law can be better understood. Furthermore, it can be used to illuminate the process through which Australia's national law influences its international obligations.

---

[137] Lightfoot (n 41), at p.461.
[138] *Ibid*.

This has significant implications for the BBNJ process and Australia's impact over the ABMT aspect of the negotiations as will be explored in Chapter 5.

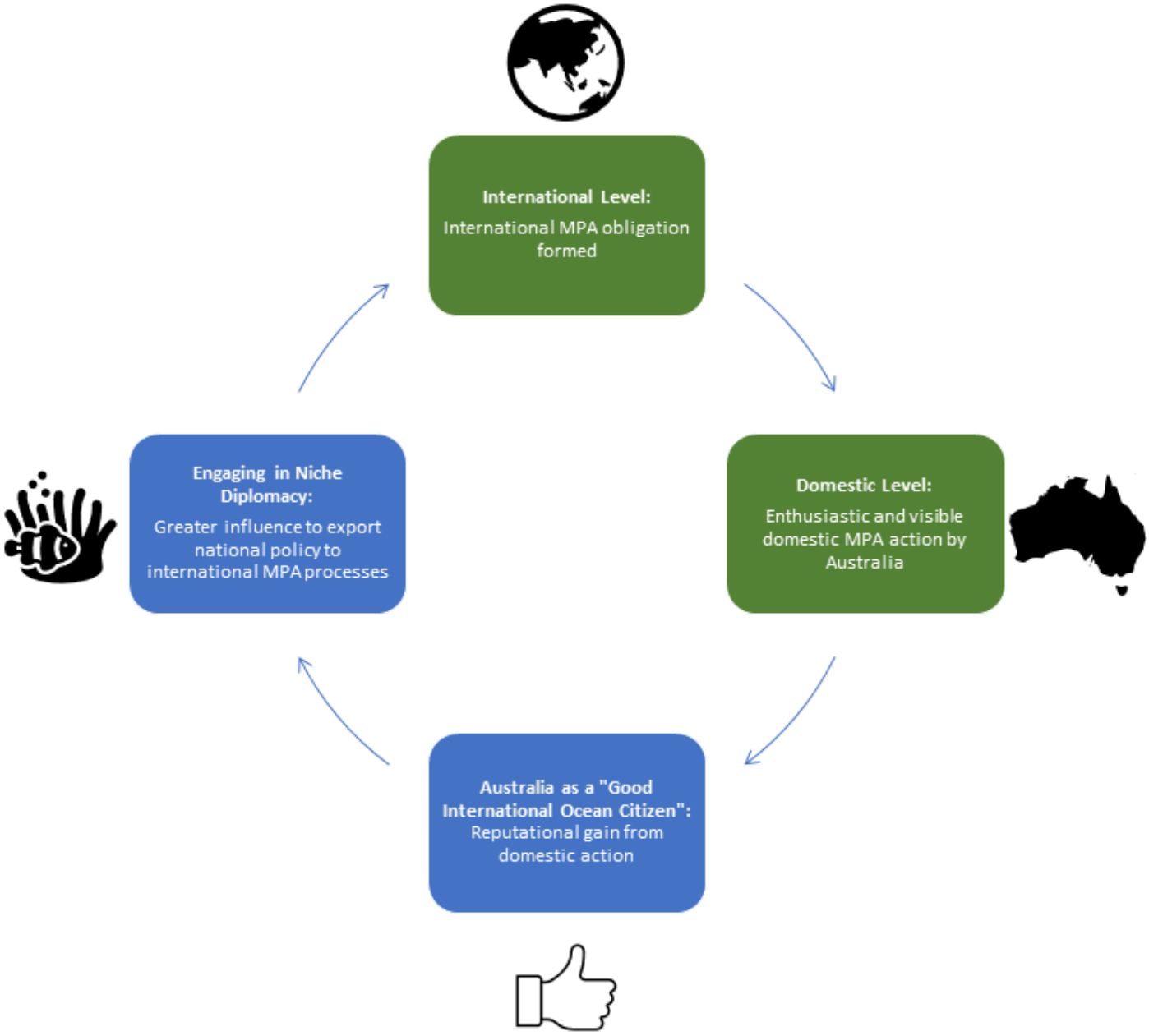

Figure 2: The Feedback Loop theoretical Model demonstrating the interaction between Australia's national and international MPA policy and action. The green boxes represent the two levels of law-making while the blue boxes represent the middle power strategic considerations that Australia utilises.

3.4 Using the Feedback Loop Model to Address the Research Questions

The current theoretical framework is shaped to address the research question in order to be an effective tool for the analysis of Australian MPA practice. Namely the first research sub-question: "How does Australia's domestic and international MPA practice interact?" will be addressed quite directly by the Feedback Loop Model. The model, after all, is attempting to characterise this very interaction through the usage of middle power theory. This approach should also go some way to addressing the gap within the literature regarding the connection between Australia's national and international MPA practice.

The Feedback Loop Model represents a proposed ideal approach from Australia to coordinating its MPA policy between national and international levels built upon middle power strategies. Should Australia deviate from this expected approach it will provide the opportunity for critical analysis of its actions and motivations. Furthermore, it will allow the interaction between its domestic and international MPA practice to be mapped next to a theorised model. Chapter 4, then, will apply the Feedback Loop Model to a chronological review of Australia's MPA practice in order to test its effectiveness in categorising the interaction between the national and international level.

The ultimate rationale for examining the interaction between the levels of Australian MPA practice is to examine the impact it may have on the BBNJ negotiations and the final BBNJ instrument itself. As such the second research sub-question is "What effect does the interaction between Australia's domestic and international practice have on the BBNJ negotiations on MPAs?" It is important then that the Feedback Loop Model has the capacity to extrapolate potential future directions for Australia's MPA practice and determine whether Australia is likely to be successful in its goals. This will be achieved through examining the conclusions drawn about how closely Australia's domestic and international practice adheres to the Feedback Loop Model in Chapter 4. The findings from Chapter 4 will then be applied to the case study of the BBNJ negotiations in Chapter 5 in order to determine the effect that Australia's domestic practice may have on the final instrument.

4. Three Eras of Australian Practice on MPAs: The Interaction between National and International Law and Policy

Having established a theoretical frame of reference, as well as identifying the flaws within the existing literature, this chapter will now directly address the first research sub-question. That is, "How does Australia's domestic and international MPA practice interact?" This is fundamental to addressing the broader goal of determining the implications of Australia's practice for the BBNJ agreement. To understand the interaction between international and domestic law on MPAs, the theoretical framework outlined in Chapter 3 will be utilised. This Feedback Loop Model will be applied to three key periods in the history of Australia's MPA development in order to test its conformity to the theorised behaviour of a middle power on an issue of niche diplomacy. As such this chapter will analyse the following periods of Australian MPA practice from 1990-2000 (Chapter 4.1), 2001-2012 (Chapter 4.2) and 2013-current (Chapter 4.3). This will allow an overall picture to be built of the relationship between Australia's domestic and international policy (Chapter 4.4) which can then be applied to the case study of the BBNJ negotiations in Chapter 5.

4.1 1990-2000: Building Momentum for MPAs

In order to justify beginning the analysis in 1990 it is important to mention that although Australia had engaged in some MPA action before this time, most notably the Great Barrier Reef Marine Park in 1975,[139] the 1990s saw the emergence of several significant international treaties which brought the importance of environmental management tools such as MPAs to the forefront. In particular two highly significant treaties were concluded and ratified by Australia being the Convention on Biological Diversity (CBD) and the United Nations Convention on the Law of the Sea (UNCLOS), in 1993 and 1994 respectively.[140] The CBD in particular envisioned the use of protected areas to conserve biodiversity through Article 8 which stated among other provisions that:

> "Each Contracting Party shall, as far as possible and as appropriate:

[139] *Great Barrier Reef Marine Park Act 1975* (Cth).

[140] *Convention on Biological Diversity*, adopted 5 June 1992, 1760 UNTS (entered into force 29 December 1993); *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 397 (entered into force 1 November 1994).

(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity…"[141]

While UNCLOS does not mention protected areas as a tool specifically, Article 61 creates an obligation to use necessary "conservation and management measures" to ensure that "the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation…"[142] Hence both treaties contribute significantly to the international push for the usage of conservation tools, such as MPAs, to achieve marine environmental management goals within states' own jurisdiction.

With the Feedback Loop Model in mind, it could be expected that Australia may be observed taking enthusiastic and visible domestic action in response to these international obligations. This is provided, of course, that MPA development and marine management in general was a niche area of policy interest. This appears to be the case given successive federal governments developed a number of highly publicised policy documents in this time period. These included the *National Strategy for Ecologically Sustainable Development* in 1992 and the *Strategy for the Conservation of Australia's Biological Diversity* in 1996.[143] Significantly each strategy resulted in significant progress for the development of MPAs within Australia. The *National Strategy for Ecologically Sustainable Development* in particular, resulted in the establishment of a National Advisory Committee on Marine Protected Areas.[144] Meanwhile the *National Strategy for the Conservation of Australia's Biological Diversity* in 1996 recommended an increase in MPAs, and the resources to create them. to improve "the currently inadequate marine protected area system."[145]

However perhaps the most significant action taken domestically for Australia for MPA development was the creation of the Oceans Policy in 1998 which championed a new National Representative System of Marine Protected Areas (NRSMPA).[146] This led to the rapid development of protected areas and, significantly, aimed to signal to the world that Australia was taking the lead on ocean

---

[141] Convention on Biological Diversity (n 140), article 8.
[142] United Nations Convention on the Law of the Sea (n 140), article 61.
[143] Richard Kenchington, 'The evolution of marine conservation and marine protected areas in Australia' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016), at p.35; Peter Cochrane, 'The marine protected area estate in Australian (Commonwealth) waters' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016) 45-63, at p.46.
[144] *Ibid*.
[145] Commonwealth of Australia, *National Strategy for the Conservation of Australia's Biological Diversity* (1996) <https://webarchive nla.gov.au/awa/20140217200131/http://www.environment.gov.au/archive/biodiversity/publications/strategy/index html> at p.15.
[146] Cochrane (n 143), at pp.45-47.

management and MPAs in particular. The Prime Minister at the time, John Howard, said as much in the foreword of the Policy:

> "With the release of Australia's Oceans Policy we again demonstrate our world leadership by implementing a coherent, strategic planning and management framework capable of dealing with the complex issues confronting the long term future of our oceans."[147]

This highlights quite clearly the reputation Australia sought to project, that of a "good international ocean citizen", in line with the expectations of the Feedback Loop Model. However, while this move was significant and projected a strong public image, in retrospect the Ocean Policy continues to be "fraught with conflict and challenges".[148] Though the creation of the NRSMPA was arguably a successful result of the Ocean Policy, it too has been heavily criticised, as examined in Chapter 2. In any case, Australia's conduct throughout the 1990s very much mirrors the expectation of the Feedback Loop Model. Here international law regarding MPAs was created and, seemingly in response, Australia took enthusiastic and visible domestic action with the establishment of three distinct policies committing to the creation of MPAs. Furthermore, Australia indicated that a motivation for this approach was to be a world leader in this space. While the usage of niche diplomacy to further its influence in international MPA discussions was yet to come, at this point Australia seems to adhere quite closely to the initial stages of the Feedback Loop Model on its MPA policy.

Notably, practical action on MPAs also occurred within this period. After the release of the Ocean Policy in particular the MPA coverage of Australia's waters almost doubled from 4.35% in 1997 to 7.24% in 2002.[149] This indicated that it was not just the establishment of policies which came out of this decade of Australian practice, but also the implementation of concrete MPAs within Australian waters. While the peak of Australia's MPA action had yet to come, the 1990s represents a significant period of momentum building for the full extent of Australia's eventual MPA practice (See Figure 3 below for an illustration of the key events).

---

[147] Commonwealth of Australia, *Australia's Oceans Policy* (1998), <https://www.environment.gov.au/archive/coasts/oceans-policy/publications/pubs/policyv1.pdf> at p.3.
[148] Joanna Vince, 'The twenty year anniversary of Australia's Oceans Policy: achievements, challenges and lessons for the future' (2018) 10(3) *Australian Journal of Maritime & Ocean Affairs*, 182-194, at p.186.
[149] Calculated from data reported at: Australian Government: Department of Agriculture, Water and the Environment (n 24).

