

The OSPAR NEAFC Collective Arrangement and Ocean Governance: Regional Seas Organisations as the Setters of Conservation Standards in ABNJ?

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Abstract

The Collective Arrangement, subscribed to by OSPAR and NEAFC and presented as a model by these organisations, suggests that regional seas organisations, such as OSPAR, are to act as standard setters for the conservation of marine biodiversity in areas beyond national jurisdiction (ABNJ). The model suggests that regional seas organisations and other organisations, such as NEAFC, the IMO and the ISA, then are to regulate human activities for which they are competent within these conservation standards. This article explores whether the Collective Arrangement might indeed function as a model for ocean governance in ABNJ and merits encouragement in a future BBNJ agreement. It concludes that the Collective Arrangement, as a model, raises both opportunities and challenges but that it might not be transplantable to other areas beyond national jurisdiction, given that the elements that characterise cooperation in the North-East Atlantic are not present in most other areas in ABNJ.

Keywords

Collective Arrangement – areas beyond national jurisdiction (ABNJ) – biodiversity beyond national jurisdiction (BBNJ) – OSPAR Commission for the Protection of the Marine Environment in the North-East Atlantic (OSPAR) – North-East Atlantic Fisheries Commission (NEAFC) – International Maritime Organization (IMO) – International Seabed Authority (ISA)

Introduction

Regulating human activities with the aim of protecting marine biodiversity in ocean areas beyond national jurisdiction (ABNJ) is fraught with difficulties. These difficulties are related to the legal principles governing ABNJ (the freedom of the high seas and common heritage of mankind, now humankind) and to the sectoral and fragmented competences of international organisations that regulate specific human activities, such as fishing or shipping, in ABNJ.¹ The Collective Arrangement (or Arrangement), concluded by the OSPAR Commission for the Protection of the Marine Environment in the North-East Atlantic (OSPAR) and the North-East Atlantic Fisheries Commission (NEAFC), is an attempt to overcome these difficulties.²

OSPAR is a regional seas organisation (RSO) and NEAFC a regional fisheries management organisation (RFMO) with competences regarding, respectively, the protection of the marine environment and fisheries in the North-East Atlantic.³ The geographic areas in which OSPAR and NEAFC have competences overlap,⁴ and their membership is almost identical.⁵

- 1 H Ringbom and T Henriksen, *Governance Challenges, Gaps and Management Opportunities in Areas beyond National Jurisdiction* (Global Environment Facility – Scientific and Technical Advisory Panel, Washington, DC, 2017).
- 2 The full title of the Arrangement is 'Collective arrangement between competent international organisations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic'. The text of the Collective Arrangement, as well as an explanatory note, is available at <https://www.neafc.org/collective-arrangement> and <https://www.ospar.org/about/international-cooperation/collective-arrangement>. All websites accessed on 24 May 2022, unless otherwise mentioned.
- 3 Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris, 22 September 1992, in force 25 March 1998) 2354 UNTS I-42279 [OSPAR Convention]; Convention on Future Multilateral Co-operation in North-East Atlantic Fisheries (London, 18 November 1980, in force 17 March 1982) 1285 UNTS I-21173 [NEAFC Convention].
- 4 See map on p. 2 of AR Benn, PP Weaver, DSM Billet *et al.*, 'Human activities on the deep seafloor in the North East Atlantic: An assessment of spatial extent' (2010) 5(9) *PLoS One* doi 10.1371.
- 5 Contracting parties to OSPAR are Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland and United Kingdom, and the European Union. Contracting parties to NEAFC are Denmark (for the Faroe Islands and Greenland), the European Union, Iceland, Norway and the United Kingdom. Given that the Member States of the European Union share competences regarding the protection of the marine environment, both the Member States and the European Union are parties to OSPAR. Given that the European Union has exclusive competence regarding the conservation of fisheries resources, it, and not its Member States, is a party to NEAFC (see respectively Articles 3(1)(d) and 4(2)(e), Treaty on the Functioning of the European Union (consolidated version), OJ C 326, 26 October 2021, 47–390).

To date, the salient activity undertaken by OSPAR and NEAFC under the auspices of the Collective Arrangement is the coordination of area-based management measures, including the establishment of marine protected areas (MPAs), in ABNJ. OSPAR and NEAFC aim to expand participation in the Collective Arrangement with other international organisations that have competences to regulate human activities in the North-East Atlantic. Relevant international organisations include the International Seabed Authority (ISA), the International Maritime Organization (IMO) and the International Commission for the Conservation of Atlantic Tunas (ICCAT). These three organisations had been invited to subscribe to the Collective Arrangement but had not taken this step nor had other organisations subscribed to the Arrangement at the time of writing.

The Collective Arrangement is part of a wider development in ocean governance, namely the adoption of area-based management measures, including MPAs, in ABNJ.⁶ It is also intimately related to the ongoing negotiations for an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of ABNJ (BBNJ negotiations).⁷ This wider context may also

6 G Wright, KM Gjerde, DE Johnson *et al.*, 'Marine spatial planning in areas beyond national jurisdiction' (2021) 132 *Marine Policy* <https://doi.org/10.1016/j.marpol.2018.12.003>; D Freestone, 'Governance of areas beyond national jurisdiction: An unfinished agenda?' in J Barret and R Barnes (eds), *Law of the Sea: UNCLOS as a Living Treaty* (British Institute of International and Comparative Law, London, 2016) 231–266; IU Jakobsen, *Marine Protected Areas in International Law, An Arctic Perspective* (Brill/Nijhoff, Leiden, 2016); N Matz-Lück and J Fuchs, 'The impact of OSPAR on protected area management beyond national jurisdiction: Effective regional cooperation or a network of paper parks?' (2014) 49 *Marine Policy* 155–166; D Freestone, D Johnson, J Ardon, K Killerlain Morrisson and S Unger, 'Can existing institutions protect biodiversity in areas beyond national jurisdiction? Experiences from two on-gong processes' (2014) 49 *Marine Policy* 167–175; EJ Molenaar and AG Oude Elferink, 'Marine protected areas in areas beyond national jurisdiction: The pioneering efforts under the OSPAR Convention' (2009) 5 *Utrecht Law Review* 5–20; J Ardon, K Gjerde, S Pullen and V Tilot, 'Marine spatial planning in the high seas' (2008) 32 *Marine Policy* 832–839.

7 United Nations General Assembly (UNGA) Resolution 72/249, 24 December 2017, convening the Intergovernmental Conference (IGC) for the negotiation of a BBNJ agreement. The IGC was preceded by a preparatory process, which lasted for about a decade. So far four IGC sessions have been held, the latest in March 2022. While the IGC was to have terminated its work during this fourth session, it did not. A fifth session is now foreseen in August 2022, subject to the approval of the UNGA. For information on the BBNJ negotiations see <https://www.un.org/bbnj/>. Also see the reports in the *Earth Negotiations Bulletin* of the various sessions of the negotiations available at <https://enb.iisd.org/negotiations/conservation-and-sustainable-use-marine-biological-diversity-beyond-areas-national>. Also see the contributions to the special issue of (2020) 122 *Marine Policy* edited by F Humphries and H Harden-Davies, entitled 'Biodiversity Beyond National Jurisdiction (BBNJ) Treaty: The Final Stage of Negotiations';

explain why OSPAR and NEAFC presented the Collective Arrangement as a model to be adopted in other regions and by other sectors, when they submitted their joint commitment under Sustainable Development Goal (SDG) 14, target 4.c, in 2017.⁸ The text of this joint commitment reads as follows:

Through this commitment in the context of the aims of Sustainable Development Goal 14, the two Secretariats of OSPAR and NEAFC will continue to promote the benefits of the cross-sectoral work through *collective arrangement model*. We will aim to work with our sister intergovernmental organisation secretariats in other regions and other sectors to promote such collaboration.⁹

