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## **Creating Synergies Between Global and Regional MPA Regimes in Areas Beyond National Jurisdiction**

A case study on the North-East Atlantic

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## List of Abbreviations

<b>ABMT</b>	Area-Based Management Tools
<b>ABNJ</b>	Areas Beyond National Jurisdiction
<b>BBNJ</b>	Biodiversity Beyond National Jurisdiction
<b>CBD</b>	Convention on Biological Diversity
<b>CBTT</b>	Capacity Building and Technology Transfer
<b>COP</b>	Conference of Parties
<b>CP</b>	Contracting Party
<b>EIAs</b>	Environmental Impact Assessments
<b>FSA</b>	Fish Stocks Agreement
<b>G77/China</b>	Group of 77 and the Republic of China
<b>IGC</b>	Intergovernmental Conference
<b>ILBI</b>	International Legally Binding Instrument
<b>MGRs</b>	Marine Genetic Resources
<b>MPA</b>	Marine Protected Area
<b>NGO</b>	Non-Governmental Organization
<b>PrepCom</b>	Preparatory Committee
<b>RFMO</b>	Regional Fisheries Management Organization
<b>UN</b>	United Nations
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNGA</b>	United Nations General Assembly



## CHAPTER 1: INTRODUCTION

### 1.1 State of the marine environment

The marine environment is under great pressure by human activities. In 2019, the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) - an independent intergovernmental body established by member states of the Convention on Biological Diversity<sup>1</sup> (CBD) in 2012,<sup>2</sup> published the most comprehensive global assessment of biodiversity to date.<sup>3</sup> The results are disturbing. According to this report, only 3% the oceans is free from human pressure.<sup>4</sup> Live coral cover on reefs has decreased with nearly 50% in the past 150 years, the decline dramatically accelerating over the past two or three decades.<sup>5</sup> Moreover, severe impacts to marine ecosystems are illustrated by 33% of fish stocks being classified as overexploited and over 55% of ocean area being subject to industrial fishing.<sup>6</sup>

Alarming scientific reports about the collapse of biodiversity and ecosystems are nothing new, and gained attention from policymakers for decades. These efforts especially gained momentum in 1992, when the United Nations Conference on Environment & Development (UNCED) was held in Rio de Janeiro. At this conference, ‘Agenda 21’ was adopted - a comprehensive plan of action to be taken in every area in which human impacts on the environment. One important tool that is embraced by Agenda 21 to protect the oceans, are Marine Protected Areas (MPAs).<sup>7</sup> Ten years after ‘Rio’, at the Johannesburg World Summit on Sustainability Development (also nicknamed ‘Rio+10’), the international community committed itself to establish a coherent network of MPAs by 2012.<sup>8</sup> The COP of the CBD gave further content to this commitment in 2004, by additionally setting the target to cover 10% of the marine and coastal environment by 2012,<sup>9</sup> which – due to slow progress, was later pushed back to 2020.<sup>10</sup>

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<sup>1</sup> United Nations Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) 1760 UNTS 69

<sup>2</sup> IPBES, “Summary for policymakers of the assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services on pollinators, pollination and food production. Secretariat of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services” (2016) Bonn, Germany, Available online: <https://www.ipbes.net/assessment-reports/pollinators> (accessed 5 August 2020) 24.

<sup>3</sup> Freestone D, *Conserving biodiversity in areas beyond national jurisdiction* (Brill Nijhoff 2019) ch 2, 49.

<sup>4</sup> IPBES report, *supra* note 2, 24.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> UN General Assembly ‘Report of the united nations conference on environment and development’. (A/CONF.151/26) 13 August 1992, par. 17.7.

<sup>8</sup> Plan of Implementation of the World Summit on Sustainable Development, 2002, Para. 32(c).

<sup>9</sup> CBD COP Decision VII/5 ‘Marine and coastal biological diversity’ (UNEP/CBD/COP/DEC/VII/5) 13 April 2004.

<sup>10</sup> CBD COP Decision X/2 ‘The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets’ (UNEP/CBD/COP/DEC/X/2) 29 October 2010.

At the time of writing, this ‘deadline’ has expired once again and the goal of 10% coverage is still far away. Only 35 countries have reported that they currently meet this target,<sup>11</sup> and global MPA coverage is at 7,4%.<sup>12</sup> An important reason why these targets are continuously missed, is due to the slow progress with establishing MPAs in areas beyond national jurisdiction (ABNJ). These areas cover approximately 64 percent of the earth’s surface, and contain some of the world’s most unique species and habitats.<sup>13</sup> Only 1,2% of ABNJ are protected by MPAs.<sup>14</sup> This is partly due to the legal framework that applies in ABNJ, which ultimately reflects the overarching *mare liberum*, or ‘freedom of the high seas’ principle.<sup>15</sup> A common understanding in the international community that the existing legal framework in ABNJ is insufficient to protect biodiversity has led to the development of a new international legally binding instrument (ILBI) for biodiversity beyond national jurisdiction (BBNJ). Given the rapidly deteriorating state of the marine environment, the need for a comprehensive legal instrument through which the international community can establish high seas protected areas that are universally recognized and respected, is evident.

There are, however, examples of areas where – regardless of this lacking legal framework, MPAs in ABNJ are being established. Perhaps the most prominent example is the North-East Atlantic, in the maritime area of the Convention for the Protection of the Marine Environment of the North-East Atlantic<sup>16</sup> (OSPAR Convention). As opposed to the global number of 1,2% MPA coverage in ABNJ, in the high seas maritime area of OSPAR, 8,9% is protected by MPAs.<sup>17</sup> Given how active OSPAR is in ABNJ, the forthcoming new MPA governance framework of the BBNJ ILBI will have large consequences for OSPAR. Many questions can be raised in this regard. Will OSPAR benefit from this regime? How will the ILBI and OSPAR cooperate? And what are the strengths and weaknesses of these regimes? This thesis will analyze the MPA regimes of these instruments, in order to provide answers to these questions.

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<sup>11</sup> Aichi Target 11, <https://www.cbd.int/aichi-targets/target/11>, accessed on 29 May 2020.

<sup>12</sup> Protected Planet Digital Report, available at: <https://livereport.protectedplanet.net/chapter-2>, based on World Database on Protected Areas (WDPA), jointly managed by UNEP-WCMC and IUCN.

<sup>13</sup> Kraabel K D, ‘The BBNJ PrepCom and Institutional Arrangements: The Hype about the Hybrid Approach’ in Nordquist M H, Moore J N, and Long R (eds) *The marine environment and United Nations sustainable development goal 14: life below water* (Brill Nijhoff 2019) 138.

<sup>14</sup> Protected Planet Digital Report, *supra* note 12.

<sup>15</sup> Mendenhall E et al, ‘A Soft Treaty, Hard to Reach: The Second Inter-Governmental Conference for Biodiversity beyond National Jurisdiction’ (2019) 108 *Marine Policy* 103664, 1.

<sup>16</sup> Convention For The Protection Of The Marine Environment Of The North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998.

<sup>17</sup> 8,9% of OSPAR’s maritime area, 40% of which is located in ABNJ. Source: OSPAR Commission 2019, 2018 Status Report on the OSPAR Network of Marine Protected Areas, available at: <https://www.ospar.org/documents?v=40944>.

## 1.2 Purpose and scope of this thesis

The purpose of this thesis is to assess how synergies can be created between OSPAR and the BBNJ ILBI, in order to achieve effective and comprehensive MPA governance in ABNJ. There are two dimensions to this issue: An institutional- and a substantive dimension. The former entails the institutional dynamics between OSPAR and the BBNJ ILBI, which will be thoroughly analyzed in this thesis. The key question here is how these instruments will cooperate with each other, in each of the institutional models that are currently on the table in the BBNJ negotiations. The substantive element of this analysis relates to the MPA processes of OSPAR and the BBNJ ILBI. These regimes will be examined in detail, and their strengths and shortcomings are identified, in order to establish the key elements to effective MPA governance.

The issues touched upon by the OSPAR Convention and the BBNJ ILBI go far beyond just MPAs. The scope of this thesis is, however, primarily limited to their respective MPA regimes in ABNJ, since this is area on which their mandates overlap. Besides this, attention will also be paid to their institutional characteristics and cooperation mechanisms. The other elements of the BBNJ ‘package’ (marine genetic resources; environmental impact assessments; capacity building and technology-transfer) thus fall outside the scope of this thesis. As for OSPAR, its activities within national jurisdiction, as well as its activities in ABNJ that are not related to MPAs, will not be discussed.

## 1.3 Methodology

This thesis examines the *regime interaction* between the BBNJ ILBI and OSPAR. According to *Young*, for understanding regime interaction it is required “to ‘face’ the complex issues that arise from the fragmentation and diversification of international law.”<sup>18</sup> That is exactly what is done in this thesis in relation to the ILBI and OSPAR. In this analysis, what brings further complexity is the fact that it concerns *future* regime interaction. One inherent ambiguity to this research is the circumstance that the ILBI is still being negotiated. This analysis is therefore speculative, to some degree, and works with different scenarios.

*Trevisanut, Giannopoulos and Holst* have proposed a three-fold approach to regime interaction research, with three analytical dimensions: Institutional, formal and substantive.<sup>19</sup> This

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<sup>18</sup> Young MA, *Regime interaction in international law: facing fragmentation* (Cambridge University Press 2012) ch 1, 1.

<sup>19</sup> Trevisanut S, Giannopoulos N and Holst RR, *Regime interaction in ocean governance: problems, theories, and methods* (Publications on Ocean Development, Volume: 91, Brill Nijhoff 2020) ch 8, 223.

approach is adopted in the research that is conducted in this thesis, in the following manner. The first two dimensions of this three-fold approach are embodied in the analysis of the institutional relationship between the ILBI and OSPAR. This analysis looks at both the (future) institutional and the formal relationships between these bodies. The next part of the analysis focusses on the substantive dimension - their respective MPA regimes.

In order to acquire a decent understanding of this interaction, it is required to analyze the institutional and normative regimes of these instruments (insofar relevant in relation to the purpose of this thesis, as provided above). This research is conducted in a way that can best be described as pragmatic doctrinal research - especially in the case of OSPAR. For the analysis of its MPA regime, point of departure are the Convention itself, as well as the entire spectrum of hard- and soft law documents that surround it. In the case of the ILBI, the approach is less pragmatic and could be placed more in the sphere of the principled doctrinal research.<sup>20</sup> Given that negotiations are ongoing, the author is therefore required to resort to a wider variety of secondary sources as well as the underlying principles and objectives.

#### **1.4 Use of sources**

The “classic starting point”<sup>21</sup> for identifying the sources of international law are listed in article 38 of the Statutes of the International Court of Justice.<sup>22</sup> The sources listed in this provision provide the principal methodological focus of this thesis. International conventions are a key source, and provide the foundation of this thesis. Most prominently the UNCLOS, as well as, *inter alia*, the OSPAR Convention and the CBD. Furthermore, a variety of soft-law instruments are used. These include United Nations General Assembly (UNGA) Resolutions related to the BBNJ process, and a wide array of OSPAR recommendations and other documents surrounding its MPA network. As for secondary sources, a wide array of legal literature is reviewed and comprised during the research. Moreover, the various documents that are developed throughout the BBNJ-process are used extensively. These documents, which will become preparatory works once the ILBI is adopted, strictly speaking do not have any formal legal value but nonetheless bear political and normative weight, as they give important insights in what the ILBI will eventually look like. Lastly, reports of meetings from the OSPAR Commission and other bodies are thoroughly analyzed.

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<sup>20</sup> Cane P and Conaghan J, ‘Doctrinal Legal Research’ The New Oxford Companion to Law (Oxford University Press, 2009).

<sup>21</sup> Roberts A and Sivakumaran S, ‘The theory and reality of the sources of international law’ in Evans D M (eds) International Law (Oxford University Press, 5 edn, 2018) 89.

<sup>22</sup> Statute of the International Court of Justice (adopted 26 June 1945, in force 24 October 1945) USTS 993.

## **1.5 Structure of this thesis**

This thesis is structured in the following manner: Chapter 2 outlines the existing legal framework in ABNJ, with emphasis on the establishment of MPAs. In chapter 3, the OSPAR MPA network in ABNJ is analyzed. Firstly, the OSPAR Convention and OSPAR's competence to establish MPAs in ABNJ is reviewed, followed by an in-depth examination of OSPAR's MPA network in ABNJ. This is done by looking at the different stages of the MPA process: identification and designation; implementation, monitoring and review; enforcement and compliance. In chapter 4, focus is shifted to the global level: the BBNJ negotiations. Firstly, the institutional arrangements and cooperation are examined. Thereafter, the MPA regime of the ILBI is analyzed, by looking at the above-mentioned stages of the MPA-process. The following two chapters combine these findings, and form the core of this thesis. The institutional dynamics and cooperation between OSPAR and the ILBI are discussed in chapter 5, and chapter 6 compares their respective MPA regimes. Finally, in chapter 7 some general conclusions are drawn.

## **CHAPTER 2: THE EXISTING LEGAL FRAMEWORK FOR MPAS IN ABNJ**

### **2.1 Introduction**

As the term 'areas *beyond* national jurisdiction' (ABNJ) suggests, these waters are not subject to the legislative jurisdiction of any State. This however by no means implies that ABNJ is some type of legal void. In fact, there are more than 190 global or regional agreements applicable in ABNJ.<sup>23</sup> For the purpose of this thesis, two global instruments are of importance: the UN Convention on the Law of the Sea<sup>24</sup> and the Convention on Biological Biodiversity. This chapter will assess the existing legal framework in ABNJ, focusing on these two instruments. This analysis forms the basis for the discussions in the following chapters. The following section discusses UNCLOS (section 2) and its key characteristics, namely the zonal- and regional approach (section 3). Next, the CBD is assessed in section 4. Finally, some conclusions are drawn in section 5.

### **2.2 The Law of the Sea Convention**

UNCLOS, often referred to as the 'constitution of the oceans' is a framework convention, and lays down the general rules and principles for ocean government. UNCLOS is a *dynamic* treaty,

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<sup>23</sup> Bigagli E, "The International Legal Framework for the Management of the Global Oceans Social-Ecological System" (2016) 68 Marine Policy 157.

<sup>24</sup> United Nations Convention on the Law of the Sea, Montego Bay (adopted 10 December 1982, in force 16 November 1994) UNTS 397.

which lends itself well for evolutive interpretation, as it is both long-standing, and contains several ‘generic’ provisions and terms.<sup>25</sup> One key element of the UNCLOS regime is the introduction of maritime zones. Coastal States generate a territorial sea and contiguous zone, an exclusive economic zone and a continental shelf.<sup>26</sup> Beyond these maritime zones, in which the coastal State can exercise a certain degree of jurisdiction, the regimes of the Area and the high seas apply – as regulated in respective parts VII and XI of UNCLOS. These maritime zones, collectively referred to as ABNJ, ultimately reflect the overarching *mare liberum*, or ‘freedom of the high seas’ principle. The overall result is “a complex, loosely coordinated, and generally permissive regime for governing ABNJ”.<sup>27</sup>

The central provision of part VII on the high seas is article 87. It contains a non-exhaustive list of the high seas freedoms, including the freedoms of navigation, overflight and fishing. States must exercise these freedoms in a manner consistent with UNCLOS and other rules of international law, and with due regard for the interests of other States.<sup>28</sup> Although part VII does not contain a specific provision on the protection of the marine environment, the general rules contained in part XII (which will be further discussed below) are thus applicable in the high seas, as well as rules of customary international law and those contained in other conventions (e.g., IMO instruments). Moreover, section II of Part VII effectively qualifies the freedom of fishing. This is made clear by articles 118 and 119 and also by additional instruments regulating high seas marine living resources, most prominently the 1995 Fish Stocks Agreement.<sup>29</sup> It can be concluded that, although characterized as “permissive”, high seas freedoms are subject to several restraints, and thus by no means absolute.

The Area comprises of the deep seabed, ocean floor and subsoil.<sup>30</sup> The Area contains a variety of mineral and hydrocarbon resources, which are the “common heritage of mankind”, a concept introduced by *Pardo’s* historic speech at the UNGA in 1967.<sup>31</sup> These mineral resources, and the exploitation thereof, form the central tenet of part XI. This contrasts sharply with Part VI as discussed above, which revolves around the high seas freedoms. Some similarities can nonetheless be spotted, as no State can claim or exercise jurisdiction or sovereignty in the

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<sup>25</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* [2009] ICJ Rep 109-10 para. 66.

<sup>26</sup> Parts II, V and VI UNCLOS. Part IV on archipelagic States is also relevant in certain cases.

<sup>27</sup> Mendenhall et al, *supra* note 15, 1.

<sup>28</sup> Article 87 (1) UNCLOS.

<sup>29</sup> R Rothwell, T Stephens, *The International Law of the Sea* (3<sup>rd</sup> edn, Nordicum-Mediterraneum 2012) ch 7, 177.

<sup>30</sup> Article 1 (1) UNCLOS.

<sup>31</sup> A Pardo, ‘The Common Heritage of Mankind: Selected Papers on Oceans and World Order: 1967-1974’ (Malta University Press, 1975), 31.