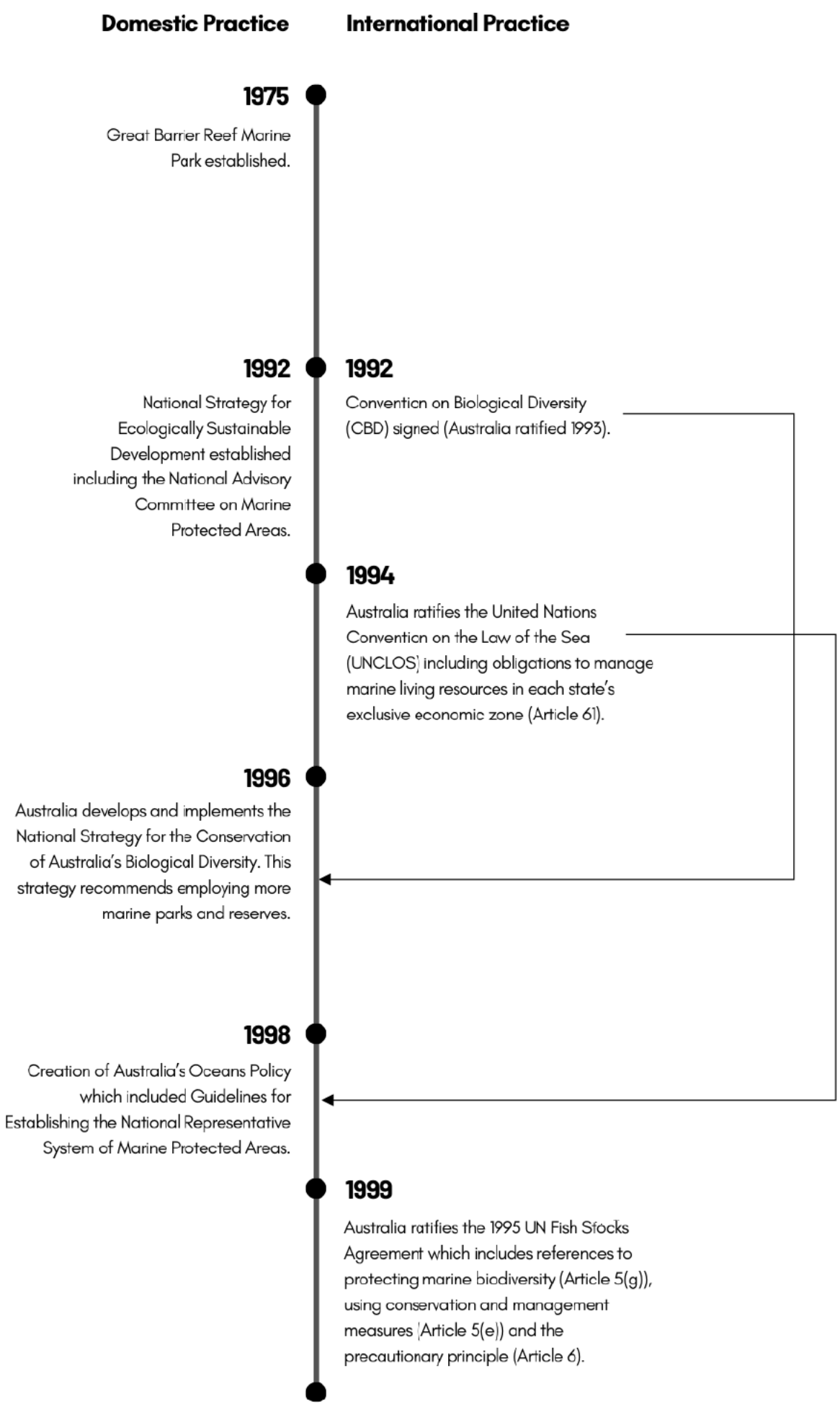
Domestic Practice
International Practice
1975
Great Barrier Reef Marine Park established.
1992
National Strategy for Ecologically Sustainable Development established including the National Advisory Committee on Marine Protected Areas.
1992
Convention on Biological Diversity (CBD) signed (Australia ratified 1993).
1994
Australia ratifies the United Nations Convention on the Law of the Sea (UNCLOS) including obligations to manage marine living resources in each state's exclusive economic zone (Article 61).
1996
Australia develops and implements the National Strategy for the Conservation of Australia's Biological Diversity. This strategy recommends employing more marine parks and reserves.
1998
Creation of Australia's Oceans Policy which included Guidelines for Establishing the National Representative System of Marine Protected Areas.
1999
Australia ratifies the 1995 UN Fish Stocks Agreement which includes references to protecting marine biodiversity (Article 5(g)), using conservation and management measures (Article 5(e)) and the precautionary principle (Article 6).

Figure 3 (previous page): A timeline highlighting key events in Australia's domestic and international practice focusing on the 1990-2001 era. Directional arrows indicate theorized causation based on the Feedback Loop Model.

Sources:

Great Barrier Reef Marine Park Act 1975 (Cth).

Richard Kenchington, 'The evolution of marine conservation and marine protected areas in Australia' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016), at pp.29-42.

Peter Cochrane, 'The marine protected area estate in Australian (Commonwealth) waters' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016) at pp.45-63.

Convention on Biological Diversity, adopted 5 June 1992, 1760 UNTS (entered into force 29 December 1993);

United Nations Convention on the Law of the Sea, adopted 10 December 1982, 1833 UNTS. 397 (entered into force 1 November 1994).

4.2 2001-2012: Australia's MPA Practice in Full Swing

This period of MPA practice represented a significant increase in Australian MPA action at both a domestic and international level. It began with Australia trying to bring its experience from the implementation of domestic policy into the international arena. Specifically in 2002 Australia at the World Summit on Sustainable Development (WSSD) was influential in the ocean management space.[150] As Lightfoot puts it: "Here Australia had been able to successfully export a 'world-leading policy'."[151] This represents the final stage in the Feedback Loop Model as Australia, apparently successfully, attempts to bring the influence gained from the innovative Oceans Policy to shape an international negotiation. The ultimate outcome of the WSSD on MPAs was an agreed goal for all state parties to strive for "representative" MPA networks.[152] No doubt Australia considered itself well on the way to achieve this goal at this stage given its ongoing NRSMPA process. Hence to this point Australia has continued to conform to the Feedback Loop Model, engaging eagerly with MPAs domestically while starting to play a key role in their proliferation internationally.

Furthermore, the WSSD had a knock-on influence within other international fora, notably quite immediately within CCAMLR:

> "In 2002, CCAMLR committed to establishing an MPA network to meet targets set by the 2002 United Nations World Summit on Sustainable Development (WSSD)."[153]

That CCAMLR was influenced significantly by the WSSD has been further confirmed by Sykora-Bodie and Morrison who argue:

> "CCAMLR members are hesitant to publicly admit that global conservation dialogues influence their thinking and decision-making, but interviews revealed that this is an intentional choice and that participants of all backgrounds and affiliations were conscious of global efforts to develop networks of MPAs. … Primarily, this is an attempt to maintain CCAMLR's historical independence from the UN treaty system."[154]

---

[150] Lightfoot (n 41).
[151] *Ibid.*, at p.462.
[152] World Summit on Sustainable Development, *Draft plan of implementation of the World Summit on Sustainable Development* (2002) A/CONF.199/L.1, <https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/L.1&Lang=E> at p.19 (accessed 30 August 2021).
[153] Brooks (n 67), at p.281.
[154] Seth T Sykora-Bodie, Tiffany H Morrison, 'Drivers of consensus-based decision-making in international environmental regimes: Lessons from the Southern Ocean' (2019) 29 *Aquatic Conservation: Marine and Freshwater Ecosystems* 2147-2161, at p.2154. https://doi.org/10.1002/aqc.3200

As such, the WSSD goal became the impetus for the MPA actions that were to be taken by CCAMLR later within this period. Australia's influence at the WSSD was beginning to create somewhat of a domino effect in other international fora. This would continue throughout the coming years.

Similarly, to the WSSD in 2004, the CBD Conference of the Parties (COP) set a target for '…comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas' by 2012.[155] Given the similarity here it is likely this was a continuation of Australia's influence from the WSSD. Indeed, the 'Decision on Protected Areas (Articles 8 (a) to (e))' from the COP in 2004 specifically referenced the WSSD regarding MPAs stating in a footnote that; "References to marine protected area networks to be consistent with the target in the WSSD plan of implementation."[156] This highlights again the influence Australia exerted at the WSSD conference carried over into other forums making decisions on MPAs, no doubt assisted by Australia's own voice at the COP.

Meanwhile domestically, by 2007 Australia had implemented the South-East Commonwealth Marine Reserve network and increased the total coverage of MPAs from 7.26% to 10.05%.[157] This meant that Australia had passed what was to be the most long-standing target benchmark for MPAs (10% coverage of ocean area).[158] Hence, Australia was significantly ahead of the international curve on these issues within its own waters, which is envisioned as necessary for the effective strategic use of the Feedback Loop Model.

At this time CCAMLR (of which Australia was a key member) was successful at implementing the South-Orkney Islands Southern Shelf MPA in 2009, the first ever high seas MPA.[159] This demonstrated the continued momentum of MPAs on the international stage. The next year the most authoritative and concrete MPA target was created as an outcome of the CBD's Aichi Targets.[160] Specifically, Target 11 set a firm number on the percentage of MPA coverage that should be reached by member states in ocean areas.[161] The amount was 10% coverage by 2020,[162] which is significant when it is considered that Australia had already reached this mark three years beforehand.

---

[155] Conference of the Parties of the Convention on Biological Diversity, 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting: VII/28. Protected areas (Articles 8 (a) to (e))' UNEP/CBD/COP/DEC/VII/28 (13 April 2004), at pp.3 and 7.
[156] *Ibid.*, at p.10.
[157] Calculated from data reported by at Australian Government: Department of Agriculture, Water and the Environment (n 24).
[158] Convention on Biological Diversity (n 46).
[159] Commission for the Conservation of Antarctic Marine Living Resources (n 15) <https://www.ccamlr.org/en/measure-91-03-2009> (accessed 23 April 2021).
[160] British Antarctic Survey, *South Orkneys Marine Protected Area* (2009) <https://www.bas.ac.uk/media-post/south-orkneys-marine-protected-area/> (accessed 24 June 2021).
[161] Convention on Biological Diversity (n 46).

This was followed by CCAMLR's adoption of Conservation Measure 91-04 in 2011, which had been proposed by Australia a year earlier as a general framework for implementing MPAs within the CCAMLR area.[163] This demonstrates another successful instance of international law influence from Australia which seemed to also be owed to its ongoing reputation as a leader in MPA practice. Having been significantly involved in the implementation of this general framework for MPAs, as well as its continued influence at the WSSD, Australia had set themselves up to be a driving force behind future implementation of MPAs within the Southern Ocean.

While Australia had many successes in influencing MPA practice to this point, the year of 2012 was the peak of Australia's MPA practice in terms of enthusiasm and action, both domestically and internationally. Within Australian waters, it was the culmination of the NRSMPA process which resulted in the implementation of 40 new MPAs within specific regional zones.[164] This increased Australia's MPA coverage massively to the 36.4%, around which it continues to stay.[165] The MPAs were implemented all around Australia according to zones being the South-West, North-West, North and Temperate East and the Coral Sea.[166] This was a dramatic expansion to Australia's domestic MPAs, very much in line with the enthusiastic and highly visible MPA action envisioned by the Feedback Loop Model. With this step Australia captured headlines with proclamations such as "World's largest marine reserve network unveiled" and "Australia creates world's largest marine reserve network".[167] Indeed the scale of the network was impressive enough to help towards further enhancing Australia's reputation as a "good international ocean citizen" despite some concerns expressed at the time about concessions made to oil and gas industry in the North-West region.[168] Rhetoric from the then-Environment Minister Tony Burke supports the notion that this was seen as an attempt to be at the forefront of developments in this area. He said, "It's time for the world to turn a corner on protection of our oceans… Australia today is leading that next step."[169]

---

[162] *Ibid*.
[163] Goldsworthy et al., 'Marine protected areas in the Antarctic and Sub-Antarctic region' in Wescott and Fitzsimons eds., Big, Bold and Blue: Lessons from Australia's Marine Protected Areas. CSIRO Publishing, 2016, at pp.105-106.
[164] Cochrane (n 143), at pp.47-49.
[165] Calculated from data reported by at Australian Government: Department of Agriculture, Water and the Environment (n 24).
[166] Cochrane (n 143), at pp.47-49.
[167] Duffy (n 11), The Guardian (n 11).
[168] The Guardian (n 11).
[169] Duffy (n 11).

The timing of this announcement from Australia is unlikely to be a coincidence as it was unveiled on the 14th of June 2012.[170] This coincided with the first days of the United Nations Conference on Sustainable Development (UNSCD) or Rio 2012 (13th-22nd June 2012).[171] This conference was envisioned as a follow up to the WSSD at which Australia was so successful in implementing its MPA target. It is likely then that Australia, as a key proponent of the MPA targets set at the WSSD wished to meet these targets proactively to boost its reputation on this issue. Furthermore, this announcement was likely planned to allow Australia to have a greater impact on the conference. In Australia's submission after all, it highlighted the importance of the "Blue Economy" and Ocean Issues" as its first priority area for the summit.[172] The main outcome was the non-binding "The Future We Want" document, which did little for MPAs save for "reaffirm" their importance and reference Aichi Target 11.[173] However, in other areas the impact of Australia's statement was clear, such as on illegal, unregulated and unreported fishing, World Trade Organisation fisheries subsidies and even the emerging BBNJ process.[174] These and other preferred outcomes for Australia were mentioned prominently, and with very similar wording, within the Oceans and Seas section of the UNSCD outcome document.[175] While no binding developments arose from this conference it does serve to highlight how Australia may leverage MPA action into broader influence over international ocean management in line with being regarded as a "good international ocean citizen".