This article presents the proposition that the Collective Arrangement, as a model, suggests that RSOs are to act as standard setters for the conservation of the marine biodiversity in ABNJ. Within these standards, RSOs or other organisations, such as RFMOs, would then regulate those human activities for which they are competent. This proposition finds support in the explanatory note to the Collective Arrangement, which provides, amongst other things, the following: 'From the OSPAR perspective, the aim of institutional cooperation is to help deliver an ecosystem approach to the management of *all relevant human activities* in the marine environment'.¹⁰

This article explores whether the Collective Arrangement might indeed function as a model for ocean governance in ABNJ. It concludes that the Collective Arrangement, as a model, raises both opportunities and challenges, but that it might not be readily transplantable to other ABNJ-areas, given that the elements that characterise cooperation in the North-East Atlantic are not present in most other areas in ABNJ. Prior to engaging in the analysis outlined

D Leary, 'Agreeing to disagree on what we have or have not agreed on: The current state of play of the BBNJ negotiations on the status of marine genetic resources in areas beyond national jurisdiction' (2019) 99 *Marine Policy* 21–29.

8 On SDG 14 see K Scott, 'SDG 14: Conserve and sustainably use the oceans, seas, and marine resources for sustainable development' in J Ebbesson and E Hey (eds), *The Handbook of the Sustainable Development Goals and International Law* (Cambridge University Press, Cambridge, forthcoming 2022).

9 Emphasis added. United Nations, 'Commitment between the Secretariats of the North East Atlantic Fisheries Commission and the OSPAR Commission under the collective arrangement' available at <https://sdgs.un.org/partnerships/commitment-between-secretariats-north-east-atlantic-fisheries-commission-and-ospar>. Unfortunately, no progress reports have been submitted under the commitment.

10 Italics added, see websites referred to in (n 2).

above, this article discusses the context in which the Collective Arrangement was adopted and its content.

The Context in which the Collective Arrangement Emerged

The Adoption of Annex v to the OSPAR Convention

With the adoption, in 1998, of Annex v on the Protection and Conservation of Ecosystems and Biological Diversity of the Maritime Area to the OSPAR Convention, OSPAR developed its competence to set standards for the conservation of marine biodiversity.¹¹ The adoption of Annex v, however, can also be explained in the context of, among other developments, decisions taken by the conference of the parties (COP) to the Convention on Biological Diversity (CBD).¹² In 1994, the first COP to the CBD placed 'the conservation and sustainable use of coastal and marine biological diversity' as a priority item on the agenda of the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA).¹³ Subsequently, in 1995, at the second COP of the CBD, the terms 'marine and coastal protected areas' emerged both in the so-called Jakarta Mandate, a ministerial declaration, and in a COP decision on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity.¹⁴ Moreover, the COP decision called on relevant international organisations, including RSOs and RFMOs, to develop measures to enhance the conservation and sustainable use of marine and coastal biodiversity.¹⁵ These developments within the CBD aimed to stimulate research on and the development of criteria for the identification and management of marine and coastal protected areas.¹⁶

Since the adoption of Annex v to the OSPAR Convention, OSPAR has developed a large number of measures that seek to implement Annex v, including a recommendation on the establishment of a network of MPAS in the North-East

11 Ministerial Meeting of the OSPAR Commission, Sintra, 23 July 1998, in force 30 August 2000. The annexes to the OSPAR Convention are available at <https://www.ospar.org/convention/text>.

12 Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 1-30619.

13 CBD COP 1, Decision 1/7 (1994), Annex, para 5.5.3. Decisions of the CBD COP are available at <https://www.cbd.int/decisions/cop/>.

14 On the Jakarta Mandate see *The Jakarta Mandate – from global consensus to global work conservation and sustainable use of marine and coastal biological diversity* (Secretariat of the CBD, Montreal, 2000) 11–13 (on area-based management measures in ABNJ); also see CBD COP 2, Decision 11/10 (1995), Annex I, para iv. For an overview on how the CBD has considered marine biodiversity see <https://www.cbd.int/marine/decisions.shtml>.

15 CBD COP 2, Decision 11/10 (1995), para 13.

16 See *The Jakarta Mandate* (n 14), at pp. 12–13 (on 'objectives').

Atlantic, in 2003,¹⁷ a report on regulatory regime for establishing MPAs in ABNJ, in 2009,¹⁸ an agreement listing threatened and/or declining species and habitats, in 2008,¹⁹ and a Strategy on Biological Diversity and Ecosystems, in 2020, as well as several decisions and recommendations implementing these measures.²⁰ OSPAR, based on Annex v, also started developing 'programmes and measures for the control of the human activities identified by the application of the criteria in Appendix 3',²¹ including 'protective, conservation, restorative or precautionary measures related to specific areas or sites or related to particular species or habitats'²² based on an integrated ecosystem approach.²³ In 2010, OSPAR established the first six MPAs in ABNJ in the North-East Atlantic. Two additional MPAs in ABNJ were established in 2012 and 2021.²⁴

OSPAR has the competence to regulate pollution from land-based sources,²⁵ dumping,²⁶ and offshore sources,²⁷ as well as human activities that may affect the conservation of marine biodiversity.²⁸ However, OSPAR does not have the

17 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas as amended by OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a network of Marine Protected Areas available at <https://www.ospar.org/work-areas/bdc>.

18 OSPAR Regulatory Regime for establishing Marine Protected Area (MPAs) in Areas Beyond National Jurisdiction (ABNJ) of the OSPAR Maritime Area available at <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>.

19 OSPAR List of Threatened and/or Declining Species and Habitats, OSPAR Agreement 2008-06, available at <https://www.ospar.org/work-areas/bdc/species-habitats>; accessed 27 April 2022.

20 Available at https://www.ospar.org/site/assets/files/1466/biodiversity_strategy_2010-2020.pdf.

21 OSPAR Convention (n 3), Annex v, Article 3(1).

22 *Ibid.*, Article 3(1)(ii).

23 *Ibid.*, Article 3(1)(iv).

24 For the MPAs adopted by OSPAR see 'MPAs in areas beyond national jurisdiction' (OSPAR Commission) available at <https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>. Also see D Johnston, 'Can competent authorities cooperate for the common good: Towards a collective arrangement in the North-East Atlantic' in PA Berkman and AN Vylegzhanin (eds), *Environmental Security in the Arctic Ocean* (Springer, Dordrecht, 2013) 333–443; BC O'Leary, RL Brown, DE Johnson *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* 598–605; Molenaar and Oude Elferink (n 6).

25 OSPAR Convention (n 3), Article 3 and Annex I.

26 *Ibid.*, Article 4 and Annex II.

27 *Ibid.*, Article 5 and Annex III.

28 *Ibid.*, Annex v. OSPAR has adopted, for example, a regulatory instrument for marine scientific research, the OSPAR Code of Conduct for Responsible Marine Research in the Deep Seas and High Seas of the OSPAR Maritime Area, Agreement 2008-1, available at

competence to regulate fishing, shipping or deep seabed mining. Annex v instead provides that if OSPAR determines that regulatory action of shipping or fishing activities is desirable, it shall contact the competent organisation and cooperate with that organisation.²⁹ The same applies to deep seabed mining activities, even if these activities are not mentioned in Annex v.³⁰ Where fishing is concerned, one of the competent organisations is NEAFC.³¹ To streamline OSPAR's MPAs in ABNJ and NEAFC's fisheries management measures, the two organisations started consultations, which led to the adoption of a memorandum of understanding (MoU) in 2008.³² Thereafter, OSPAR initiated the so-called 'Madeira process' involving a wide range of international organisations with competences to regulate human activities in ABNJ in the North-East Atlantic, as well as interested organisations with competences in other areas in ABNJ.³³ The aim of the Madeira process was to enhance cooperation and coordination among these organisations and to develop an agreement among competent organisations in the North-East Atlantic. This process eventually led to OSPAR and NEAFC adopting the Collective Arrangement in 2014, so far without the participation of other organisations.³⁴

<https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction>. Moreover, its recommendations regarding the established MPAs in ABNJ apply to any human activity, except fishing, shipping and deep seabed mining, likely to cause harm to the environment and, for example, require the conduct of environmental impact assessments and strategic environmental assessments, see text at and (nn 89 and 90).

