

Marine protected areas in areas beyond national jurisdiction: The state of play

Elisabeth Druel (IDDRI)

AN EFFICIENT TOOL TO PROTECT MARINE BIODIVERSITY

As the threats against marine biodiversity in areas beyond national jurisdiction are growing, with the expansion of traditional activities such as navigation or fishing and the emergence of new threats linked for example to bioprospection ocean acidification, the establishment of marine protected areas is seen as an efficient tool to protect this fragile environment. In 2010, the Conference of the Parties to the Convention on Biological Diversity agreed that a network of marine protected areas covering 10% of the oceans should be established by 2020.

THE NEED FOR A GLOBAL FRAMEWORK

At the international level, discussions on the establishment of a legal framework for the creation and management of marine protected areas in areas beyond national jurisdiction are taking place between the parties to the United Nations Convention on the Law of the Sea, in working groups established by the United Nations General Assembly and between the parties to the Convention on Biological Diversity. The need for an implementing agreement to the United Nations Convention on the Law of the Sea has been underlined by various stakeholders, but negotiations on this issue are likely to be long and painful, as States do not agree on their final outcomes.

THE REGIONAL INITIATIVES

At the same time, some initiatives are taken within the framework of regional seas conventions such as OSPAR, the CCAMLR or the Barcelona Convention or even outside this framework, as it is the case for the Sargasso Sea Initiative. These pioneering initiatives are helpful but also raise a number of questions, inherent to the very limits of the regional framework such as the issue of third States and of free riders States. In this fragmented regional framework, efficient coordination and cooperation between all the competent authorities will also be of utmost importance.

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“For that which is common to the greatest number has the least care bestowed upon it.”

ARISTOTLE

1. INTRODUCTION

Areas beyond national jurisdiction (hereinafter ABNJ) cover around half of the planet’s surface (the high seas alone cover 64% of the surface of oceans and seas¹). They are also the least known and least protected areas on Earth. This situation can be easily explained by the fact that scientific research and, more broadly, maritime activities were long confined to the coastal waters alone.

But with the depletion of coastal resources, linked to the development of more advanced technologies, human activities have expanded across the oceans and now even ABNJ are subject to growing human pressure. This means that ABNJ and their resources are under increasing pressure from the intensity and diversity of human activities (1.1.). In this respect, Marine Protected Areas (MPAs) are seen as an efficient tool to protect marine biodiversity against these threats (1.2.).

1.1. Existing and emerging threats in areas beyond national jurisdiction

In recent years, the exponential use of ABNJ and their resources is the first thing that should be noted.

Traditional activities impacting the world’s oceans are still increasing. There has been growth in international maritime traffic over recent decades², and in fishing activities in the high seas

(Bensch et al., 2009). In practical terms, this means that current threats linked to traditional activities in the oceans are now more important than before: overexploitation, IUU fishing and the alteration of deep-water habitats due to new destructive fishing practices all concern fishing activities, whereas the growth in international maritime traffic may increase other risks of damage such as oil pollution, the introduction of alien species or sound pollution. It is also worth noting that land-based pollution largely affects the marine environment, even in ABNJ, where the question of marine pollution is still unsolved. Recently, attention has focused on the trash vortexes that exist in the oceans: the so-called Great Pacific Garbage Patch and the North Atlantic Garbage Patch. Today, fishing remains the single most important threat to the marine environment.

In the near future, it is likely that some emerging uses will also play an important part: for example, the development of bioprospecting (Arnaud Haon et al., 2011; Leary, 2011), ocean fertilisation, CO₂ storage (Rayfuse et al., 2008), or the development of the use of energy resources in or under the seabed (Appiott, 2011). These new uses, also linked to the degradation of our terrestrial environment, are coupled with new threats such as climate change, which leads to acidification or underwater noise caused by seismic surveys carried out when prospecting for oil in the seabed³.

The creation of MPAs in areas beyond national jurisdiction (hereinafter MPAs in ABNJ) is seen as an efficient tool to protect marine biodiversity against all of these threats⁴.

1. As we will see later in this introduction, a legal distinction has to be made between ABNJ and the high seas.

2. For example, in 2008, international seaborne trade reached its highest level ever with 8.17 billion tonnes of goods transported by sea. For more details, see the Review of Maritime Transport 2009 published by the United Nations Conference on Trade and Development (UNCTAD/RMT/2009) available at <http://www.unctad.org/Templates/webflyer.asp?intDocItemID=18684&docid=12455&intItemID=5248&lang=1&mode=press>.

3. For a more detailed presentation of these issues, see Rochette J. (2009).

4. See for example the UN document A/65/68, *Letter dated*

1.2. Marine Protected Areas in Areas Beyond National Jurisdiction

There is no universally agreed definition of the wording “marine protected area”, but different organisations and institutions have developed their own definitions.

At the international level, the Convention on Biological Diversity (CBD) defines the broader term “protected area” in its Article 2: “A geographically defined area which is designated or regulated and managed to achieve specific conservation objectives”. However, the CBD does not give a definition of MPAs as such. In Decision VII/5 adopted by the Conference of the Parties in 2004, reference is made to the definition given by the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas (the Ad-Hoc Group) in its 2003 report⁵. The Ad-Hoc Group defines an MPA as “an area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna, and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings”.

FAO defines MPAs as “temporally and geographically defined areas that afford natural resources greater protection than is afforded in the rest of an area as defined in relation to fisheries management”⁶.

The International Union for Conservation of Nature (IUCN) also proposes a definition according to which an MPA is “any area of intertidal or sub-tidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment”⁷.

In MPAs, the level of protection may vary depending on the pressures on the area to be protected and on the needs for conservation: some MPAs may be entirely or partly marine reserves, with no-take zones, while in others only certain activities such as fishing or tourism will be regulated and not necessarily prohibited. As a consequence, in every forum the definition of MPAs is always a very

broad one. The idea here is that MPAs will have “a special status in comparison with the surrounding area due to their more stringent regulation of one or more human activities [...] by one or more measures [...] for one or more purposes” (Molenaar et al., 2009). The definition will therefore allow for certain flexibility in the intensity of management measures.

Several international or regional organisations are already able to establish what can be called sectoral MPAs (area-based management tools) in ABNJ: the International Maritime Organization (IMO) with Particularly Sensitive Sea Areas (PSSA), the International Whaling Commission (IWC) with whale sanctuaries, or the ISA with Areas of Particular Environmental Interest. In this respect, the question has been raised as to whether or not fisheries management measures taken by Regional Fisheries Management Organisations (RFMOs) in ABNJ should be considered as MPAs⁸. In the end, it seems that their recognition as MPAs will depend on their objectives: if they were created not only to manage, but also to protect and preserve the fishing resources.