Meanwhile, in an apparent attempt to capitalise upon this momentum, as well as that from the agreement on Conservation Measure 91-04, Australia introduced in that same year, a proposal to CCAMLR for a new East Antarctic MPA along with France and the European Union.[176] This proposal consisted of seven zones covering 1.8 million square km along the east coast of Antarctica.[177] Again Australia was likely driven to extend its domestic MPA practice into an international arena, as reflected in the Feedback Loop Model. This indicated a desire for Australia to achieve a similar

---

[170] *Ibid.*
[171] The International Institute for Sustainable Development, 'Summary of the United Nations Conference on Sustainable Development' (2012) 27(51) *Earth Negotiations Bulletin* 1-24, at p.1.
[172] Australian Government, *Australia's Submission to the Rio+20 Compilation Document* (2012) <https://coombs-forum.crawford.anu.edu.au/sites/default/files/publication/coombs_forum_crawford_anu_edu_au/2013-11/rio20_compilation_document.pdf> at pp.3-4 (accessed 17 August 2021).
[173] United Nations, *The Future We Want: Outcome document of the United Nations Conference on Sustainable Development* (2012) <https://sustainabledevelopment.un.org/content/documents/733FutureWeWant.pdf> at p.46 (accessed 17 August 2021).
[174] *Ibid*, at pp.41-46; Australian Government (n 172), at p.4.
[175] *Ibid*, at pp.41-46.
[176] Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), "Report of the Thirty-First Meeting of the Commission", Hobart, Australia (23 October- 1 November 2012), available at: https://www.ccamlr.org/en/system/files/e-cc-xxxi.pdf, at pp.28-29.
[177] Cassandra Brooks, *Why are talks over an East Antarctic marine park still deadlocked?* (2017) The Conversation, <https://theconversation.com/why-are-talks-over-an-east-antarctic-marine-park-still-deadlocked-86681> (accessed 15 June 2021).

"splash" in the high seas as it had managed within its own territory. It is also significant that the proposed East Antarctic MPA was situated in the area where Australia's historic sovereignty claims reside, perhaps indicating a desire to replicate the domestic network within Australia's claim.[178] In any case it is clear that the timing of Australia's dramatic domestic expansion of MPAs and the CCAMLR East Antarctic proposal were not coincidental, and each was planned to build momentum for the other.

As such Australia took significant action in both spheres of its MPA practice in 2012 and behaved very much in a way expected by the Feedback Loop Model. Throughout the first two decades of practice analysed, in fact, Australia continued to exceed its international obligations domestically, while projecting a reputation as a "good international ocean citizen". This reputation was then used to attempt to bring new elements to international law, such as at the WSSD and as a part of CCAMLR (See Figure 4 below for a visual of these interactions). However, while Australia had so far adhered to this strategy, in the final era of practice it demonstrated significant deviation from the expected model.

[178] Brooks et al. (n 65), at p.6.

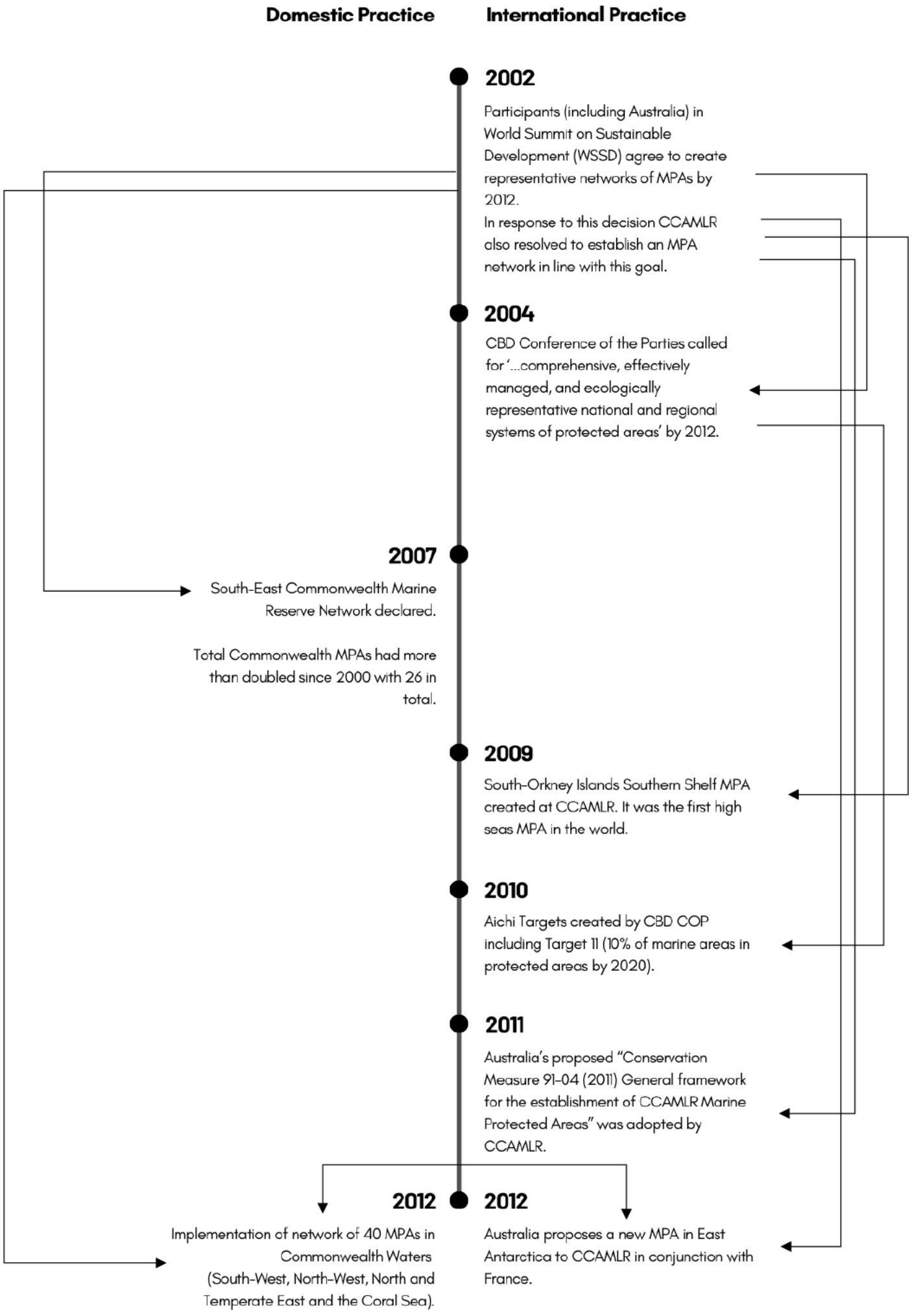
Domestic Practice
International Practice
2002
Participants (including Australia) in World Summit on Sustainable Development (WSSD) agree to create representative networks of MPAs by 2012.
In response to this decision CCAMLR also resolved to establish an MPA network in line with this goal.
2004
CBD Conference of the Parties called for '...comprehensive, effectively managed, and ecologically representative national and regional systems of protected areas' by 2012.
2007
South-East Commonwealth Marine Reserve Network declared.
Total Commonwealth MPAs had more than doubled since 2000 with 26 in total.
2009
South-Orkney Islands Southern Shelf MPA created at CCAMLR. It was the first high seas MPA in the world.
2010
Aichi Targets created by CBD COP including Target 11 (10% of marine areas in protected areas by 2020).
2011
Australia's proposed "Conservation Measure 91-04 (2011) General framework for the establishment of CCAMLR Marine Protected Areas" was adopted by CCAMLR.
2012
Implementation of network of 40 MPAs in Commonwealth Waters (South-West, North-West, North and Temperate East and the Coral Sea).
2012
Australia proposes a new MPA in East Antarctica to CCAMLR in conjunction with France.

Figure 4 (previous page): A timeline highlighting key events in Australia's domestic and international practice focusing on the 2002-2012 era. Directional arrows indicate theorized causation based on the Feedback Loop Model. Double sided directional arrows represent reciprocal interaction between national and international developments.

Sources:

World Summit on Sustainable Development, *Draft plan of implementation of the World Summit on Sustainable Development* (2002) A/CONF.199/L.1, <https://www.un.org/ga/search/view_doc.asp?symbol=A/CONF.199/L.1&Lang=E> at p.19 (accessed 30 August 2021).

Cassandra M Brooks, 'Competing Values on the Antarctic High Seas: CCAMLR and the Challenge of Marine-Protected Areas' (2013) 3(2) *The Polar Journal* 277–300, at p.286. https://doi.org/10.1080/2154896X.2013.854597

Cassandra M Brooks et al., 'Reaching Consensus for Conserving the Global Commons: The Case of the Ross Sea, Antarctica' (2020) 13(1) *Conservation Letters* e12676, at pp.3-5. https://doi.org/10.1111/conl.12676.

Conference of the Parties of the Convention on Biological Diversity, 'Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Seventh Meeting: VII/28. Protected areas (Articles 8 (a) to (e))' UNEP/CBD/COP/DEC/VII/28 (13 April 2004), at pp.3 and 7.

Peter Cochrane, 'The marine protected area estate in Australian (Commonwealth) waters' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016) at pp.45-63.

Commission for the Conservation of Antarctic Marine Living Resources, *Conservation Measure 91-03 (2009) Protection of the South Orkney Islands southern shelf* (2009) 91-03 <https://www.ccamlr.org/en/measure-91-03-2009> (accessed 23 April 2021).

Convention on Biological Diversity, *Aichi Biodiversity Targets*, <https://www.cbd.int/sp/targets/> (Accessed 1 March 2021).

Goldsworthy et al., 'Marine protected areas in the Antarctic and Sub-Antarctic region' in Wescott and Fitzsimons eds., Big, Bold and Blue: Lessons from Australia's Marine Protected Areas. CSIRO Publishing, 2016, at pp.105-106.

Commission for the Conservation of Antarctic Marine Living Resources, 'Conservation Measure 91-04 (2011) General framework for the establishment of CCAMLR Marine Protected Areas' (2011) 91-04, available at: (https://www.ccamlr.org/en/measure-91-04-2011), (accessed 23 April 2021).

Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), "Report of the Thirty-First Meeting of the Commission", Hobart, Australia 23 October- 1 November, available at: https://www.ccamlr.org/en/system/files/e-cc-xxxi.pdf, at pp.28-29.

4.3 2013- Current: MPA Stagnation with Signs of Life?

The Feedback Loop Model does not represent an unconditional expected behavioural pattern for a state but rather a strategy that interested middle powers may use to increase their influence in a particular issue area. Hence, it is only viable when state decision-makers see the issue in question as an important national interest. This becomes particularly clear in the current period of MPA practice.

After the change of government in 2013 election, Australia's desire to pursue leadership on MPAs was called into question. Specifically, the newly elected Prime Minister Tony Abbott made his stance on Australia's comprehensive MPA action clear in the lead up to the election.[179] On the announcement of the large MPA expansion in 2012, Abbott, then leader of the opposition, was quoted as saying he was "'"instinctively against" anything which impinges on the rights of recreational fishermen."[180] This was followed by rhetoric throughout the 2013 election campaign such as "We do not want to lock up our oceans".[181] Hence the reduction of the previous government's MPA action was a policy that Abbott brought to the 2010 and 2013 elections, representing the effective "collapse of bipartisanship" on MPA policy which had continued across multiple governments from both major parties to this point.[182] Correspondingly the new government in 2013 announced an independent review into Australia's domestic MPA network.[183] This put a halt on Australia's previously rapid progress towards MPA expansion. This also meant that Australia was no longer on the path to accrue goodwill for its ocean action, hence the new policy represented a derogation from the Feedback Loop Model. It is possible that there was a perception that Australia had already created enough of a reputation in the ocean management space that it could afford to take a break from decisive action and instead focus on tinkering with the existing system, while still wielding influence on the international stage.

The results of the review were released with revised zoning in 2015 before the further revision in 2018 by the Director of National Parks.[184] This final and most current MPA network still covers around 36.7% of Australia's waters,[185] but it has been argued that:

---

[179] Chris Smyth, 'Commonwealth marine reserves: big and bold campaigns but business-as-usual outcomes?' in Wescott and Fitzsimons eds., *Big, Bold and Blue: Lessons from Australia's Marine Protected Areas* (CSIRO Publishing, 2016), 379-390, at p.385.
[180] Duffy (n 11).
[181] Smyth (n 179).
[182] *Ibid*.
[183] Cockerell et al. (n 36), at p.2.
[184] *Ibid*.
[185] Calculated from data reported at: Australian Government: Department of Agriculture, Water and the Environment (n 24).