29 OSPAR Convention (n 3), Annex v, Article 4.

30 OSPAR, for example, consulted with NEAFC, the IMO and the ISA before the establishment of the Charlie-Gibbs South MPA, see O'Leary *et al.* (n 24), at p. 604.

31 Other relevant organisations with competences regarding marine living resources in the North-East Atlantic include ICCAT, the North Atlantic Marine Mammal Commission (NAMMCO) and the North Atlantic Salmon Conservation Organization (NASCO).

32 Memorandum of Understanding between the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission, Agreement 2008-4 (5 September 2008) available at <https://www.ospar.org/about/international-cooperation/memoranda-of-understanding>.

33 For the history of the consultations see the information note prepared by the OSPAR and NEAFC Secretariats, *On the Process of Forming a Cooperative Mechanism Between NEAFC and OSPAR: From the First Contact to a Formal Collective Arrangement*, UNEP Regional Seas Reports and Studies No. 196, 2015, at pp. 12–13 (on the Madeira process), available at <https://www.ospar.org/documents?v=3511>.

34 *Ibid.*, at pp. 14–15. For further information on other competent organisations potentially subscribing to the Collective Arrangement see the reports of the meetings of the Collective Arrangement available through the search facility at <https://www.ospar.org/meetings/archive>.

Other Regional Initiatives

The adoption of Annex V to the OSPAR Convention did not stand on its own. For example, the parties to the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention) in 1995 adopted the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean.³⁵ In 2001, the Pelagos Sanctuary for marine mammals, partially located in the high seas, even if in an area that compromises undeclared exclusive economic zones (EEZ),³⁶ was added to the list of specially protected areas of Mediterranean importance (SPAMI).³⁷ All other SPAMI are located in areas subject to coastal State jurisdiction. Other regional organisations that have adopted or fostered the adoption of area-based management measures in ABNJ include the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and Sargasso Sea Commission. CCAMLR,³⁸ after consultations within the Antarctic treaty system about the competences of institutions within that system,³⁹ has declared two MPAs in high seas areas in which fishing is either prohibited or significantly limited and regulated: The South Orkney Islands Southern Shelf MPA was declared in 2009 and the Ross Sea Region MPA became effective in 2017.⁴⁰ The Sargasso Sea Commission, not an RSO but a body that operates in a stewardship role and without management authority,⁴¹ was instrumental in obtaining the description of the

35 The Barcelona Convention (Barcelona, 16 February 1976, in force 12 February 1978) 1102 *UNTS* I-16908. The Protocol (Barcelona, 10 June 1995, in force 12 December 1999, 2102 *UNTS* I-36553) replaced the 1982 Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 3 April 1982, in force 23 March 1986, 1425 *UNTS* I-24079), no MPAs in ABNJ were established under this Protocol.

36 Meaning that these areas lie within 200 nautical miles from the baselines of the coastal States in question, but that their water columns remain high seas because coastal States have not claimed an EEZ.

37 For further information see 'SPAMIS' (Specially Protected Areas Regional Activity Centre) available at <http://www.rac-spa.org/spami>.

38 CCAMLR was established by the Convention for the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980, entered into force 7 April 1982) 1329 *UNTS* I-22301 [CCAMLR Convention].

39 NB Gardiner, 'Marine protected areas in the Southern Ocean: Is the Antarctic Treaty System ready to co-exist with a new United Nations instrument for areas beyond national jurisdiction?' (2020) 122 *Marine Policy* i.p. 2–4, <https://doi.org/10.1016/j.marpol.2020.104212>.

40 See 'Marine protected areas (MPAs)' (CCAMLR) available at <https://www.ccamlr.org/en/science/marine-protected-areas-mpas>; M Howard, 'Biodiversity in areas beyond national jurisdiction (BBNJ): The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the United Nations BBNJ Agreement' (2021) 11(2) *The Polar Journal* 303–316.

41 The Sargasso Sea Commission was established by the Hamilton Declaration on Collaboration for the Conservation of the Sargasso Sea, adopted 11 March 2014, available at

Sargasso Sea as an ecologically or biologically significant marine area (EBSA) within the framework of the CBD in 2012.⁴² Based on this description, the Sargasso Sea Commission sought cooperation with the Northwest Atlantic Fisheries Commission (NAFO), an RFMO competent to regulate fishing in the Northwest Atlantic and whose geographic area of competence includes part of the Sargasso Sea.⁴³ NAFO subsequently adopted a decision that closed sea-mount areas in the Sargasso Sea to bottom fisheries.⁴⁴

OSPARS MPAS in ABNJ and the Pelagos Sanctuary in the Mediterranean Sea to the extent that it is located on the high seas, at least in legal terms, need to be distinguished from the measures adopted by NEAFC, NAFO and CCAMLR. The former are area-based management measures adopted by an RSO that seek to regulate human activities in ABNJ, which the RSO is not necessarily competent to regulate; the latter are area-based management measures that regulate fishing, which the RFMOs (NEAFC and NAFO), and CCAMLR⁴⁵ are competent to regulate, at least for their members. Moreover, the UN Fish Stocks Agreement, through its rules of reference to measures adopted by RFMOs or arrangements, including CCAMLR, requires its parties to ensure that vessels flying their flag

<http://www.sargassoseacommission.org/meet-the-commission/hamilton-declaration>. See Annex II to the Hamilton Declaration for its competences. Also see D Freestone, 'The Sargasso Sea Commission: An evolving new paradigm for high seas ecosystem governance?' (2021) *Frontiers in Marine Science* <https://doi.org/10.3389/fmars.2021.668253>; Freestone *et al.* (n 6); D Freestone and K Killerlain Morrison, 'The Sargasso Sea Alliance: Seeking to protect the Sargasso Sea' (2012) 27(3) *International Journal of Marine and Coastal Law (IJMCL)* 647–655.

42 See CBD COP 11 Decision XI/17 (2012), para 3. For the description of the Sargasso Sea see UN Doc UNEP/CBD/SBSTTA/16/INF/7, Report of the Wider Caribbean and Western Mid-Atlantic Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas, 23 April 2012, at pp. 107–128. Both the COP decision and the report are available at <https://www.cbd.int/decision/cop/?id=13178>.

43 NAFO was established by the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries (Ottawa, 24 December 1978, in force 1 January 1979) 1135 UNTS I-17799.

44 The decision on bottom fishing was first adopted in 2015 and extended in 2021. See NAFO Conservation and Enforcement Measures 2015, at pp. 25–27 and NAFO Conservation and Enforcement Measures 2021, at pp. 27–29, available at <https://www.nafo.int/Fisheries/Conservation>. For an analysis of how the Sargasso Sea Commission has sought to cooperate with competent international organisations see D Freestone, 'The limits of sectoral and regional efforts to designate high seas marine protected areas' (2018) 12 *AJIL Unbound* 129–133; Freestone (2016) (n 6); D Diz, 'The seamounts of the Sargasso Sea: Adequately protected?' (2016) 31(2) *IJMCL* 359–370; Freestone *et al.* (2014) (n 6).