Area.<sup>32</sup> The main components of the *common heritage* doctrine are: a mechanism of international management of deep seabed mining through the International Seabed Authority (ISA); the sharing of benefits from deep seabed mining for the benefit of humanity as a whole; the peaceful use of deep seabed areas; and the non-appropriation of seabed areas and seabed resources private entities or States.<sup>33</sup>

In contrast to the regime of the EEZ, which has a maximum breadth of 200 nm, the continental shelf can extend beyond 200 nm if the criteria listed in article 77 (4) are met.<sup>34</sup> In these situations, a ‘dual-regime’ exists, where the seabed, ocean floor and subsoil fall under the continental shelf regime (and are thus *within* national jurisdiction), and the water column is high seas (and thus *beyond* national jurisdiction). This has proven to be problematic when regional organizations want to establish MPAs in these areas. Permission and cooperation from the coastal State in question is required, and it has been shown that States are generally hesitant to do so.<sup>35</sup> This led to the establishment of MPAs for only the water column, where the seabed remains unprotected.<sup>36</sup>

Lastly, it is important to mention that States can, in principle, only exercise legislative and enforcement jurisdictions on vessels flying its flag.<sup>37</sup> In a few limited scenarios, enforcement actions can be taken against ships flying a different flag, but only when strict conditions are met.<sup>38</sup> As little to no relationship between a vessel and the flag State is required, stringent flag State jurisdiction can be easily evaded by registering under ‘flag of convenience’. This can easily be done, as some States have open registers. As of 2015, 71.3% of the global fleet was registered in open registries.<sup>39</sup>

Part XII of UNCLOS contains rules regarding the protection and preservation of the marine environment, and is applicable in all maritime zones – ABNJ. The central provision of this Part

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<sup>32</sup> Article 137 (1) UNCLOS.

<sup>33</sup> R Rothwell, T Stephens, *supra* note 29, 126.

<sup>34</sup> A more detailed discussion of the complex issue of extended continental shelves falls beyond the scope of this thesis. For an in-depth discussion: Busch SV, ‘The Delimitation of the Continental Shelf beyond 200 Nm’ in Oude Elferink AG, Henriksen T and Busch SV (eds), *Maritime Boundary Delimitation: The Case Law* (Cambridge University Press 2018) 319 – 375.

<sup>35</sup> This was shown by several OSPAR MPA’s, when coastal States were asked to establish seabed MPAs on their extended continental shelves. Iceland refused this, and Portugal committed itself to do but the actual establishment of these MPAs took over five years (OSPAR Commission Meeting 2015, summary record (OSPAR 15/20/1-E) par. 4.26).

<sup>36</sup> For example, the Charlie-Gibbs North MPA under OSPAR is located on Iceland’s extended continental shelf, which remains unprotected (2018 MPA Status report, *supra* note 15, 18).

<sup>37</sup> Article 92 UNCLOS.

<sup>38</sup> Article 110, 111 UNCLOS.

<sup>39</sup> Ford JH and Wilcox C, “Shedding Light on the Dark Side of Maritime Trade – A New Approach for Identifying Countries as Flags of Convenience” (2019) 99 Marine Policy 1.

is article 192, which is customary international law.<sup>40</sup> Article 192 contains a general obligation to protect the marine environment.

Additionally, article 194 (1) is of particular importance in regard to marine protected areas - although this term is not used in UNCLOS. Paragraph 1 allows States to take “all measures” to prevent, reduce and control pollution. On top of that, paragraph 5 provides that “special measures” can be taken to protect and preserve rare or fragile ecosystems. What such measures might entail is not further elaborated on. It can be argued that this provision allows for the establishment of MPAs in the EEZ.<sup>41</sup> This provision does not, however, provide legal basis for the unilateral establishment of MPAs in ABNJ. This conclusion can be derived from the wording of paragraph 1, providing that measures taken based on this provision need to be “in accordance with part XII”. Part XII builds on the jurisdictional framework of specific maritime zones contained in UNCLOS,<sup>42</sup> including the common heritage and high seas freedoms regimes. Establishing MPAs in ABNJ, and thereby imposing restrictions on other States cannot be said to be in accordance with these rules.

Also of relevance is the obligation of States to cooperate for the protection and preservation of the marine environment, as reflected in article 197. States must take into account characteristic regional features, Importantly, it can be derived from the wording of this provision that global cooperation seems to be preferred.<sup>43</sup>

### **2.3 Zonal and Sectoral Approach**

Key characteristics of UNCLOS are its zonal and sectoral approach. The zonal approach essentially entails the introduction of maritime zones, as discussed in the section 2. From an environmental point of view, this is arguably a flawed system. Ecosystems are not bound by jurisdictional boundaries, and often spread out across several of them. This makes it a complex task to effectively manage and protect ecosystems, as they may be subject to different regimes. It requires cooperation and coordination with many different stakeholders, States and organizations to effectively manage them. The sectoral approach further complicates the establishment of coherent MPAs. This approach encompasses the fact that different activities are governed by different bodies. Cooperating mechanisms between such bodies do not exist within UNCLOS. In ABNJ, this is particularly challenging. If States want to establish a

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<sup>40</sup> *South China Sea Arbitration (Philippines v China)* ICGJ 495 (PCA 2016) par. 956.

<sup>41</sup> Oude Elferink AG, “Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC” (2018) 33 *The International Journal of Marine and Coastal Law* 445.

<sup>42</sup> Molenaar EJ, Oude Elferink AG, “Marine Protected Areas in Areas beyond National Jurisdiction The Pioneering Efforts under the OSPAR Convention” (2009) 5 *Utrecht Law Review* 9.

<sup>43</sup> ‘States shall cooperate on a global basis and, as appropriate, on a regional basis’, Article 194 (5) UNCLOS.

coherent MPA – governing all activities in a certain area, cooperation with a variety of bodies is necessary. Three of such bodies are of particular importance in relation to OSPAR: The International Seabed Authority (ISA), North-East Atlantic Fisheries Commission (NEAFC), and the International Maritime Organization (IMO). Their competences shall now be further explained.

The exploration of mineral resources on the deep seabed (the Area) is governed by the ISA. The ISA has an extensive mandate to protect the marine environment, granted by article 145 UNCLOS. Moreover, by virtue of article 162(2)(x) UNCLOS the ISA can disapprove areas for exploitation by contractors in case of potential risk of serious harm to the marine environment. It is important to note that the ISA's environmental mandate is strictly limited to matters related to non-living resources. Activities like bottom trawling, with detrimental effects on deep-sea ecosystems, fall outside of its mandate. In its Mining Code<sup>44</sup> the ISA introduced several environmental safeguards and widely applies the precautionary approach.<sup>45</sup> The ISA can designate Preservation Reference Zones (PRZ)<sup>46</sup> in which mining is prohibited, and Areas of Particular Interest (APEIs),<sup>47</sup> aimed at protecting certain habitat types.

States fishing on the high seas are obliged to cooperate under article 118 UNCLOS. Where there is a Regional Fisheries Management Organizations (RFMO) with competence to establish conservation and management measures, States are obliged to give effect to their duty to cooperate by becoming a member of this RFMO, or by agreeing to apply the conservation and management measures established by this RFMO.<sup>48</sup> For OSPAR, the most important RFMO is NEAFC, given the vast overlap between their respective maritime areas.<sup>49</sup> The primary purpose of RFMOs is the regulation and coordination of the exploitation of fish stocks. The conservation of living resources is also a key element in their mandate, as provided by article 118 UNCLOS. The FSA further elaborates on this obligation, and introduces modern principles like the

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<sup>44</sup> The Mining Code comprises of three sets of regulations: Regulations on prospecting and exploration for polymetallic nodules in the Area, 13 July 2000 (Nodules Regulations); Regulations on prospecting and exploration for polymetallic sulphides in the Area, 7 may 2010 (Sulphides Regulations); Regulations on prospecting and exploration for cobalt-rich ferromanganese crusts in the Area, 29 November 2009 (Cobalt Crusts Regulations).

<sup>45</sup> Scovazzi T, "The Exploitation of Resources of the Deep-Seabed and the Protection of the Environment" (2014) 57 *German Yearbook Of International Law* 185.

<sup>46</sup> Regulation 31 (7) Nodules Regulations.

<sup>47</sup> ISA Legal and Technical Commission, 'Environmental Management Plan for the Clarion-Clipperton Zone' (ISBA/17/LTC/7) 13 July 2011, Article 42.

<sup>48</sup> UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995, in force 11 December 2001) 2167 UNTS 88, article 8 (3).

<sup>49</sup> Benn AR et al, "Human Activities on the Deep Seafloor in the North East Atlantic: An Assessment of Spatial Extent" (2010) 5 *PLoS ONE*.

ecosystem<sup>50</sup> and precautionary approach.<sup>51</sup> NEAFC actively uses this mandate to protect the marine environment, and has been fighting illegal, unreported and unregulated fishing with a blacklist since 2005, and has a Port State Control system in place since 2007.<sup>52</sup> Under its own Convention, NEAFC has the possibility to close certain areas from fisheries.<sup>53</sup> NEAFC has used this option extensively, by closing five areas in the Rockall-Hatton Bank area to bottom fishing in 2007, and by closing five areas to bottom fishing in the Mid-Atlantic Ridge in ABNJ to protect Vulnerable Marine Ecosystems (VMEs) in 2009.<sup>54</sup>

The third sectoral body of importance is the IMO, the global organization responsible for regulation of international shipping activities.<sup>55</sup> The IMO has 171 member States, and its main instruments have close to universal acceptance.<sup>56</sup> As the primary global body for shipping, it plays an important standard-setting role through UNCLOS, which refers to “generally accepted international standards” (GAIRAS) in a significant number of provisions throughout the Convention.<sup>57</sup> It is largely agreed that standards are “generally accepted” when they meet the criteria of widespread participation.<sup>58</sup> Given the widespread acceptance of IMO instruments, standards set by the IMO can therefore become binding on UNCLOS parties through GAIRAS, even when they are not a member to the relevant treaty.

Two key Conventions adopted under the IMO are MARPOL<sup>59</sup> and SOLAS,<sup>60</sup> which both have close to universal acceptance. IMO instruments rely heavily on the flag State principle as laid down in article 94 UNCLOS. The IMO Conventions are thus also applicable in ABNJ, given that States can exercise jurisdiction over their flagged vessels anywhere. Although it is not its primary focus, the IMO does have tools to protect the marine environment from shipping impacts by establishing Particularly Sensitive Sea Areas (PSSAs) and Special Areas under

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<sup>50</sup> Article 5 (f) FSA

<sup>51</sup> Article 6 FSA

<sup>52</sup> Hoydal K, Johnson D and Hoel A, ‘Regional Governance: The Case of NEAFC and OSPAR’ in Serge M. Garcia Jake Rice Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation* (Wiley 2014) 229

<sup>53</sup> Convention on Future Multilateral Cooperation in Northeast Atlantic Fisheries (18 November 1980, in force 17 March 1982)

<sup>54</sup> Hoydal K, Johnson D, Hoel A, *supra* note 52, 230

<sup>55</sup> Gjerde KM and Rulska-Domino A, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead” (2012) 27 *The International Journal of Marine and Coastal Law* 364.

<sup>56</sup> By percentage of global merchant tonnage: MARPOL, 97,07%; SOLAS, 98,8%; STCW 98.77%; COLREG, 98,05% (IMO Document MSC 84/INF.13, 2008).

<sup>57</sup> E.g. UNCLOS Articles 21 (2) on innocent passage; Article 39 (2) (b) on transit passage; Article 94 (2) (a) on flag state duties; Article 211 (2) on pollution from vessels.

<sup>58</sup> Frank V, *The European Community and marine environmental protection in the international law of the sea: implementing global obligations at the regional level* (Martinus Nijhoff Publishers 2008) ch 1, 26

<sup>59</sup> International Convention for the Prevention of Pollution from Ships, 17 February 1973, as modified by the Protocol of 1978, in force 2 October 1983.

<sup>60</sup> International Convention for the Safety of Life at Sea, 1 November 1974, in force 25 May 1980.

MARPOL. A PSSA is an area that requires special protection because of its significance for recognized “ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities”.<sup>61</sup> PSSAs are established through non-binding IMO Assembly resolutions, and in and of itself confer no direct regulatory benefit.<sup>62</sup> They must therefore be accompanied by at least one ‘associated protective measure’ (APM), which must be submitted within two years after the approval in principle of the PSSA.<sup>63</sup> These measures “should be specifically tailored to meet the need of the area to prevent, reduce, or eliminate the identified vulnerability of the area from international shipping activities”,<sup>64</sup> and may include may include ships’ routing measures, reporting requirements, discharge restrictions, operational criteria and prohibited activities.<sup>65</sup> APMs can also include the designation of a Special Area under MARPOL.<sup>66</sup> A Special Area is defined as “a sea area where for recognized technical reasons in relation to its oceanographical and ecological conditions and to the particular character of its traffic, the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, as applicable, is required”.<sup>67</sup> Special Areas are intended to grant a higher level of protection to specific vulnerable parts of the oceans,<sup>68</sup> and impose more stringent restrictions on the discharge of harmful substances.<sup>69</sup> A Special Area can encompass the maritime zones of several States, or even an entire enclosed or semi-enclosed area.<sup>70</sup> Whereas no PSSAs have been designated in ABNJ, Special Areas were designated in high seas areas of the Mediterranean Sea and Antarctic Sea.<sup>71</sup>

In sum, all these sectoral bodies have the tools to establish marine protected areas or other area based management tools. They all have different purposes and use different criteria to establish

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<sup>61</sup> IMO Revised guidelines for the identification and designation of particularly sensitive sea areas, 1 December 2005, Article 1.2.

<sup>62</sup> Prior S, Chircop A and Roberts J, “Area-Based Management on the High Seas: Possible Application of the IMO’s Particularly Sensitive Sea Area Concept” (2010) 25 *The International Journal of Marine and Coastal Law* 499.

<sup>63</sup> Drankier P, “Marine Protected Areas in Areas beyond National Jurisdiction” (2012) 27 *The International Journal of Marine and Coastal Law* 301.

<sup>64</sup> IMO Resolution A.982(24), 6 February 2006 (A 24/Res.982) par. 7.5.2.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, 6.1.1. Special Areas can be designated under MARPOL Annexes I, II, IV and V.

<sup>67</sup> IMO Resolution A.927(22), 15 January 2002, par. 2.1.

<sup>68</sup> Drankier P, *supra* note 63, 300.

<sup>69</sup> Prior S, Chircop A and Roberts J, “Area-Based Management on the High Seas: Possible Application of the IMO’s Particularly Sensitive Sea Area Concept” (2010) 25 *The International Journal of Marine and Coastal Law* 509.

<sup>70</sup> IMO Resolution Resolution A.927(22), 15 January 2002 par. 2.2.

<sup>71</sup> Special Areas under MARPOL,

<http://www.imo.org/en/OurWork/Environment/SpecialAreasUnderMARPOL/Pages/Default.aspx>, accessed 3 July 2020.

them. In order to establish a coherent MPA in ABNJ, cooperation with these bodies is required so that these protective measures can be coordinated and all activities in the area are covered.

## 2.4 Convention on Biological Diversity

Besides the UNCLOS, the other global instrument with relevance to MPAs in ABNJ is the CBD. The CBD is more of a modern treaty, at least in comparison to UNCLOS, and applies the precautionary and ecosystem approach.<sup>72</sup> At first glance, this Convention appears to be a suitable instrument for the establishment of such MPAs. In this regard, article 4 and 8 are of particular importance. The former delineates the scope of the CBD and provides that it is applicable to components of biodiversity in areas within national jurisdiction, and merely to processes and activities in ABNJ. The latter provision entails the obligation to establish a system of MPAs or areas where special measures need to be taken to conserve biological diversity. *Drankier* argues that article 8 is also applicable in ABNJ, considering that such special measures would be used to regulate processes or activities.<sup>73</sup> Others argue that the establishment of MPAs in ABNJ would concern the protection of components of biodiversity, and thus fall outside of the CBD's scope.<sup>74</sup> The latter argument seems the most convincing, given that article 22 (2) of the CBD gives priority to the law of the sea. Rather than overcoming the restrictions of the UNCLOS as discussed above, the CBD thereby confirms this framework.<sup>75</sup> Moreover, article 5 urges parties to cooperate with each other and with competent international organizations in respect of ABNJ for the conservation and sustainable development of biodiversity. It should be noted that by the inclusion of the phrase "as far as possible and as appropriate", the binding force of this provision is limited.

Overall, it can be concluded that the CBD's relevance in regard to MPA governance in ABNJ is very limited. It has been observed that this instrument largely relies on "the goodwill of its Parties and other competent organizations to implement its decisions, targets and guidance documents".<sup>76</sup> Therefore, this brief analysis will suffice for the purpose of this thesis.

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<sup>72</sup> The precautionary approach is implicitly mentioned in the preamble of the Convention, and an ecosystem approach can be derived from articles 2, 8 and 9. See also Decision COP II/8 (UNEP/CBD/COP/DEC/2/8) where it is provided that the "ecosystem approach should be the primary framework of action to be taken under the Convention".

<sup>73</sup> *Drankier P*, *supra* note 63, 297.

<sup>74</sup> *Matz-Lück N, Fuchs J*, "The Impact of OSPAR on Protected Area Management beyond National Jurisdiction: Effective Regional Cooperation or a Network of Paper Parks?" (2014) 49 *Marine Policy* 158.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ardron JA et al*, "The Sustainable Use and Conservation of Biodiversity in ABNJ: What Can Be Achieved Using Existing International Agreements?" (2014) 49 *Marine Policy* 100.

## 2.5 Concluding Remarks

This chapter has given a general overview of the existing legal framework in ABNJ. The comment that the regime governing ABNJ is “complex, loosely coordinated, and generally permissive”<sup>77</sup> is accurate. It is no novelty that there is a need to improve this regime, especially in regard to biodiversity protection. This has led to the initiation of the BBNJ process, which will be further discussed in the chapter 4. For now, if a regional organization wishes to establish an MPA in ABNJ, it has to find its way through this complex framework. Looking at UNCLOS, it can be concluded that it remains silent on the unilateral or regional establishment of MPAs in ABNJ. It neither allows nor prohibits it. Establishment of MPAs in ABNJ by means of regional cooperation is possible, as long as it is in accordance with the Convention and other rules of (customary) international law. The compatibility between high seas freedoms of third States and conservation measures in the MPAs need careful consideration.<sup>78</sup> Cooperation with many different States, stakeholders, sectoral and regional organizations is required in order to establish an MPA in ABNJ. It should also be borne in mind that, even when such cooperation is successful, conservation measures in such an MPA can only be imposed on the parties that agreed to its establishment, in accordance with the *pacta tertiis* principle.