> "Protection levels of the 2018 MPA system were downgraded when compared to both the 2012 and 2015 iterations. This was evidenced by the substantial loss of highly protected zones (I – II) in 2018, replaced either by zones protecting only seafloor habitats, i.e. Habitat Protection Zones (IV), or zones offering little biodiversity protection, i.e. Multi-Use Zones (VI)."[186]

Indeed, in categorising instances of "downgrading, downsizing, and degazettement" in worldwide MPAs, Albrecht et al found that the 2018 review resulted in substantial downgrading of Australia's MPA network.[187] Additionally, it was found that 21 of the 26 downgrading events that took place were associated with reducing restrictions on commercial fishing.[188] Furthermore, the "residual" nature of Australia's MPAs was now becoming more evident within the literature as stated by Cockerell et al:

> "All iterations of the MPA system made negligible, and progressively smaller, reductions in the exposure of marine biodiversity to threats posed by commercial fishing and petroleum extraction."[189]

Hence, Australia's domestic network not only halted its previously rapid progress in this period, but also lessened its already highly criticised effectiveness. It should be noted that this rezoning did not significantly reduce the total area of Australian waters that were covered by some form of MPA, just the level of protection within these MPAs. This likely indicates that while Australia was engaged in effective downgrading of MPA protections, it still aimed to maintain a reputation which came from the coverage percentage statistics. This fits with the argument that Australia has long prioritised reputation over effectiveness of MPAs. This is starkly highlighted by the finding that if only areas that were protected from "industrial-scale activity" were counted to Australia's MPA coverage total the MPA network would represent only 8% of the Australian EEZ.[190] This raises the question of how Australia's international practice faired in the same time period, as the Feedback Loop predicts the need for enthusiastic domestic action in order to have a greater impact on international developments on MPAs.

Looking to Australia's performance in CCAMLR, there is also a corresponding stagnation evident. Since the introduction of Australia's East Antarctica Proposal in 2012 there has been no agreement on its implementation.[191] This is despite Australia conceding a significant reduction of the area covered

---

[186] Cockerell et al. (n 36), at p.8.
[187] Albrecht (n 33).
[188] *Ibid*.
[189] Cockerell et al. (n 36), at p.8.
[190] Albrecht (n 33), at p.8.
[191] See e.g., Commission for the Conservation of Antarctic Marine Living Resources (n 78).

from seven zones covering 1.8 million km^2 down to three covering only 1 million km^2.[192] Meanwhile the Ross Sea Region MPA, also proposed in 2012 by the United States and New Zealand, had gone on to be implemented in 2016 and was the largest high seas MPA in the world.[193] Flaws in Australia's MPA practice, perhaps coupled with a lack of political will to pursue the East Antarctic Proposal more vigorously, had seen Australia's MPA progress in Antarctica languish along with its domestic activities. For example, McGee et al raise the potential of a "logrolling strategy" in which Australia may cooperate with China by supporting its stalled proposal on special area management around its Kunlun research station in exchange for support on the stalled East Antarctic MPA proposal.[194] Though the authors ultimately caution against the risks that this sort of strategy may have for the norms of the Antarctic Treaty System, [195] it reflects perhaps a lack of political will that Australia has not been able to successfully pursue similar diplomatic strategies in relation to the East Antarctic MPA proposal in the past nine years. Indeed, given the time that has passed since its East Antarctic Proposal was first introduced, it seems unlikely that Australia would allow a priority area to lag so significantly, without a lack of support from the federal government.

The Feedback Loop Model would suggest that this lack of progress is the result of a decline both in Australia's reputation as an international MPA leader, but also in a lack of willingness to engage in the Feedback Loop influence building strategy in the first place. It seems evident that it was not a priority for the Australian government in 2013 and has remained so in the near decade since.

However, MPA action has begun to re-emerge recently as part of Australian policy. Namely the current federal government has announced plans to create MPAs in the waters surrounding Australia's Indian Ocean territories, Christmas Island and the Cocos (Keeling) Islands.[196] This would purportedly cover 740,000km^2 and increase Australia's MPA coverage from 37% to 45% of its own waters.[197] While this seems a sudden positive development for Australian MPA progress, it is worth noting several characteristics of these proposed MPAs. The first is the distant nature of these reserves. While they are important habitats in their own right, they also represent faraway areas of Australia's maritime space that are relatively insulated from large scale mainland commercial activities. Hence, they arguably represent a continuation of the residual approach to MPAs that has been broadly critiqued within the literature.[198] Furthermore, the impressive increase in coverage numbers being prominently spruiked indicates that the Australian government is continuing its focus on the visibility of the MPA action rather than its effectiveness. While it is difficult to speak to the actual efficacy of

[192] Brooks (n 67).
[193] Teschke et al. (n 58).
[194] McGee et al. (n 87).
[195] *Ibid.*, at pp.9-10.
[196] Department of Agriculture, Water and the Environment (n 54).
[197] *Ibid.*
[198] See e.g., Devillers et al (n 28).

these proposed reserves, as they are still in the planning stages, they represent a significant shift in Australia's MPA practice which, since 2013, had been characterised by stagnation, and arguably regression, in all areas.

It appears that the stagnation was the result of new policy considerations in 2013 which viewed MPAs as less of a priority area. One possible reason for this decline in interest is that Australia had easily reached and exceeded all key international obligations and targets that had been set for MPAs at least from a purely percentage coverage perspective (e.g., Aichi Target 11 of 10% coverage).[199] As such, there may have been a perception of diminishing returns for pushing ahead with domestic action, manifesting in an apparent economic opportunity cost for missing development prospects that less well-protected states may seize upon.

However there has been a fundamental shift in the ocean management and biodiversity conservation landscape in general, with the election of President Joe Biden in the United States.[200] Namely with Biden's concerted push to take drastic and immediate environmental action in the early stages of his presidency, international momentum has rapidly gathered for more ambitious international targets for biodiversity protection.[201] Biden himself has announced the United States' plan to reach 30% coverage of both terrestrial and marine spaces by 2030.[202] Meanwhile 60 states have joined the High Ambition Coalition for Nature and People which calls for the same goals to protect biodiversity.[203] Australia itself, seemingly in response to this renewed interest in biodiversity conservation, has announced its membership of the Global Ocean Alliance's 30 by 30 Initiative as well as the High Ambition Coalition, each of which strive for this same 30% coverage target by 2030.[204]

However, while the more ambitious target of 30% coverage of ocean areas is still being exceeded by Australia, it seems the need to remain at the forefront of this issue as a "good international ocean citizen" has remerged in Australian policy discourse. Namely the aim to increase coverage well beyond 30%, to 45%, can be seen as a peremptory move to stay ahead of other states who may soon match Australia's current coverage. Likewise, Australia recently announced a new $100 million "Oceans Leadership Package" in its recent federal budget.[205] The reputation projection is evident in the title as well as in the accompanying statement from Environment Minister Sussan Ley who

---

[199] Convention on Biological Diversity (n 46).
[200] Chase et al., *Biden's Historic Action on 30x30* (2021) Natural Resources Defense Council <https://www nrdc.org/experts/alison-chase/bidens-historic-action-30x30> (accessed 23 April 2021).
[201] *Ibid.*
[202] *Ibid.*
[203] High Ambition Coalition for Nature and People, (2021) <https://www.hacfornatureandpeople.org/> (accessed 24 June 2021).
[204] Department of Agriculture, Water and the Environment (n 44); Department of Agriculture, Water and the Environment, *Australia joins international alliance to conserve planet's biodiversity* (2021) <https://minister.awe.gov.au/ley/media-releases/australia-joins-international-alliance-conserve-planets-biodiversity> (accessed 15 June 2021).
[205] Prime Minister, Minister for the Environment, Minister for Energy and Emissions Reduction (n 23).

proclaimed that "Australia already has one of the largest networks of marine parks in the world, protecting over 3.3 million square kilometres of our marine jurisdiction and this expansion will further support the health of our oceans."[206] Hence, it remains to be seen whether Australia seeks to leverage these new developments into greater influence in international law-making forums such as the next Intergovernmental Conference for the BBNJ, now scheduled for early 2022.[207] This possibility will be explored in Chapter 5.

While this period of Australian MPA practice has represented significant stagnation in the previously enthusiastic development of MPAs, it appears that a renewed effort is being made to return to the Feedback Loop Model (See figure 5 for key events). After a hiatus which appeared to be the result of a lack of domestic initiative and stalling international targets, it seems Australia is again attempting to take visible action in response to rapid international developments. It is also worth noting that the concern with reputation seemed to be present even when Australia did little but downgrade MPA protection as coverage numbers specifically remained consistent. Now that Australia has announced the latest wave of domestic action it remains to be seen how it may translate this into international sphere, namely in CCAMLR with its East Antarctica Proposal, as well as part of the BBNJ.

[206] Department of Agriculture, Water and the Environment, *Celebrating World Oceans Day* (2021) <https://minister.awe.gov.au/ley/media-releases/celebrating-world-oceans-day> (accessed 24 June 2021).
[207] UNGA Res.75/L.96 (n 8).

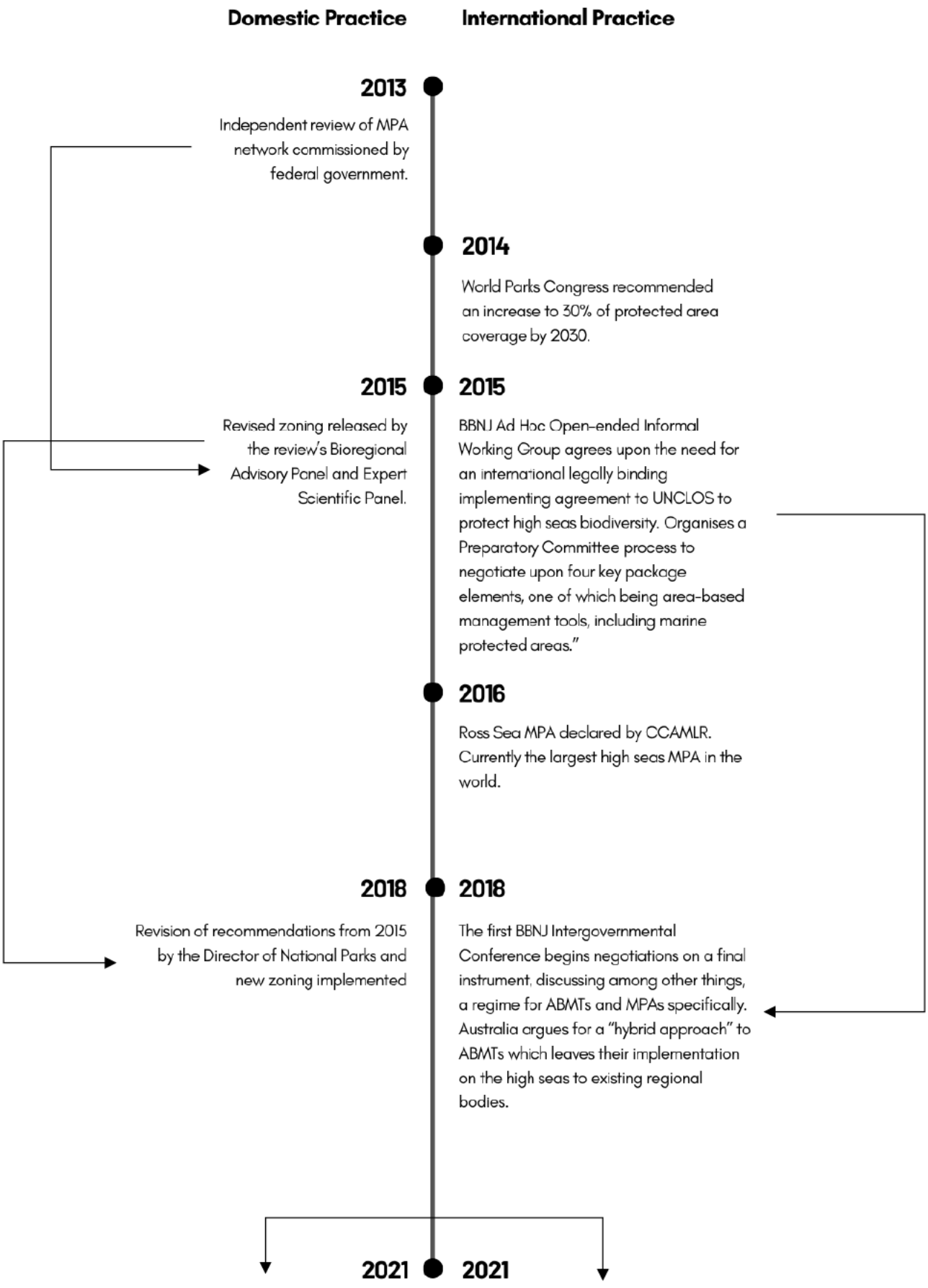
Domestic Practice
International Practice
2013
Independent review of MPA network commissioned by federal government.
2014
World Parks Congress recommended an increase to 30% of protected area coverage by 2030.
2015
Revised zoning released by the review's Bioregional Advisory Panel and Expert Scientific Panel.
2015
BBNJ Ad Hoc Open-ended Informal Working Group agrees upon the need for an international legally binding implementing agreement to UNCLOS to protect high seas biodiversity. Organises a Preparatory Committee process to negotiate upon four key package elements, one of which being area-based management tools, including marine protected areas."
2016
Ross Sea MPA declared by CCAMLR. Currently the largest high seas MPA in the world.
2018
Revision of recommendations from 2015 by the Director of National Parks and new zoning implemented
2018
The first BBNJ Intergovernmental Conference begins negotiations on a final instrument, discussing among other things, a regime for ABMTs and MPAs specifically. Australia argues for a "hybrid approach" to ABMTs which leaves their implementation on the high seas to existing regional bodies.
2021
Australia announces plans to establish two new large MPAs around Christmas Island and the Cocos (Keeling) Islands. These proposed MPAs will cover 740 000 square kilometres and will increase Australia's MPA coverage percentage from 37% to 45% according to the current Environment Minister Sussan Ley.
2021
Australia signs on to Global Ocean Alliance's 30 by 30 initiative (supporting the target of 30% of the ocean protected by 2030). Also joins the High Ambition Coalition for Nature and People which has the same target.