45 Note that technically speaking, CCAMLR is not an RFMO because it has the wider mandate to protect Antarctic marine living resources, even if most of its regulations to date concern the regulation of fishing. See CCAMLR Convention (n 38), Articles II, IX.

abide by these measures, even if the relevant State is not a party to the RFMO in question or to CCAMLR.⁴⁶

Global Developments

Starting early this century, the adoption of area-based management measures also gained traction at the global level. For example, the annual resolutions on the law of the sea adopted by the United Nations General Assembly (UNGA) since 2002 have called on States

to develop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, *the establishment of marine protected areas consistent with international law* and based on scientific information, including representative networks.⁴⁷

In 2006, spurred by a UNGA resolution,⁴⁸ the Food and Agriculture Organization of the United Nations (FAO) started working on the identification of vulnerable marine ecosystems (VMES) and their protection, in particular from bottom fishing.⁴⁹ In 2008, these efforts resulted in the adoption of the International Guidelines for the Management of Deep-sea Fisheries in the High Seas (Guidelines).⁵⁰ The aim of the Guidelines is the identification of VMES in ABNJ and their protection from deep sea fisheries through area-based fisheries management measures. Also, in 2006, the Intergovernmental

46 United Nations 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 (New York, 4 August 1995, in force 11 December 2001) 2167 UNTS 1-37924, see in particular Articles 8(4), 17–21 [UN Fish Stocks Agreement].

47 Emphasis added. UNGA Resolution 57/151, Oceans and the Law of the Sea, 12 December 2002, para 53. For the latest UNGA resolution on the topic, see UNGA Resolution 75/239, Oceans and the Law of the Sea, 31 December 2020, which refers to marine protected areas in several paragraphs.

48 UNGA Resolution 61/105, 8 December 2006, Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and Related Instruments, paras 89–92.

49 See ‘The FAO International Guidelines for the Management of Deep-sea Fisheries in the High Seas’ (FAO) available at <https://www.fao.org/fishery/en/topic/166308/en>.

50 International Guidelines for the Management of Deep-sea Fisheries in the High Seas (FAO, Rome, 2009) available at <https://www.fao.org/documents/card/en/c/b02fc35e-a0c4-545a-86fb-4fc340e13b52>.

Oceanographic Commission of the United Nations Educational, Scientific and Cultural Organization (IOC) started to develop tools for marine spatial planning (MSP).⁵¹ In 2009, these efforts resulted in the adoption of guidelines for MSP and, in 2018, the adoption of the MSPglobal Initiative, which provides further guidance on how to realise MSP.⁵² While the main focus of these instruments is on MSP in areas within national jurisdiction, the instruments include within their ambit MSP in ABNJ.⁵³

Moreover, in 2010, COP X of the CBD adopted the Aichi Biodiversity Targets. Target 11 provides, among other things, that by 2020

10% of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.⁵⁴

In 2015, the quantitative aspect of Target 11 was incorporated into the SDGs.⁵⁵ SDG 14, on life below water, in its fifth target provides: 'By 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information'.⁵⁶

Global organisations have also adopted area-based management measures in ABNJ. The IMO has the competence to adopt special areas under 1973/78

51 See 'Marine spatial planning' (UNESCO-Intergovernmental Oceanographic Commission) available at <https://ioc.unesco.org/our-work/marine-spatial-planning>.

52 For the Guidelines on MSP see C Ehler and F Douvère, *Marine Spatial Planning: A Step-by-Step Approach toward Ecosystem-based Management*, IOC and Man and the Biosphere Programme, IOC Manual and Guides No. 53, ICAM Dossier No. 6 (UNESCO, Paris, 2009) available at <https://unesdoc.unesco.org/ark:/48223/pf0000186559>. For information on the MSPglobal Initiative see <https://www.mspglobal2030.org/>.

53 See *MSPglobal International Guide on Marine/ Maritime Spatial Planning* (UNESCO-IOC and Directorate-General for Maritime Affairs and Fisheries of the European Commission, 2019) available at <https://unesdoc.unesco.org/ark:/48223/pf0000379196>; also see Wright *et al.* (n 6).

54 CBD COP 10 Decision X/2 (2010), Strategic Plan for Biodiversity 2011–2020, including the Aichi Biodiversity Targets.

55 For a critical assessment of how Aichi Biodiversity Target 11 was incorporated in the SDGs see SE Reesa, NL Foster, O Langmead, S Pittman and DE Johnson, 'Defining the qualitative elements of Aichi Biodiversity Target 11 with regard to the marine and coastal environment in order to strengthen global efforts for marine biodiversity conservation outlined in the United Nations Sustainable Development Goal 14' (2018) 93 *Marine Policy* 241–250. On SDG 14 see Scott (n 8).

56 Available at <https://sdgs.un.org/goals/goal14>.

Convention for the Prevention of Pollution by Ships (MARPOL)⁵⁷ as well as the competence to adopt particularly sensitive sea areas (PSSAs).⁵⁸ Two special areas (the Antarctic area and the Mediterranean) include ABNJ; so far PSSAs have not been adopted in ABNJ.⁵⁹ In 2012, the ISA developed a regional environmental management plan (REMP) for the Clarion-Clipperton Zone and it is currently in the process of developing additional REMPs. REMPs include protected areas that are closed to deep seabed mining.⁶⁰

During the first decades of the twenty-first century, the conservation of marine biodiversity in ABNJ by way of area-based management measures, including MPAs, thus had become part of the work of regional and global organisations focused on ocean governance. The Collective Arrangement is part of this process, both in terms of implementing ongoing developments and in terms of aiming to influence developments at the global level. In the latter case, the ongoing BBNJ negotiations also may explain part of the *raison d'être* of the Collective Arrangement.

The Specific Context Provided by the BBNJ Negotiations

The BBNJ negotiations address both the *conservation* of marine biological diversity and the *sustainable use* of marine genetic resources in ABNJ.⁶¹ While regulating the conservation of marine biodiversity in ABNJ is fraught with difficulties,⁶² regulating the sustainable use of marine genetic resources⁶³ adds

57 Oslo, 15 February 1972, in force 7 April 1974, 932 *UNTS* 1-13269.

58 For information on special areas see 'Special areas under MARPOL' (IMO) available at <https://www.imo.org/en/OurWork/Environment/Pages/Special-Areas-Marpol.aspx>. For information about PSSAs see 'Particularly sensitive sea areas' (IMO) available at <https://www.imo.org/en/OurWork/Environment/Pages/PSSAs.aspx>. Also see D Freestone and V Harris, 'Particularly sensitive sea areas beyond national jurisdiction: Time to chart a new course?' in MH Nordquist, J Norton Moore, and R Long (eds), *International Marine Economy, Law and Policy* (Brill/Nijhoff, Leiden, 2017) 322–362.

59 See websites referred to in *ibid.*

60 See 'Environmental management plans' (ISA) available at <https://www.isa.org/jm/minerals/environmental-management-plan-clarion-clipperton-zone>; see also AL Jaeckel, *The International Seabed Authority and the Precautionary Principle* (Brill/Nijhoff, Leiden, 2017) 202–210.

61 There is at present still some debate as to whether a future BBNJ agreement is to address only access to and benefit sharing from access to marine genetic resources or should include fish and other marine biological resources. However, a majority of the delegations at the fourth session of the BBNJ negotiations, in March 2022, seem to agree that the only access to and benefit sharing from access to marine genetic resources should be included in a future BBNJ agreement. See (2022) 25(225) *Earth Negotiations Bulletin* 5.