## CHAPTER 3: MPAS IN ABNJ UNDER OSPAR

### 3.1 Introduction

It has previously been shown that MPA coverage in OSPAR’s ABNJ-maritime area is very high, with 8,9% coverage. This stands in stark contrast with the global average in ABNJ of 1,2%. These numbers certainly give the impression that biodiversity protection in this area is at a very high level. However, the literature is full of examples of ‘paper parks’, i.e. designated protected areas that are not ensuring a high level of protection in practice.<sup>79</sup> This chapter will assess OSPAR’s network of MPAs in ABNJ, in order to establish whether it can be qualified as such.

Firstly, OSPAR’s regulatory framework, as well as its competence to establish MPAs in ABNJ will be discussed in section 2. Thereafter, the MPA regime will be thoroughly reviewed by looking at the following stages: Identification and designation (section 3), cooperation with

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<sup>77</sup> Mendenhall E et al, *supra* note 15.

<sup>78</sup> Tanaka Y, “Reflections on High Seas Marine Protected Areas: A Comparative Analysis of the Mediterranean and the North-East Atlantic Models” (2012) 81 *Nordic Journal of International Law* 325.

<sup>79</sup> Pieraccini M, Coppa S and Lucia GAD, “Beyond Marine Paper Parks? Regulation Theory to Assess and Address Environmental Non-Compliance” (2016) 27 *Aquatic Conservation: Marine and Freshwater Ecosystems* 177.

other organizations (section 4), implementation and monitoring (section 5) and enforcement (section 6).

### **3.2 OSPAR Convention and competence to establish MPAs in ABNJ**

The OSPAR Convention was adopted in Paris on 22 September 1992, and replaced the 1972 Oslo Convention on Dumping Waste at Sea and the 1974 Paris Convention on Land-Based Sources and Marine Pollution. OSPAR has 16 contracting parties (CPs): Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom of Great Britain and Northern Ireland, Luxembourg, Switzerland and the European Union, all of which have signed and ratified the OSPAR Convention.

OSPAR is a modern, second generation environmental protection treaty.<sup>80</sup> This is illustrated by the inclusion of the precautionary principle,<sup>81</sup> polluter pays principle,<sup>82</sup> ecosystem approach<sup>83</sup> and the use of best Best Available Techniques (BAT) and Best Environmental Practices (BEP).<sup>84</sup> The Convention consists of 34 articles, containing general obligations and principles which are elaborated in its five Annexes and three Appendixes.<sup>85</sup> Article 1 (a) defines the ‘maritime area’, in which the Convention applies. The maritime area encompasses extensive areas of ABNJ in the Wider Atlantic and the Arctic, covering roughly 40% of the total area.<sup>86</sup> OSPAR’s key organ is the OSPAR Commission. The Commission meets annually, and is made up of representatives of each of the CPs. Its most important functions include supervising the implementation of the Convention and reviewing the condition of the maritime area and the effectiveness of measures.<sup>87</sup> The Commission can adopt decisions and recommendations.<sup>88</sup> Both are adopted by consensus, or a three-quarters majority when no consensus can be reached.<sup>89</sup> Decisions are legally binding,<sup>90</sup> whereas recommendations have no binding force.<sup>91</sup> Besides CPs, the Commission meetings can also be attended by Observers.<sup>92</sup> Observers have

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<sup>80</sup> König D, “Marine Environment, International Protection” (2013) Max Planck Encyclopedia of Public International Law 15.

<sup>81</sup> OSPAR Convention preamble; Article 2 (2)(a); Article 3 (1)(b).

<sup>82</sup> OSPAR Convention preamble; Article 2 (1)(a); Article 2 (2)(a).

<sup>83</sup> OSPAR Convention Article 2 (2)(b).

<sup>84</sup> OSPAR Convention Article 2 (3)(b).

<sup>85</sup> Molenaar EJ, Oude Elferink AG, *supra* note 42, 13.

<sup>86</sup> MPAs in areas beyond national jurisdiction, <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>, accessed on 5 June 2020.

<sup>87</sup> OSPAR Convention Article 10.

<sup>88</sup> OSPAR Convention Article 13 (1).

<sup>89</sup> OSPAR Convention Article 13 (2).

<sup>90</sup> OSPAR Convention Article 13 (2).

<sup>91</sup> OSPAR Convention Article 13 (5).

<sup>92</sup> OSPAR Convention article 11.

no voting right, but may participate and present information and reports.<sup>93</sup> OSPAR currently has 64 Observers: 41 NGOs and 23 Intergovernmental Organizations.<sup>94</sup>

Annex V of the OSPAR Convention on “The Protection And Conservation Of The Ecosystems And Biological Diversity Of The Maritime Area”, which was added in 1998, has most relevance in relation to MPAs. Article 2 of Annex V provides that:

“In fulfilling their obligation under the Convention to take, individually and jointly, the necessary measures to protect the maritime area against the adverse effects of human activities [...]”<sup>95</sup>

This provision provides general obligations with regard to the protection of the maritime area.<sup>96</sup> Building on this obligation, Article 3 (1)(b)(ii) formulates a duty of the OSPAR Commission to:

“develop means, consistent with international law, for instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to particular species or habitats;”<sup>97</sup>

Neither of these provisions provide directly for the establishment of MPAs in ABNJ. These provisions are, however, mentioned in the preamble of the decisions creating MPAs in ABNJ, and thus seem to be interpreted as the legal basis for their establishment.

Article 4 of Annex V is also of importance, as it limits the scope of the OSPAR Convention by excluding measures related to fisheries and maritime transport. Although not expressly stated, deep sea mining activities are also excluded from OSPAR’s mandate, as these are governed by the ISA. All other activities which can have an adverse effect on the ecosystem and the biological diversity in the North-East Atlantic are covered by OSPAR.<sup>98</sup> Such activities include scientific research, cable-laying, land-based pollution, and the construction of offshore installations and artificial islands.

OSPAR’s CPs committed themselves in 2003<sup>99</sup> to establish an ecologically-coherent and well managed network of MPAs.<sup>100</sup> The aim of this ‘OSPAR network’ is threefold:

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<sup>93</sup> OSPAR Convention article 11 (2).

<sup>94</sup> <https://www.ospar.org/organisation/observers>, accessed 9 August 2020.

<sup>95</sup> OSPAR Convention Annex V, Article 2.

<sup>96</sup> Tanaka Y, *supra* note 78, 315.

<sup>97</sup> OSPAR Convention Annex V, Article 3 (1)(b)(ii).

<sup>98</sup> Molenaar EJ, Oude Elferink AG, *supra* note 42, 14.

<sup>99</sup> Summary record 2003 OSPAR Commission meeting (OSPAR 03/17/1-E) 23-27 June 2003, Annex 9: OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas.

<sup>100</sup> OSPAR Recommendation 2003/3, par. 2.1.

1. Protect, conserve and restore species, habitats and ecological processes which are adversely affected as a result of human activities;
2. Prevent degradation of and damage to species, habitats and ecological processes, following the precautionary principle;
3. Protect and conserve areas that best represent the range of species, habitats and ecological processes in the OSPAR maritime area.<sup>101</sup>

This MPA network includes MPAs “outside the jurisdiction of the CPs which has been included as a component of the network by the OSPAR Commission”.<sup>102</sup> The legal framework within which this is to be achieved, is addressed in a document that was published in 2009, named “OSPAR’s Regulatory Regime for establishing Marine Protected Areas (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area”.<sup>103</sup> In this document, it is concluded that OSPAR plays an important role in protecting the parts of its maritime area in ABNJ. It is argued that no other international organization is mandated to set in place an integrated process for the protection of this area, having regard to human activities and their cumulative impacts on the basis of the ecosystem approach.<sup>104</sup> It is acknowledged that OSPAR’s competences in ABNJ are limited, but this is then relativized by the argument that:

“the limitations to manage such important activities also apply in areas within national jurisdiction (cf. UNCLOS Article 58), and this had not been an impediment for establishing MPAs in such areas. Thus it may be said that ABNJ raise additional questions, but not necessarily new issues with respect to the scope of OSPAR to exercise its competence in ABNJ.”<sup>105</sup>

However, as pointed out by *Matz-Lück* and *Fuchs*, this “can hardly be considered an argument”<sup>106</sup> since the context is entirely different. Indeed, the drafters of this document seem to overlook fact that in the EEZ the coastal State has jurisdiction with regard to the protection and preservation of the marine environment.<sup>107</sup> Although it is correct that the EEZ, for certain purposes, remains “high seas” since thirds States enjoy certain high seas freedoms,<sup>108</sup> it should not be overlooked that States exercising these rights must have due regard to the rights and duties of the coastal State<sup>109</sup> - whose domestic regulations adopted pursuant to article 56 (1) UNCLOS form an integral part of the EEZ regime. In the high seas, in contrast, equal rights are

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<sup>101</sup> *Ibid.*, par. 2.1.

<sup>102</sup> *Ibid.*, par. 1.1.

<sup>103</sup> 2009 OSPAR Commission meeting (OSPAR 09/22/1-E) 22–26 June 2009, Annex 6.

<sup>104</sup> *Ibid.*, par. 2.21.

<sup>105</sup> *Ibid.*, 2.22.

<sup>106</sup> *Matz-Lück* N, *Fuchs* J, *supra* note 74, 159.

<sup>107</sup> Article 56 (1)(b)(iii) UNCLOS.

<sup>108</sup> Article 58 (1), 87 (1) UNCLOS.

<sup>109</sup> Article 58 (3) UNCLOS.

granted to all States. Although a rule of ‘due regard’ also applies here, all States are placed on an equal footing – which is an important difference.

Although this argumentation is compelling, in the author’s view there is more nuance to it. What should be kept in mind, is the question of the *range of application* of these MPAs. For these measures to merely apply *inter partes*, the OSPAR Convention provides sufficient legal basis. This is in line with article 311 (3) UNCLOS, as the establishment of MPAs that apply *inter partes* is in line with the objectives of UNCLOS, especially those of part XII. However, when a broader range of application is pursued (i.e., non-OSPAR member States) more legal hurdles present themselves. Here, the above argument regarding the differences between ABNJ and the EEZ weights more heavily. The rights and freedoms of all States (in particularly non-OSPAR CPs) need to be carefully considered, and intensive cooperation with sectoral bodies is required.

OSPAR has been actively expanding its MPA network since 2003. The so called ‘OSPAR Network’ comprises of a total of 496 MPAs, covering an area of 864,337 square kilometers, and 6.4 % of the OSPAR Maritime Area.<sup>110</sup> Seven of those MPAs are located in ABNJ, as shown in table 3.1 below.

Name	Established	Size	Located entirely in ABNJ
<b>Charlie-Gibbs South MPA</b>	OSPAR Ministerial Meeting in 2010	146,032 km <sup>2</sup>	Yes
<b>Mid-Atlantic Ridge North of the Azores High Seas MPA</b>	OSPAR Ministerial Meeting in 2010	93,570 km <sup>2</sup>	No, seabed located on extended continental shelf of Portugal
<b>Milne Seamount Complex MPA</b>	OSPAR Ministerial Meeting in 2010	20,914 km <sup>2</sup>	Yes
<b>Josephine Seamount High Seas MPA</b>	OSPAR Ministerial Meeting in 2010	19,363 km <sup>2</sup>	No, seabed located on extended continental shelf of Portugal
<b>Altair Seamount High Seas MPA</b>	OSPAR Ministerial Meeting in 2010	4,384 km <sup>2</sup>	No, seabed located on extended continental shelf of Portugal
<b>Antialtair High Seas MPA</b>	OSPAR Ministerial Meeting in 2010	2,807 km <sup>2</sup>	No, seabed located on extended continental shelf of Portugal
<b>Charlie-Gibbs North High Seas MPA</b>	OSPAR Ministerial Meeting in 2012	178,094 km <sup>2</sup>	No, seabed located on extended continental shelf of Iceland

**Table 3.1:** OSPAR MPAs in ABNJ<sup>111</sup>

<sup>110</sup> OSPAR 2018 MPA Status report, *supra* note 17, 7.

<sup>111</sup> *Ibid.*, 17.

These MPAs will now be thoroughly analyzed and discussed. The focus will be on the Charlie-Gibbs South MPA. The reason for this is twofold. Firstly, because it is entirely located in ABNJ. This is also the case for the Milne Seamount MPA, however this MPA is considerably smaller in size. Secondly, the process leading to the establishment of the Charlie Gibbs-South MPA is extensively documented and can be seen as the laying down the framework for the high seas MPAs that followed.

### **3.3 Identification and designation**

In 2003, the OSPAR Commission adopted the “Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area”.<sup>112</sup> This document, which was amended by the Biodiversity Committee<sup>113</sup> in 2007 and 2016, sets out the process of identification and selection of sites. The procedure is applicable to the establishment of MPAs both within and beyond national jurisdiction.<sup>114</sup> It sets out a two-stage approach to designating MPAs. In the first stage, the ‘ecological criteria/considerations’ should be applied, which are listed in Appendix 1. These are: Threatened or declining species and habitats/biotopes; important species and habitats/biotopes; ecological significance; high natural biological diversity; representativity; sensitivity; naturalness. An area qualifies for selection as an MPA if it meets several but not necessarily all of these criteria.<sup>115</sup> It is not provided what is meant by “several”. It certainly means not all criteria need to be met, but at least more than one. *O’Leary* et al observed that “in practice it turned out that it was better to provide evidence that a site could meet many of the criteria”.<sup>116</sup> Once sites are selected by using these criteria, they are to be prioritized by re-applying the criteria listed in Appendix 1, and by applying the additional ‘practical criteria/considerations’ listed in Appendix 2: Size; potential for restoration; degree of acceptance; potential for success of management measures; potential damage to the areas by human activities; scientific value. As is illustrated by table 2.1, these criteria are well-balanced with the aims of the OSPAR Network.

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<sup>112</sup> Agreement 2003-17, Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area, as amended by BDC 2007 (BDC 2007 Summary Record (BDC 07/12/1) § 3.43b), and BDC 2016 (BDC 16/9/1, §5,27 and Annex 13).

<sup>113</sup> The Biodiversity Committee meets annually, and oversees the implementation of Annex V to the Convention, as well as the Biodiversity Strategy.

<sup>114</sup> OSPAR Agreement 2003-17 par. 3.2.

<sup>115</sup> *Ibid.*, Appendix I.

<sup>116</sup> O’Leary B et al, “The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next” (2012) 36 *Marine Policy* 601.

<b>Aims of the OSPAR Network</b>	<b>Protect, conserve and restore species, habitats and ecological processes which are adversely affected as a result of human activities</b>	<b>Prevent degradation of and damage to species, habitats and ecological processes following the precautionary principle</b>	<b>Protect and conserve areas which best represent the range of species, habitats and ecological processes in the maritime area</b>
<b>Ecological considerations</b>	(1.1) Threatened or declining species and habitats/biotopes	(1.1) Threatened or declining species and habitats/biotopes (1.2) Important species and habitats/biotopes (1.6) Sensitivity	(1.3) Ecological significance (1.4) High natural biological diversity (1.5) Representativity (1.7) Naturalness
<b>Practical considerations</b>	(2.1) Size (2.2) Potential for restoration (2.3) Degree of acceptance (2.4) Potential for success of management measures (2.6) Scientific value	(2.1) Size (2.3) Degree of acceptance (2.4) Potential for success of management measures (2.6) Scientific value (2.5) Potential damage to the area by human activities	(2.1) Size (2.3) Degree of acceptance (2.4) Potential for success of management measures (2.6) Scientific value

**Table 3.2:** Correlation between identification criteria and aims of the OSPAR Network<sup>117</sup>

Although it is provided that the Identification Guidelines are applicable to all MPAs, the document seems to be drafted for MPAs within national jurisdiction. Very specific information about the possible sites is required, which in many cases will not be available for the generally more remote sites in ABNJ. Moreover, Appendix 4 is not applicable to sites in ABNJ.<sup>118</sup> This Appendix describes in a detailed proposal procedure for sites that are selected through this process. As an alternative, it is merely provided that the OSPAR Commission is responsible for data validation and final approval.<sup>119</sup>

One interesting element in OSPAR's designation process is the role of NGOs. As shown in section 2, a total of 41 NGOs are admitted to OSPAR as Observers. Whereas some of these NGOs play a very marginal role of importance, and rarely attend Commission meetings, others are very actively involved. Some NGOs, like BirdLife, OCEANA, WWF and GreenPeace are active participants in the Commission meetings, as well as OSPAR's subsidiary bodies, such as the Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA) and the Biodiversity Committee (BC). The formal basis for their involvement in these meetings cannot be found in the OSPAR Convention, which merely provides that Observers are allowed to attend Commission meetings, nor in the Identification Guidelines – that do not even mention Observers. It can instead be found in Annex 31 of the 2003 Commission meeting, outlining the “strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic”.<sup>120</sup> Here, it is provided that the OSPAR Commission shall consider reports

<sup>117</sup> OSPAR Agreement 2003-17, Appendix 3.

<sup>118</sup> OSPAR Agreement 2003-17, Appendix 4, 6, last paragraph.

<sup>119</sup> Ibid.

<sup>120</sup> Summary record 2003 OSPAR Commission meeting (OSPAR 03/17/1-(A-B)-E) 23-27 June 2003, Annex 31.

and assessments from CPs and observers on possible components of the OSPAR network.<sup>121</sup> Perhaps surprisingly, given this loose basis, some NGOs play a key role in the identification and designation of MPAs – as will become evident in the remainder of this section.