Figure 5 (previous page): A timeline highlighting key events in Australia's domestic and international practice focusing on the 2013-Current era. Directional arrows indicate theorized causation based on the Feedback Loop Model. Double sided directional arrows represent reciprocal interaction between national and international developments.

Sources:

Brayden Cockerell et al., 'Representation Does Not Necessarily Reduce Threats to Biodiversity: Australia's Commonwealth Marine Protected Area System, 2012–2018' (2020) 252 *Biological Conservation* 108813, at p.2. https://doi.org/10.1016/j.biocon.2020.108813

MPA News, 'The 30% no-take target of the World Parks Congress: Why it is both problematic and useful' (2015), available at (https://mpanews.openchannels.org/news/mpa-news/30-no-take-target-world-parks-congress-why-it-both-problematic-and-useful), (accessed 23 April 2021).

UNGA Res.69/292 (6 July 2015) Sixty-ninth session, agenda item 74(a).

The International Institute for Sustainable Development, 'Summary of the First Session of the Intergovernmental Conference on an Internationally Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction' (2018) 25(179) *Earth Negotiations Bulletin* 1-18, at p.8.

Commission for the Conservation of Antarctic Marine Living Resources, *Conservation Measure 91-05 (2016) Ross Sea Region Marine Protected Area* (2016) 91-05 <https://www.ccamlr.org/en/measure-91-05-2016> (accessed 23 April 2021).

Department of Agriculture, Water and the Environment, *Joint media release: Australia to expand Marine Parks* (May 2021) <https://minister.awe.gov.au/ley/media-releases/australia-expand-marine-parks> (accessed 15 June 2021).

Department of Agriculture, Water and the Environment, *Joint media release: Protecting our unique marine environment* (October 2021) <https://minister.awe.gov.au/ley/media-releases/protecting-our-unique-marine-environment> (accessed 5 October 2021).

Department of Agriculture, Water and the Environment, *Australia joins Global Ocean Alliance* (2021) <https://minister.awe.gov.au/ley/media-releases/australia-joins-global-oceans-alliance?utm_source=miragenews&utm_medium=miragenews&utm_campaign=news> (accessed 15 March 2021).

Department of Agriculture, Water and the Environment, *Australia joins international alliance to conserve planet's biodiversity* (2021) < https://minister.awe.gov.au/ley/media-releases/australia-joins-international-alliance-conserve-planets-biodiversity> (accessed 15 June 2021).

4.4 How to Understand the Interaction Between Australia's International and National Law-Making on MPAs?

Having examined Australian MPA practice over three distinct periods, the findings of this analysis can now be consolidated to characterise the interaction between Australia's domestic and international policy on MPAs. This will serve to address the first research sub-question.

As outlined in the above sections, three distinct periods in Australia's MPA practice are observable. The first (1990-2000) laid the groundwork for the current prominence of MPAs, both within Australia and internationally. Foundational environmental treaties motivated Australia to adopt a series of policy plans which culminated in the decision to establish the NRSMPA.[208] Furthermore, Australia was observed adhering to the initial stages of the Feedback Loop Model in its response to international MPA action, as it took actions to project a reputation as a good international citizen on this issue. However, the translation of this reputation into influence in the international sphere, as envisioned by the Feedback Loop Model, did not yet occur in this period.

The second period (2001-2012) saw the full utilisation of the Feedback Loop strategy for Australia within MPA policy. It exerted significant influence over the development of MPA targets internationally, while vigorously pursuing expansion of domestic coverage. This was highlighted internationally by its influential role at the WSSD on MPAs and subsequent international targets, the adoption of Conservation Measure 91-04 as a general framework for MPAs within CCAMLR and the subsequent East Antarctica MPA Proposal.[209] Meanwhile domestically Australia increased its MPA network from 7.2% in 2002 to 36.4% of Australian waters by 2012.[210] This period represented a largely successful attempt by Australia to establish reputation and influence on MPA policy, even if the conservation outcomes were less effective.[211]

However, within the final period analysed (2013-current), Australia began to pull away from the Feedback Loop Model, instead engaging in reviews which downgraded the protected status of its domestic MPAs while seeing international MPA proposals stagnate.[212] This highlighted an important

---

[208] Cochrane (n 143), at pp.45-47.
[209] Conference of the Parties of the Convention on Biological Diversity (n 155); Commission for the Conservation of Antarctic Marine Living Resources, 'Conservation Measure 91-04 (2011) General framework for the establishment of CCAMLR Marine Protected Areas' (2011) 91-04, available at: (https://www.ccamlr.org/en/measure-91-04-2011), (accessed 23 April 2021); Commission for the Conservation of Antarctic Marine Living Resources (n 176) .
[210] Calculated from data reported at: Australian Government: Department of Agriculture, Water and the Environment (n 24).
[211] See e.g., Devillers et al. (n 28).
[212] Cockerell et al. (n 36).

caveat for the Feedback Loop Model. That is, the model relies on a middle power state having a policy interest in achieving international influence on an issue to be an accurate predictor of its behaviour. Also, it raised a potential cost-benefit trade-off that may have been considered, given Australia was significantly ahead of the international coverage targets at the time, it may have concluded there was little more to gain from being even further ahead of the international average.

However, to this point in 2021 there has been a significant resurgence in Australia's engagement with international MPA developments, with its commitment to a number of non-binding 30% coverage targets.[213] Likewise, Australia has recently declared its intention to implement further domestic MPAs, bringing its national coverage up to 45%.[214] These recent actions seem to signal Australia's desire to return to building a reputation as a leader in MPA practice, as per the Feedback Loop Model. This is perhaps in response to a renewed push for more robust MPA coverage targets internationally. It is yet to be seen if this trend will continue to emulate the model in future. Particularly interesting will be if Australia attempts to tie this domestic action into greater influence at the next stage of BBNJ negotiations, which will be examined further in Chapter 5.

As such three distinct periods of Australian MPA practice have resulted in differing interactions between Australia's international and domestic practice. The first (1990-2000) is characterised by Australia's robust policy response to international treaties. The second (2001-2012) is better understood as a complete example of the cyclical interaction between the two levels of law-making, with multiple examples of Australia leveraging domestic action in international settings. Finally, the third period represents a deviation from this approach with a more inactive MPA practice. However, at the end of this period there has been some recent suggestion that Australia may return to the Feedback Loop Model of behaviour. Perhaps 2021 and beyond could even represent the start of another new period of Australian practice.

To conclude though on how to categorise the interaction between Australia's domestic and international MPA policy, the differences between these distinctive periods need to be explained. What is it that drives Australia's MPA law and policy to differ so drastically from one decade to the next? It appears that the Feedback Loop Model is only an accurate predictor of behaviour when the national government prioritises MPAs as a part of Australian foreign policy. While this has largely been the case over these three decades of practice, it is not guaranteed. Indeed, it could even be expected that a large amount of visible domestic action on MPAs could trigger somewhat of a

[213] See e.g., Department of Agriculture, Water and the Environment (n 44) (n 204).
[214] Department of Agriculture, Water and the Environment (n 54).

pushback from domestic stakeholders.[215] Furthermore, periods of reduced action on international MPAs may also cause stagnation and introspection from domestic policy makers.

Despite all these variations in national policy, however, it is clear that international law affects domestic law on MPAs and that domestic law is then brought by Australia into international law-making processes such as CCAMLR and the BBNJ negotiations. The theorised reason for this process, that Australia as a middle power wishes to have greater influence over areas of international law despite its limited capabilities, holds up reasonably well when analysed alongside the distinctive periods of Australian practice. While deviations from the Feedback Loop Model may occur, it appears that these are merely periods of adjustment in which a combination of domestic and international factors reduce the priority of MPA action. Given the recent developments, both domestically and internationally on MPAs to this point in 2021, it is not unreasonable to expect that Australia is looking to return to reputation building on marine management. As such, in answer to the research sub-question: "How does Australia's domestic and international MPA practice interact?" the following can be said: Australia's domestic and international MPA practice generally follow a Feedback Loop Model which sees Australia take domestic action to increase international influence. While there may be occasional stagnation, if international action continues to develop, Australia will eventually return to influence building in response.

As such, the first of the two research sub-questions has largely been addressed. The next chapter will then turn to the second research sub-question. Namely, Chapter 5 will discuss what the ongoing pattern of Australian MPA policy interaction may mean for the ongoing BBNJ negotiations and the future high seas MPA regime. The criticisms of Australia's domestic and international practice will also shape the conclusions drawn in order to envision lessons that may be applied to the BBNJ regime.

[215] See e.g., James Fitzsimons and Geoff Wescott, 'Large-scale Expansion of Marine Protected Area Networks: Lessons from Australia' (2018) 24(4) *Parks* 19-34, at pp.20-22.

5. What are the Implications of Australia's Practice for the BBNJ Negotiations on High Seas MPAs?

Chapter 4 categorised the interaction between Australia's national and international practice to address the first research sub-question. This new understanding of Australia's practice can now be used to inform an examination of potential future actions Australia may pursue on MPAs. As such, this chapter will address the second research sub-question: "What effect does the interaction between Australia's domestic and international practice have on the BBNJ negotiations on MPAs?" In order to answer this question, firstly Australia's current positions at the BBNJ negotiations will be examined, especially in relation to the ABMT package element and MPAs specifically (Chapter 5.1). This will be achieved through the application of the Feedback Loop Model to Australia's behaviour in order to attempt to explain its conduct to this point, as well as project forward and analyse what it may hope to achieve in the upcoming negotiations. Next, this chapter will examine the potential for Australia to influence the course of MPA creation on the high seas after the agreement has been finalised and whether this will have a positive or negative effect on the quality of ocean conservation (Chapter 5.2). Finally, this section will conclude with some lessons that the BBNJ may be able to draw from Australia's MPA practice in order to design a more effective international regime for high seas MPAs (Chapter 5.3).

5.1 How can Australia influence the BBNJ Negotiations on MPAs?

In order to explore what effect Australia's practice may have on the BBNJ negotiations, it is important to remember the theorised goal of Feedback Loop Model. That is, for Australia to increase its influence on the formation of the international obligations surrounding MPAs to compensate for its limited size. This is driven by Australia's prioritisation of ocean management in its foreign and domestic policy.[216] With this in mind, it is expected that Australia, having largely engaged in this reputation building behaviour on MPAs, would be particularly focused on the regime for ABMTs at the negotiations. Wright et al. note that Australia has "highlighted lessons learned from domestic experiences," on "ecological issues" within the negotiations so far.[217] This is the sort of assertion of reputation that is expected from a middle power within the Feedback Loop Model. It follows that, in highlighting its reputation regarding MPAs in particular, Australia would argue for an MPA regime

[216] See e.g., Australian Government (n 19).
[217] Wright et al. (n 2).

on the high seas which allows for the replication of its own practice. After all, its East Antarctic MPA proposal was based upon the same "CAR" (comprehensive, adequate, representative) principles as its domestic network and shared some of the same flaws.[218] Hence Australia can be expected to argue for an MPA regime which gives it the agency to continue to attempt to implement its own MPA policy in high seas areas. The following assessment of Australia's BBNJ practice then will look where and how Australia advocates for such measures.

To briefly summarise Australia's arguments to this point on the BBNJ negotiations on ABMTs; Australia has supported "…promoting ABMT establishment by regional bodies, and greater coordination and coherence, including through global standards and principles."[219] In other words it has argued for a "hybrid model" of ABMT implementation which would aim to enhance the ability of regional bodies to implement ABMTs on the high seas, as will be discussed below.[220] Australia also expressed a preference for recognising the "…knowledge and science base…" of these existing bodies, though not through any formal notion of recognition or establishment of a hierarchy within the BBNJ regime.[221] It envisions this being possible by "…encouraging them to make better use of ABMTs, with reporting mechanisms; and "mandating the ILBI COP [international legally binding instrument Conference of the Parties] to discuss implementation and share information."[222] In short Australia appears to focus particularly on the role of regional bodies in the BBNJ process.