The aim of this paper is to discuss not sectoral MPAs, but multi-sectoral ones that aim to regulate different uses in the area protected. Therefore, and unless otherwise specified, the term MPAs used in this document should be understood as “multi-sectoral MPAs”.

The international community undertook, within several fora, to establish a network of MPAs covering a large portion of the oceans. At the World Summit on Sustainable Development in 2002, the creation of this network was discussed. Point 32(c) of the Johannesburg Plan of Implementation encourages States to develop “MPAs consistent with international law and based on scientific information including representative networks by 2012 and

¹⁶ March 2010 from the Co-Chairpersons of the Ad Hoc Open Ended Informal Working Group to the President of the General Assembly, § 58.

⁵ See document UNEP/CBD/SBSTTA/8/INF/7.

⁶ FAO website: <http://www.fao.org/fishery/topic/4400/en>.

⁷ General Assembly Resolution 17.38 of 1988, re-affirmed by Resolution 19.46 of 1994.

⁸ The question was discussed during the 2010 meeting of the Ad Hoc Open-ended Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond national jurisdiction (the WG BBNJ); indeed, “a suggestion was made that fisheries management measures, such as the protection of spawning stocks and the establishment of catch or fishing limits for specific areas could be considered a form of marine protected area” (document UN/A/65/68 of 17 March 2010, p. 13). This issue is of particular relevance when considering the issue of fisheries closures or reserves: see for example E. Molenaar and A.G. Oude Elferink, *Marine Protected Areas in areas beyond national jurisdiction: the pioneering efforts under the OSPAR Convention*, 2009 Utrecht Law Review Volume 5, Issue 1, p. 7: “For ABNJ, many regional fisheries management organisations (RFMOs) have adopted MPAs in the form of ‘closed areas’ where all or certain fishing activities are prohibited for all or part of the year”.

time/area closures for the protection of nursery grounds and periods⁹. It should be noted that in point 32(c), a distinction is made between MPAs and fisheries closures.

According to the CBD, as of 2010, only 1% of the oceans were covered by MPAs, and the vast majority of these were located in areas under national jurisdiction¹⁰. In this context, it is likely that the deadline of 2012 will not be met by States. This is the reason why in 2010, at the Conference of the Parties to the CBD, States decided to extend the deadline for the establishment of a network of MPAs covering 10% of the oceans from 2012 to 2020¹¹.

In this wider context, the issue of MPAs in ABNJ is today attracting more and more attention from the international community and raising a certain number of legal issues. The second section of this paper will focus on the current discussions and initiatives taking place at the global scale, while the third section will develop several aspects of the regional approach.

2. CURRENT DISCUSSIONS AND INITIATIVES AT THE GLOBAL SCALE

Although there are many institutions that might have a sectoral approach to the issue of MPAs in ABNJ, we will focus only on UNCLOS (2.1), the UNGA framework (2.2) and the CBD (2.3), the three main global fora in which this question is currently being discussed.

2.1. The United Nations Convention on the Law of the Sea

UNCLOS divides the oceans into different zones: the territorial sea, the contiguous zone, the exclusive economic zone, the continental shelf, the Area and the high seas. In this list we find two zones

that are not under the jurisdiction of any State: the Area and the high seas. These areas are commonly referred to as ABNJ.

The high seas are defined in Article 86 of UNCLOS as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”. To make it simple, the high seas are the parts of the water column of the oceans that are beyond areas of national jurisdiction. Their legal regime is mostly one of freedom¹², and the only jurisdiction that applies to activities carried out there is the one of the flag State. This regime does not apply to the seabed and the subsoil of the oceans, which constitute either the Area¹³ or a continental shelf extending beyond the 200 nautical mile limit¹⁴.

The high seas are *res nullius* – they do not belong to anyone. As such, they are prone to overexploitation because of the “Tragedy of the Commons” (Hardin, 1968).

The regime applicable to the Area differs from the one for the high seas and is subject to controversy. In 1970, the UNGA adopted its resolution 2749 (XXV)¹⁵ which stated that “the sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the Area), as well as the resources of the area, are the common heritage of mankind”.

However, a few years later, UNCLOS considered that “the Area and its resources are the common heritage of mankind”¹⁶ and that “resources” means all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules¹⁷.

According to these more recent definitions, the only resources considered to be under the common heritage of mankind regime are mineral resources. Nothing is said about other types of resources, including living organisms or marine

9. Johannesburg Plan of Implementation (UN Doc. A/CONF.199/20, 4 September 2002), Resolution II, Annex.

10. CBD COP 10 Decision X/29 on Marine and Coastal Biodiversity, §4: “despite efforts in the past few years, just over 1 per cent of the ocean surface is designated as protected areas”.

11. CBD COP 10 Decision X/2, *Strategic Plan for Biodiversity 2011 - 2020*, Annex III, target 11: “By 2020, at least 17 per cent of terrestrial and inland water areas, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.”

12. Freedom of the high seas, cited in Article 87 of UNCLOS, comprises *inter alia* freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands, freedom of fishing and freedom of scientific research.

13. See Article 1(1) of UNCLOS: “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction”.

14. For a definition of the extended continental shelf, see Article 76 of UNCLOS.

15. 1970 UN General Assembly 2749 (XXV): Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction.

16. Article 136 of UNCLOS

17. Article 133 of UNCLOS

genetic resources. These two definitions have resulted in controversy regarding the legal status of marine living resources in the Area. This issue is currently being discussed within the framework of the United Nations Ad Hoc Open-ended Informal Working group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction (hereinafter the WG BBNJ), as we will see in point 1.1.2 of this document.

The exploitation of mineral resources in the Area is regulated by UNCLOS and its Agreement on the implementation of its Part XI. Within this framework, the International Seabed Authority (ISA) is responsible for the organisation and control of activities taking place in the Area¹⁸.

It is also worth noting that some parts of the high seas (the water column) do not cover the Area, but an extended continental shelf. Over the extended continental shelf, the coastal State exercises its sovereign rights for its exploration and the exploitation of its mineral resources¹⁹. Several States have already submitted requests for the extension of their continental shelf to the United Nations Commission on the Limits of the Continental Shelf (CLCS)²⁰ and more submissions from other States and recommendations from the CLCS are expected over the next few years. This raises questions about the creation and management of MPAs in ABNJ, as we will see later on in this document.