The first proposal for an MPA in ABNJ, the Charlie-Gibbs Fracture Zone,<sup>122</sup> was proposed by an NGO (WWF) in 2007.<sup>123</sup> The five proposals that followed were prepared by the University of York, in collaboration with OSPAR and sponsored by Germany in 2008.<sup>124</sup> Thereafter, only two new proposals for MPAs in ABNJ were made, both by NGOs: the Arctic Ice MPA and the North Atlantic Current and Evlanov Seamount (NACES) MPA, by respectively WWF<sup>125</sup> and BirdLife.<sup>126</sup> Notably, to date no CP has made a proposal for an MPA in ABNJ following the procedure in the Identification Guidelines. Given the limited guidance Agreement 2003-17 gives for the selection of sites in ABNJ and taking into account the unique nature of these MPAs, a single mechanism to cover both types of MPAs seems sub-optimal. This was recognized by the parties in at the 2011 ICG-MPA meeting.<sup>127</sup> It was noted that there is “no coordinated approach by CPs to select any further sites with a view to enhance the ecological coherence of the OSPAR MPA Network in ABNJ”.<sup>128</sup> Regrettably, no follow-up was made in the following sessions.

In 2019, a consultation procedure<sup>129</sup> for MPAs in ABNJ was developed. The aim of this procedure is to enhance transparency of the nomination process, and to draw attention of users, coastal States and other stakeholders to the proposed MPA.<sup>130</sup> This can certainly contribute to enhanced acceptance and compliance, but does not address the problem that there is no streamlined process for identifying sites in ABNJ. This is likely to be the reason that the last proposal made by a CP is dated from 2008. Although establishing MPAs in ABNJ is inherently more challenging than establishing MPAs within national jurisdiction due to the limited

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<sup>121</sup> *Ibid.*, par. 4.4 (d).

<sup>122</sup> Later to be split up in two MPAs, the Charlie-Gibbs North and -South MPAs.

<sup>123</sup> Summary record 2007 OSPAR Commission meeting (OSPAR 07/24/1-E) 25-19 June 2007, par. 6.17.

<sup>124</sup> Summary record 2008 OSPAR Meeting of the Working Group on Marine Protected Areas, Species and Habitats (MASH) Baiona (Spain): 21-24 October 2008, MASH 08/8/1-E, par. 5.17.

<sup>125</sup> Summary Record of the Meeting of the 2014 Biodiversity Committee (BDC), The Hague, 18-22 February 2014, BDC 14/9/91, par. 4.18.

<sup>126</sup> Summary record 2011 OSPAR Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA 11/10/1-E) 5-7 September 2011.

<sup>127</sup> Summary record 2016 OSPAR Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA 16/9/1-E) 11-13 October 2016, par. 5.4.

<sup>128</sup> ICG-MPA 2011, *supra* note 116, par. 4.16.

<sup>129</sup> OSPAR Agreement 2019-09, General consultation procedures for establishing Marine Protected Areas in Areas Beyond National Jurisdiction of the OSPAR Maritime Area.

<sup>130</sup> *Ibid.*, par. 3.1.

knowledge of these offshore areas, it can nonetheless be concluded that the existing mechanisms within OSPAR for selecting sites are lacking.

### **3.4 Implementation, Monitoring and Review**

In order to assure that MPAs in ABNJ are not just “paper parks”,<sup>131</sup> and actually achieve their conservation objectives, implementation of measures and monitoring their effects on the marine environment are essential. First, the measures that need to be implemented need to be reviewed. OSPAR’s MPAs in ABNJ are each established by a binding decision of the OSPAR Commission, which is accompanied by a non-binding recommendation. These documents are very similar for each MPA, thus one may take the Charlie Gibbs-South MPA as a sufficiently illustrative example. This MPA is established by Decision 2012/2.<sup>132</sup> This document, which is fairly brief, sets out the purpose and scope, coordinates of the area and entry into force. The purpose of this decision is “to establish the Charlie-Gibbs South Marine Protected Area [...] in accordance with the conservation objectives”. These objectives are set out in Annex 2 of the corresponding Recommendation.<sup>133</sup> General objectives are given, as well as specific objectives for the water column, benthopelagic layer and benthos. The recommendation further contains provisions on awareness raising, information building, marine science, new developments, third parties and reporting obligations.<sup>134</sup> It is important to note that the recommendation, which is of soft law nature,<sup>135</sup> contains the substantive part of the MPA. Besides that, the objectives and other obligations are all very general and do not entail any specific obligations or actions. It is up to the CPs to implement this into their domestic legislation. On top of that, these objectives are phrased in a very hortatory manner.<sup>136</sup>

On implementation of decisions, the OSPAR Convention provides that decisions shall, where appropriate, contain provisions specifying the timetable by which they shall be implemented.<sup>137</sup> Remarkably, the decisions that establish MPAs in ABNJ do not contain such provisions. The only mechanism in place to urge CPs to implement the MPAs is their obligation to report on implementation, anchored in article 5 of the Recommendation. This article provides that CPs should report annually on the implementation of the management measures. Annex 1 contains

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<sup>131</sup> Matz-Lück N, Fuchs J, *supra* note 74.

<sup>132</sup> OSPAR Decision 2010/2 on the establishment of the Charlie Gibbs South Marine Protected Area.

<sup>133</sup> OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area.

<sup>134</sup> *Ibid.*, Article 3.

<sup>135</sup> OSPAR Convention article 13 (5).

<sup>136</sup> For example, “the management framework for the Charlie-Gibbs South MPA should be implemented” (OSPAR Recommendation 2010/13 par. 3.2).

<sup>137</sup> OSPAR Convention article 13.

a form, in which Parties are requested to provide information on specific measures, the effectiveness of measures, any specific difficulties encountered and the reasons for not having fully implemented the Recommendation.<sup>138</sup> These reports are submitted to the ICG-MPA. The amount of reports that are received are generally very low, ranging from only 5 in 2013<sup>139</sup> to 11 in 2015.<sup>140</sup> During the 2018 ICG-MPA meeting it was agreed to change the reporting format to a single form covering all MPAs, instead of a separate one for each individual MPA. The results are not made publicly available, and can thus not be assessed. Very little information in this regard is published by OSPAR, which raises questions regarding the implementation of measures. In the 2016 MPA status report,<sup>141</sup> implementation of MPAs in ABNJ is briefly addressed. The question “Are measures to achieve conservation objectives being implemented?” is answered by merely stating that progress has been made in regard to the OSPAR-NEAFC collective arrangement and that “further work is required; in particular with regard to seabed mining, cable laying and military activities”.<sup>142</sup> The 2018 MPA Status report<sup>143</sup> merely states that no new information on the management status of MPAs in ABNJ has been provided since the 2016 data call.<sup>144</sup>

Monitoring has been described as a key strength of the OSPAR Commission.<sup>145</sup> The reporting obligation of the CPs is anchored in the OSPAR Convention in article 22. Building upon this, OSPAR has an extensive and detailed program in place to monitor and assess the status of the OSPAR maritime area.<sup>146</sup> However, no monitoring programs are in place specifically for the MPAs in ABNJ. The recommendations provide that CPs should “identify suitable mechanisms for monitoring the achievement of the conservation objectives for the area”.<sup>147</sup> However, as can be derived from the 2016 and 2018 MPA Status reports, progress in this regard is non-existent. In the 2016 Report it is stated that, given the lack of dedicated site condition monitoring

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<sup>138</sup> Ibid., Annex 1.

<sup>139</sup> 2013 OSPAR Commission: Report of the meeting of ICG-MPA (ICG-MPA 13/9/1-E) 21-23 January 2013, par. 5.2.

<sup>140</sup> 2015 OSPAR Commission: Report of the meeting of ICG-MPA (ICG-MPA 15/9/1-E) 13-15 October 2015, par. 5.2.

<sup>141</sup> OSPAR Commission 2017, 2016 Status Report on the OSPAR Network of Marine Protected Areas, available at <https://www.ospar.org/documents?d=37521>, accessed 5 July 2020.

<sup>142</sup> Ibid., 43.

<sup>143</sup> 2018 MPA Status report, *supra* note 17.

<sup>144</sup> Ibid., 48.

<sup>145</sup> Johnson D, “Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement in the North-East Atlantic” (2012) Environmental Security in the Arctic Ocean NATO Science for Peace and Security Series C: Environmental Security 333.

<sup>146</sup> OSPAR Coordinated Environmental Monitoring Programme (CEMP) (OSPAR Agreement 2016-01), and OSPAR Joint Assessment and Monitoring Programme (JAMP) 2014 – 2023.

<sup>147</sup> Recommendation 2010/13, par. 3.3.3 d.

programs in place, it is unknown if the MPAs in ABNJ are moving towards its conservation objectives.<sup>148</sup> No progress in this regard is shown by the 2018 Report.

### 3.5 Enforcement and Compliance

When discussing enforcement in ABNJ, two matters need to be emphasized. First of all, as noted in chapter two, conservation measures in ABNJ only work *inter partes*. In accordance with the *pacta tertiis* principle, conservation measures in the MPAs cannot be imposed on non-CPs. Secondly, no State has enforcement powers on foreign-flagged vessels, except in a few limited scenarios which are subject to strict conditions, none of which relate to the protection and preservation of the marine environment.<sup>149</sup> These two matters impose major limitations on any high seas MPA.

Perhaps for this reason, the legal framework surrounding OSPAR's MPAs lacks enforcement measures of any kind. The 2003 MPA Management Guidelines<sup>150</sup> encourage CPs to adopt enforcement tools such as warnings, penalties and fines, however only with regard to MPAs within national jurisdiction. In the decisions and recommendations surrounding the MPAs in ABNJ, enforcement is not mentioned. OSPAR seems to be very aware of its limited competence in this regard, as the matter is not discussed during any of its Commission-, ICG-MPA or BDC meetings – as far as can be derived from the published documentation, at least. Flag State enforcement thus seems to be the only available tool. However, mere reliance on flag State enforcement is generally not very effective. As discussed in chapter 2, flag State controls can easily be circumvented by registering under a different Flag, preferably one of a State (e.g. a flag of convenience) that is no party to OSPAR.

An issue closely related to enforcement is compliance. Given the absence of an enforcement scheme in OSPAR and the soft-law nature of the MPAs in ABNJ, it can be argued that a solid compliance mechanism is required, as in the absence of such a mechanism the implementation solely relies on the goodwill of the parties. In the OSPAR Convention, compliance is regulated in article 23. This provision provides that compliance shall be assessed by the Commission, based on the reports of the Parties on implementation. When appropriate, the Commission can take measures to assist a CP to carry out its obligations.<sup>151</sup> As previously shown, reporting obligations with regard to MPAs in ABNJ are taken loosely by the Parties, and the results are

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<sup>148</sup> 2016 MPA Status report, *supra* note 141, par. 3.7, 46.

<sup>149</sup> Articles 110, 111 UNCLOS.

<sup>150</sup> OSPAR Commission, 'Guidelines For The Management Of Marine Protected Areas In The OSPAR maritime Area' (OSPAR 2003-18) par. 4.4.

<sup>151</sup> OSPAR Convention article 23 (b).

not made publicly available. As far as can be derived from the annual Commission reports, no measures based on this provision have so far been taken.

### 3.6 International Cooperation

As discussed in chapter 2, there are several sectoral organizations that are mandated to regulate activities in ABNJ. Cooperation with such bodies is thus necessary in order to establish a comprehensive cross-sectoral MPA in ABNJ. OSPAR has been doing so actively, and has taken the lead in enhancing cooperation in the North-East Atlantic by initiating the ‘Madeira Process’ – a series of informal meetings with the aim to ensure a high level of conservation of selected areas in the North-East Atlantic beyond national jurisdiction.<sup>152</sup> The first meeting was held in 2010, and attended by a variety of international organizations, including the ISA, NEAFC, IMO, ICCAT, NASCO, NAMMCO and IWC.<sup>153</sup> A draft ‘Collective Arrangement’ (CA) was adopted, setting out the joint principles and specification for collaborative management of selected aspects of biodiversity protection.<sup>154</sup> The OSPAR Commission endorsed the text in 2011.<sup>155</sup> In 2014, NEAFC entered the Arrangement, which led to the adoption of a renewed and more extensive Arrangement in 2014.<sup>156</sup> The aim of this revised CA is to become “a collective and multilateral forum composed of all competent entities addressing the management of human activities in this region”.<sup>157</sup> Thus, it differs significantly from the bilateral Memoranda of Understanding (MoU) as it aims at wider participation.<sup>158</sup> The aim of the CA is to cooperate and seek coordination to ensure that suitable measures for the conservation and management of certain areas are implemented, informed by the conservation objectives established for these areas.<sup>159</sup> The CA applies to selected areas beyond national jurisdiction in the North-East Atlantic. A list of all areas which are closed by NEAFC for the protection of Vulnerable Marine Ecosystems (VMEs) is included, as well of a list of all OSPAR MPAs in ABNJ. All areas are specified with coordinates and conservation measures that are applicable. The first meeting

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<sup>152</sup> Johnson D, “Can Competent Authorities Cooperate for the Common Good: Towards a Collective Arrangement in the North-East Atlantic” (2012) Environmental Security in the Arctic Ocean NATO Science for Peace and Security Series C: Environmental Security 333.

<sup>153</sup> Summary record 2010 Biodiversity Commission (BDC 10/11/1-E) 15-18 June 2010, par. 4.7.

<sup>154</sup> Wright G, Rochette J and Druel E, ‘Marine Protected Areas in Areas beyond National Jurisdiction’ in Rayfuse R (eds) *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing 2015) 272.

<sup>155</sup> Summary record 2011 OSPAR Commission meeting (OSPAR 11/20/1-E) 20-24 June 2011, par. 4.17.

<sup>156</sup> OSPAR Agreement 2014-09 (Update 2018): Collective arrangement between competent international organizations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic.

<sup>157</sup> 2018 MPA Status Report, *supra* note 17, 15.

<sup>158</sup> <https://www.ospar.org/about/international-cooperation/collective-arrangement>, accessed on 9 June 2020.

<sup>159</sup> Collective arrangement, *supra* note 156, par. 5.

under the CA was held in 2015, which was described as very successful by the OSPAR parties, leading to “much better mutual understanding of working methods, approaches to conservation and potential for better collaboration and complementary actions”.<sup>160</sup> The meeting has been held annually since then, steadily gaining attraction from a growing number of international organizations. At the most recent meeting in 2019, representatives from FAO, HELCOM, ICCAT, ICES, NAMMCO and UNEP attended.<sup>161</sup> Despite efforts by NEAFC and OSPAR, to date the IMO and ISA have not entered the CA. Remarkably, after the third CA meeting in 2017, NEAFC and OSPAR secretariats would contact the IMO and ISA for participating in the fourth meeting,<sup>162</sup> but despite this they did not attend.<sup>163</sup>

Besides continuing efforts to strengthen the Collective Arrangement, OSPAR has sought to formalize working arrangements with other international organizations by entering into Memoranda of Understanding (MoU). Throughout the years, a significant number of MoUs have been established. The most important ones in regard to MPAs in ABNJ shall now be briefly discussed.<sup>164</sup>

The first document of importance in this regard is the cooperation arrangement with the IMO, which was established 1999.<sup>165</sup> In this arrangement, the parties agree to consult each other on matters of common interest with a view of ensuring maximum coordination,<sup>166</sup> exchange information<sup>167</sup> and attend each other’s meetings.<sup>168</sup> In 2018 the cooperation between the IMO and OSPAR was further strengthened by the adoption of a MoU<sup>169</sup> with the purpose to “cooperate in promoting issues within the scope of the London Convention and London Protocol (LC/LP) to prevent marine pollution by dumping of wastes and other matter in order to protect the marine environment and promote the sustainable use of conservation of marine resources”.<sup>170</sup> With a view to achieve this purpose, the IMO and OSPAR will promote reporting and compliance under the LC/LP, exchange information, promote the development and

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<sup>160</sup> Summary record 2015 OSPAR Commission meeting (OSPAR 15/20/1-E) 22-26 June 2015, par. 10.11.

<sup>161</sup> Summary record 2019 OSPAR Commission meeting (OSPAR 19/20/1-E) 24-28 June 2019, par. 8.12.

<sup>162</sup> Summary record 2017 OSPAR Commission meeting (OSPAR 17/19/1-E ) 26-29 June 2017, par. 10.2 a.

<sup>163</sup> Summary record 2018 OSPAR Commission meeting (OSPAR 18/20/1-E) 25-29 June 2018, par. 8.1.

<sup>164</sup> For a full list of MoUs and Cooperation Agreements, see: <https://www.ospar.org/about/international-cooperation/memoranda-of-understanding>.

<sup>165</sup> 1999 Agreement of Cooperation Between the International Maritime Organization (IMO) and the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission) A21/26.

<sup>166</sup> Ibid., Annex 3 Article 1.

<sup>167</sup> Ibid Article 2.

<sup>168</sup> Ibid, Article 3.

<sup>169</sup> Agreement of Cooperation between the International Maritime Organization (IMO) and the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Commission).

<sup>170</sup> Ibid., Article 1.

implementation of joint regional workshops and capacity building, share experiences and implement technical cooperation and assistance activities.<sup>171</sup>

Cooperation between NEAFC and OSPAR goes back to 2008, when a MoU<sup>172</sup> was established. This MoU aims to enhance cooperation by, inter alia, exchanging information, cooperating in marine spatial planning and area management, encouraging the funding and conduct of marine science, cooperating on specific projects through ICES and establishing Observer arrangements.<sup>173</sup>

Cooperation with the ISA was formalized through a MoU in 2011. The parties agreed to consult on matters of mutual interest with a view to enhance coordination of their respective activities, encourage the conduct of marine scientific research, exchange data and invite each other's representatives to attend and participate in meetings of their governing bodies.