To understand the content of Australia's argument on ABMTs it is important to outline that the ways in which the new instrument may interact with the plethora of existing measures on the high seas. Namely, it has been agreed that the new instrument "should not undermine" existing bodies and instruments which has been particularly difficult given the range of ABMTs that exist across a number of sectors in the high seas.[223] This includes a plethora of sectoral (such as the International Maritime Organisation (IMO) and International Seabed Authority (ISA)), regional (such as RFMOs) and other regimes that need to be accounted for by the design of the BBNJ instrument.[224]

The way that these complex interactions have been addressed at the negotiations is through the usage of three simplified general models by a report of the negotiation chair, published after the preparatory committee process.[225] These are the global, regional/sectoral and hybrid models.[226] The global model

---

[218] Kearney et al. (n 37).
[219] The International Institute for Sustainable Development (n 21) at p.6.
[220] Scott (n 12) at pp.176-177.
[221] The International Institute for Sustainable Development (n 21), at pp.6-8.
[222] *Ibid.*, at p.8.
[223] UNGA Res.69/292 (n 5) (3).
[224] O'Leary et al. (n 17).
[225] United Nations, *Chair's streamlined non-paper on elements of a draft text 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 diversity of areas beyond national jurisdiction* (2017)

envisions a top-down approach to ABMT implementation which will involve the creation of an overarching body which can give directions to existing organisations.[227] A sectoral/regional approach on the other hand advocates sparse changes to the international system, relying simply on bodies such as RFMOs, the ISA and the IMO to undertake area-based conservation measures under their existing mandate.[228] Finally, a hybrid model lies somewhere between these two extremes and would involve empowering these regional bodies to undertake these decisions through standard-setting and expanding their mandates.[229] This is the approach that Australia has advocated for. It is also worth noting that these categories have been criticised as obscuring the matter rather than clarifying it.[230] Indeed, it has been argued that the level of regime interaction is better understood on a sliding scale from the global to regional approaches.[231] In any case, these points highlight the difference of opinion over how to best implement ABMTs, particularly MPAs, in the high seas and hence what part Australia's position may play.

The motivation behind, and indeed the merit of, Australia's proposals are important factors to consider, especially as the BBNJ negotiations may well trend towards a middle ground position on ABMTs. As will be discussed in the next section, Australia's hybrid approach is likely to be particularly influential to the final agreement given its appearance of compromise between the global and regional approaches. This is especially the case if Australia is able to successfully leverage its reputation as a good MPA actor within the negotiations.[232]

Australia's argument for a "hybrid model" of decision-making is particularly significant given that Australia plays a prominent role in a number of regional fisheries management organisations (RFMOs) despite a lack of large distant water fisheries.[233] Australia's reputation as a leading actor in a number of these bodies supports the idea that it believes that it would have a greater influence over the placement and implementation of these high seas MPAs in a hybrid regime. This is especially relevant as the RFMOs with Australian membership largely cover the oceans surrounding Australia,

---

<https://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf> (accessed 4 November 2020) at pp.21-22.

[226] *Ibid*.

[227] Scott (n 12) at pp.176-177.

[228] *Ibid*.

[229] *Ibid*.

[230] See, e.g., Nichola A Clark, 'Institutional arrangements for the new BBNJ agreement: Moving beyond global, regional, and hybrid,' (2020) 122 *Marine Policy* 104143; 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* 1–44. https://doi.org/10.1163/9789004395633_002

[231] Gjerde et al. (n 230), at pp.36-37.

[232] See e.g., Lightfoot (n 41).

[233] Kwame Mfodwo, and Martin Tsamenyi, 'Developments in Global Fisheries to 2020: Implications for Australia's Fisheries Interests and Enforcement Obligations.' (2011) 3(4) *Australian Journal of Maritime & Ocean Affairs* 120–29, at pp.120-121. https://doi.org/10.1080/18366503.2011.10815689.

the Indian, Pacific and Southern Oceans.[234] It is probable then that Australia would look to be heavily involved in the creation of MPAs, particularly in these areas given their proximity to Australia's own national waters. As such, Australia would be able to wield greater influence as a middle power in a smaller organisation such as these RFMOs (the RFMOs with Australian membership average approximately 20 members),[235] compared to a potential global decision-making body for BBNJ. Australia is also likely against the regional model as it would be desirable to confer greater responsibility upon RFMOs and other regional bodies by enhancing their capabilities, rather than merely leaving them to protect high seas biodiversity through their existing remit.[236]

Australia would potentially be able to replicate or improve upon its influence within CCAMLR's MPA system within the RFMOs of which it is a member. While Australia has been unsuccessful in implementing its East Antarctica MPA to this point, it has still wielded significant influence as a part of CCAMLR, particularly in its proposed and accepted Conservation Measure 91-04 as a General Framework on MPAs.[237] Having the ability to have such an influence over the high seas MPA processes within other RFMOs would allow Australia to be able to safeguard its interests within the ocean areas that surround it. In fact, a parliamentary document from 2014 highlighted a number of policy motivations for Australia to engage strongly with RFMOs, namely statements such as "protect and enhance our sovereign interests…", "protect sovereign rights…", "combat IUU fishing…" and "influence…conservation and management…"[238] were all mentioned. This highlights the role of RFMOs for Australia is as an instrument for greater influence on ocean policy outside of Australia's borders. Australia's niche diplomacy capabilities are also relevant here as Haward and Bergin contend:

> "Regional fisheries issues are multilevel 'games' in which our interests in one forum can affect activities in another. Skills in conference diplomacy are therefore important."[239]

---

[234] Australian Government Department of Agriculture, Water and the Environment, *International fisheries* <https://www.agriculture.gov.au/fisheries/international> (accessed 9 July 2020).
[235] Calculated by author (excluding observer and partner states) from Australian Government Department of Agriculture, Water and the Environment, available at:
<https://www.agriculture.gov.au/fisheries/international/ccsbt>;
<https://www.agriculture.gov.au/fisheries/international/iotc>;
<https://www.agriculture.gov.au/fisheries/international/siofa>;
<https://www.agriculture.gov.au/fisheries/international/south-pacific-rfmo>;
<https://www.agriculture.gov.au/fisheries/international/wcfpc>;
<https://www.agriculture.gov.au/fisheries/international/ccamlr>; (accessed 16 July 2021).
[236] Scott (n 12) at p.176.
[237] Goldsworthy et al (n 163).
[238] Department of Agriculture, *Australia's future activities and responsibilities in the Southern Ocean and Antarctic waters* (June 2014) <https://www.aph.gov.au/DocumentStore.ashx?id=672e2f44-70d2-4e1c-aec3-4c24821f26cc&subId=253746> at pp.2-3.
[239] Haward and Bergin (n 133), at p.15.

As such Australia's ability to strategically influence these organisations through its usage of the Feedback Loop Model is an important consideration. Ultimately then Australia is likely arguing for a hybrid model to MPAs at the BBNJ, as it allows for greater influence over key areas of law-making.

This approach is reflected in the theorised Feedback Loop Model which envisions Australia aiming to build a reputation through domestic action and then utilising niche diplomacy to bring this influence to international negotiations. In this case, having exercised its domestic power to build an extensive MPA network within its own waters, as well as attempting to achieve a similar outcome in its Antarctic claim, it is reasonable to assume that Australia would like to exert as much influence as possible over a network of MPAs that may be instituted in the high seas areas surrounding its national waters. Indeed, Australia has also argued strongly for consultation with coastal states as a part of the ABMT process under the BBNJ instrument.[240] It seems then that Australia strategically approaches MPA policy with an aim to continue to exert a key influence in the emerging BBNJ regime. It has been mentioned that Australia has leveraged its domestic experiences to this end while there has also been a recent increase in Australia's MPA actions, despite a preceding period of stagnation discussed in Chapter 4.[241] Australia's latest action towards new MPAs has involved an increase in publicity surrounding its return to ocean conservation action, and hence influence building:

> "Minister Ley said that the Oceans Leadership Package signals an exciting new phase of its [the federal government's] commitment to ocean health, advancing blue carbon initiatives and marine biodiversity."[242]

Furthermore, the MPA credentials of Australia, specifically the coverage aspect, have also been used in this promotional manner recently:

> "Consultation has begun on the establishment of a Marine Protected Area larger than the size of France in Australia's Indian Ocean Territories which could see formal protection across up to 45% of the nation's oceans… Australia already has one of the largest networks of marine parks in the world, protecting over 3.3 million square kilometres of our marine jurisdiction and this expansion will further support the health of our oceans."[243]

This indicates that perhaps Australia is looking to re-engage with international ocean process such as the BBNJ negotiations. The upcoming IGC-4 in early 2022 is the last one scheduled,[244] although allowances may be made for further negotiations. Hence, it is likely that Australia is making a significant diplomacy push to achieve its goals for the ABMT package element of the new instrument.

---

[240] See e.g., The International Institute of Sustainable Development (n 21), at p.8.
[241] See e.g., See e.g., Department of Agriculture, Water and the Environment (n 54)
[242] Department of Agriculture, Water and the Environment (n 206).
[243] *Ibid*.
[244] UNGA Res.75/L.96 (n 8).

It seems then, from exploring Australia's performance at the BBNJ negotiations, that it is arguing in line with its on-going strategy for MPAs outlined by the Feedback Loop Model. Having explored Australia's current BBNJ practice on MPAs it is worth considering its capacity to influence the BBNJ regime after the completion of the instrument and what implications may result.

5.2 How could Australia influence High Seas MPAs Post-BBNJ?

The quality of Australia's domestic practice has already been assessed extensively by the literature analysed above in Chapter 2. The conclusions drawn found that Australia's practice was largely ineffective as it was overly focused on the appearance of conservation rather than measurable outcomes and genuine protection from threats to biodiversity.[245] While these assessments were of practice in Australia's own waters, some similar patterns were noted in its proposal for an East Antarctic MPA within an international context. Specifically, Australia's proposal was built upon the same, arguably flawed CAR principle,[246] while it also avoided interference with Australia's fishing interests within the Southern Ocean.[247] This reflected the "residual" tendencies apparent within Australian thinking on MPAs.[248] Given the flaws within Australia's practice, it is important to consider what impact Australian influence may have on the BBNJ regime on MPAs after the conclusion of negotiations.

While the replication of Australia's own approach to MPAs within the BBNJ regime would potentially be concerning, for reasons already outlined, the difference in scale of Australia's influence must be noted. While the federal government of Australia has the power to implement whichever approach to MPAs that it may choose in its own waters, there are several layers of decision-making that insulate the international arena from these flaws somewhat. For example, a hybrid approach to MPAs would create a situation where states would need to engage with the various relevant regional bodies in order to create an MPA on the high seas.[249] This means that Australia would not be free to simply model high seas MPAs on its own practice without the input of a number of other actors. As observed within CCAMLR, significant stagnation has occurred on Australia's East Antarctic MPA proposal highlighting the difficulty of securing international agreement on these MPA measures.[250] As such while Australia may be able to obtain agreement on a hybrid model for ABMTs, it does not

[245] See e.g., Devillers et al. (n 28); Cockerell et al. (n 36); Kearney et al. (n 35), (n 37).
[246] Kearney et al. (n 37).
[247] Brooks (n 67).
[248] Devillers et al (n 28).
[249] Scott (n 12), at p.176.
[250] See e.g., Brooks et al. (n 65).

follow that Australia will have complete freedom to implement high seas MPAs in perfect replication of its own domestic MPAs.

However, while Australia may not be able to freely implement high seas MPAs, it may still wield an outsized influence in the final decision-making process. As discussed above, it is very likely that a motive for Australia's argument for a hybrid decision-making model is the retention of the influence it has accrued within the RFMO system. The smaller forums are likely to make it easier for Australia to secure support for its own proposals, while also preventing the implementation of proposals which may be against its interests. As such, it is possible that Australia's MPA practice could still adversely impact the effectiveness of a system of high seas MPAs if Australia is able to help create a system within which it has significant influence.

However, to understand exactly the extent of the influence that Australia may be able to have within the completed BBNJ ABMT regime, it is important to examine exactly which sort of ABMT regime is currently being considered by the negotiating states. The most recent BBNJ Draft Text was prepared by the President of the Intergovernmental Conference, Rena Lee, after the third and latest IGC and serves as a model for the negotiations going forward.[251] While it contains a large amount of bracketed text, to indicate segments that are yet to be agreed upon,[252] it is still a valuable source on the progress of BBNJ negotiations to this point.

The relevant part of the Draft Text is Part III titled "Area-Based Management Tools, including Marine Protected Areas" and consists of draft Articles 14-21.[253] It is worth exploring a number of these relevant articles in order to understand what a potential ABMT regime could look like and hence the areas where Australia may be able to influence high seas MPAs. Immediately, the criticism of Hammond and Jones stands out, that the draft text does not contain any obligation on states to actually establish MPAs in ABNJ, only the mechanism through which they may.[254] However as Australia has shown an inclination to pursue MPA creation proactively in the past, it can still be expected to make use of the following provisions.