62 See text at and (n 1).

63 Marine genetic resources (MRGs) comprise the genetic material present in marine life. MGRs can be used in a variety of production process, including those that generate

another layer of complexity. This extra layer of complexity concerns the regulation of access to the resources, and thus the regulation of human activities such as bioprospecting,⁶⁴ and how benefits obtained from access to those resources are to be shared. The complexity is connected to the diametrically opposite implications which the principle of the freedom of the high seas and the principle of the common heritage of humankind have for access to resources and benefit sharing from access to those resources in ABNJ. The former suggests that access to the resources, even if regulated, is on a first come first serve basis and no benefit sharing; the latter suggest that access to the resource, besides being regulated, is to be facilitated for all States and that benefits are to be shared.⁶⁵ In an attempt to mitigate the complexities to which these opposing principles give rise, the term ‘benefit sharing’ has emerged in the BBNJ negotiations, even if the principle of the common heritage of humankind continues to play a role in the negotiations.⁶⁶ As Dire Tladi shows, a focus on ‘benefit sharing’, however, does not alleviate the negotiators from having to decide how access to the resources is to be regulated and especially how benefits are to be shared.⁶⁷

medicines, cosmetics and food products. For further information see AD Rogers, A Baco, E Escobar-Briones *et al.*, ‘Marine genetic resources in areas beyond national jurisdiction: Promoting marine scientific research and enabling equitable benefit sharing’ (2021) 8 *Frontiers in Marine Science* <https://doi.org/10.3389/fmars.2021.667274>.

- 64 J Mossop, ‘Marine bioprospecting’ in D Rothwell, A Oude Elferink, K Scott and T Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, Oxford, 2015) 825–843.
- 65 *Ibid.*, at pp. 836–839; also see ABM Vadrot, A Langlet and I Tessnow-von Wysocki, ‘Who owns marine biodiversity? Contesting the world order through the “common heritage of humankind” principle’ (2021) *Environmental Politics* doi: 10.1080/09644016.2021.1911442; E Hey, ‘Regime interaction and common interests in regulating human activities in area beyond national jurisdiction’ in S Trevisanut, N Giannopoulos and R Roland Holst (eds), *Regime Interaction in Ocean Governance: Problems, Theories and Methods* (Brill/Nijhoff, Leiden, 2020) 85–123, at pp. 104–112; D Tladi, ‘An institutional framework for addressing marine genetic resources under the proposed treaty for marine biodiversity in areas beyond national jurisdiction’ (2019) 19 *International Environmental Agreements* 485–495; D Tladi, ‘The common heritage of mankind in the proposed implementing agreement’ in MH Nordquist, J Norton Moore, and R Long (eds), *Legal Order in the World’s Oceans, UN Convention on the Law of the Sea* (Brill/Nijhoff, Leiden, 2018) 72–90.
- 66 See, for example, (2022) 25(225) *Earth Negotiations Bulletin* 3–4 (showing that the common heritage principle emerged in the negotiations in relation to, for example, access to and benefit sharing from access to marine genetic resources). Also see Tladi (2018) *ibid.*, (pointing out that that the principle of the common heritage of humankind cannot be equated with benefit sharing because the former involves broader issues of solidarity).
- 67 See Tladi (2019) *ibid.*

For purposes of this article, it is important to note the link between setting conservation standards and regulating access to resources. Access to marine genetic resources will have to take place within the parameters set by conservation standards.⁶⁸ It is in this context that an ‘elephant in the room’ of the BBNJ negotiations keeps resurfacing: the ‘not undermine’ clause.⁶⁹ It raises complex questions regarding inter-organisational relationships and the competences to be attributed to bodies to be established under a future BBNJ agreement.⁷⁰ Global organisations, such as the IMO and the ISA, and, regional organisations, such as RFMOs and RSOs, have adopted area-based management measures in ABNJ by way of which they set conservation standards and regulate human activities for which they are competent.⁷¹ The question then arises how these conservation standards will relate to any area-based conservation standards adopted in the context of a future BBNJ agreement. For example, will decisions taken within the framework of a future BBNJ agreement have to consider the conservation standards adopted by the ISA or an RSO when regulating access to marine genetic resources. And conversely, will existing global and regional organisations have to consider the conservation standards set under a future BBNJ agreement when they seek to regulate those human activities for which they are competent.

The Collective Arrangement as a model forwards a particular solution to these complex questions. It suggests that OSPAR, and potentially other RSOs, are to set the standards for the conservation of marine biodiversity in ABNJ, with RSOs and other international organisations, each within their

68 R Warner, ‘Conserving marine biodiversity in areas beyond national jurisdiction: Co-evolution and interaction with the law of the sea’ in Rothwell *et al.* (eds) (n 64), 752–776.

69 See UNGA Resolution 72/249, 24 December 2017, convening the Intergovernmental Conference for the BBNJ negotiations. Paragraph 7 provides: ‘Recognizes that this process and its result should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies’. Also see A Friedman ‘Beyond “not undermining”: Possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction’ (2019) 75(2) *ICES Journal of Marine Science* 452–456; Z Scanlon, ‘The art of “not undermining”: Possibilities within existing architecture to improve environmental protections in areas beyond national jurisdiction’ (2018) 78(1) *ICES Journal of Marine Science* 405–416.

70 See NA Clark, ‘Institutional arrangements for the new BBNJ Agreement: Moving beyond global regional and hybrid’ (2020) 122 *Marine Policy* <https://doi.org/10.1016/j.marpol.2020.104143>; A Oude Elferink, ‘Exploring the future institutional landscape of the oceans beyond national jurisdiction’ (2019) 28 *RECIEL* 236–243; D Tladi, ‘The proposed implementing agreement: Options of coherence and consistency in the establishment of protected areas beyond national jurisdiction’ (2015) 30 *IJMCL* 654–673.

71 See text at and (nn 37–44, 57–59).

competence, regulating human activities within those standards. In other words, OSPAR's MPAs in ABNJ set the conservation standards for the areas designated as such in the North-East Atlantic and other competent organisations, as NEAFC has done, are to regulate a human activity for which they are competent within those standards. The Collective Arrangement also suggests that global organisations are to regulate human activities for which they are competent within the conservation standards set by RSOs. Relevant organisations would include the IMO and the ISA, but also a body regulating access to marine genetic resources under a future BBNJ agreement. Needless to say, this aspect of the model raises complex political issues regarding the competences of all organisations involved, questions that were not resolved during the fourth session of the BBNJ negotiations in March 2022.⁷²

The Content of the Collective Arrangement

The Collective Arrangement was adopted by OSPAR and NEAFC in 2014 as 'a formal agreement between legally competent authorities managing human activities' in ABNJ in the North-East Atlantic.⁷³ As mentioned above, previous thereto cooperation between these two organisations was based on a MoU, concluded in 2008.⁷⁴ While the Collective Arrangement builds on this MoU, its 'objective is to facilitate cooperation and coordination on area based management between legally competent authorities' in ABNJ in the North-East Atlantic.⁷⁵ The intention thus clearly is to expand participation in the Collective Arrangement, beyond NEAFC and OSPAR, to other organisations with regulatory powers in the region. Cooperation is to be based on MoUs or other bilateral agreements between competent authorities. Relevant MoUs or bilateral agreements are listed in Annex 2 to the Collective Arrangement.⁷⁶ As

72 See (2022) 25(255) *Earth Negotiations Bulletin* 6–7.

73 See explanatory note to the Collective Arrangement on websites referred to in (n 2).

74 See text at and (n 32).

75 See explanatory note to the Collective Arrangement on websites referred to in (n 2) and Collective Arrangement, Articles 1 and 3.