Although MoUs can be a useful tool to enhance coordination, they are of a very general nature and do not specify the cooperation processes between the parties. The collective arrangement is more useful, since it not only contains more detailed obligations, but also a list of specific sites in which it is applicable. Coordination between OSPAR and NEAFC can still be improved, by further increasing the overlap of protected areas. In the meantime, however, by means of the CA the remaining sites are mutually recognized and a steady flow of information between both organizations is guaranteed. The annual meetings that have taken place under the CA have been marked very useful, and the number of participants is growing. Efforts by the OSPAR Commission to get the IMO and ISA should be continued and intensified, although their entrance into the arrangement does not seem likely in the near future.

### **3.7 Concluding Remarks**

OSPAR's efforts to establish MPAs in ABNJ have been marked as pioneering by some,<sup>174</sup> while others argue that it falls short of its potential.<sup>175</sup> After having thoroughly analyzed all elements of the MPAs, the latter argument seems most convincing. Due credit must be given, however, since OSPAR's high seas MPA network is the first of its kind. In this sense at least, OSPAR can be considered pioneering, as it arguably paved the way for other regional organizations to do the same. However, when looking deeper into the content of these MPAs, it becomes evident

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<sup>171</sup> Ibid., Article 2.

<sup>172</sup> Memorandum of Understanding between the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission, 5 September 2008.

<sup>173</sup> Ibid., par. 1.

<sup>174</sup> Molenaar EJ, Oude Elferink AG, *supra* note 42, 7.

<sup>175</sup> Matz-Lück N, Fuchs J, *supra* note 74, 157.

that much work is to be done for them to be more than just a ‘paper park’. Granted, the legal framework within which OSPAR has to operate has severe limitations, as shown in chapter 2. But even within this framework, more can be done. There are several measures that should be taken to improve the effectivity of these MPAs, e.g. creating site-specific monitoring programs, a cooperative enforcement regime among CPs, port States controls, cooperative use of a Vessel Monitoring System (VMS) and specific implementation guidelines. These matters will be elaborated on in chapter five.

## **CHAPTER 4: MPAS IN THE BBNJ NEGOTIATIONS**

### **4.1 Introduction and historic overview**

Now that the OSPAR MPAs have been analyzed, in this chapter the focus shifts to what is happening on the global level: the BBNJ negotiations. The BBNJ-process can broadly be divided in three phases: The BBNJ Working Group, Preparatory Committee (PREPCOM), and Intergovernmental Conference (IGC).

The first phase was initiated in 2004, when the UNGA established the *Ad Hoc* Open-Ended Informal Working Group to study issues related to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (BBNJ WG).<sup>176</sup> In 2011, at its fourth meeting, the BBNJ WG recommended the UNGA<sup>177</sup> to initiate a process on the legal framework for the conservation and sustainable use of BBNJ, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS.<sup>178</sup> Moreover, it was recommended that this process would address, together and as a whole: (i) marine genetic resources, including questions on the sharing of benefits; (ii) measures such as area-based management tools, including marine protected areas; (iii) environmental impact assessments; (iv) capacity-building and the transfer of marine technology.<sup>179</sup>

At the ninth meeting of the BBNJ WG in 2014, another set of recommendations to the UNGA was made.<sup>180</sup> The UNGA was recommended to decide at its 69<sup>th</sup> session to develop a new legally binding instrument on BBNJ under UNCLOS, and to start a negotiating process to that

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<sup>176</sup> UN General Assembly resolution 59/24 (A/RES/59/24), 4 February 2005.

<sup>177</sup> Letter dated 30 June 2011 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/66/119).

<sup>178</sup> *Ibid.*, par. I (a).

<sup>179</sup> *Ibid.*, par. I (b).

<sup>180</sup> Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/780).

end.<sup>181</sup> Moreover, it was recommended to establish a preparatory committee prior to holding an intergovernmental conference.<sup>182</sup>

The UNGA followed these recommendations, and at its 69<sup>th</sup> session established the Preparatory Committee (PREPCOM).<sup>183</sup> The PREPCOM was mandated to make substantive recommendations to the General Assembly on the elements of a draft text of an ILBI under UNCLOS. The PREPCOM met four times, in 2016 and 2017. In its final report,<sup>184</sup> it outlines the scope of an ILBI and its relationship with other instruments, guiding approaches and principles, as well as the elements of the package.<sup>185</sup>

The final phase of the BBNJ-process is the intergovernmental conference (IGC). The UNGA decided at its 72<sup>nd</sup> session to convene the IGC, with the adoption of Resolution 72/249.<sup>186</sup> The negotiations shall address the topics identified in the ‘package’ that was agreed in 2011. The IGC consists of four planned sessions, to be held between 2018 and 2020 – three of which are completed at the time of writing. Due to the global COVID-19 pandemic, IGC-4 was postponed to the “the earliest possible available date”.<sup>187</sup> At the time of writing, no new date has been set.

Having outlined a brief history of the BBNJ-process, the remainder of this chapter will focus on the elements of the BBNJ negotiations that are most relevant for OSPAR’s MPA regime in ABNJ. The following section will discuss the over-arching issues of cooperation and institutional arrangements. Thereafter, the different elements and processes of MPAs will be analyzed, namely: Identification and designation (section 3), implementation, monitoring and review (section 4) and enforcement and dispute settlement (section 5). Finally, some brief conclusions will be drawn in section 6.

## **4.2 Cooperation and Institutional Arrangements**

As was discussed in chapter 2, a variety of activities in ABNJ are being regulated by regional and sectoral bodies. This raises questions on how the institutions of this new treaty will interact with these bodies. This matter has been a key issue since the very beginning of the BBNJ

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<sup>181</sup> Ibid., par I (e).

<sup>182</sup> Ibid., par I (e)(i).

<sup>183</sup> UN General Assembly Resolution 69/292 (A/RES/69/292), 19 June 2015.

<sup>184</sup> Report of the Preparatory Committee established by General Assembly resolution 69/292 (A/AC.287/2017/PC.4/2), 31 July 2017.

<sup>185</sup> T. Kantai et al, ‘Summary of the Third Session of the Intergovernmental Conference (IGC) on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19-30 August 2019’ (2019). 25 Earth Negotiations Bulletin 2.

<sup>186</sup> UN General Assembly Resolution 72/249 (A/RES/72/249), 19 January 2018.

<sup>187</sup> UN General Assembly decision 74/543 (A/DEC/74/543), 11 March 2020.

process, at the early stages of the BBNJ WG.<sup>188</sup> Throughout these sessions, delegations remained divided on this topic.

In the letter from the Co-Chairs of the BBNJ WG, in which recommendations are provided to the president of the UNGA, this issue of cooperation was addressed by the following phrase: “the process [...] should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies”.<sup>189</sup> It has been argued that the term *undermine* has been selected for its ambiguity, in order to break a deadlock in the negotiations.<sup>190</sup> This led to the inclusion of this phrase in the PREPCOM’s mandate,<sup>191</sup> and it has ‘haunted’<sup>192</sup> the negotiations ever since. During the PREPCOM phase, it was used as an argument by nations that opposed the creation of a new global body, as this would ‘undermine’ other instruments and frameworks.<sup>193</sup> No significant progress was made on this matter, and a similar notion was thus included in the mandate of the IGC.<sup>194</sup>

Throughout the IGCs, this issue remained controversial. Prior to IGC-2, the ‘Presidents Aid’<sup>195</sup> contained three options for what was later to become article 4 on the ‘Relationship between this Agreement and the Convention and relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies’ in the Draft texts. Two of those options had a more positive approach to cooperation, focusing on promoting coherence and complementarity (option I) and implementation in a mutually supportive manner (option III). Option II contained the notion of ‘not to undermine’.<sup>196</sup> In the Draft that was released prior to IGC-3, article 4 contained both the ‘not to undermine’ phrase, as well a paragraph that essentially merged options I and III of the presidents Aid, as proposed by the EU during IGC-2.<sup>197</sup> Notably, at IGC-3, the deletion of this paragraph was requested by the Core Latin American Countries, the Russian Federation, the EU, the African Group, Iceland, Australia,

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<sup>188</sup> V De Lucia, Reflecting on the meaning of “not undermining” ahead of IGC-2, (2019) K.G. Jebsen Centre for the Law of the Sea 2.

<sup>189</sup> Letter dated 13 February 2015 from the Co-Chairs of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/69/780), 13 February 2015, par. I (g).

<sup>190</sup> V De Lucia, *supra* note 188, 2.

<sup>191</sup> UN General Assembly Resolution 69/292 (A/RES/69/292), 19 June 2015.

<sup>192</sup> V De Lucia, ‘Rethinking the Conservation of Marine Biodiversity beyond National Jurisdiction: From “Not Undermine” to Ecosystem-Based Governance’, (2019) ESIL Reflections 8:4 1.

<sup>193</sup> Kraabel K D, *supra* note 13, 141.

<sup>194</sup> UN General Assembly Resolution 72/240 (A/RES/72/249), 19 January 2018.

<sup>195</sup> President’s aid to negotiations (A/CONF.232/2019/1), 3 December 2018.

<sup>196</sup> *Ibid.*

<sup>197</sup> T. Kantai et al, ‘Summary of the Second Session of the Intergovernmental Conference on an International 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: 25 March - 5 April 2019’ (2019) 25 Earth Negotiations Bulletin, 15.

and the IMO.<sup>198</sup> In the most recent draft text that was released prior to IGC-4, all that remains is:

“This Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies.”<sup>199</sup>

It is remarkable that this highly controversial phrase, which was seemingly selected for its ambiguity, is included in a draft in this stage of the negotiations. This illustrates how divided some delegations still are on this issue, even after over a decade of negotiations.

As the issue of the relationship of existing bodies and instruments remains contentious, the same goes for the institutional arrangements. These are two distinct, yet closely related matters. In order to decide on the issue of cooperation, it needs to be clear what the *object* of this cooperation is. Which new bodies will be established, that existing regional and sectoral bodies will have to cooperate with?

In this regard, three main approaches were tabled during negotiations: a global approach, a hybrid approach and a regional approach. The former two emerged in early stages of the negotiations, while the latter came later - as proposed by New Zealand in the PREPCOM phase.<sup>200</sup>

The global approach, with strong global institutional arrangements, is mostly popular amongst developing States, including the strong blocks of the G-77/China and the African Group. It entails a strong COP that establishes ABMTs, including MPAs, and oversees implementation, monitoring and review.<sup>201</sup>

The regional approach is built on the acknowledgement of the primacy of regional and sectoral bodies, favoring weak institutional arrangements. Under this approach, designation of ABMTs, including MPAs, implementation of measures and monitoring and review will happen on the regional and sectoral level, without global oversight. Some States supporting this approach, including OSPAR-members Iceland and Norway, have suggested that the new regime could be supported by expanded regional seas programs.<sup>202</sup> This approach is popular amongst some

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<sup>198</sup> IGC-3 Summary, *supra* note 185, 5.

<sup>199</sup> 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 (27 November 2019).

<sup>200</sup> Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction New Zealand Submission December 2016, 3.

<sup>201</sup> Kraabel K D, *supra* note 13, 161.

<sup>202</sup> Kraabel K D, “Institutional Arrangements in a BBNJ Treaty: Implications for Arctic Marine Science” (2020) Marine Policy 103807 4.

developed nations, Russia and Iceland being its most vocal advocates. The hybrid approach essentially envisions a system where objectives and timeframes for their implementation are set on the global level, which are then to be implemented by States, particularly through regional and sectoral organizations.<sup>203</sup> This approach is supported by, amongst others, New Zealand, Japan, Australia, Switzerland and Chile.

Two options can be derived from the most recent Draft text. Firstly, a variant in which ABMTs, including MPAs are designated by the COP, along with conservation measures, while “taking into account existing measures under relevant legal instruments and frameworks and relevant global, regional and sectoral bodies, as appropriate”.<sup>204</sup> Such instruments and bodies play a role in the implementation of management measures. This approach could be placed somewhere in between the global and hybrid model.

The second option, clearly embodying a strong regional approach, merely gives the COP the power to identify *potential* sites and make recommendations on conservation measures, whilst acknowledging the primary authority of relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.<sup>205</sup>

Besides a COP, a scientific and technical bod and a secretariat are also likely to be established.<sup>206</sup> The exact role of these institutions, and the role of any potential subsidiary bodies remains subject to debate.<sup>207</sup> It remains to be seen how these matters will develop during IGC-4, and perhaps during additional sessions. For OSPAR and other regional and sectoral bodies, these issues are of critical importance, as they can potentially drastically change their role and competence in ABNJ.

In the following sections, the processes in relation to AMBTs, including MPAs will be discussed in more detail.

### **4.3 Identification and Designation**

The first stage in establishing AMBTs, including MPAs, is identification of potential sites. Some controversial matters, in this regard, remain. One point of disagreement is the role of the scientific and technical body in relation to these criteria. It has been proposed to let the scientific

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<sup>203</sup> Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction New Zealand Submission December 2016, 3.

<sup>204</sup> Revised Draft, *supra* note 199, Article (1) (b) (ii), Alt 1.

<sup>205</sup> Revised Draft, *supra* note 199, Article 19 (1) (c), Alt 2.

<sup>206</sup> Revised Draft, *supra* note 199, Article 49 (scientific and technical body), 50 (secretariat).

<sup>207</sup> IGC-3 summary, *supra* note 185, 17.

and technical body (further) develop the criteria.<sup>208</sup> Secondly, some individual criteria which are listed in an Annex to the Draft text, are controversial – including climate change<sup>209</sup> and the inclusion of social and economic factors.<sup>210</sup> The list of criteria that are on the table is extensive, as shown in figure 3.1 below, and needs further work. As pointed out by Norway during IGC-3, “we may end up with every part of the ocean requiring special treatment”.<sup>211</sup> The Draft further provides in article 16 that the criteria are non-exhaustive and indicative. Once a potential site has been identified through these criteria, a proposal can be made. The draft outlines the following procedure: State Parties, individually or collectively, submit a proposal to the Secretariat,<sup>212</sup> which then transmits the proposal to the scientific and technical body for a preliminary review. Thereafter, a consultation procedure is initiated, in which regional and sectoral bodies play a central role.<sup>213</sup> The revised proposal is then re-submitted to the scientific and technical body, which makes recommendations to the COP.<sup>214</sup>

**[ANNEX I  
Indicative criteria for identification of areas]**

- [(a) Uniqueness;
- [(b) Rarity;]
- [(c) Special importance for the life history stages of species;
- [(d) Special importance of the species found therein;
- [(e) The importance for threatened, endangered or declining species or habitats;
- [(f) Vulnerability, including to climate change and ocean acidification;
- [(g) Fragility;
- [(h) Sensitivity;
- [(i) Biological diversity [and productivity];
- [(j) Representativeness;]
- [(k) Dependency;
- [(l) Exceptional naturalness;]
- [(m) Ecological connectivity [and/or coherence];
- [(n) Important ecological processes occurring therein;
- [(o) Economic and social factors;]
- [(p) Cultural factors]
- [(q) Cumulative and transboundary impacts;]
- [(r) Slow recovery and resilience;
- [(s) Adequacy and viability;
- [(t) Replication;
- [(u) Feasibility.]

**Figure 3.1:** List of identification criteria<sup>215</sup>

<sup>208</sup> IGC-3 summary, *supra* note 185, 9.

<sup>209</sup> *Ibid.*, 8.

<sup>210</sup> *Ibid.*, 8-9.

<sup>211</sup> IGC-3 summary, *supra* note 185, 8.

<sup>212</sup> Revised draft, *supra* note 199, Article 17 (1).

<sup>213</sup> Revised draft, *supra* note 199, Article 18 (2), 18 (2)(b).

<sup>214</sup> Revised draft, *supra* note 199, Article 18 (6).

<sup>215</sup> Revised draft, *supra* note 199, Annex I.

Negotiating parties seem to have reached near consensus on this process. Unsurprising exceptions are Iceland and the Russian Federation, avid supporters of a strictly regional approach – with the Russian Federation going as far to propose the deletion of the provision on Proposals in its entirety or moving it to an Annex.<sup>216</sup>

Some issues nonetheless remain controversial. First of all, some delegations are divided on the question whether to accompany the proposal with a management plan, conservation and management measures, or to let the COP identify such plans/measures.<sup>217</sup> Secondly, some delegations – most fanatically the Russian Federation – advocate time-bound AMBTs, including MPAs.<sup>218</sup> Others, including the EU, support regularly reviewing MPAs. Furthermore, the question whether adjacent coastal States should have special rights remains very contentious.<sup>219</sup> Finally, the decision-making process is an issue on which no convergence can thus far be observed. During IGC-2, many countries supported consensus-based decision making, including the African Group, China and the US.<sup>220</sup> The Like-Minded Latin American Countries and New Zealand supported other measures in case of non-consensus.<sup>221</sup> At IGC-3 this matter was discussed in the so called ‘informal-informals’ (formal, more closed sessions), facilitated by Revell (New Zealand) who reported “diverging views on whether decision making should be only by consensus, or a fallback voting mechanism should be contemplated in cases where consensus cannot be reached”.<sup>222</sup>

A related, but separate issue is the *recognition* of existing MPAs that were established by relevant regional and sectoral bodies. Automatic recognition of such MPAs has been tabled, as well as creating a “recognition process”.<sup>223</sup> Both these options were included in the President’s Aid that formed the foundation for the negotiations at IGC-2,<sup>224</sup> followed by a paragraph that provides that non-recognition under the ILBI “shall not affect the legal effect of that measure”.<sup>225</sup> During the discussion on this provision at IGC-2, Australia and the Russian

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<sup>216</sup> IGC-3 summary, *supra* note 185, 13.