As such, beginning with Article 17 addressing the potential process for the submission of MPA proposals, the proposals are to be "…submitted by States Parties… to the secretariat…"[255] and follow

---

[251] United Nations, *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* (2019) <https://undocs.org/en/a/conf.232/2020/3> A/CONF.232/2020/3 (accessed 12 July 2021).
[252] *Ibid.*, at p.2.
[253] *Ibid.*, at pp.13-19.
[254] Amy Hammond and Peter JS Jones. 'Protecting the 'Blue Heart of the Planet': Strengthening the Governance Framework for Marine Protected Areas beyond National Jurisdiction' (2021) 127 *Marine Policy* 104260, at p.10. https://doi.org/10.1016/j.marpol.2020.104260.
[255] United Nations (n 249), at Article 17(1), p.15.

a number of criteria.[256] This indicates that proposals for new MPAs would be brought to the secretariat to commence the process. "Bodies of relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies…" are then invited to consult on the merits of the proposal as per draft Article 18, highlighting the involvement of these regional bodies in the regime.[257]

When it comes to decision-making in draft Article 19 there appears to be much less agreement, indicated by a greater amount of bracketed text.[258] The draft essentially presents two options, the first is that the Conference of the Parties (COP) would be empowered to make decisions regarding "The identification of areas requiring protection…" and "The establishment of area-based management tools, including marine protected areas, and related conservation and [management] [sustainable use] measures…".[259] Having made these decisions, the COP may then decide to recommend measures to "…relevant global, regional and sectoral bodies…" and/or adopt "…complementary…" measures to those of these bodies.[260] Finally, and perhaps controversially, this first option allows for the adoption of measures by the COP "Where there are no relevant legal instruments or frameworks or relevant global, regional or sectoral bodies…".[261]

The second option for draft Article 19 allows the COP only to identify potential ABMTs and make recommendations "…while recognizing the primary authority for the adoption of such measures within the respective mandates of relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.]"[262] Hence these two options for decision-making in the BBNJ draft instrument offer varying levels of authority for the COP in the decision-making process. The first is more in line with the global and hybrid approach in that it envisions some role for the regional and sectoral bodies but also acts to fill gaps between regimes.[263] The second option is much more reminiscent of the regional approach in which the COP is granted very little decision-making power when it comes to ABMTs.[264]

As such, whichever measure is implemented ultimately will have a significant impact on the influence of Australia within the BBNJ instrument. The first option still maintains a strong role for regional bodies, in line with Australia's argument for a hybrid model of decision-making. It envisions the role of the BBNJ draft instrument to recommend measures to these regional bodies and adopt

---

[256] *Ibid.*, at Article 17(4)-(5), p.15.
[257] *Ibid.*, at Article 17(2) (b), p.16.
[258] *Ibid.*, at p.17.
[259] *Ibid.*, at Article 19 Alt. 1(b), p.17.
[260] *Ibid.*, at Article 19 Alt. 1(c), p.17.
[261] *Ibid.*, at Article 19 Alt. 1(d), p.17.
[262] *Ibid.*, at Article 19 Alt. 2, p.17.
[263] Scott (n 12).
[264] *Ibid.*

"…complementary…" measures.[265] In other words where there is a relevant regional or sectoral body, it will have the chief responsibility for the implementation of these measures. However, the COP is authorised to act when there is an absence of relevant bodies, though what circumstances this would include specifically is unclear from the draft text and would likely need further clarification.[266] The second option privileges regional bodies even more, limiting the COP decision-making function to simply making recommendations as to "Matters related to…" ABMTs and other measures to the relevant body.[267] Such a regime would vest the various regional bodies with even greater influence than the first option. It appears then that Australia, as a state that would benefit from a significant role for regional bodies and RFMOs in particular, would be content with the state of these negotiations. After all, either option would vest considerable decision-making power in the RFMOs within which Australia wields significant influence. While Australia has seemingly advocated more in line with the first option,[268] the power of regional bodies would be retained in the second option even more strongly. Perhaps this is because the first option may confer a greater level of legitimacy and allow for greater coordination between the global and regional level, arguably generating more effective outcomes. Indeed, Bergin and Haward make it clear that this is a required skill of successful navigation of fisheries issues, saying that they represent "multi-level games".[269] As Australia has demonstrated this skill previously, it is likely it will wield significant influence over the development of the high seas MPA network, if it is indeed a priority for Australia.

To briefly finish summarising the key points within the draft articles, Article 20 is on implementation.[270] It interestingly compels states (within bracketed text) to "promote" the adoption of ABMTs within regional and sectoral bodies and "encourage" eligible non-parties to comply with the measures.[271] Also, according to this article, State Parties are still obligated to cooperate under that agreement even if they are not a member of regional or sectoral body and have not agreed to the measures.[272] This again privileges regional bodies, as it gives activities conducted under their purview further normative legitimacy. Finally, draft Article 21 is on monitoring and review and obligates states to report to the COP on ABMTs and provides for the monitoring and possible "…amendment or revocation…" of ongoing ABMT measures "…on the basis of an adaptive management approach".[273] This is promising for a potential dynamic approach to MPA management, although it will need to be more robust and comprehensive in order to be effective.

---

[265] United Nations (n 251), at Article 19 Alt.1(c)(ii), p.17.
[266] *Ibid.*, at Article 19 Alt. 1(d), p.17.
[267] *Ibid.*, at Article 19 Alt.2, p.17.
[268] See e.g., The International Institute for Sustainable Development (n 21).
[269] Haward and Bergin (n 133).
[270] United Nations (n 251), at pp.17-18.
[271] *Ibid.*, at Article 20(4)-(5), p.18.
[272] *Ibid.*, at Article 20(6), p.18.
[273] *Ibid.*, at Article 21(4), p.18.

As such, there is some reason for concern when examining Australia's MPA practice and how it may come to affect an eventual MPA regime for the BBNJ instrument. Its domestic usage of MPAs has proven overly focused on appearance, residual and, as a result, ineffective.[274] However, Australia is likely to play an influential role, both in the creation of the MPA mechanism as part of the BBNJ, and also in its implementation in future. This is illuminated in the examination of the draft text which looks to regional bodies as a key part of implementing MPAs under the BBNJ instrument. It has also been demonstrated that Australia has a greater influence over these regional forums than it may in a more global setting. It is a possibility then that Australia may have the capacity to somewhat influence MPA creation within ABNJ in line with its own domestic practice, including its ongoing flaws. However, Australia's experience may also be beneficial for the BBNJ regime on MPAs, if state parties consider the lessons the BBNJ may draw from Australia's practice going forward.

5.3 What lessons can be drawn from Australia's MPA practice for the BBNJ?

It has been established above that Australia has both the motivation and the ability to influence the BBNJ regime for MPAs through its own practice. This can be achieved through exerting reputational influence in the BBNJ negotiations themselves, as well as in the subsequent decision-making fora for high seas MPAs. However, it has also been argued that Australia's practice is quite likely undesirable for the BBNJ regime on MPAs. As such this section will explore what lessons the state parties to BBNJ negotiations *should* take from the history of Australia's practice to help to construct an effective regime for MPAs.

5.3.1 Tracking Progress: The Coverage Trap

The first important trend that has permeated Australian practice is an overt focus on percentage coverage.[275] This is something that needs to be handled with caution by the BBNJ negotiating states. While it has been shown that these kinds of percentage targets do drive a race for MPA creation significantly,[276] it too often becomes the case that the MPAs resulting from this race are ineffective and other measures of progress are overshadowed.[277] Agardy et al highlight this issue neatly stating:

[274] See e.g., Devillers et al. (n 28); Cockerell et al. (n 36); Kearney et al. (n 35), (n 37).
[275] See e.g., Devillers et al. (n 28); Rees et al (n 47).
[276] See e.g., Jones and De Santo (n 50).
[277] *Ibid*.

> "Targets turn out to be particularly useful in signifying the commitment of a country to international maritime agreements (allowing comparisons of its commitment with those of others)… But the setting of targets can be a double-edged sword – targets can be achieved with spurious, or even meaningless designations of protection (a form of 'greenwashing'), and they can also lead institutions to make poor choices in allocation of resources for conservation and management."[278]

For example, while Australia boasts a large network of protected areas at face value, the fact that only 8% of its advertised 37% coverage is fully protected is indicative of a disparity between perceived and actual conservation.[279] This is vital given the fact that fully protected or "no take" areas have been found to be one of five indicative factors for the most effective protection of biodiversity.[280] On the other hand partially protected areas have been argued to amount to an ecological "red-herring" given their lack of conservation effectiveness but image of protection.[281] Indeed, Roberts et al. argue that Australia's network of MPAs could be significantly improved if it was targeted towards "…large, no-take areas in coastal environments" rather than its current configuration consisting largely of partially protected areas.[282] While there may be an argument that, given the likely difficult nature of securing compromise between states over high seas protected areas, any sort of protection should be considered a victory, it is also important to consider opportunity cost. States and other actors opposed to higher levels of protection will likely argue against any form of protected area. This means that the establishment of weaker protected areas will result in time and other vital resources, such as political will, being wasted on a lower level or protection.

There has been some progress towards more stringent targets when it comes to MPAs, with the World Parks Congress' 2014 target aiming for "at least 30 per cent of each habitat type to be afforded strict protection", while language such "a network of highly protected MPAs" was used in 2016 by the World Conservation Congress in calling for the same goal.[283] However, these more stringent targets have been non-binding and it is arguable whether states would pursue action with such vigour and relative ease were they restricted to this higher standard. While undoubtedly compromise is necessary in practice, the targets for high seas MPAs should reflect best practice standards rather than limiting their ambition from the outset. As such, a system of parallel targets could be envisioned in which the BBNJ MPA process aims for two numbers: a percentage coverage of "conservation measures" and

---

[278] Agardy et al. (n 52), at p.8.
[279] Albrecht et al. (n 33), at p.8.
[280] Graham Edgar et al., 'Global conservation outcomes depend on marine protected areas with five key features' (2014) 506 *Nature* 216-229, at pp.216-217. https://doi.org/10.1038/nature13022
[281] John W Turnbull et al., 'Evaluating the Social and Ecological Effectiveness of Partially Protected Marine Areas' (2020) *Conservation Biology* 1–12. https://doi.org/10.1111/cobi.13677.
[282] Roberts et al. (n 39), at p.25.
[283] Fitzsimons and Wescott (n 215).

then a second target stating a percentage coverage of fully protected areas. Such a goal could be worded as follows for example (using Aichi Target 11 as a base):

> "By 2030, at least 40 per cent of marine areas beyond national jurisdiction shall be subject to area-based conservation measures, with at least 30 per cent in fully protected marine protected areas, especially areas of particular importance for biodiversity and ecosystem services, 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 landscapes and seascapes."[284]

The numbers chosen are simply for the sake of an example, but the concept should serve to impose a high standard of protection, while still acknowledging somewhat the implementation of partially protected MPAs and other conservation initiatives, which may be able to create momentum or be implemented alongside fully protected zones. In separating these targets into tiers, the momentum generated by the pursuit of numerical targets would still be retained, while misleading partial coverage percentages would not be enough to satisfy the goal alone. Such a system would however prevent states touting success meeting the target, without adequate protection being applied in ABNJ. This is a key lesson from Australian practice, in which the visible nature of the coverage target has driven progress, but also has been used misleadingly to enhance Australia's reputation while properly conserving only a small segment of Australian waters.

5.3.2 Avoiding Residual Tendencies

Another prominent and somewhat related trend in Australia's practice is that of residual MPA implementation.[285] That is, the placement of MPAs in areas where they avoid interfering with any major human uses of the ocean such as fishing or petroleum extraction.[286] This is largely due to the convenience of establishing MPAs in regions that are likely to cause little political or economic backlash from stakeholders.[287] This phenomenon is unlikely to be improved by the introduction of a greater range of stakeholders and actors in ABNJ, including the interests of many of the likely member states of the BBNJ agreement themselves. Hence, Australia's experience is likely to act as a presage for the difficulty that comes from stakeholder interests, especially in extractive industries, when implementing these MPAs.

---

[284] Modified from Convention on Biological Diversity (n 140).
[285] Devillers et al. (n 28).
[286] *Ibid*.
[287] *Ibid*.

While there is some merit in considering the setting aside of so-called untouched areas that are not already impacted by human activities for future protection,[288] it is more important that MPAs in ABNJ act to prevent ongoing damaging human activities. After all, it has been demonstrated that human activities such as fishing are the biggest threat to these vulnerable marine ecosystems.[289] As such, it is important that political expedience is not valued over conservation effectiveness. In the case of Australia, its MPA network was designed in this way in part to avoid the potential political unpopularity of MPA measures that may affect stakeholder interests. However, substantial parts of the opposition to Australia's MPA networks, demonstrated by many of the 740,000 submissions over a public consultation period, were largely built upon misnomers that Australia's MPA network was likely to substantially affect recreational fishing in particular.[290] The reality was that the areas being protected were unlikely to ever be visited by the average Australian recreational fisher.[291] Furthermore, this opposition to MPAs within Australia was encouraged and driven primarily by commercial fishing interests allying with recreational fisheries lobbies which built their campaigns on the inaccuracy that recreational fishing would be significantly affected in Australia by the MPA networks.[292] This campaign, and the perception of backlash from coastal communities that accompanied it, was largely believed to be a key motivator for Australia's review of domestic networks and indeed the stagnation in MPA policy.[293]

This highlights the importance of engaging with vested interests heavily throughout the planning stages. Commercial interests would have likely been far less resistant if they were brought in early on the MPA network process.[294] Furthermore, Fitzsimons and Wescott find that in Australia, despite initial resistance, after 5-10 years of an MPA being in place, local fisheries perspectives can change from negative to "neutral or positive" indicating that initial opponents can be won over long term.[295] Hence, it will be important to engage with the relevant stakeholders all throughout the process in the BBNJ context as well. Despite there likely being less recreational fishing on the high seas commercial industries and other stakeholders will still need to be informed and involved. Having a transparent and consultative process would alleviate the types of misinformation often present in domestic MPA networks.