It is widely accepted that UNCLOS is the overarching legal framework for all activities in the oceans and seas, including the establishment of MPAs (Salpin et al., 2010). Only a few States (Russia, Venezuela) have challenged this assumption and have shown preference for the regulation of activities within the context of the CBD²¹.

Article 192 of UNCLOS provides that States have a general obligation to protect and preserve the marine environment. Together with articles

194(5) on the protection and preservation of rare and fragile ecosystems and endangered habitats and 197 on cooperation between States, they form the legal basis for the creation of MPAs in the high seas. In practical terms, this means that although UNCLOS does not explicitly mention the creation of MPAs in ABNJ (the issue had not really emerged when the Convention was adopted), it also does not forbid it, and the aforementioned articles constitute the legal basis to do so.

For that matter, one international organisation created by UNCLOS has some competence in the environmental field. Indeed, according to article 145 of UNCLOS, ISA has to establish rules, regulations and procedures to ensure the effective protection of the marine environment and the protection and conservation of natural resources. ISA can also decide to establish impact reference zones and preservation reference areas to restrict seabed mining activities under the Regulations on Prospecting and Exploration for Polymetallic nodules and under the new Code on prospecting and exploration for polymetallic sulphides and for cobalt rich crusts²².

Because of these competences, some have argued that the mandate of ISA should be extended to the protection of all resources in ABNJ, including through the establishment of MPAs²³. In order to make this happen, it would be necessary to adopt an additional agreement. This view has been expressed several times. In a 2003 study, for example, the CBD Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) stated that: *“enlarging the mandate of the International Seabed Authority would require amending the United Nations Convention on the Law of the Sea, the procedure for which is set out in Article 312 of the Convention. However, the same end might be achieved by adopting a protocol or an implementing agreement to add management of the biological resources of the Area to the mandate of the International Seabed Authority. A possible alternative could be for a meeting of the State parties to adopt an “agreed interpretation” of the Convention stating that “resources” shall be read as including biological resources with all the necessary consequential amendments*”²⁴. It is therefore clear that today, ISA

18. Article 1 of the Agreement relating to the implementation of Part XI of the Convention.

19. See UNCLOS, Article 77: *“The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its resources”*.

20. Article 76 of UNCLOS. A detailed list of the submissions and recommendations already made can be found on the website of the Division for Ocean Affairs and the Law of the Sea (DOALOS) of the United Nations at http://www.un.org/Depts/los/clcs_new/clcs_home.htm.

21. See the reports of the four meetings of the Working Group by the International Institute for Sustainable Development (IISD) reporting services at <http://www.iisd.ca/>. During these meetings, Russia and Venezuela declared several times that they consider the CBD to be the legitimate framework for the regulation of activities in ABNJ.

22. ISBA/6/A/18, adopted on 13 July 2000 and ISBA/16/A/12/Rev.1, adopted on 7 May 2010

23. See T. Scovazzi (2004): *“Due to its competences, the ISBA would be in the best position to participate in the establishment of a system of marine protected areas in the seabed beyond the limits of national jurisdiction”*.

24. Doc. UNEP/CBD/SBSTTA/8/INF/3/Rev.1 of 22 February 2003, *“Study of the relationship between the Convention on Biological Diversity and the United Nations*

does have the mandate to regulate the establishment and management of MPAs in ABNJ.

2.2. The United Nations General Assembly framework

Since 1984, the UNGA considers developments pertaining to UNCLOS as well as those relating to ocean affairs and the law of the sea, initially under the item entitled “Law of the sea” and then under the item entitled “Oceans and the law of the sea”, and adopts every year a resolution on Oceans and the Law of the Sea. These resolutions have no legally binding force, and serve only as recommendations to the States²⁵.

The UNGA has considered the question of MPAs several times in its resolutions. In 2010, the UNGA, in its Resolution 65/37 A (paragraph 179) on “Oceans and Law of the Sea” declared that it “encourages States to further progress towards the 2012 target for the establishment of marine protected areas, including representative networks, and calls upon States to further consider options to identify and protect ecologically or biologically significant areas, consistent with international law and on the basis of the best available scientific information”.

Moreover, the UNGA created two fora in which the issue of MPAs in ABNJ is regularly addressed. The first one is the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS), created in 1999 by Resolution 54/33 in order to facilitate the annual review by the UNGA of developments in oceans affairs. In UNICPOLOS, several discussions were held between delegations on the management of marine biodiversity beyond national jurisdiction²⁶.

More important is the WG BBNJ, created in 2004 via Resolution 59/24 of the UNGA. According to paragraph 73 of this Resolution, the mandate of the WG BBNJ is, *inter alia*, “to indicate, where appropriate, possible options and approaches to promote international cooperation and coordination for the conservation and sustainable use of marine biological diversity beyond national jurisdiction”.

The work undertaken in this last arena is of particular relevance for the issue of MPAs in ABNJ. As has been stated previously in this document, UNCLOS does not mention MPAs in ABNJ. The

standing issues of their creation, management and monitoring are therefore not regulated at the international level. However, the mandate given to the WG BBNJ by the UNGA implies that it could be able to recognise the existence of a gap in the international framework regulating the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. As a consequence, the WG BBNJ could recommend launching a process under the auspices of the UNGA to negotiate an implementing agreement under UNCLOS in order to solve this issue. And this implementing agreement could deal with the question of MPAs in ABNJ, as has long been suggested by NGOs and international organisations²⁷.

Previous meetings of the WG BBNJ took place in 2006, 2008, and 2010, without making any significant headway in discussions. One of the reasons why the work did not progress in all that time was that most of the attention was focused on the issue of marine genetic resources. In the context of the WG BBNJ, there are three important groups of States, all of which have different points of view on marine genetic resources. The G77 plus China considers that marine genetic resources located in the seabed and subsoil of the Area are the common heritage of mankind, and that their exploration and exploitation should be carried out for the benefit of mankind as a whole²⁸. A group of several developed States, including the United States, Canada, Japan, Norway and Iceland, opposed this point of view and repeatedly declared that the common heritage of mankind principle does not apply to marine genetic resources. According to them, the only regime applicable is the one set out in Part VII of UNCLOS, and the exploitation of marine genetic resources should not be subject to any benefit sharing. The third group is composed of the European Union (EU) Member States. During the first three meetings of the WG BBNJ, the EU had

Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed, available at: <http://www.cbd.int/doc/meetings/sbstta/sbstta-08/information/sbstta-08-inf-03-revi-en.pdf>.