<sup>217</sup> *Ibid.*, 10.

<sup>218</sup> E. Morgera et al, ‘Summary of the First Session of the Intergovernmental Conference on an International 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: 4-17 September 2018’ (2018) 25 Earth Negotiations Bulletin 6, see also IGC-3 summary, *supra* note 185, 10.

<sup>219</sup> For more on adjacency, see: Mossop J and Schofield C, “Adjacency and Due Regard: The Role of Coastal States in the BBNJ Treaty” (2020) Marine Policy 103877.

<sup>220</sup> IGC-2 Summary, *supra* note 197, 7.

<sup>221</sup> *Ibid.*

<sup>222</sup> IGC-3 summary, *supra* note 185, 10.

<sup>223</sup> IGC-1 summary, *supra* note 218, 6.

<sup>224</sup> *Ibid.*, par. 4.2, Option I (4).

<sup>225</sup> *Ibid.*, par. 4.2, Option I (5).

Federation opposed the formal notion of ‘recognition’ in the text.<sup>226</sup> On the other hand, the Like-Minded Latin American Countries advocated “a global overarching framework for the *recognition* and establishment of ABMTs to complement measures designated under existing regional and sectoral bodies”<sup>227</sup> (emphasis added). Notably, in the Draft that was released prior to IGC-3, no provision on recognition was included. During IGC-3, the issue was nonetheless brought up again by the EU, proposing to use the identification criteria for recognizing existing MPAs, gaining support from the Pacific Small Island Developing States.<sup>228</sup> This brief discussion did not lead to the inclusion of a provision on recognition in the latest Draft. However, this shows that ‘recognition’ is still a topic of debate and could still be included in the text in a later stage of the negotiations. If the eventual BBNJ-treaty does remain silent on this issue, an option for existing bodies that have established ABMTs, including MPAs, would be to follow the ‘regular’ proposal procedure as described above. This procedure allows for parties to collectively submit proposals. Through this mechanism, regional and sectoral bodies could achieve recognition of existing MPAs. This process does, however, seem sub-optimal and burdensome on regional bodies.

#### **4.4 Implementation, Monitoring and Review**

Solid implementation, monitoring and review mechanisms are crucial for an effective network of ABMTs and MPAs in ABNJ. Before diving into this topic, one thing must be pointed out, namely that discussions about implementation, monitoring and review are closely linked to the matters of cooperation and institutional arrangements, as examined in section 2. It should be kept in mind that the outcome of these discussions will – for al large part - determine on what *level* implementation, monitoring and review take place (globally, or (sub)regionally). In this regard, the suggestion of the EU, US and Japan to address these issues in more detail once delegations have a better understanding of the obligations under the ILBI,<sup>229</sup> seems logical.

Within the BBNJ negotiations, discussions about implementation have two dimensions: Implementation of the ILBI as a whole (Draft article 53), and the specific implementation of part III ABMTs, including MPAs (Draft article 20).

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<sup>226</sup> IGC-2 summary, *supra* note 197, 5

<sup>227</sup> *Ibid.*, 5

<sup>228</sup> E. Morgera et al, ‘BBNJ IGC-3 Highlights: Wednesday, 21 August 2019’ (2019) 25 Earth Negotiations Bulletin

<sup>229</sup> IGC-3 summary, *supra* note 185, 19

During IGC-2, broad support was noted for implementation on the national level.<sup>230</sup> This is reflected in Draft article 20 (1) on implementation of part III, providing that States “shall ensure that activities under their jurisdiction or control that take place in areas beyond national jurisdiction are conducted consistently with the decisions adopted under this Part”,<sup>231</sup> and article 53 (1), applicable to the ILBI as a whole, obliging States to take the necessary legislative, administrative and policy matters.<sup>232</sup> Another provision worth mentioning is article 20 (6),<sup>233</sup> which provides that:

“A State Party that is not a participant in a relevant legal instrument or framework, or a member of a relevant global, regional, subregional or sectoral body, and that does not otherwise agree to apply the conservation and management measures established under such instruments, frameworks or bodies is not discharged from the obligation to cooperate”<sup>234</sup>

This article mimics article 17 of the Fish Stocks Agreement,<sup>235</sup> which builds on the obligation to cooperate in the conservation and management of living resources of article 119 UNCLOS. In the context of the FSA, this provision has, in conjunction with article 8 (4), the consequence that States that do not comply with their duty to cooperate have no access to fish stocks. The inclusion of a similar provision in the BBNJ-treaty would clearly have very different consequences, given the different objectives of the treaties. The foundation of this provision would be article 197, which entails a duty to cooperate for the protection and preservation of the marine environment, instead of article 119 UNCLOS on living resources. Most importantly, whereas under the FSA the potential loss of access to fish stocks creates a strong stimulus for States to comply to their duty to cooperate, such a stimulus is hard to imagine in the context of MPAs in BBNJ. The value of this provision also depends on the type of institutional framework that is chosen, as well as on the issue of recognition. In regional model without a recognition-mechanism, States that are not a member to a regional body are not bound to the measures adopted by that body. The inclusion of this provision will effectively qualify the already existing obligation to cooperate of third States, so that they are under a duty to comply to these measures nonetheless.

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<sup>230</sup> IGC-2 summary, *supra* note 197, 7.

<sup>231</sup> Revised draft, *supra* note 199, Article 20 (1).

<sup>232</sup> *Ibid.*, Article 53 (1).

<sup>233</sup> It should be noted that this provision is entirely placed in ‘brackets’.

<sup>234</sup> Revised draft, *supra* note 199, Article 20 (6).

<sup>235</sup> 1995 UN Fish Stocks Agreement, *supra* note 48

One issue of controversy is what role the COP will play in implementation. At IGC-3, diverging opinions in this regard can be observed. The US and China opposed review by the COP, while the EU and New Zealand were in favor of such a mechanism.<sup>236</sup>

As for monitoring and review, during the ‘informal-informals’ at IGC-3 on this topic, strong support for a structure consisting of States reporting on implementation, and monitoring and review by a scientific and technical body was reported.<sup>237</sup> This is reflected in article 21 of the Draft text. The first paragraph provides that reports on implementation will be made publicly available by the secretariat.<sup>238</sup> Moreover, the Scientific and Technical Body will monitor and periodically review AMBTs, including MPAs, including related conservation measures.<sup>239</sup>

#### **4.5 Enforcement and Compliance**

As discussed in chapter 2, no State enjoys enforcement powers in ABNJ, except when explicitly provided for in limited scenarios.<sup>240</sup> Early on in the negotiations it became clear that enforcement measures in the BBNJ treaty needed to be consistent with UNCLOS.<sup>241</sup> Granted, a treaty that is only applicable in ABNJ may at first sight not lend itself well for a comprehensive enforcement scheme. However, there are options that could function within the existing UNCLOS framework, without ‘undermining’ it. Flag State enforcement is the first option that comes to mind. States could be obliged to enforce measures on vessels flying its flag, a system that is used by the FSA.<sup>242</sup> Another alternative would be the use of port State measures (also used by the FSA),<sup>243</sup> building on the broad enforcement powers of port States granted by article 218 UNCLOS.<sup>244</sup> It has been proposed to introduce regional and sub-regional enforcement committees, also based on the FSA, but this proposal did not gain wide support and no follow-up was made.<sup>245</sup>

No such mechanisms are currently on the table during the BBNJ negotiations. Even though some form enforcement scheme was initially widely supported during the early Working

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<sup>236</sup> IGC-3 summary, *supra* note 185, 17, 19.

<sup>237</sup> E. Morgera et al, ‘BBNJ IGC-3 Highlights: Tuesday, 27 August 2019’ (2019) 25 Earth Negotiations Bulletin.

<sup>238</sup> Revised draft, *supra* note 199, Article 21 (1).

<sup>239</sup> *Ibid.*, article 21 (2).

<sup>240</sup> Article 105, 110, 111 UNCLOS.

<sup>241</sup> Letter from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/63/79), 16 May 2008, par. 31, also: Letter from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/65/68), 17 March 2010 par. 67.

<sup>242</sup> Article 19 (1)(b) FSA.

<sup>243</sup> Article 23 FSA.

<sup>244</sup> For an in-depth discussion on port-State measures, see: Witbooi E, “Illegal, Unreported and Unregulated Fishing on the High Seas: The Port State Measures Agreement in Context” (2014) 29 The International Journal of Marine and Coastal Law.

<sup>245</sup> IGC-2 summary, *supra* note 197, 14.

Groups,<sup>246</sup> influential delegations favoring a ‘soft’ treaty, such as the Russian Federation, China and the US, successfully wiped this idea off the table.

What is left, is a very weak compliance mechanism. During IGC-3, States were still divided on whether to include a such a mechanism, and to what extent. China opposed a reference in the Draft to the COP “addressing cases of non-compliance”, whereas the US opposed a compliance mechanism altogether.<sup>247</sup> Australia and Canada, on the other hand, called for addressing non-compliance in a constructive way.<sup>248</sup> It has also been suggested to create a compliance committee that reports to the COP.<sup>249</sup> In Draft article 53 (3), it is provided that the COP “shall consider and adopt cooperative procedures and institutional mechanisms to promote compliance [...] and to address non-compliance”. The meaning of the formulation “cooperative procedures and institutional mechanisms” cannot be derived from the wording of this rather vague provision, nor from the documentary history of the negotiations. This provision appears to be inspired by the CBD’s Nagoya Protocol on Access and Benefit-sharing.<sup>250</sup> Reviewing this instrument provides some more insight in what this draft provision might entail. Article 30 of this Protocol mimics draft article 53 (3), and additionally provides that “these procedures and mechanisms shall include provisions to offer advice or assistance, where appropriate”.<sup>251</sup> This is clearly a very ‘soft’ mechanism, which will not do wonders for compliance. Excluding this part of the provision could mean that the drafters envision a stronger system, but this remains to be seen.

#### **4.6 Concluding Remarks**

The BBNJ treaty is a treaty ‘under construction’. Negotiations are ongoing and delegations are still very divided on a variety of topics. Therefore, any analysis of this topic remains speculative, to some extent. Nonetheless, the form and shape of this new treaty can roughly be derived from the negotiation reports and draft articles, and what is emerging is not what many had hoped for. The treaty that is currently on the table will not drastically alter the legal regime in ABNJ (as illustrated in chapter 2), and lacks strong enforcement and compliance mechanisms, as showcased in section 6. It can even be expected that things will be narrowed

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<sup>246</sup> Letter from the Co-Chairpersons of the Ad Hoc Open-ended Informal Working Group to the President of the General Assembly (A/63/79), 16 May 2008, par. 54 (d).

<sup>247</sup> IGC-3 summary, *supra* note 185, 19.

<sup>248</sup> *Ibid.*

<sup>249</sup> IGC-2 summary, *supra* note 197, 14.

<sup>250</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, adopted 29 October 2010, into force 12 October 2014.

<sup>251</sup> *Ibid.*, Article 30.

down even further, in order to reach consensus. As observed by *Mendenhall et al*, “signals thus far suggest that consensus may be achieved by softening the agreed-upon rules, keeping the level of precision, obligation, and delegation low enough to decrease the difficulty and cost of ratifying the eventual BBNJ agreement.”<sup>252</sup>

However, more positive conclusions can also be drawn. As illustrated in sections 3 and 4, the ILBI will offer a structured approach to establishing, implementing and monitoring AMBTs, including MPAs. Whereas OSPAR’s MPAs can arguably be labelled as ‘paper parks’, the future BBNJ MPAs certainly have the potential to be more effective. The next chapter will further elaborate on how the ILBI, besides offering a more structured approach, appears to give a more prominent role to science, and has a more transparent and flexible approach.

## **CHAPTER 5: Institutional dynamics between OSPAR and the BBNJ ILBI**

### **5.1 Introduction**

In the previous chapters, the regimes for MPAs in ABNJ of OSPAR the BBNJ ILBI have been analyzed. This chapter will discuss the potential institutional dynamics between these two instruments, looking at the three institutional concepts of the ILBI that were discussed in the previous chapter (regional, hybrid and global). It will become evident that all these outcomes have positive elements, and can potentially offer a favorable and workable outcome - albeit in different ways. As the BBNJ negotiations are still ongoing, this analysis is tentative, and the value of each model is highly dependent on the details of the final outcome. Before starting the analysis, two issues must be pointed out. Firstly, it must be noted that these approaches are merely concepts, and that they are not worked out in great detail. This analysis therefore remains speculative, to some degree, and attempts to outline the contours of this cooperation, rather than the specifics. Secondly, it must be stressed that, as shown in chapter 4, the institutional aspects of the ILBI are a controversial issue on which the negotiating States are still divided. The three approaches that are discussed in this chapter are merely concepts, and the arrangements that will eventually emerge can have many forms. To illustrate this, one could imagine a spectrum, with on one side a global approach with a strong institutional arrangements, and on the other side a strictly regional approach without global oversight by a COP. The hybrid approach lies somewhere in the middle of two extremes. Many more institutional approaches could be imagined, to placed anywhere on this spectrum. However, for the sake of clarity, the discussion below will focus on these three concepts.

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<sup>252</sup> Mendenhall E et al, *supra* note 15, 7.

The following section looks at the cooperation between OSPAR and the ILBI in a global model. Section 3 discusses the hybrid approach, and section 4 the regional approach. Lastly, in section 5 some general conclusions are drawn.

## 5.2 Global approach

The scenario of a global approach will have the most far-reaching consequences for OSPAR. Delegations supporting this approach called for a global mechanism to employ a centralized, comprehensive approach over activities in ABNJ.<sup>253</sup> The COP will have the competence to establish ABMTs, including MPAs, and oversee implementation, monitoring and review. It needs to be stressed that this does not mean that regional bodies like OSPAR will be sidelined – the idea is to draw on the expertise of such bodies,<sup>254</sup> however their exact role remains unclear. The complex question of the exact legal relationship between OSPAR and the ILBI falls outside of the scope of this thesis.<sup>255</sup> It suffices here to emphasize that a hierarchy between the ILBI and OSPAR would be established. This is often seen as a an undesirable situation, in particular by some developed States that argue that this would ‘undermine’ existing regional and sectoral bodies. Indeed, OSPAR would lose some of its autonomy, and distant States could make proposals for ABMTs, including MPAs, in OSPAR’s maritime area. However, it seems unlikely that this will happen, given that the proposal procedure that is currently on the table is rather lengthy and requires extensive data collection. It certainly seems more likely that the OSPAR member States will instead (individually or collectively) make proposals. States should nonetheless be cautious of the potential influence of distant States.<sup>256</sup>

As outlined in chapter 3, one of the issues that OSPAR encounters when establishing MPAs in ABNJ, is that conservation measures in such an MPA can only be imposed on the parties that agreed to its establishment, in accordance with the *pacta tertiis* principle. One advantage of the global model is that MPAs that are established through the ILBI are binding on all its member States.

A legal issue that can be raised in this regard, is whether these MPAs are binding on States that

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<sup>253</sup> Kraabel K B, *supra* note 202, 3.

<sup>254</sup> Kraabel K B, *supra* note 13, 156.

<sup>255</sup> For an in-depth discussion on this, see: Friedman A, “Beyond ‘Not Undermining’: Possibilities for Global Cooperation to Improve Environmental Protection in Areas beyond National Jurisdiction” (2019) 76 ICES Journal of Marine Science 454, and also: Scanlon Z, “The Art of ‘Not Undermining’: Possibilities within Existing Architecture to Improve Environmental Protections in Areas beyond National Jurisdiction” (2017) 75 ICES Journal of Marine Science 405-415.

<sup>256</sup> An interesting example in this regard is the International Whaling Commission. The IWC was originally created with the purpose to manage whaling, but due to the influence of distant non-whaling States underwent a drastic reformation, eventually leading to a moratorium on commercial whaling.

are parties to UNCLOS, but not to the ILBI. The underlying legal issue here is that of third States, which is addressed in section 4 of the Vienna Convention on the Law of Treaties (VCLT).<sup>257</sup> The general rule is that a treaty does not create either obligations or rights for a third State without its *consent*.<sup>258</sup> Non-members of the ILBI are thus, in principle, not bound by these MPAs. One interesting way through which third States can nonetheless be bound by the ILBI is through GAIRAS.<sup>259</sup> As discussed in chapter 2, one unique characteristic of UNCLOS is that States can be bound by rules contained in certain Conventions to which they are not a member, if those rules can be classified as GAIRAS in UNCLOS. One provision of particular relevance in relation to MPAs is article 211 (2) UNCLOS, providing that States shall adopt laws for the prevention, reduction and control of pollution from vessels flying their flag, which at least have the same effect as that of generally accepted international rules and standards.<sup>260</sup> If in a global approach, the ILBI sets global pollution standards that are applicable in all MPAs that are created under it, these rules could become GAIRAS. It can be said that such an interpretation is in line with the objectives of part XII of UNCLOS. States are not only under an obligation to protect and preserve the marine environment, but also to cooperate to this end.<sup>261</sup>

Another question that should be mentioned in relation to the global model, is what happens to OSPAR's existing MPA network in ABNJ. This is of key importance to OSPAR, and involves the issue of 'recognition' as discussed in chapter 4. The inclusion of a recognition process, or automatic recognition of existing MPAs, is arguably aligned with the overarching objectives of the global model. It would lead to defragmentation of different instruments in ABNJ, resulting in a more centralized regime. From OSPAR's perspective, automatic recognition would be most favorable, for two reasons. Firstly, since it would be least burdensome for OSPAR. If instead a recognition process is chosen, OSPAR would presumably have to provide data and perhaps even make adjustment to the regulatory framework of its MPAs to 'fit' the ILBI's framework. Secondly, as argued by the Like-Minded Latin American Countries at IGC-2, "the BBNJ instrument should not evaluate ABMTs by regional and sectoral bodies but rather ensure their compatibility with other instruments".<sup>262</sup> This positive approach to cooperation should be pursued, as it will contribute to increased integration of sectoral and regional bodies in the ILBI.