---

[288] Bethan O'Leary et al., 'Addressing Criticisms of Large-Scale Marine Protected Areas' (2018) 68(5) *Bioscience* 359–70, at pp.361-363. https://doi.org/10.1093/biosci/biy021
[289] O'Leary et al. (n 17).
[290] Fitzsimons and Wescott (n 215), at p.20.
[291] *Ibid*.
[292] Smyth (n 179), at p.386.
[293] *Ibid*., at p.385.
[294] See e.g., Cassandra Brooks et al., "Managing Marine Protected Areas in Remote Areas: The Case of the Subantarctic Heard and McDonald Islands" *Frontiers in Marine Science* (2019) 6, article 631. https://doi.org/10.3389/fmars.2019.00631
[295] Fitzsimons and Wescott (n 215), at p.22.

Hence, residual MPA networks can be the product of avoiding the more difficult questions for consultation as was largely done in the Australian case and, as such, it is important that high seas fishing and other interests are involved in the designation of these MPAs. This in particular involves engaging with fishing states in order to design MPAs which are more robust, yet generate broader support, rather than avoiding these competing interests. A key example of this is given by Brooks et al in their assessment of the Heard and McDonald Islands MPA in Australia's Southern Ocean territories.[296] Specifically, they detail how "comprehensive stakeholder consultation" was involved in the designation of this measure.[297]

They put the success of this MPA down to its remote nature coupled with:

> "…collaboration with the fishing industry, which has allowed stakeholders to manage threats posed by the fishing industry and provide an efficient approach for addressing management gaps."[298]

The authors highlight that the fishing industry acted as a partner in this conservation measure due to its ability to monitor the area and report findings that would have been otherwise difficult given the limited resources of the management authority.[299] This case is worth examining for high seas MPAs as they will likely also be remote and difficult to monitor. While this process will be more complex on the high seas given the multitude of actors if pursued ambitiously, it should result in more effective protected areas for ABNJ. De Santo also highlights the importance of "equitable and transparent stakeholder engagement" as a key recommendation for high seas MPAs based on lessons drawn from the CCAMLR and OSPAR experiences.[300] At this stage the draft articles of the BBNJ do include a provision for potential stakeholder involvement at the proposal stage in Article 17(2), however it is currently bracketed, indicating that states have not yet agreed upon it.[301] Consultation with stakeholders on the submitted proposal is also provided for within draft Article 18.[302] It should be noted that it is important that stakeholders are involved from the very beginning of the planning stages to allow for the most effective outcomes.[303]

---

[296] Brooks et al. (n 294).
[297] *Ibid.*, at p.5.
[298] *Ibid.*, at p.8.
[299] *Ibid.*, at p.9.
[300] Elizabeth M De Santo, 'Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ)' (2018) 97 *Marine Policy* 34-43, at p.42. https://doi.org/10.1016/j.marpol.2018.08.034
[301] United Nations (n 251), at p.15.
[302] *Ibid.*, at pp.15-16.
[303] Brooks et al. (n 294), at pp.11-12.

As such, to avoid a reactive residual network that resulted in Australia, it is important that users of proposed MPA areas are involved in the process of MPA design from early on. This alleviates concerns from industry and states with vested interests and allows for an approach to conservation which "view[s] resource users not only as a potential threat to the environment, but also as a critical partner for achieving conservation goals"[304]. The benefit of this approach is twofold. Firstly, it will discourage MPA proposals from avoiding vested interests for the sake of ease of implementation. Secondly, it will allow for more effective compliance and monitoring if stakeholders are engaged and involved in the MPA process themselves.[305] It will be important for any system of high seas MPAs to have these difficult conversations, rather than avoiding them.

5.3.3 Dealing with Stagnation within International Fora

Turning to Australia's international practice, it is clear that its MPA ambitions in Antarctica have met with greater resistance than perhaps was expected. After the introduction of the East Antarctic MPA proposal in 2012, Australia, along with co-proponents France and the EU, has been unable to secure agreement on this proposed MPA.[306] This has been through a combination of the institutional structure of CCAMLR, requiring consensus agreement on MPA proposals,[307] as well as Australia's flawed approach to the negotiations.[308] Australia seems to have struggled as its proposal has failed to generate the trust required from other states, due to its privileging of Australian interests and the added tension of historical sovereignty claims.[309] The lack of ability to convince persistent objector states through the usage of science-based evidence as well as through high level diplomacy has been a recurrent theme.[310]

Lessons from Australia's experience at CCAMLR include the need to build trust and support for MPA proposals at an international level. To this end, a solid science base is cited as a key driver behind the success of the Ross Sea Region MPA,[311] something which had been lacking in the East Antarctic.[312] It is therefore important for the BBNJ agreement to operationalise the science requirements behind the MPA proposals. On this point the BBNJ draft includes in Article 18(6) that "The revised proposal shall be submitted to the Scientific and Technical Body, which shall assess the proposal, and make

[304] *Ibid.*, at p.11.
[305] *Ibid.*
[306] Brooks et al. (n 65).
[307] See e.g., Nilsson et al. (n 62); Teschke et al. (n 58); Constable (n 63).
[308] See e.g., Brooks (n 67); Brooks et al. (n 65).
[309] Brooks et al. (n 65).
[310] See e.g., Brooks (n 65); Tang (n 86); Liu (n 80).
[311] Brooks et al. (n 65).
[312] Brooks (n 67).

recommendations to the Conference of the Parties."[313] This is a welcome addition but further details about the process of the Scientific and Technical Body need to be elaborated on before its sufficiency can be ascertained. Indeed, certain persistent objector states in CCAMLR have shown that they need to be shown a compelling scientific basis for their approval,[314] something Australia has struggled to demonstrate in its own proposal. De Santo also argues that demonstrating a science basis for MPAs in the high seas will be critical, recommending "Clearer pathways for science advice in the process should be identified, ensuring the evidence-base for closures is sound, adequate, and precautionary in nature."[315] However, Sylvester and Brooks highlight that even in the case of the "best practices for actionable science" followed by the Antarctic Peninsula MPA proposal, it has still met with challenges.[316] This indicates that generating political will is also an important step in successful MPA agreements.

As such, the importance of diplomacy for trust building is also evident. The US, for example, engaged actively with China and Russia in a number of diplomatic moves which ended with securing agreement in the Ross Sea MPA.[317] Brooks et al highlight the vital role that high level diplomatic meetings between the United States, New Zealand and China played in securing China's support for the measure.[318] Furthermore, advocacy in particular from then US Secretary of State John Kerry, as well as a "political window of opportunity" resulted in the agreement of Russia to the Ross Sea MPA proposal.[319] This contrasts Australia's experience with its own East Antarctica Proposal which has not benefited significantly from this kind of visible diplomacy.

The international practice of Australia at CCAMLR highlights the factors which will influence the progress of agreements for international MPAs in Australia. Specifically, states proposing MPAs will need to build trust and support for their MPAs through proposals that do not raise any concerns of interference with other states' interests. Furthermore, they must be built upon a substantial scientific basis, something that will require significant effort given the relatively unknown state of the high seas environment. Much of this effort should be borne by the Scientific and Technical Body as well as the proponent state. Draft Article 17(5) states that:

---

[313] United Nations (n 251), at p.16.
[314] See e.g., Brooks et al., (n 65), at p.6.
[315] De Santo (n 300).
[316] Zephyr T Sylvester and Cassandra M Brooks, 'Protecting Antarctica through Co-production of actionable science: Lessons from the CCAMLR marine protected area process' (2020) 111 *Marine Policy* 1-13. https://doi.org/10.1016/j.marpol.2019.103720
[317] Brooks et al. (n 65).
[318] *Ibid*.
[319] *Ibid*.

> "Further requirements regarding the contents of proposals [shall] [may] be elaborated by the Scientific and Technical Body as necessary, for consideration and adoption by the Conference of the Parties."[320]

As such, it will be important that these requirements are detailed and include a prominent scientific justification. Finally, high-level diplomacy is likely to be required in order to secure the agreement of more reluctant states. The importance of undertaking this kind of effort is clear given the previous experiences in high seas MPAs in the context of CCAMLR. The agreement on the Ross Sea MPA, the largest high seas MPA in the world, stands out as a key example of this process in action.[321] Meanwhile, Australia's own experience with failing to implement the East Antarctic has underscored the importance of diplomacy with its failure to build trust for its proposal and motives.

5.5 Concluding on Australia and MPAs within the BBNJ

To conclude, the driving question of this chapter is: "What effect does the interaction between Australia's domestic and international practice have on the BBNJ negotiations on MPAs?" Through a thorough examination of Australia's BBNJ practice, using all that has been determined on the relationship between Australia's national and international practice in previous chapters, this question has been addressed in some detail.

Firstly, given the Feedback Loop Model it can be presumed that Australia is seeking to use its reputation accrued from national practice to influence the BBNJ regime on MPAs. Specifically, it looks to be arguing for a hybrid model for the implementation of MPAs as this best suits its capacity to have an influence within regional organisations. Hence Australia's previous approaches to international MPA proceedings, as well as its own domestic practice, serve to explain its approach at the BBNJ.

Next, the potential for Australia to have an influence after the agreement is completed was analysed in the context of the draft text as it currently stands. From this analysis it can be concluded that the negotiations are trending towards a model for MPAs quite similar to that argued for by Australia, one which vests key decision-making power in regional bodies but also fills the gaps between them. Though the draft text is still a work in progress it again highlights that Australia's practice may have a strong impact on the final regime for high seas MPAs if the completed instrument is in a form which will allow Australia to have an influence within the decision-making.

---

[320] United Nations (n 251), at p.15.
[321] Brooks et al. (n 65).

Finally, the chapter looked to draw lessons from Australia's international practice in order to assist states bringing MPA proposals in a future BBNJ regime. The need for robust targets, extensive stakeholder consultation and a strong scientific basis and diplomatic backing for the MPA proposals on the high seas was highlighted by Australia's experiences. While Australia has the potential to influence the BBNJ instrument in a way which may result in somewhat perverse conservation outcomes as discussed earlier in this chapter, if its experiences are drawn upon to inform future practice, the outcomes may be more constructive. Indeed, while Australia as an individual actor may not necessarily have a desirable impact on a high seas MPA regime, negotiating states would do well to learn from the flaws in its practice.

6. Conclusion

The emerging regime for ABMTs on the high seas is perhaps the most crucial development in marine biodiversity conservation law to date. This new regime will rely particularly on the usage of MPAs to pursue conservation goals. Being a legal tool with significant history both within states' own waters, as well as in international fora, it is important that state experiences with MPAs are drawn upon to inform the emerging regime. Indeed, this thesis focused upon Australia as a state with significant experience in all facets of MPA practice. Ultimately the goal was to understand what impact a state such as Australia, boasting this MPA experience, may have on the development of this international instrument.

Across the four major chapters of the thesis the central research question: 'what are the implications of Australia's MPA practice for the BBNJ regime for MPAs?' was explored in considerable depth. Chapters 2 and 3 laid out the gaps within the existing literature on Australian MPA practice and the theoretical tools (the Feedback Loop Model) to address these gaps respectively. Chapters 4 and 5 then looked to answer the research sub-questions. These were:

1. How does Australia's domestic and international MPA practice interact?
2. What effect does the interaction between Australia's domestic and international practice have on the BBNJ negotiations on MPAs?

The interaction between the levels of law-making emerged as a clear theme as it became apparent that Australia has strategically pursued its MPAs interests and influence in both spheres. Likewise, it became clear that Australia does not quite live up to its image as a leading MPA actor given the apparent flaws in its practice, at least in part as the result of this strategic approach. With these conclusions in mind Australia may well have a significant impact on the BBNJ negotiations, as well as MPA creation within the final regime. However, this is not desirable given its historically deficient approach to MPAs. It is important then that the lessons Australia's missteps are heeded by the international community. These include the need for a strict and tiered target-based approach which allows for the catalytic influence of coverage targets without the misleading progress reporting. Furthermore, the importance of stakeholder involvement, robust scientific standards, and diplomacy for the successful creation of high seas MPAs all should not be understated.

There is much to be learnt from Australia's experience as an active MPA actor over the past thirty years. While this notion is not entirely new, past assessments have limited themselves to looking at domestic or international practice separately. It is hoped this research can highlight instead how these factors are intrinsically linked. Australia demonstrates clear synergy between its domestic and

international MPA practice and follows the Feedback Loop Model of behaviour quite clearly when it is pursuing MPAs as a policy priority. Likewise, understanding this link highlights that flawed practice in a domestic setting can have a negative influence at the global level as well. Given Australia's relatively inordinate potential influence over the emerging BBNJ regime, it is worth considering how this phenomenon may be exacerbated by other states with similarly flawed practice that act as the key power brokers within the BBNJ negotiations. Further studies may direct their attention to the linkages between the international and domestic practices of these other states in this area. Further research on the relationship between Australia's domestic and international practice in other matters of environmental protection or even beyond may likewise be informative. Particularly in a policy area where Australia does not seem to seek reputational advantages, such as climate change mitigation.

Ultimately, the way that individual states may have an influence at the BBNJ negotiations is under-studied. It is important to recognise that states are not approaching these negotiations in a vacuum, but rather with a complex set of motivations and experiences. In examining how Australia has approached the particular issue of MPA implementation and management, it is hoped that more attention can be given to the way that international environmental law is shaped by those who act as its legislators: the states of the world.