25. Article 10 of the United Nations Charter.

26. See the reports of the meetings of UNICPOLOS at http://www.un.org/Depts/los/consultative_process/consultative_process.htm.

27. See for example the suggestions made by Greenpeace (<http://www.greenpeace.org/international/en/publications/reports/suggested-draft-high-seas-impl/>), Pew (http://www.pewenvironment.org/uploadedFiles/PEG/Publications/Other_Resource/BBNJ%20Policy%20Statement_FINAL.pdf) and IUCN (S. Hart (2008), *Elements of a Possible Implementation Agreement to UNCLOS for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction*. IUCN, Gland, Switzerland).

28. See for example the opening statement of Argentina made on behalf of the G77 plus China at the meeting of the Working Group in 2011: “As established in General Assembly resolution 2749 (XXV) which is part of customary international law, activities in the area “seabed and ocean floor and the subsoil thereof, beyond the limits of the national jurisdiction” shall be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing States”.

emphasised the need to implement an agreement in order to establish an international legal framework for the creation and management of MPAs and for Environmental Impact Assessments (EIA). It was opposed to the recognition of the common heritage of mankind principle for marine genetic resources, but showed willingness to discuss some possible benefit sharing²⁹.

The fourth meeting of the WG BBNJ took place in 2011 and led to the adoption of recommendations that could be considered an important step forward. Delegates agreed to recommend to the UNGA that “a process be initiated [...], with a view to ensuring that the legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under UNCLOS”³⁰. Such a recommendation, however, does not prejudice the results of the process. During the meeting, delegates of the G77 plus China and the EU seemed to agree on the need for an implementing agreement, but Canada and the US clearly stated that according to them, a better implementation of existing instruments would be sufficient to fulfil the objectives of the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction.

The process initiated by the UNGA “would address the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction, in particular, together and as whole, marine genetic resources, including questions on the sharing of benefits, measures such as area-based management tools, including marine protected areas, and environmental impact assessments, capacity-building and the transfer of marine technology”. MPAs in ABNJ will therefore be considered during this process, which will probably take some years before achieving any results. Countries from the G77 plus China do not consider MPAs as a priority: their own priority is the establishment of a regime for access and benefit sharing for marine genetic resources³¹. For developed countries other

than members of the EU, the current state of play is satisfying and there is no need to develop a new instrument to establish MPAs in ABNJ³². But the issue is of great importance for the EU, especially given the fact that MPAs in ABNJ already exist in a Convention area in which the vast majority of contracting parties are EU Member States: the OSPAR Convention.

2.3. The Convention on Biological Diversity

The 1992 CBD contains no specific article on marine and coastal biodiversity. In order to fill this gap, in 1995, the Conference of the Parties to the CBD adopted the Jakarta mandate on the conservation and sustainable use of marine and coastal biological diversity³³. This mandate contains basic principles, develops thematic areas and has further been implemented through a multi-year programme of work described in Decision VII/5³⁴. The operational objective 3.2 of this programme deals with the “enhancement of the conservation and sustainable use of biological diversity in marine areas beyond the limits of national jurisdiction” and the suggested activity here is “to support any work of the United Nations General Assembly in identifying appropriate mechanisms for the future establishment and effective management of marine protected areas in areas beyond national jurisdiction”.

The Conference of the Parties to the CBD recognises “the United Nations General Assembly’s central role in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction”³⁵. But the CBD also

China but shares their views, circulated a concept paper in which it declared that “for Mexico, conservation of biological diversity through a variety of zonal management tools such as marine protected areas will lack legitimacy without a framework that ensures fair and equitable sharing of benefits arising from the use of marine genetic resources of the international seabed area”.

29. For a more detailed presentation of past Working Group discussions, see media coverage published by the International Institute for Environment and Development Negotiations at: <http://www.iisd.ca/>.

30. The recommendations can be found on the website of the Division for Ocean Affairs and the Law of the Sea at: <http://www.un.org/Depts/los/biodiversityworkinggroup/biodiversityworkinggroup.htm>.

31. The opening statement made by Argentina on behalf of the G77 plus China only refers to marine genetic resources. Mexico, which is not a member of the G77 plus

32. In particular, see the opening statement of the Delegation of Canada, in which it declares that “while there have been calls for new overarching institutions or frameworks to conduct area-based management, Canada urges that we build on existing structures and initiatives. Canada believes that now is an opportune time to have a systematic analysis of the modalities of establishing and managing high seas MPAs and other forms of spatially-based conservation. This would help us assess the feasibility of establishing a network of marine protected areas under existing mechanisms without a new institution or new framework needed to be put in place”.

33. CBD COP 2 Decision II/10 on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity.

34. CBD COP 7 Decision VII/5 on Marine and Coastal Biodiversity.

35. CBD COP 9 Decision IX/20 on Marine and Coastal

recognises its own role in certain aspects of the protection of marine biodiversity in ABNJ, mostly when these aspects are linked to knowledge and science. In Decision VIII/24 on protected areas, it states that “*the Convention on Biological Diversity has a key role in supporting the work of the General Assembly with regards to marine protected areas in areas beyond national jurisdiction by focusing on provision of scientific and, as appropriate, technical information and advice relating to marine biological diversity, the application of the ecosystem approach and the precautionary approach, and in delivering the 2010 target*”³⁶.

In 2008, the CBD adopted scientific criteria for identifying ecologically or biologically significant marine areas in need of protection in open ocean waters and deep-sea habitats (EBSAs)³⁷. These criteria are uniqueness or rarity; special importance for life-history stages of species; importance for threatened, endangered or declining species and/or habitats; vulnerability, fragility, sensitivity or slow recovery; biological productivity; biological diversity and naturalness. These scientific criteria and the methodologies developed for the identification of EBSAs can be applied both within and beyond national jurisdiction. It should be noted that the management of these marine areas remains in the hands of the competent authorities, and can be achieved through a variety of tools, including (but not exclusively) through the establishment of MPAs.