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<sup>257</sup> Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, in force 27 January 1980) 1155 UNTS 331.

<sup>258</sup> Article 34 VCLT.

<sup>259</sup> See chapter 1 section 3 for more on GAIRAS.

<sup>260</sup> Article 211 (2) UNCLOS.

<sup>261</sup> Articles 192 and 197 UNCLOS.

<sup>262</sup> IGC-2 Summary, *supra* note 197, 5.

The issue of recognition raises similar legal questions as those discussed above, in regard to third States. In this case, however, it is about third States to OSPAR, that are members to both the ILBI and UNCLOS. Can these States be bound to measures taken by OSPAR, if its MPAs are to be recognized under the ILBI? Again, the basic rule is that no obligation arises for third States without their consent.<sup>263</sup> What it comes down to, is whether signing and ratifying the ILBI can be classified as ‘consent’. In the author’s view, the answer is yes. With the inclusion of a recognition mechanism in the ILBI, the negotiating States implicitly give their consent to be bound by measures created by regional bodies. After all, this is the very purpose of such a mechanism. Moreover, it should be borne in mind that *consent* does not mean to join a certain instrument. As noted by Kolb: “Given that the third State accepts the rights or obligations, it ‘participates’, through its consent, to some partial extent in the treaty.”<sup>264</sup>

To sum up: the global approach will create a hierarchy, and it is likely that OSPAR would lose some of its autonomy, and will need to adapt its existing mechanisms to this new governance system. This would impose a major burden on OSPAR. Hence, its CPs will presumably not be very sympathetic to this approach. However, as shown in chapter 3, these existing MPA mechanisms have significant shortcomings. Such reforms would, although burdensome, almost certainly lead to improvements. A well worked-out global model could significantly strengthen OSPAR’s efforts in ABNJ. Besides the advantage that conservation measures will be applicable to all ILBI-member States, such a model can lead to improved and strengthened implementation and monitoring mechanisms. However, for such a model to function, recognition of OSPAR’s existing MPAs is essential, and the question of the exact relationship between OSPAR and the ILBI needs to be carefully worked out.

### **5.3 Hybrid approach**

If the negotiations instead result in a hybrid model, the BBNJ COP will set objectives and timeframes, which are then to be implemented by regional bodies like OSPAR. This variant would still result in a hierarchical relationship between the BBNJ COP and OSPAR, however to a much lesser degree. OSPAR will maintain most of its competences, and fewer – if any, adaptations will be required. Several degrees of hybridity are possible, as this approach can be placed anywhere on the spectrum in between the global and regional models. A variant that is leaning more towards the global side is reflected in the current article 19 of the draft, in which

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<sup>263</sup> Article 34 VCLT.

<sup>264</sup> Kolb R, *The law of treaties* (Edward Elgar Publishing 2017) ch 6, 116.

the COP can establish ABMTs, including MPAs, whilst taking into account existing measures from regional bodies.<sup>265</sup> The COP can furthermore recommend OSPAR members to promote the adoption of conservation measures, and adopt measures complementary to the existing measures under OSPAR.<sup>266</sup> OSPAR would maintain its competence to establish MPAs through its already existing mechanisms,<sup>267</sup> which would then potentially have to go through a recognition process. For the hybrid model to function effectively, the inclusion of such a process is desirable – although not as essential as it is for the global approach. The hybrid approach leaves more room to regional bodies to implement measures to their discretion, which will inevitably lead to a lesser degree of global uniformity compared to the global approach. However, especially from the perspective of OSPAR, it would significantly enhance the effectivity of existing MPAs and measures if they were to be binding upon all member States to the BBNJ treaty.

A major advantage of the hybrid approach, from OSPAR's perspective, is that it will not require any drastic adaptations. The standards that are set on the global level will need to be implemented, however this can be done through the existing processes within OSPAR – including the existing MoUs and the Collective Arrangement with NEAFC. Moreover, OSPAR's competences in ABNJ would presumably be strengthened, for two reasons. Firstly, because the objectives and timeframes that are set on the global level by the ILBI could form a strong incentive for OSPAR parties to intensify its activities in ABNJ. As shown in chapter 3, progress on establishing new MPAs in ABNJ has been sluggish since 2012. This model of global standard-setting and time-frames could be as a strong incentive for OSPAR's CPs to pick up the pace. Again, the mechanisms to do so are already in place. Secondly, the same effect can be expected within sectoral bodies like the IMO and the ISA, which could lead to improved coordination and cooperation (i.e. by joining the Collective Arrangement).

An argument against this approach could be that it can be viewed as a compromise: A result of lengthy discussions between delegations favoring global- or regional models, and in particular some developed nations endlessly reiterating that a global framework would undermine existing bodies and instruments. It must be kept in mind that the BBNJ negotiations were initiated because of common understanding in the international community that the existing legal framework in ABNJ is insufficient to protect biodiversity, as shown by the analysis in chapter 2. The conclusions drawn in chapter 3, that OSPAR's MPAs in ABNJ are lacking on many

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<sup>265</sup> Revised Draft, *supra* note 199, article 19 (b).

<sup>266</sup> *Ibid.*, article 19 (c).

<sup>267</sup> *Ibid.*, article 19 (c)(i).

aspects, are largely a consequence of this. It would arguably be a missed opportunity if what results is a ‘soft’<sup>268</sup> treaty. As stated by De Lucia, the BBNJ negotiations are an opportunity to “rethink” the boundaries of ocean governance.<sup>269</sup> A hybrid model does not drastically change the governance model in ABNJ. Although OSPAR might benefit from it nonetheless, as argued above, it is also not unthinkable that not much will change. After all, in many regions, regional bodies aimed at protecting the marine environment are non-existent or not very well-developed. A scenario in which the global standards and time-frames will focus on these regions, and set thresholds accordingly, is not unlikely.

In sum, the hybrid approach could be a good outcome for OSPAR. The inclusion of a recognition process is, again, highly desirable in order to ensure its existing network of MPAs can be integrated into the BBNJ framework. Moreover, the objectives that are set by the ILBI should be tailored for each region. Matters that should be taken into account in this regard are the characteristics of the marine environment and the ecosystems; the existence of a regional body to protect the marine environment; the advancement of such a body, particularly in regard to MPAs; the role of - and cooperation with sectoral bodies in the region. This way, tailor-made objectives can be set that will form an incentive for OSPAR to improve its MPA regime in ABNJ. Lastly, the question of the relationship between regional and sectoral bodies and the ILBI, and the cooperation between these instruments needs to be carefully considered. The overarching provision on this in the Draft text is article 4, and as shown in the previous chapter, the phrase ‘not to undermine’ forms the central tenet of this provision, as it has been selected at the expense of more positive phrasings promoting coherence and complementarity. This is regrettable, as such terms “offer an interpretive approach more apt to foster the integration of exiting instruments, bodies and institutions and the ILBI in a manner that contributes to more effective ocean governance”.<sup>270</sup>

#### **5.4 Regional approach**

The regional approach relies heavily on existing institutions, and recognizes the primacy of regional and sectoral bodies. Only certain core functions of the ILBI would fall under the mandate of the BBNJ’s COP,<sup>271</sup> but the establishment, implementation and monitoring of ABMTs, including MPAs, would be left to regional and sectoral bodies. Importantly, in this

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<sup>268</sup> Mendenhall et al, *supra* note 15.

<sup>269</sup> V De Lucia, *supra* note 192.

<sup>270</sup> V De Lucia, *supra* note 188, 4.

<sup>271</sup> Kraabel K D, *supra* note 202, 4.

scenario there will not be a hierarchical relationship between OSPAR and the BBNJ-COP. Moreover, if a regional model emerges it is unlikely that a recognition mechanism will be included.<sup>272</sup> Those States supporting a regional approach argue that the ILBI could strengthen the effectiveness of existing bodies by creating mechanisms for collaboration between and among regional and sectoral bodies, limiting the ILBI to setting standards and principles for regional and sectoral bodies' consideration.<sup>273</sup> Within OSPAR, such a mechanism already exists, in the form of the Collective Arrangement. As shown in chapter 2, the Collective Arrangement (CA) aims to be a "a collective and multilateral forum composed of all competent entities addressing the management of human activities" in the North-East Atlantic.<sup>274</sup> This illustrates that OSPAR already has processes in place that could be required in a BBNJ-framework with a regional approach. Besides OSPAR's efforts to cooperate across sectors, it is also the leading regional body when it comes to establishing MPAs in ABNJ.<sup>275</sup> Therefore, OSPAR will presumably be able to carry on with *business as usual*, and no adaptation will be required. This could be viewed as an advantage of the regional approach. However, the opposite could be argued more convincingly. One major issue that is inherent to the regional approach is fragmentation. Currently, over 190 global or regional agreements applicable in ABNJ.<sup>276</sup> Different sectoral and regional bodies have their own types of ABMTs or MPAs, with varying objectives, scopes, and regulations.<sup>277</sup> The legal regime in ABNJ is thus already very fragmented, and a regional model without global oversight will only lead to deepened fragmentation. This is primarily an issue from a global perspective, in particular for sectoral bodies with a global competence, such as the IMO and the ISA. For such organizations it is a challenge to cooperate with regional bodies, given the disparity of these regimes. It can be argued that a more centralized and streamlined model would make it significantly easier to cooperate with regional bodies, since it allows for more of a one-size-fits-all approach for

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<sup>272</sup> This is illustrated by the optional provisions in the President's Aid being listed under an option that embodies a global approach, and the other option that can be categorized under the regional approach, not containing such a mechanism.

<sup>273</sup> IGC-1 summary, *supra* note 218, 16.

<sup>274</sup> 2018 MPA Status Report, *supra* note 17, 15.

<sup>275</sup> Two other regional bodies that have established MPAs in ABNJ are CCAMLR and the Barcelona Convention. However, the former is a very different type of organization that focusses on living resources and will thus most likely not be affected by the BBNJ treaty, and the latter established the 'Pelagos Sanctuary' in 1999 (<http://www.rac-spa.org/spami>, accessed on 24 July 2020) that is partly located in ABNJ, but no more MPAs in ABNJ have since then been established.

<sup>276</sup> Bigagli E, "The International Legal Framework for the Management of the Global Oceans Social-Ecological System" (2016) 68 *Marine Policy* 157.

<sup>277</sup> e.g. PSSAs under IMO, VMEs and closed areas under NEAFC, ISA's Preservation Reference Zones, Pelagos Sanctuary for the Conservation of Marine Mammals under the Barcelona Convention, and the MPAs under CCAMLR that focus on living resources.

sectoral bodies when cooperating in different reasons. As this could lead to these bodies being eager to cooperate with regional bodies, it could in turn have a positive carryover to OSPAR.

Fragmentation and varying degrees of protection in different areas is inherent to the regional approach. This does not mean that this approach is by default a bad outcome. The key is to work it out in such a manner that all these different instruments and bodies can collaborate and to create an integrated system. An example of such a regional model has recently been proposed by Iceland.<sup>278</sup> In a comment on the revised draft that was prepared after IGC-3, submitted at the invitation of IGC-president Lee, Iceland suggests a regional approach in which cooperation between relevant international legal instruments and frameworks and global, regional and sectoral bodies is conducted through a regional “consultation process”.<sup>279</sup> This process is to be formalized either as an international body, or by giving one of the participants the role of administrator.<sup>280</sup> The similarities with OSPAR’s Collective Arrangement are obvious. It has been said that this proposal seems to suggest a “a multiplication of Collective Arrangements.”<sup>281</sup> For OSPAR, such a model would arguably be desirable, as it builds on and strengthens its existing mechanisms, and requires no adaptations to existing mechanisms. If, however, a regional model emerges that does not contain such cooperating mechanisms, and instead merely emphasized that the ILBI should ‘not undermine’ regional and sectoral bodies, it would arguably be a very dissatisfying outcome for OSPAR. The gaps and flaws of the existing regime in ABNJ, as analyzed in chapter 2, would remain, as well as the weaknesses of OSPAR’s MPA network in ABNJ.

## **5.5 Concluding remarks**

This chapter analyzed the future cooperation of OSPAR and the BBNJ ILBI. It has been shown that each of the institutional models of the ILBI can potentially be a good outcome for OSPAR, albeit in different ways. This conclusion is of particular importance in relation to the ‘not to undermine’ controversy. Some delegations are primarily concerned with avoiding the creation of a treaty that duplicates mandates, overlaps existing competences and therefore undermines existing bodies. The North-East Atlantic is perhaps the best region to take as an example in this regard, since OSPAR is very active in ABNJ in comparison to other regional instruments.

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<sup>278</sup> Textual proposals submitted by delegations by 20 February 2020, in response to the invitation by the President of the Conference in her Note of 18 November 2019 (A/CONF.232/2020/3) 52.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> V De Lucia, ‘Squaring the Oceanic Circle? On Regional Approaches to the Conservation of Marine Biodiversity in Areas beyond National Jurisdiction’ (May 9, 2020), on-line: [Vito De Lucia Regional Governance BBNJ 4](#).

Therefore, in this region it is simply not possible to create a new global MPA regime without encroaching on OSPAR's competences and mandate. This does, however, not mean that OSPAR will be 'undermined' by the ILBI. The contrary is the case. As has been shown, regardless of which institutional model emerges, they all have the potential to *strengthen* OSPAR's MPA regime. This conclusion calls for a fundamentally different approach to the institutional arrangement of the ILBI. Instead of being overly cautious of undermining existing instruments, emphasis should be placed on creating synergies and complementarity, to ultimately strengthen regional instruments. Such an approach is in line with the overall objectives of UNCLOS to protect and preserve the marine environment, and to cooperate to this end.

## **CHAPTER 6: THE MPA PROCESS**

### **6.1 Introduction**

Whereas the previous chapter focused on the institutional dynamics between OSPAR and the ILBI, this chapter will examine the processes for establishing and implementing MPAs within these instruments. Chapter 3 has shown that OSPAR's MPA regime falls short of its potential; it lacks solid implementation mechanisms, site-specific monitoring, and any type of enforcement scheme. The purpose of this chapter is to assess to what extent these shortcomings can be 'filled in' by the BBNJ ILBI, and to identify fundamental elements of an effective MPA regime. This is done by comparing the three stages of MPA governance of OSPAR and the ILBI: Identification and designation (section 2); implementation, monitoring and review (section 3); enforcement and compliance (section 4).

Before diving into this analysis, it should be emphasized that the MPA-process is closely linked to the institutional elements as discussed above. In a strong regional model, for example, ABMTs, including MPAs would be established by regional and sectoral bodies, and there would be no overarching global mechanism. Thus, for the sake of this analysis, a hybrid approach scenario will be assumed, which contains a process through which ABMTs, including MPAs can be established on the global level. This is not merely assumed for practical purposes; it has been argued that this is a likely outcome of the negotiations.<sup>282</sup> When looking at the history of the BBNJ process, this indeed seems likely. Opponents of the global- and regional approaches have been divided since the very beginning of the negotiations, and their positions have not drastically changed. A compromise will have to be made, presumably in the form of

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<sup>282</sup> Kraabel K D, *supra* note 13, 8.

some type of hybrid approach. Moreover, the treaty that is currently reflected in the Draft does describe a process to designate, implement and monitor ABMTs, including MPAs.

**6.2 Identification and Designation**

The first stage in the MPA-process is the identification of sites. Both OSPAR and the (draft) ILBI use their own set of criteria, as shown in figure 5.1. Although there is some overlap between these criteria, some differences can also be observed. Whereas the BBNJ-criteria are mostly purely biological, OSPAR’s criteria embody a more practical approach (e.g. scientific value, potential damage by human activities, size, potential success of management measures). The manner in which the criteria are applied also differs significantly. One important difference is that the approach of the BBNJ ILBI is more flexible. Contrarily, as shown in chapter 3, OSPAR has a fairly detailed two-stage identification process which relies heavily on the exhaustive list of identification criteria.<sup>283</sup> In the ILBI, in contrast, the criteria in the current draft are merely indicative, and they can be further developed by the Scientific and Technical Body.<sup>284</sup>

<b>OSPAR<sup>285</sup></b>	<b>BBNJ<sup>286</sup></b>
Threatened or declining species and habitats/biotopes	Special importance for the life history stages of species
Important species and habitats/biotopes	Special importance of the species found therein
Ecological significance	The importance for threatened, endangered or declining species or habitats
High natural biological diversity	Vulnerability, including to climate change and ocean acidification
Representativity	Fragility
Sensitivity	Sensitivity
Naturalness	Biological diversity
Size	Dependency
Potential for restoration	Ecological connectivity
Potential for success of management measures	Important ecological processes occurring therein
Potential damage to the area by human activities	Slow recovery and resilience
Scientific value	Adequacy and viability
	Replication

**Figure 5.1:** Identification criteria of OSPAR / BBNJ

<sup>283</sup> OSPAR Agreement 2003-17.

<sup>284</sup> Revised draft, *supra* note 199, article 16 (3).

<sup>285</sup> OSPAR Agreement: 2003-17.

<sup>286</sup> Revised draft, *supra* note 199, Appendix I. Criteria that are placed in ‘brackets’ are not included.