76 Currently, five MoUs or agreements are listed in Annex 2: the 2008 MoU between NEAFC and OSPAR; the 2009 Agreement of Cooperation between the IMO and NEAFC; the 2011 MoU between the OSPAR and the ISA; the 1999 Agreement of Cooperation between the IMO and OSPAR; and the 2018 MoU between the IMO and OSPAR on the promotion of the London Convention and Protocol. Other potentially relevant MoUs or agreements that OSPAR has concluded include the 2021 MoU between OSPAR and the Bonn Agreement Contracting Parties, the 2013 MoU between OSPAR and NASCO, the 2009 Practical Arrangement between OSPAR and

mentioned above, the ISA, the IMO and ICCAT have been invited to subscribe to the Collective Arrangement, but to date these organisations have not taken this step. However, in 2019, the North Atlantic Marine Mammal Commission (NAMMCO) announced its intention to conclude a MoU with OSPAR and thereafter consider subscribing to the Collective Arrangement.⁷⁷ At the time of writing, this MoU does not seem to have been concluded.

Besides Annex 2, listing relevant MoUs and bilateral agreements, the Collective Arrangement consists of a short text that sets out the aims of the Arrangement and Annex 1, listing the area-based management measures in ABNJ that have been adopted by NEAFC and OSPAR. The main substantive objectives of the Collective Arrangement are to foster the exchange of information about area-based management measures in ABNJ and to promote cooperation and coordination with the aim of ensuring 'suitable measures for the conservation and management' in ABNJ amongst competent international organisations.⁷⁸ In order to attain these objectives the participating organisations are to exchange 'scientific information, environmental assessments and monitoring data'; 'notify and inform each other of existing and proposed human uses' in areas included in Annex 1; 'cooperate, where appropriate, on environmental impact assessments, strategic environmental impact assessments and equivalent instruments'; consult annually; cooperate to enhance knowledge; and 'consult the coastal State in those cases where the areas listed in Annex 1 are superjacent to areas under national jurisdiction'.⁷⁹ In addition, the Collective Arrangement provides that these activities shall be based on 'internationally agreed principles, standards and norms', the MoUs listed in Annex 2, 'scientific evidence', and a non-exhaustive list of relevant binding and non-binding international instruments,⁸⁰ including the United Nations Convention on the Law of the Sea,⁸¹ the OSPAR and NEAFC conventions,⁸²

the International Atomic Energy Association. See 'Memoranda of understanding & cooperation arrangements' (OSPAR Commission) available at <https://www.ospar.org/about/international-cooperation/memoranda-of-understanding>.

77 Aide Memoire, Fifth meeting under the Collective Arrangement, 28–29 May 2019, paras 2.26–2.27, available at <https://www.ospar.org/meetings/archive?q=Collective+Arrangement&a=&y=&s=>.

78 See Collective Arrangement (n 2), Articles 2, 5.

79 *Ibid.*, Article 6.

80 *Ibid.*, Article 4.

81 Montego Bay, 10 December 1982, in force 16 November 1994, 1833 UNTS I-31363.

82 See (n 3).

the FAO Code of Conduct for Responsible Fisheries,⁸³ ISA regulations,⁸⁴ and MARPOL.

As mentioned above, Annex 1 lists the areas in ABNJ for which area-based management measures have been adopted by OSPAR and NEAFC and would list area-based management measures in ABNJ adopted by any other competent organisation that may decide to subscribe to the Collective Arrangement. The NEAFC area-based management measures aim to protect vulnerable ecosystems and relate to bottom-trawling. They include areas in which bottom trawling is regulated as well as areas where such fishing is prohibited.⁸⁵ NEAFC established these areas by way of recommendations, which based on an opting-out procedure became binding for its parties.⁸⁶ The OSPAR area-based management measures are in the form of MPAs, some of which apply only to the water column, while others apply to the water column and the seabed. The former is the case for those MPA's that overlap with claims to extended continental shelves.⁸⁷ OSPAR established the MPAs by way of decisions, which become binding for its parties subject to an opting-out procedure.⁸⁸ OSPAR also has adopted non-binding recommendations providing management measures for each MPA.⁸⁹ Relevant measures include the requirement to conduct environmental impact assessments and strategic environmental assessments, notification of new human activities in the MPA or beyond the MPA, if the latter 'may be potentially conflicting with the conservation objectives and likely to cause a significant impact to the ecosystems' of the MPA and reporting requirements.⁹⁰ NEAFC has coordinated the establishment of areas closed to

83 FAO Code of Conduct for Responsible Fisheries (Rome, 1995) available at <https://www.fao.org/documents/card/en/c/e6cf549d-589a-5281-ac13-766603db9c03/>.

84 'The Mining Code' (ISA) available at <https://www.isa.org.jm/mining-code>.

85 See Collective Arrangement (n 2), Annex IA.

86 NEAFC Convention (n 3), Article 12.

87 See the Collective Arrangement (n 2), Annex IB. Part of the Altair Seamount High Seas MPA, the Antialtair Seamount High Seas MPA, the Josephine Seamount High Seas MPA and the MAR North of the Azores High Seas MPA potentially overlap with the yet to be determined extended continental shelf of Portugal. The Charlie-Gibbs High Sea MPA overlaps part of the extended continental shelf submission by Iceland (OSPAR Commission, *Background Document on Charlie-Gibbs North High Seas MPA* (2012) 5, available at <https://www.ospar.org/documents?v=7307>).

88 OSPAR Convention (n 3), Article 13.

89 *Ibid.*, Article 13(5). For a list of relevant decisions and recommendations as well as background documents see the Collective Arrangement (n 2), Annex IB, Appendix I.

90 Quotes are from OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area, which is available through the OSPAR search facility on the OSPAR website at <https://www.ospar.org/convention/agreements?q=OSPAR+Recommendation+2010%2F13&t=&a=&s=#agreements-search>.

bottom trawling with the MPAs established by OSPAR. As a result, a number of the NEAFC and OSPAR area-based management measures wholly or partially overlap. For example, there is considerable overlap between the Charlie-Gibbs South and North MPAs, established by OSPAR, and the Middle MAR closed area to bottom trawling, established by NEAFC.⁹¹

Regular meetings take place within the framework of the Collective Arrangement. Between 2015 and 2019 meetings were held annually.⁹² These meetings were attended by representatives of the NEAFC and OSPAR secretariats as well as observer organisations, including some of those mentioned above, and representatives of members of NEAFC and OSPAR. Presumably, due to the COVID-19 pandemic these meetings did not take place in 2020 and 2021. However, a meeting has been planned for 2022.⁹³

OSPAR and NEAFC refer to the Collective Arrangement as a 'formal agreement' and OSPAR lists the Collective Arrangement under the heading 'other agreements', texts which are considered to be none legally binding under the OSPAR Convention.⁹⁴ Nevertheless, as argued elsewhere, the Collective Arrangement might be governed by the rules on treaties concluded between international organisations, as reflected in the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations.⁹⁵ Be that as it may, it is perhaps more to the point to note that, as in many international environmental law-making processes and in law-making process involving the law of the sea, a variety of instruments of different legal character play a role in developing normativity.⁹⁶ The Collective Arrangement, regardless of its legal status, is part of a complex

91 See the map in the 2012 *Status Report on the OSPAR Network of Marine Protected Areas* (OSPAR Commission, 2013), at p. 30, available at https://www.ospar.org/ospar-data/p00618_2012_mpa_status%20report.pdf.

92 Reports of the meetings are available through the search facility on the OSPAR website at <https://www.ospar.org/meetings/archive>.