The criteria established by the CBD are not exclusive of different criteria that may be used by other international organisations or NGOs. The CBD SBSTTA noted in 2010 that “*there are no inherent incompatibilities between the various sets of criteria that have been applied nationally and by various United Nations organizations (e.g. FAO, the International Maritime Organization, the International Seabed Authority) and NGOs (e.g. BirdLife International and Conservation International). Consequently, most of the scientific and technical lessons learned about application of the various sets of criteria can be generalised. Moreover, some of the sets of criteria can act in complementary ways, because unlike the CBD EBSA criteria (annex I to decision IX/20), some of the criteria applied by other United Nations agencies include considerations of vulnerability to specific activities*”.

All the work of the CBD has been further recognised by the UNGA. Among other things, the General Assembly recalled in 2010 that “*the Conference of the Parties to the Convention on Biological*

Diversity, at its ninth meeting, adopted scientific criteria for identifying ecologically or biologically significant marine areas in need of protection in open-oceans waters and deep-sea habitats and scientific guidance for selecting areas to establish a representative network of marine protected areas including in open-ocean waters and deep-sea habitats”³⁸.

Regional workshops are currently organised by the CBD together with relevant international and regional organisations with a view to facilitating the identification of EBSAs³⁹.

UNCLOS, the UNGA framework (with the UN Resolutions, UNICPOLOS and the WG BBNJ) and the CBD are currently the most important international fora within which discussions on MPAs in ABNJ are taking place. But the regional level is also intervening on this issue, and already has some well developed initiatives.

3. CURRENT DISCUSSIONS AND INITIATIVES AT THE REGIONAL SCALE

UNCLOS requires States to cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations for the protection of the marine environment⁴⁰. In particular, States bordering enclosed or semi-enclosed seas “*shall endeavour directly or through an appropriate regional organisation [...] to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment*”⁴¹. In this context, it is at the regional level that most initiatives are underway for the creation and management of MPAs in ABNJ. These initiatives will be presented first (3.1), and the limitations of this regional approach will then be pointed out (3.2).

3.1. State of play

Nowadays, the creation of MPAs in ABNJ is widely discussed in the context of the regional seas conventions. However, there are currently only four regional seas convention with a mandate covering the ABNJ: the Barcelona Convention and its

Biodiversity, Preamble.

36. CBD COP 8 Decision VIII/24 on Protected Areas, §42.

37. CBD COP 9, Decision IX/20 on Marine and coastal biodiversity, Annex I.

38. Resolution 65/37/A of 7 December 2010, § 180.

39. CBD COP 10, Decision IX/29 on Marine and coastal biodiversity, § 36.

40. Article 197 of UNCLOS: “*States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in formulating and elaborating international rules, standards, and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features*”.

41. Article 123 of UNCLOS.

Protocol on Specially Protected Areas⁴², the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region⁴³, the CCAMLR⁴⁴ and the OSPAR Convention⁴⁵. There has been no significant progress on the issue within the framework of the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region. It is therefore within the framework of the three other conventions that current regional initiatives are taken. Besides, initiatives to protect large parts of the oceans through the creation of MPAs also exist outside the framework of the regional seas conventions, as is the case for the Sargasso Sea.

3.1.1. The Barcelona Convention

The first ever MPA in ABNJ was created in the context of the Barcelona Convention and of its Protocol on Specially Protected Areas⁴⁶ (the Protocol). Adopted in 1995 and subsequently entered into force in 1999, the Protocol applies to the entire Mediterranean Sea, including the seabed, the subsoil and the high seas⁴⁷. Its Part II, Section 2, provides for the establishment of a list of Specially Protected Areas of Mediterranean Importance (SPAMIs), including in the high seas⁴⁸. According to Article 9(2)(b), the proposal for the inclusion of a protected area in the high seas should be made “by two or more neighbouring Parties concerned if the area is situated partly or wholly on the high sea”. Once listed, the status of the area is recognised by the Parties to the Protocol who have the obligation to comply with the measures adopted

for its protection⁴⁹. The range of these measures is quite large, according to Article 6 of the Protocol: it goes from the regulation of navigation to the prohibition of the dumping or discharge of wastes and the regulation of fishing activities. This approach raises certain political issues concerning coordination and cooperation with the other international organisations present in the region, such as the General Fisheries Commission for the Mediterranean (GFCM) or the IMO. Areas listed as SPAMIs should also have a management plan in place, but the Protocol leaves the Parties free to decide which form the management structure should take.

In 1999 in Rome, France, Italy and Monaco signed an international agreement on the creation of a sanctuary for the protection of marine mammals in the Mediterranean Sea. The sanctuary covers 87 500 sq. meters, including some large parts located in ABNJ. In 2001, the sanctuary was listed as a SPAMI under the Protocol. The Pelagos management plan provides for the creation of an international level of management (including a secretariat) with, at the national level, a specific management structure. The international level of management is not in place yet.

Since the creation of the Pelagos sanctuary, progress has been slow in the Mediterranean Sea. For this reason, the Barcelona Convention, through its Regional Activity Centre for Specially Protected Areas (RAC/SPA), has launched a project entitled “SPAMIs in open seas”. During the first phase of the project (2008/2009), twelve priority conservation areas were identified. The project is now in its second phase: “support to the Parties of the Barcelona Convention for the establishment of MPAs in open seas areas, including the deep seas⁵⁰”.

3.1.2. The CCAMLR

There is still much debate on whether the CCAMLR is a RFMO or a regional sea convention. Adopted in 1980 and entered into force in 1982, the CCAMLR was considered at this time as an innovative and comprehensive instrument dedicated to the protection of the Antarctic marine environment, including fisheries management. The CCAMLR must also be seen within the broader context of the Antarctic Treaty System⁵¹ and of its Madrid Protocol⁵². In the Madrid Protocol,

42. Convention for the Protection of the Mediterranean Sea Against Pollution (Barcelona, 16 February 1976), revised as the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (Barcelona, 10 June 1995) and its Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995).

43. Convention for the Protection of the Natural Resources and Environment of the South Pacific Region (Noumea, 24 November 1986).

44. Convention for the Conservation of Antarctic Marine Living Resources (Canberra, 20 May 1980).

45. Convention for the Protection of the Marine Environment of the North East Atlantic (Paris, 22 September 1992).

46. It should be noted that the wording “ABNJ” has a special meaning in the Mediterranean context. For a precise overview of the complexity of maritime delimitations in the Mediterranean, see: IUCN, *Towards a better Governance of the Mediterranean / Vers une meilleure gouvernance de la Méditerranée*, IUCN, 2010.

47. Article 2 of the Protocol.

48. Article 9(1)(a) of the Protocol: “SPAMIs may be established, following the procedure provided for in paragraph 2 to 4 of this Article in [...] zones partly or wholly on the high seas”.