In chapter 3 it was concluded that OSPAR's identification and designation processes have their shortcomings. It was explicitly recognized by the CPs that there is no coordinated approach to select sites in ABNJ.<sup>287</sup> Whereas for MPAs within national jurisdiction, a detailed proposal procedure is in place, no such a mechanism exists for MPAs in ABNJ.<sup>288</sup> Here, the contrast with the BBNJ ILBI is abundantly clear. A detailed proposal procedure is expected to be put in place; it is clearly provided how proposals are to be submitted and what elements they shall include.<sup>289</sup> Importantly, the Scientific and Technical Body is likely to play a central role throughout this process. This is certainly a strength of the BBNJ regime. To avoid politization of MPA governance, it is of key importance to have solid scientific input throughout the processes. Although the ILBI's Scientific and Technical Body will presumably not have the competence to identify sites – which is regrettable, it plays a key role in the assessment of proposals. The same cannot be said for OSPAR. As it has no scientific body of its own, it instead cooperates with ICES. However, ICES is not involved in any stage of OSPAR's MPA process.

Another important difference between the proposal procedures of these instruments is the role of NGOs. Within OSPAR, as shown above, they play a central role in the identification process. Whereas the CPs have been very reluctant to make proposals for sites in ABNJ, NGOs have been actively doing so. This discrepancy is not surprising, given the different interests and purpose of NGOs as opposed to States. Whereas States are primarily concerned with their own (economic) interests, certain NGOs revolve around their purpose to protect the (marine) environment.<sup>290</sup> For States, the process of collecting data and making proposals for areas that are located far off their shores could be seen as burdensome, as it is not in their direct (economic) interest. It can therefore be expected that, similar to OSPAR, the BBNJ member States will not make many proposals. NGOs should thus be allowed as Observers to the BBNJ-COP, thereby allowing them to get involved in the MPA-process. This would have three advantages: It creates a better balance of interests; it takes away some of the workload from the member States; and it will lead to more proposals being made. As shown in OSPAR, it suffices to merely allow NGOs to participate and provide information, without getting a right to vote. This model has proven to be successful, given the profound influence NGO's have had on OSPAR's MPA network in ABNJ.

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<sup>287</sup> ICG-MPA 2011, *supra* note 116, par. 4.16.

<sup>288</sup> Revised draft, *supra* note 199, article 17.

<sup>289</sup> *Ibid.*

<sup>290</sup> This can perhaps not be said for all NGOs, as some serve different purposes, but at least for e.g. WWF and GreenPeace, which are both very active in OSPAR.

It has to be seen what role Observers will play in the BBNJ-COP, if any. This is currently not a topic of debate at the negotiations. This is perhaps not surprising, given the fact that some major issues remain unresolved – most importantly the type of institutional model that will be used. Indeed, at this point it is not even set in stone *if* a COP will be established. It nonetheless seems unlikely that NGOs will be able to play a role in the ILBI, since no States are currently actively advocating this. Perhaps voices in favor of this will arise once the important institutional questions are answered, but this does not seem likely. However, even if the final treaty does not regulate the admission of Observers, the Rules of Procedure that are to be adopted by the COP<sup>291</sup> may be a final resort.<sup>292</sup> Again, it would suffice to merely let NGOs attend meetings and provide information for them to have a significant impact on the MPA regime.

In sum, it can be said that the approach of the ILBI offers a more coordinated and structured approach to establishing MPAs. This is not surprising, since this regime is tailored specifically for areas beyond national jurisdiction. The same cannot be said about OSPAR's MPA regime in ABNJ, which is scattered across different decisions, recommendations and other soft-law documents, and lacks a detailed and coordinated process to identify sites and establish MPAs in ABNJ. However, one important strength of this regime is the role of NGOs as Observers, which could be a suitable model to include in the ILBI.

### **6.3 Implementation, monitoring and review**

It has been shown in chapter 3 that OSPAR's implementation and monitoring mechanisms in ABNJ are very weak. The decisions and recommendations that establish these MPAs, forming the basis for implementation, are generally soft-law in nature and do not contain strong obligations. Instead, the substantive parts of these documents are mostly framed in the form of objectives, which do not lend themselves well of direct implementation. Since the BBNJ ILBI is still being developed, there are no decisions of the BBNJ COP to assess and compare this to. It can nonetheless be observed that the general implementation obligations of the ILBI are significantly stronger than those within OSPAR. The ILBI will presumably oblige its members to ensure that activities under their jurisdiction and control are conducted consistently with the decisions adopted in relation to ABMTs, including MPAs.<sup>293</sup> Moreover, member States shall

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<sup>291</sup> As reflected in article 48 (3) of the most recent Draft, *supra* note 199.

<sup>292</sup> Although the admission of Observers is an issue that is regulated in main Convention text in most cases (i.e., OSPAR (art. 11) Barcelona Convention (art. 20), FSA (art. 12 (2)), but some exceptions exist (i.e., the IWC).

<sup>293</sup> Revised draft, *supra* note 199, Article 20 (1).

take necessary legislative, administrative and policy measures.<sup>294</sup> The OSPAR Convention contains no such obligations, nor do the decisions that establishes these MPAs. It is merely provided in the recommendations on the management of the MPAs that Parties *should* implement the ‘management framework’ (the decision and the recommendation) for the MPAs. Implementation is thus largely left to the discretion and goodwill of the CPs. Parties are expected (again, they *should*) to report on implementation. It has previously been concluded that this reporting obligation is taken loosely, given the low number of reports that is received by the ICG-MPA. Importantly, these reports are not made publicly available. Even in the bi-annual MPA Status Reports no information from these reports is published. It can safely be assumed that implementation is either not happening at all, or at best very sluggishly. The ILBI certainly has a more transparent approach to implementation, since implementation reports will be made publicly available. This is arguably important, since general concern about the state of the marine environment is increasing, and parties that are not fulfilling their obligations can be held accountable by NGOs and the general public.

As for monitoring, it has been shown that OSPAR has no site-specific monitoring programs in place. It is therefore unknown whether the MPAs in ABNJ are moving towards their objectives.<sup>295</sup> Instead of setting up site-specific monitoring programs in collaboration with ICES, OSPAR leaves this task to its CPs, which are urged to “identify suitable mechanisms for monitoring the achievement of the conservation objectives”.<sup>296</sup> The ILBI, on the other hand, offers a more structured approach to monitoring, in which the Scientific and Technical Body plays a central role.

Overall, it can be said that the ILBI will presumably have solid implementation and monitoring mechanisms in place. This stands in stark contrast to OSPAR, which is essentially lacking any kind of such mechanisms. It will have to be seen how this works in practice, once ABMTs, including MPAs, are established under the ILBI, but judging from the contours of the legal framework that is emerging it seems like at least the basic mechanisms will be significantly stronger. A major strength of the ILBI, as opposed to OSPAR, is the expected involvement of a Scientific and Technical Body throughout the MPA-process. This body provides independent

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<sup>294</sup> Revised draft, *supra* note 199, Article 53.

<sup>295</sup> 2016 MPA Status report, *supra* note 141, par. 3.7, 46.

<sup>296</sup> OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area.

<sup>296</sup> *Ibid.*, Article 3.3.3 (d).

advice and overlooks implementation and monitoring, whilst not being bound by national interests or political views.

#### 6.4 Enforcement and Compliance

The designation of MPAs does not automatically equate with effective management of human activities affecting the marine environment.<sup>297</sup> ‘Paper parks’ are no uncommon phenomenon, especially in ABNJ.<sup>298</sup> Weak enforcement mechanisms are often an important cause of this, as has been shown by a case study with 15 Italian MPAs. Only the 3 MPAs that were effectively being enforced showed positive ecological responses.<sup>299</sup> Although the circumstances of this case study were different, since they are all located within national jurisdiction, it is nonetheless illustrative for the importance of effective enforcement.

It is therefore regrettable that OSPAR and the BBNJ ILBI both lack such mechanisms. Both OSPAR and the ILBI rely heavily – or perhaps more appropriately, exclusively, on flag State jurisdiction. As shown in chapter 2, it has long been a fundamental principle of customary international law that the flag State has exclusive jurisdiction over vessels flying its flag. This principle is in line with the existing legal regime in ABNJ, which in essence revolves around the freedom of the high seas. However, this enforcement regime is arguably ill-suited for the new regime in ABNJ that is currently being created. A new regime, which further narrows down the high seas freedoms (a process that has been going on for quite some time)<sup>300</sup> should be accompanied by an alteration of the enforcement regime. Although negotiations are ongoing, it seems certain that this will not happen. This is regrettable, since enforcement and compliance mechanisms give a legal instrument *teeth* - and without them, obligations may be left hull. Especially in regard to ABMTs, including MPAs, leaving compliance fully to the goodwill of the member States could be a bad idea, keeping in mind the spatial and material scope of the ILBI. It can be expected that compliance will be low, given the lack of (economic) national interest that States have in MPAs that lie beyond their jurisdiction.

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<sup>297</sup> Matz-Lück N, Fuchs J, *supra* note 74, see also: Pieraccini M, Coppa S and Lucia GAD, “Beyond Marine Paper Parks? Regulation Theory to Assess and Address Environmental Non-Compliance” (2016) 27 *Aquatic Conservation: Marine and Freshwater Ecosystems* 178.

<sup>298</sup> Rife AN et al, “When Good Intentions Are Not Enough ... Insights on Networks of ‘Paper Park’ Marine Protected Areas” (2012) 6 *Conservation Letters*, 200.

<sup>299</sup> Guidetti P et al, “Italian Marine Reserve Effectiveness: Does Enforcement Matter?” (2008) 141 *Biological Conservation* 701.

<sup>300</sup> For an in-depth discussion of creeping coastal State jurisdiction in ABNJ, see: R Warner, R Rayfuse, ‘Securing a Sustainable Future for the Oceans beyond National Jurisdiction: The Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century’ (2008) 23 *The International Journal of Marine and Coastal Law* 408.

As the ILBI will not alter the principle of exclusive flag State jurisdiction, the existing legal obstacles for OSPAR to enforce measures taken in ABNJ, will remain. However, even within this framework, a variety of tools are already available.

For instance, satellite technology can be used to monitor the position of vessels. Vessel monitoring systems (VMS) are already widely used in fisheries management<sup>301</sup> and could be equally valuable when used in relation to MPAs in ABNJ. The value of satellite tracking systems in relation to MPAs has been shown by WWF at the 2013 OSPAR ICG-MPA meeting. WWF presented a document on the use of satellite Automated Information System (s-AIS)<sup>302</sup> data as a tool to check compliance with bottom gear closures in OSPAR MPAs in ABNJ.<sup>303</sup> The results indicated that there may be bottom fishing activities taking place at the Josephine seamount complex, which is also a closed area under NEAFC.<sup>304</sup>

Another effective enforcement tool that does not contradict the principle of exclusive flag State jurisdiction in ABNJ, are port State measures. Port States are granted far-reaching enforcement jurisdiction over vessels that are voluntarily in their ports, pursuant to article 218 UNCLOS. Although in and on itself this is already a useful tool for individual States, it has been shown in practice that through regional cooperation, more can be achieved. The Paris MoU<sup>305</sup> is a prominent example of successful regional cooperation, building upon article 218 UNCLOS. The MoU is essentially a formalized cooperation between 27 States, committing themselves to maintain an effective system of port State control with a view to enhance compliance of foreign merchant vessels with the standards laid down in 17 different global instruments.<sup>306</sup> Port inspections are intensified to achieve a density rating of approximately 90 per cent of all ships using ports in the region.<sup>307</sup>

As for compliance, the regimes of OSPAR and BBNJ are, again, similar – and rather ‘soft’. As was observed in chapter 3, the OSPAR Commission can merely assist Parties to carry out their obligations. It has been observed that, as far as can be derived from OSPAR’s Commission

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<sup>301</sup> FAO, ‘Technical guidelines for responsible fisheries 4’ suppl. 4: .Marine protected areas and fisheries (2011) par. 7.3.

<sup>302</sup> AIS is very similar to VMS, but instead used for collision avoidance, identification and location information (source: <https://www.orbcomm.com/en/networks/satellite-ais>, accessed 1 August 2020).

<sup>303</sup> ICG-MPA 2013 (1) par. 5.14.

<sup>304</sup> Ibid.

<sup>305</sup> Paris Memorandum of Understanding on Port State Control, Including 42nd Amendment (adopted 17 May 2019, in force 21 December 2019).

<sup>306</sup> Ibid., section 1.

<sup>307</sup> Kiehne G, “Investigation, Detention and Release of Ships under the Paris Memorandum of Understanding on Port State Control: A View from Practice” (1996) 11 *The International Journal of Marine and Coastal Law* 217, 219.

meetings, this mechanism has not been used. For the ILBI, it can be expected that *if* there will be a provision on compliance (since several strong delegations, like the US, are reluctant about this), it will most likely merely allow the COP to offer advice and assistance. It seems highly unlikely that such a mechanism will do wonders for compliance.

## **6.5 Concluding remarks**

It has previously been shown that it is a complex task to establish, implement and enforce MPAs in ABNJ in the existing legal framework. Since the BBNJ ILBI will not significantly alter this framework, the question arises how effective and comprehensive MPA governance in ABNJ can be achieved. This chapter assessed and compared the regimes of OSPAR and the BBNJ ILBI, and several key issues that can contribute to this end have been identified. In each of the stages of MPA governance, it has been shown that both instruments have their strengths and weaknesses.

Negotiating delegations at the BBNJ negotiations should look at regional and sectoral bodies that are establishing ABMTs and MPAs, and *learn* from them. OSPAR forms a prime example, since it has been creating and implementing MPAs in ABNJ for over a decade. Although much more work is to be done, and its MPA network is far from perfect, the weaknesses of this regime are perhaps form even more valuable lessons than its strengths.

## **CHAPTER 7: CONCLUSIONS**

The purpose of this thesis is to assess how synergies can be created between OSPAR and the BBNJ ILBI, in order to achieve effective and comprehensive MPA governance in ABNJ. Several key issues that contribute to this endeavor have been identified:

### **A positive approach to cooperation should be taken, instead of ‘not to undermine’**

It has been shown that all institutional models of the ILBI (global, hybrid and regional) have the potential to strengthen regional bodies and instruments – albeit in different ways. This conclusion calls for a fundamentally different approach to the ongoing discussions about the institutional arrangements of the ILBI. Instead of being overly cautious of duplicating mandates and ‘undermining’ existing bodies, States should instead focus on *realizing the potential* of the ILBI to complement and ultimately *strengthen* these bodies. This is not an easy task, given the complexity and fragmentation of the existing legal framework. One crucial element in the ILBI that will for a large part be decisive for whether this can be achieved, is to take a more positive approach to the cooperation with existing bodies. The phrase ‘not to undermine’ should be abandoned, and the treaty provisions on cooperation

should instead embrace more positive phrasing that focus on complementarity, compatibility and mutual support.

### **A recognition mechanism for existing MPAs should be included in the ILBI**

One of the weaknesses of OSPAR's current MPA regime in ABNJ is that conservation measures in these MPAs can only be imposed on its CPs. For this reason, it is very desirable for OSPAR that the ILBI contains a mechanism through which its existing MPA can be recognized, preferably in the form of automatic recognition. This cannot be seen separately from the conclusion drawn above, since recognition of existing MPAs is one of the key elements that must be included in the ILBI for it to strengthen OSPAR's efforts in ABNJ. Moreover, some legal hurdles have been identified that must be overcome in order to include such a mechanism.

### **Scientific inputs should be woven in to all stages of the MPA process**

One important element of transparent MPA governance is the inclusion of scientific inputs throughout the processes of establishing and monitoring MPAs. Two advantages of this have been identified: Firstly, this avoids excessive 'politization' of the MPA regime, and secondly to enhance transparency and acceptance from the general public. Whereas OSPAR attributes a very marginal role to science in its MPA regime, it has been shown the ILBI will presumably have a Scientific and Technical Body that will assess proposals. Although it is arguably a missed opportunity that this Body will most likely not have to competence to identify sites and make proposals, its mere existence is one of the potential strengths of the MPA regime of the forthcoming BBNJ treaty. It would be a major improvement of OSPAR's MPA regime if collaboration with ICES would be intensified, by – for example, allowing ICES to identify potential MPA-sites and assess proposals.

### **NGOs should be allowed as Observers to the ILBI**

It has been shown that NGOs play an important role in OSPAR's MPA regime, by identifying sites and making proposals. The legal basis for their involvement is, however, rather loose. It is merely provided in the Convention that NGOs are allowed to attend Commission meetings as Observers, and that they can provide information. This shows that such a legal basis is sufficient for NGOs to have a very positive influence on an MPA regime. In the view of the author, a similar model should therefore be adopted in the BBNJ ILBI. Three potential benefits of this have been identified: It creates a better balance of interests; it takes away some of the workload from the member States; and it will lead to more proposals being made.

### **Enforcement is key to effective MPAs that achieve their objectives**

It has been shown that OSPAR lacks enforcement mechanisms of any kind, and the same is expected for the ILBI. This is not surprising, since international treaties and conventions generally do not contain such a mechanism. However, in the author's view, in the case of MPAs in ABNJ, it is of vital importance to include some type of enforcement scheme, for two reasons. Firstly, due to the material scope of the ILBI, which creates very little (if any) economic incentives for States to comply to measures taken in MPAs in ABNJ. Secondly, due to the spatial scope of the ILBI - given the legal regime of ABNJ, where the high seas freedoms prevail and flag State enforcement is the only available enforcement tool. It has, however, been shown that several enforcement tools are already available that are not being utilized.

Although this thesis has only looked at the North-East Atlantic, these findings could nonetheless be useful for other regional instruments. Notwithstanding the fact that ecological, legal, and political circumstances may differ significantly in other regions, all regional instruments operate within the same overarching framework of UNCLOS. Moreover, the ILBI does not distinguish between different regional bodies, but offers a framework that is to be applied in all areas beyond national jurisdiction. The author would thus argue that the ILBI has the potential to strengthen the MPA regime anywhere, not just in the North-East Atlantic. In fact, given that OSPAR is miles ahead of most regional instruments, it could be argued that other regions may even gain more from this. Moreover, the key issues that contribute to effective MPA governance could be applied to any region.

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