93 See 'Meeting calendar' (OSPAR Commission) available at <https://www.ospar.org/meetings/calendar>.

94 See 'The OSPAR acquis: Decisions, recommendations & agreements' (OSPAR Commission) available at <https://www.ospar.org/convention/agreements/page3?t=32281>; see also J Rochette, S Unger, D Herr *et al.*, 'The regional approach to the conservation and sustainable development of marine biodiversity in areas beyond national jurisdiction' (2014) 49 *Marine Policy* 109–117, at p. 113.

95 Vienna, 21 March 1986, not in force, Registration number not available. See Hey (n 65), at pp. 110–112.

96 A Boyle, 'Soft law' in L Rajamani and J Peel (eds), *The Oxford Handbook of International Law Environmental Law* (2nd ed., Oxford University Press, Oxford, 2021) 420–453; for the law of the sea, see the contributions to N Klein (ed), *Unconventional Lawmaking in the Law of the Sea* (Oxford University Press, Oxford, 2022).

law-making process which aims to develop normativity for regulating human activity in ABNJ.

In this context, it is relevant to recall that the OSPAR MPAs and NEAFC measures on bottom trawling in ABNJ are legally binding for their respective parties and that NEAFC's measures gain wider legal significance for the parties to the UN Fish Stocks Agreement.⁹⁷ Also important in this context is that the UN Fish Stocks Agreement when requiring its parties to abide by the measures adopted by RFMOs or arrangements, even if they are not a party to the RFMO or arrangement in question, leaves unarticulated the legal status of the measures at stake.⁹⁸ A future BBNJ agreement could proceed in a similar manner and incorporate conservation standards adopted by RSOS or other bodies regardless of the legal status of the instruments involved

The Collective Arrangement as a model, then, suggests a specific way of cooperating with the aim of conserving marine biodiversity in ABNJ. It foregrounds the role of RSOS as the competent organisations for setting standards for the conservation of marine biodiversity. It thereby suggests that access to a resource is no longer to be solely regulated by organisations that have traditionally had close ties with the sector they are regulating, such as RFMOs or the IMO,⁹⁹ or by the ISA, which has a dual mandate to promote deep seabed mining and protect the marine environment from this activity.¹⁰⁰ The Collective Arrangement further suggests that access to resources is to come second to the conservation of the marine biodiversity. If this model were to be integrated into a future BBNJ agreement, it would significantly further qualify the principle of the freedom of the high seas and further develop the environmental dimensions of the principle of the common heritage of humankind. However, developing this model presents both opportunities and challenges for ocean governance.

97 See text at and (nn 86, 88, and 46) respectively.

98 The UN Fish Stocks Agreement (n 46) consistently refers to 'measures' without spelling out the legal status of these instruments.

99 Hey (n 65), at pp. 97–104.

100 H Lily and L Hughes, WWF, *The International Seabed Authority and Principles of International Environmental Law: Critique and Recommendations* (WWF, 2020) https://wwfint.awsassets.panda.org/downloads/isa_and_principles_of_international_environmental_law_final_wwf_2020.pdf; see also A Jaeckel, 'Strategic environmental planning for deep seabed mining in the Area' (2020) 114 *Marine Policy* <https://doi.org/10.1016/j.marpol.2019.01.012>; A Jaeckel, KM Gjerde and JB Ardon, 'Conserving the common heritage of mankind – Options for the deep-seabed mining regime' (2017) 78 *Marine Policy* 150–157.

The Collective Arrangement: Opportunities and Challenges for Ocean Governance

In terms of ocean governance, the Collective Arrangement suggests that it is RSOs, such as OSPAR, that are to set the standards for the conservation of marine biodiversity in ABNJ. Based on these standards, to the extent that RSOs are competent, such as OSPAR for example for dumping, they would regulate human activities in ABNJ. Other competent international organisations would regulate other human activities, such as shipping, fishing, or deep seabed mining, based on the conservation standards that RSOs adopt. The Collective Arrangement also suggests that, in future, accessing marine genetic resources would be regulated within the conservation standards set by RSOs.

The model forwarded by the Collective Arrangement raises both opportunities and challenges. The most salient opportunity relates to the likelihood of more integrated ecosystem-based approaches emerging if relevant competent international organisations cooperate to regulate human activities based on uniform conservation standards set by an RSO dedicated to the conservation of marine biodiversity.¹⁰¹ However, there may be other ways of achieving that end. A relevant example may be provided by the manner in which the Sargasso Sea Commission has proceeded.¹⁰²

Other opportunities relate to the knowledge base from which RSOs are likely to operate and to their ability to engage more directly with stakeholders. RSOs, given their knowledge base, are probably in a better position to determine what is required to conserve marine biodiversity in the region in which they operate than a global body under a future BBNJ agreement. However, acquiring such a knowledge base requires technical know-how and financial resources in order, for example, to develop assessments of the state of marine biodiversity and solutions to any problems identified. In this context it is relevant to note that OSPAR, NEAFC and their contracting parties operate in a context where financial resources are relatively abundant. As a result, they work in an ocean area which is relatively well researched, leading to a data rich environment. Moreover, OSPAR and NEAFC have for decades relied on the International Council for the Exploration of the Sea (ICES) for scientific advice.¹⁰³ For other

101 Also see Rochette *et al.* (n 94); Molenaar and Oude Elferink (n 6).

102 See text at and (nn 41–44).

103 ICES dates back to 1902 and builds on a long and rich history of scientific cooperation in the North-East Atlantic, even if its work also includes other marine regions. See the ICES website, <https://www.ices.dk/Pages/default.aspx>; also see YM Walther and C Möllmann, 'Bringing integrated ecosystem assessments to real life: A scientific framework for ICES' (2014) 71(5) *ICES Journal of Marine Science* 1183–1186.

States and the RSOs, or other regional organisations to which they are parties, acquiring this capacity may require significant support.¹⁰⁴ This topic is part of the agenda of the BBNJ negotiations in terms of capacity building and transfer of technology and in terms of the Global Environment Facility and other funds that might act as financial mechanisms for a future BBNJ agreement. However, agreement on these agenda items is still pending.¹⁰⁵

RSOs are probably also in a better position to realise meaningful local stakeholder involvement than a global body under a future BBNJ agreement would be.¹⁰⁶ Global bodies tend to interact more actively with well-funded global, often northern, NGOs and other powerful stakeholders. However, as with the development of a proper knowledge base, meaningful interaction with stakeholders requires funding and knowledge, which may present a challenge for some RSOs or other regional organisations and thus also require support.¹⁰⁷

It is also important to realise that for the above-mentioned opportunities to materialise, the Collective Arrangement, as a model, is crucially dependent on a future BBNJ agreement recognising the role of RSOs as standard setters for the conservation of marine biodiversity in ABNJ. Without that recognition the standards set by RSOs would not trump the freedom of the high seas nor the competence of other international organisations to regulate human activities based on their own conservation standards.¹⁰⁸

The opportunities presented by the model forwarded by the Collective Arrangement, then, come with their own challenges, especially for States and organisations that operate in areas where financial resources are less abundant than in the North-East Atlantic. The Collective Arrangement, as a model, also raises challenges of a more general nature. These challenges raise intertwined philosophical and practical questions. A first, perhaps more philosophical, challenge relates to the question of who is to safeguard the common interest in the conservation of marine biodiversity in ABNJ.¹⁰⁹ Irrespective of what is to

104 Also see Rochette *et al.* (n 94), at pp. 115–116; MA Ferreira, C Barrio Froján, V Gunn and DE Johnson, 'A role for UNEP's Regional Seas Programme under the post-2020 global biodiversity framework' (2020) 136 *Marine Policy* 104930.

105 (2022) 25(225) *Earth Negotiations Bulletin* 11–14, 16–17.

106 NJ Gray, RL Gruby and LM Campbell, 'Boundary objections and global consensus: Scalar narratives of marine conservation in the Convention on Biological Diversity' (2014) 14(3) *Global Environmental Politics* 64–83.