49. Article 8(3) of the Protocol.

50. See website of the project: http://medabnj.rac-spa.org/index.php?option=com_content&view=frontpage&Itemid=1&lang=en.

51. Antarctic Treaty (Washington, 1 December 1959).

52. Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 4 October 1991).

there is a legal basis for the creation of two types of protected areas in the Antarctic: Antarctic Specially Protected Areas⁵³ and Antarctic Specially Managed Areas⁵⁴. These zones can cover ABNJ⁵⁵ and, in fact, some of them already do.

Contrary to the Barcelona Convention, there is no Protocol on MPAs in the CCAMLR. The basis for the creation of MPAs in the CCAMLR area is Article 9 of its Convention on conservation measures that can be adopted by its Contracting Parties. Such conservation measures include *inter alia* “the designation of the quantity of any species which may be harvested in the area to which the Convention applies” or “the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation including special areas for protection and scientific study”. It should also be noted that the CCAMLR does not have the mandate to adopt measures related to the regulation of navigation. This type of measure is of the competence of IMO, which has already declared the Antarctic as a “Special Area” under the MARPOL Convention⁵⁶.

In 2009, the Commission adopted conservation measure 91-03 on the protection of the South Orkney Islands Southern Shelf, based on a submission made by the United Kingdom. Among other things, the measure provides for the prohibition of fishing activities within the defined area, the prohibition of discharges and waste by fishing vessels and a ban on transshipment. The CCAMLR has also set an objective to create a representative network of MPAs by 2012⁵⁷. A proposal made by Australia was discussed last year without success⁵⁸, but discussions are still ongoing among the Commission members and some decisions are expected at the next meeting of the

Contracting Parties in October 2011, especially on the designation of zones that should be protected and on the establishment of a procedure to create and manage MPAs in the Antarctic. Legal uncertainty remains as to the articulation of these MPAs with the wider Antarctic Treaty System.

3.1.3. The OSPAR Convention

Like the CCAMLR, the OSPAR Convention does not contain a specific Protocol or specific articles on the creation and management of MPAs in ABNJ. Its Article 1 states that the area of the Convention includes “the internal waters and the territorial seas of the Contracting Parties, the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal State to the extent recognised by international law and the high seas, including the bed of all these waters and its sub-soil.” The legal basis for the creation of MPAs in ABNJ is to be found in Annex V of the Convention, on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area⁵⁹. Its Article 2 indicates that Contracting Parties shall “take all the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected”.

According to Article 4 of the same Annex, the OSPAR Commission does not have the mandate to adopt measures related to fisheries and navigation and should, when it considers that action is desirable in relation to such issues, draw these questions to the attention of the competent authority or international body (in this case, principally the North East Atlantic Fisheries Commission – NEAFC – and the IMO). A Memorandum of Understanding (MoU) and an Agreement of Cooperation have been signed between OSPAR and these two organisations⁶⁰, which provide for cooperation and coordination between them. Competence for regulating the exploitation of mineral resources in the Area falls under the mandate of ISA and a MoU has also been signed in this respect⁶¹.

53. Article 3, Annex V, Madrid Protocol.

54. Article 4, Annex V, Madrid Protocol.

55. The situation of the Antarctic is as particular as that of the Mediterranean Sea. According to the Antarctic Treaty, all territorial claims are frozen in the zone of the Treaty. Therefore, there is no territorial sea or EEZ, and the high seas start right after the coast. In practical terms, it means that all MPAs in the CCAMLR area will be in the high seas.

56. International Convention for the Prevention of Pollution from Ships (London, 2 November 1973) as modified by the Protocol of 1978 (London, 17 February 1978). The Antarctic has been established as a Special Area under Annex I of the MARPOL Convention (Oil) and Annex V (Garbage) in 1990 and under Annex II (Noxious Liquid Substances) in 1992.

57. CCAMLR XXVII Final Report, §7.19: “The Commission endorsed the milestones agreed by the Scientific Committee to guide its work towards the achievement of a representative system of MPAs within the Convention area by 2012”.

58. See CCAMLR XXIX, Final Report, §7.1 – 7.20.

59. Annex V on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area, Sintra, 23 July 1998.

60. Memorandum of Understanding between the North East Atlantic Fisheries Commission (NEAFC) and the OSPAR Commission, 2008 (available at http://www.ospar.org/html_documents/ospar/html/mou_neafc_ospar.pdf) and Agreement of Cooperation between the International Maritime Organisation (IMO) and the OSPAR Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR), 1998, available at: http://www.ospar.org/html_documents/ospar/html/imo_oneils_letter_30_nov_1999_and_attachments_from_imo.pdf.

61. Memorandum of Understanding between the OSPAR Convention and the International Seabed Authority, 2010.

In 2003, the OSPAR Commission adopted a recommendation on a network of Marine Protected Areas, including in the ABNJ, providing for the establishment of an ecologically coherent network of well-managed MPAs in the Convention area⁶² by the end of 2010. At the ministerial meeting of Bergen (20 – 24 September 2010), it appeared clearly that this deadline would not be met. Another recommendation amending the previous one was therefore adopted, which set 2012 as the new deadline for the establishment of a network of MPAs⁶³.

At the same meeting, the Contracting Parties also adopted six decisions⁶⁴ and six recommendations⁶⁵ on the designation and management of six MPAs in ABNJ. The MPAs designated via the decisions were the Milne Seamount MPA, the Charlie Gibbs South MPA, the Altair Seamount High Seas MPA, the Antialtair Seamount High Seas MPA, the Josephine Seamount High Seas MPA, and the Medium Atlantic Ridge north of the Azores MPA. The OSPAR Convention has therefore created the first ever network of MPAs in ABNJ. In this context, three interesting points must be underlined.

In 2009, while discussions on the nomination of these areas were underway at OSPAR, the NEAFC

decided to close to bottom fishing certain vulnerable areas, which correspond approximately to the MPAs subsequently designated by OSPAR. This is a good example of coordination between two regional organisations that are active within more or less the same area. This should not, however, be considered as being the definitive form that cooperation should take, as we will see in part two.

Four of these MPAs (Altair, Antialtair, Josephine and Medium Atlantic Ridge) are exclusively located in the high seas, meaning that the seabed and the subsoil are not included in the geographical coverage of the MPAs. There is a simple reason for this: Portugal has made a submission to the CLCS for an extended continental shelf, a submission covering these areas. The seabed and subsoil of these MPAs will therefore be under the jurisdiction of this country, which is responsible for taking measures related to its protection. Portugal has agreed to nominate the seabed and subsoil of these areas as an MPA. There is now a need to coordinate measures taken by OSPAR and measures taken by Portugal in order to ensure the protection of these areas.

The same issue has also been discussed for the Charlie Gibbs Fracture Zone. The original proposal made by the World Wildlife Fund (WWF) included a larger area, north of the area that was designated in 2010. But in 2008, Iceland indicated that this area would overlap part of the continental shelf that it will claim as an extended continental shelf. As a consequence, Iceland strongly opposed the nomination of the Northern area as an MPA, invoking its rights as a coastal State. The issue should be discussed again in order to reach a political consensus, but remains a sensitive question⁶⁶. On a broader scale, a discussion on how to coordinate the adoption and implementation of measures in the high seas water columns and in the extended continental shelf appears to be necessary.

Another crucial and unresolved issue concerns the management of these areas. Interestingly, the management framework has been established through six recommendations (which are not legally binding), contrary to the six (legally binding)

62. OSPAR Recommendation 2003/3 on a network of Marine Protected Areas.

63. OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a network of Marine Protected Areas: “the purpose of this Recommendation is to continue the establishment of the OSPAR Network of Marine Protected Areas and to ensure that [...] by 2012 it is ecologically coherent, includes sites representative of all biogeographic regions in the OSPAR maritime area and is consistent with the CBD target for effectively conserved marine and coastal ecological regions”.

64. OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area; OSPAR Decision 2010/2 on the Establishment of the Charlie Gibbs South Marine Protected Area; OSPAR Decision 2010/3 on the Establishment of the Altair Seamount High Seas Marine Protected Area; OSPAR Decision 2010/4 on the Establishment of the Antialtair Seamount High Seas Marine Protected Area; OSPAR Decision 2010/5 on the Establishment of the Josephine Seamount High Seas Marine Protected Area; OSPAR Decision 2010/6 on the Establishment of the MAR North of the Azores High Seas Marine Protected Area.

65. OSPAR Recommendation 2010/12 on the Management of the Milne Seamount Complex Marine Protected Area; OSPAR Recommendation 2010/13 on the Management of the Charlie Gibbs South Marine Protected Area; OSPAR Recommendation 2010/14 on the Management of the Altair Seamount High Seas Marine Protected Area; OSPAR Recommendation 2010/15 on the Management of the Antialtair Seamount High Seas Marine Protected Area; OSPAR Recommendation 2010/16 on the Management of the Josephine Seamount High Seas Marine Protected Area; OSPAR Recommendation 2010/17 on the Management of the MAR North of the Azores High Seas Marine Protected Area.

66. See for example Salpin and Germani (2010): “Until the CLCS has made its recommendations and a State has established the limits of its outer continental shelf, and notwithstanding the inherent right of coastal States over its continental shelf, the protection of vulnerable marine ecosystems will require great cooperation among coastal States and competent international and regional organisations. This is a point that the Group of Jurists/Linguists of the OSPAR Commission failed to take into account in its otherwise comprehensive advice on the competence of OSPAR to designate MPAs in areas beyond national jurisdiction and a point that Iceland, Denmark and Portugal legitimately raised”.

decisions providing for the nomination of the MPAs. As has been said before, the OSPAR Commission does not have the competence to regulate fishing, navigation or deep-sea mining in the Convention area: this is the responsibility of other regional or international organisations such as IMO, NEAFC, or ISA. In order to ensure that MPAs are correctly managed, it will be of the utmost importance to coordinate and cooperate with these organisations.

3.1.4. The Sargasso Sea initiative

Initiatives to protect large parts of the oceans, including ABNJ, also exist beyond the sole framework of the regional seas conventions. In such cases, the approach consists in using a combination of several sectoral instruments and coordinating them in order to grant protection to the threatened area. A good example of this approach is the Sargasso Sea Alliance.

The Alliance is an initiative led by the government of Bermuda, in partnership with other international organisations and NGOs. Its aim is to establish an MPA in the Sargasso Sea, but the vast majority of the sea is in ABNJ and only a small part lies within Bermuda's EEZ. Unlike the Mediterranean, the Antarctic or the North East Atlantic, there is no regional sea convention that covers the entire Sargasso Sea and also applies to the ABNJ. Because there is no regional or international framework for the establishment of MPAs in ABNJ in the region, the Alliance aims at playing the coordinating role traditionally given by States to the regional seas secretariats in other parts of the world.

The Sargasso Sea is already a candidate EBSA⁶⁷. The approach used by the Alliance to protect it is a sectoral one. Using articles 192 and 194(5) of UNCLOS as a legal basis, the Alliance aims to mobilise several sectoral international organisations in order to encourage them to adopt new protection measures for this area. The relevant organisations are IMO, in relation to ship discharges and the designation of a PSSA, the Northwest Atlantic Fisheries Organization (NAFO) and the International Commission for the Conservation of Atlantic Tuna (ICCAT) in relation to fisheries, and ISA in relation to seabed mining.

Even if the formal designation of the entire Sargasso Sea as a multi-sectoral MPA is not possible yet, a combination of protective measures should

be taken by sectoral organisations that have a mandate to act in ABNJ.

3.2. Analysis and trends

Even if the regional framework appears to be widely developed and sophisticated in terms of the creation and management of MPAs in ABNJ, this approach has also its own limitations.

From a political point of view, the regional approach has been criticised because even if it allows for a better consideration of regional specificities, it might also lead to discrepancies between the various regions of the world, depending on the capacities of the secretariats, the financial resources available and the priorities of the parties to the regional seas conventions. This was pointed out by IUCN in 2008: *“There is considerable risk of creating inconsistent results across different regions and/or for different industries affecting the global commons”* (Gjerde et al., 2008). The means (financial, human, legal) devoted to the implementation of the management measures adopted within the framework of the regional sea convention, including for enforcement and compliance, is also a crucial issue (Rochette & Druel, 2011).