107 See B Cashore, S Bernstein, D Humphreys, I Visseren-Hamakers and K Rietig, 'Designing stakeholder learning dialogues for effective global governance' (2019) 38(1) *Policy and Society* 118–147.

108 Tladi (2019) (n 65), at p. 487; Freestone (2018) (n 44).

109 See R Roland Holst, 'Community interests and sovereignty: On consonance and dissonance in the law of the sea' in G Zyberi (ed), *Protecting Community Interests Through International Law* (Intersentia, Cambridge, 2021) 99–125; EJ Molenaar, 'Multilateral

be the guiding principle for a future BBNJ agreement, all States, or the international community, have an interest in the conservation of marine biodiversity in ABNJ. If RSOs, as the Collective Arrangement, as a model, suggests are to be the standard setters in the common interest, might there also be a need for global standards and a global decision-making process by way of which the activities of RSOs can be assessed by the international community? In other words, might there be a need for a governance system in which RSOs interact with a global regime?

Kristina Gjerde and Siddharth Yadav usefully have suggested that polycentric governance offers a valuable lens for structuring such a system.¹¹⁰ They suggest that the conservation of marine biodiversity requires, at the global level, overarching goals, norms and rules as well as conflict resolution mechanisms, both formal and informal, and, at all levels, strengthened institutions. This suggestion indicates that RSOs or other regional bodies should function within a global governance system. It also suggests that a future BBNJ agreement should establish decision-making bodies that, as under multilateral environmental agreements, are competent to further develop its implementation. In other words, in this case the UN Fish Stocks Agreement is not an example to be followed, given that it relies on informal meetings between its parties and the review conference for developing its implementation, with neither of these bodies having significant decision-making powers.¹¹¹ There now seems to be general agreement in the BBNJ negotiations that a COP and subsidiary bodies will be established by a future BBNJ agreement, even if their competences and functions remain the subject of deliberation.¹¹²

Other, perhaps more practical but certainly not less complicated, challenges also arise. They relate to the geographical competences of existing RSOs and to the fact that not all regions are covered by RSOs. Many regional seas conventions, such as the Cartagena Convention for the Protection and Development

creeping coastal State jurisdiction and the BBNJ Negotiations' (2021) 36(1) *IJCMCL* 5–58; Y Tanaka, 'The institutional application of the law of *dédoulement fonctionnel* in marine environmental protection: A critical assessment of regional regimes' (2014) 57 *German Yearbook of International Law* 143–180; R Rayfuse and R Warner, '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(3) *IJCMCL* 399–421.

110 KM Gjerde and SS Yadav, 'Polycentricity and regional ocean governance: Implications for the emerging UN agreement on marine biodiversity beyond national jurisdiction' (2021) 8 *Frontiers in Marine Science* doi: 10.3389/fmars.2021.70478; also see Freestone (2018) (n 44).

111 For information on these processes see UN Fish Stocks Agreement overview available at https://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm; also see Y Takei, 'UN Fish Stocks Agreement: 2006 review conference' (2006) 21(4) *IJCMCL* 551–568.

112 See (2022) 25(225) *Earth Negotiations Bulletin* 14–15.

of the Marine Environment of the Wider Caribbean Region (Cartagena Convention), do not apply to ABNJ.¹¹³ By implication, treaties, such as the Cartagena Convention, would have to be amended and, perhaps even more challenging, the expertise of their institutions enhanced. A further challenge is that not all ocean regions are covered by RSOs which might function as standards setters for the conservation of marine biodiversity in ABNJ. Examples of regions where RSOs have not been established include the Northwest Atlantic and parts of the Arctic Ocean. In the Northwest Atlantic an RSO would thus have to be established. While part of the Arctic Ocean is covered by OSPAR, OSPAR has not established MPAS in ABNJ in its 'Region 1: Arctic Waters'. This situation perhaps points to uncertainties about a possible role for the Arctic Council, which is not an RSO and in its current format cannot adopt standards or regulatory measures for Arctic waters in ABNJ.¹¹⁴

Finally, the model suggested by the Collective Arrangement presents a challenge for global organisations that are competent to regulate human activities in ABNJ. Relevant organisations include the IMO and the ISA. They would have to engage with several RSOs. This situation probably, in part, explains why the IMO, the ISA and ICCAT have been reluctant to subscribe to the Collective Arrangement. Their situation is complicated by the fact that their geographical area of competence is not restricted to the North-East Atlantic but encompasses wider ocean areas in ABNJ. As a result, they would have to adapt their regulatory regimes to the conservation standards set by different RSOs. While such an approach makes sense in that different areas in ABNJ are likely to require different conservation standards, it raises complex inter-organisational and political questions about the competences of the organisations involved.

Given the complexities involved, the model suggested by the Collective Arrangement might not be transplantable to other areas in ABNJ. Instead, flexibility might be required, allowing for different types of cooperative arrangements at different locations in ABNJ.

113 Cartagena Convention (Cartagena de Indias, Colombia, 24 March 1983, in force 11 October 1986) 1506 UNTS I-25974, Article 2(1). For further information see UN Environment, *Regional Seas Programmes Covering Areas Beyond National Jurisdiction*, Regional Seas Reports and Studies No. 202 (2017) available at <https://www.unep.org/resources/report/regional-seas-programmes-covering-areas-beyond-national-jurisdiction>.

114 V De Lucia and PP Nickels, 'Reflecting on the role of the Arctic Council vis-à-vis a future international legally binding instrument on biodiversity in areas beyond national jurisdiction' (2020) 11 *Arctic Review on Law and Politics* 189–214; V De Lucia, 'The BBNJ negotiations and ecosystem governance in the Arctic' (2019) *Marine Policy* <https://doi.org/10.1016/j.marpol.2019.103759>.

Conclusion

If the Collective Arrangement, as a model, were to have been adopted in other areas in ABNJ, it would have had the potential of significantly enhancing the position of RSOs. RSOs would have become the competent organisations to set conservation standards within which to regulate human activities in ABNJ, with other competent international organisations regulating at least some of those activities within the standards set by RSOs. The model suggested by the Collective Arrangement might to some extent have addressed the sectoral and fragmented competences of international organisations in ABNJ and brought some order to the regime complex that characterises ocean governance. However, it would have also required significant resources to establish RSOs with the ability to effectively set relevant conservation standards for all regions in ABNJ. In addition, as Gjerde and Yadav have shown, there would remain a need for strong institutions at the global level.

While the model suggested by the Collective Arrangement offers opportunities, the fact that it has not been adopted for other regions in ABNJ seems to suggest that the challenges it presents outweigh those opportunities. The reason why the Collective Arrangement has not been able to function as a model for organising cooperation in other regions in ABNJ is probably related to the characteristics of cooperation in the North-East Atlantic. Relevant elements that characterise cooperation in the North-East Atlantic include the geographically overlapping mandates of OSPAR and NEAFC, their almost identical contracting parties and their long-term reliance on ICES for scientific advice resulting in a data rich environment. It is precisely these characteristics that are absent in many other regions in ABNJ. As a result, a future BBNJ agreement may have to link to regional organisations in a flexible manner, recognising the relevance of different institutional formats, including formats such as the Collective Arrangement, the Sargasso Sea Commission, CCAMLR and other arrangements that exist at the regional level in ABNJ.

If RSOs are not to act as the setters of standards for the conservation of marine biodiversity in ABNJ, the question as to who will arise. This of course is one of the as yet unresolved challenges faced by the BBNJ negotiations. What seems clear is that in the absence of regional standard setters for the conservation of marine biodiversity, the institutions established by a future BBNJ agreement will have to take on at least part of this responsibility.