The second issue is the one of third States and free rider States. According to Article 34 of the Convention on the Law of Treaties (Vienna, 1969), *“a treaty does not create either obligations or rights for a third State without its consent”*. This means that measures adopted within the framework of the regional seas for the management of MPAs in ABNJ are not binding on States that are not contracting parties to these conventions⁶⁸. This raises questions regarding the efficiency of the measures adopted within the framework of these conventions. Several solutions have been suggested to solve this important issue. One is to encourage the participation of third States to the conventions. The OSPAR Convention, for example, allows for the participation of other States, such as States whose vessels or nationals are engaged in activities in the OSPAR maritime area if they are invited to accede by the Contracting Parties⁶⁹. In international fora such as the WG BBNJ, it has been suggested that this question should be addressed at the global level, for example through an implementing agreement to

67. It is already listed as a candidate EBSA on the GOBI website: <http://www.gobi.org/candidate-ebsas/the-sargasso-sea>. The CBD criteria met are uniqueness or rarity (high), special importance for life history stages of species (high), and importance for threatened, endangered or declining species and/or habitats (high).

68. Molenaar and Oude Elferink (2009), p. 19: *“Regulation of activities [...] which do not have due regard for, or unjustifiably affect, the ability of third States to exercise the freedoms of the high seas will not be consistent with the UNCLOS and will thereby undermine the MPAs' ability to achieve their objectives”*.

69. Article 27 of the OSPAR Convention: *“the Contracting Parties may unanimously invite States or regional economic integration organisations not referred to in Article 25 to accede to the Convention”*.

UNCLOS offering general principles and guidance for the establishment of MPAs in ABNJ. In this implementing agreement, States could for instance be encouraged to respect the measures adopted at the regional level for the management of MPAs in ABNJ.

It is also crucial to consider how coordination and cooperation between the various competent authorities responsible for the establishment and management of the MPAs can be achieved. There are two different issues in this context. The first one is the problem of coordination and cooperation between the regional sea conventions and other international organisations also competent in the region. As explained in section 3.1 of this document, regional seas conventions do not have the mandate to regulate certain activities such as navigation, fishing and deep-sea mining. Other international or regional sectoral competent authorities are responsible for the adoption of measures on these issues. For example, in the OSPAR area, NEAFC regulates bottom trawling and IMO could designate PSSAs. In this context, OSPAR plays the role of initiator, adopts measures falling under its mandate and cooperates with other international organisations for the management of the MPAs. The form that this cooperation will take is not yet determined and is still being debated amongst Contracting Parties to OSPAR.

In March 2010, an informal meeting of stakeholders took place in Madeira. Competent authorities from NEAFC, OSPAR and ISA participated in this meeting and recommended the establishment of a dialogue with representatives from IMO, ICCAT, NASCO and NAMMCO “*in order to identify generic management measures in the respective areas of competence*”⁷⁰. They also agreed on a *Draft Agreement of Competent Authorities on the management of selected areas in ABNJ within the OSPAR Maritime Area*. This agreement was divided into four parts: the text of the agreement itself; a declaration of joint principles of competent authorities on the management of human activities in MPAs in ABNJ within the OSPAR area; a list of generic management measures that could be adopted by competent authorities; and specific management measures in relation to the MPAs designated by OSPAR. The adoption of this agreement is still under discussion. A second informal meeting of competent authorities will take place at the beginning of 2012.

The approach taken in the Barcelona Convention system is quite different. According to Article 6 of the Protocol on Specially Protected Areas,

Parties can adopt protection measures regulating fishing or navigation in the MPAs. These measures can be adopted without going through IMO or the GFCM, and will therefore be opposable to the Parties to the Protocol only.

At the international level – and this is the second issue – the question is whether or not it is necessary to give a mandate extended to the establishment and management of MPAs in the ABNJ to one organisation only, or if the system could build upon the existing mandates of sectoral international or regional organisations with, serving as an overarching legal basis, articles in an implementing agreement establishing general principles of cooperation and coordination.

In any case, the establishment of an international legal framework would be useful, not only to provide guidance to regional seas conventions, but also to give a legal basis for the establishment of cross-sectoral MPAs in parts of the world where no regional sea convention exists.

CONCLUSION

As has been seen through all this document, the international community took very strong commitments in respect of MPAs in ABNJ. At the international level, the objective is to establish a network of MPAs, including in ABNJ, covering 10% of the oceans by 2020. At the regional level, objectives can be even more stringent: the deadline for the 10% coverage is 2012 in the CCAMLR and OSPAR areas for example. As strong as they may be, these commitments still have to be translated in practice: States’ individual and collective actions are today not sufficient to reach the objectives they agreed on, as illustrated by the regular postponing of deadlines.

For these ambitious objectives to be met on time, States and international organisations need to quickly solve many outstanding issues, politically and legally complex, such as the articulation between the regional and the international level or the possibility to establish MPAs that would be legally binding for third States. More importantly, they need to agree on the concrete management of these protected areas, as it will be the most crucial point to ensure that MPAs in ABNJ effectively contribute to the protection of marine biodiversity. All the initiatives presented in this document are contributing to the current discussions on the subject. ■

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List of Acronyms

ABNJ	Areas Beyond National Jurisdiction	MCS	Monitoring, Control and Surveillance
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources	MPA	Marine Protected Area
CBD	Convention on Biological Diversity	MoU	Memorandum of Understanding
CLCS	Commission on the Limits of the Continental Shelf	NAFO	Northwest Atlantic Fisheries Organization
COP	Conference of the Parties	NEAFC	North East Atlantic Fisheries Commission
DOALOS	Division for Oceans Affairs and the Law of the Sea	NGO	Non-Governmental Organisation
EBSA	Ecologically and Biologically Significant Area	OSPAR	Convention for the Protection of the Marine Environment of the North East Atlantic
EIA	Environmental Impact Assessment	PSSA	Particularly Sensitive Sea Area
EU	European Union	RAC/SPA	Regional Activity Centre for Specially Protected Areas
FAO	Food and Agriculture Organization of the United Nations	RFMO	Regional Fisheries Management Organisation
GFCM	General Fisheries Commission for the Mediterranean	SBSTTA	CBD Subsidiary Body on Scientific, Technical and Technological Advice
ICCAT	International Commission for the Conservation of Atlantic Tuna	SPAMI	Specially Protected Area of Mediterranean Importance
IMO	International Maritime Organization	UNCLOS	United Nations Convention on the Law of the Sea
ISA	International Seabed Authority	UNGA	United Nations General Assembly
IUCN	International Union for Conservation of Nature	UNICPOLOS	United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea
IWC	International Whaling Commission	WWF	World Wildlife Fund
MARPOL	International Convention for the Prevention of Pollution from Ships		

Marine protected areas in areas beyond national jurisdiction: The state of play

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