

Marine Protected Areas in Areas beyond National Jurisdiction

Petra Drankier*

Netherlands Institute for the Law of the Sea (NILOS), School of Law,
Utrecht University, Utrecht, The Netherlands

Abstract

Marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ) are embedded in a number of multilateral frameworks. The present report discusses how various global and regional conventions deal with MPAs in their regulatory frameworks, such as their processes and guidelines for the identification and designation of MPAs in ABNJ, and cross-sectoral issues. It is concluded that the designation of MPAs is one step, but it needs to be followed by effective management measures in order to prevent that MPAs, especially multi-purpose MPAs, only exist on paper for many years. Such measures are mostly sector-specific and thus often fall under the competences of various organizations that have their own individual criteria and balance of interests. The report concludes by providing recommendations to overcome obstacles in cross-sectoral cooperation and coordination, as well as on how to combine global and regional interaction.

Keywords

marine protected areas (MPAs); areas beyond national jurisdiction (ABNJ); cross-sectoral cooperation

Introduction

This report provides input for a discussion on the following research question:

How can marine protected areas (MPAs) be brought under an integrated protection scheme? And how should the cooperation and coherence/harmonization between competent (often regionally or sectorally organised) institutes be shaped?

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In order to answer this question, various global and regional conventions and organizations are examined. For each of these conventions and organizations the following sub-questions are dealt with:

1. Does the spatial scope of the convention include areas beyond national jurisdiction (ABNJ)?
2. Do the regulatory framework of the convention and the mandate of its institutional framework offer possibilities to establish MPAs in ABNJ?
3. If the convention provides for a process for the identification and designation of MPAs in ABNJ, what are the steps within this process? And what has been achieved in practice so far?
4. How does the convention deal with cross-sectoral issues in theory and practice?

After the examination of the various global and regional conventions, conclusions are drawn and as ‘food for thought’, the report ends with further considerations and questions for discussion.

United Nations Convention on the Law of the Sea

Spatial Scope of Application

As regards ABNJ, two regimes within the framework of the United Nations Convention on the Law of the Sea (hereinafter LOSC)¹ are of particular relevance: first, the regime for the high seas which is contained in Part VII, and second, the common heritage regime contained in Part XI which is applicable to the Area (the seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction). One key feature of these two regimes is that they overlap spatially. The high seas regime is not only applicable to the water column, but also to the seabed and subsoil (Article 86 LOSC).²

Regulatory Framework

Due to the sectoral focus of the LOSC, it is necessary to take into account which specific activity is to be regulated in the ABNJ. Subsequently it can be determined whether that specific activity is covered by the regime of the high

¹ Adopted on 10 December 1982; entry into force 16 November 1994; 1833 UNTS 396.

² E Molenaar and A Oude Elferink, ‘Marine Protected Areas in ABNJ: The Pioneering Efforts Under the OSPAR Convention’ (2009) 5(1) *Utrecht Law Review* 7.

seas or by the common heritage regime, the latter in principle implying the need to carry out activities for the benefit of mankind, including the need to develop monetary or other benefit-sharing mechanisms. In some cases a particular activity, such as bioprospecting, is not explicitly mentioned in one of the regimes, which may cause a lack of clarity on the applicable regime.

Part XII of the LOSC establishes, *inter alia*, general obligations for the protection and preservation of the marine environment. Article 192 of the LOSC provides that: ‘States have the obligation to protect and preserve the marine environment.’

Article 194(5) of the LOSC provides that:

The measures taken in accordance with this Part shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.

The LOSC in general does not elaborate on the general duty of the State to exercise an environmental competence in the service of the common interest of mankind specifically for ABNJ, except for certain relevant flag State and port State responsibilities. In respect of mining activities in the Area, Part XI of the LOSC sets up mechanisms which allow the International Seabed Authority (ISA) to adopt rules for the protection of the marine environment binding on all States Parties to the LOSC. Environmental protection that requires measures in ABNJ with regard to activities falling under the freedoms of the high seas, such as fisheries and shipping, are not covered by a comparable regime. Hence it is more difficult to arrive at rules to protect the marine environment binding on all States. Cooperation for the protection and preservation of the marine environment on a global or regional basis is required by Article 197 of the LOSC, although it does not specifically address ABNJ in this regard.

In relation to the LOSC the 1995 UN Fish Stocks Agreement³ must also be mentioned. A large part of this agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction. Article 5(g) of the Agreement provides that States fishing on the high seas shall protect biodiversity in the marine environment in order to conserve and manage straddling fish stocks and highly migratory fish stocks. Article 5(d) and 5(e) provides that States fishing on the high

³ 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, done in New York, 4 August 1995, in force 11 December 2001, 2167 UNTS 3.

seas shall assess the impacts of fishing and other human activities on, and adopt conservation and management measures where necessary, for species belonging to the same ecosystem. Article 8 provides that cooperation between States for conservation and management of straddling fish stocks and highly migratory fish stocks shall take place directly or through appropriate subregional or regional fisheries management organizations or arrangements (RFMOs). With respect to straddling fish stocks and highly migratory species occurring both within exclusive economic zones (EEZs) and ABNJ, reference must also be made to Articles 63, 64 and Annex I of the LOSC. And with respect to the cooperation of States in the conservation and management of living resources in areas of the high seas, Article 118 LOSC must be mentioned, which requires States to take management measures, through (sub) regional fisheries organizations as appropriate.

The Fish Stocks Agreement does not stipulate or envisage a formal linkage or hierarchical relationship between the Agreement and the constitutive instruments of RFMOs. Provisions that contain references to RFMOs are directly aimed at their Members. The constitutive instruments of some, but by no means all, RFMOs that were adopted or amended after 1995 include prominent provisions that require consistency with the Fish Stocks Agreement, and thereby establish the latter's predominance. The Agreement also lacks a procedure for assessing whether or not the constitutive instruments of RFMOs and their performance are compatible with the Agreement. The annual Informal Consultations of States Parties to the Fish Stocks Agreement (ICSPs), the Review Conference of the Fish Stocks Agreement and the UN General Assembly have nevertheless been used for a dialogue and exchange of views on the functioning of the Fish Stocks Agreement and its implementation by States individually and jointly, in particular through RFMOs. It is submitted that the challenge of implementing the Fish Stocks Agreement is to use its margin of discretion and flexibility without losing sight of the need to ensure that the establishment and operation of RFMOs must be compatible with the Agreement.⁴ For a further elaboration on RFMOs, see the chapter on Regional Fisheries Management Organizations in this report.

Institutional Framework

The ISA is, *inter alia*, charged with protecting the marine environment from the impacts of mining activities in the Area. Article 145(b) of the LOSC requires the ISA to adopt, with respect to activities in the Area, appropriate

⁴ E Molenaar, 'Non-Participation in the Fish Stocks Agreement: Status and Reasons' (2011) 26 *The International Journal of Marine and Coastal Law* 222 at 222–224.

rules, regulations and procedures for, *inter alia*, the prevention of damage to the flora and fauna of the marine environment. That wording would seem to be broad enough to allow the indication of areas, or MPAs, closed to mining activities. According to Article 162(2)(x) of the LOSC, the Council of the ISA also has the power to disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment.

Identification and Designation of Sites

All States are equally entitled to exercise high seas freedoms. The point of departure for regulating, or restricting, high seas freedoms would thus logically seem to be that they require the involvement of the international community as a whole. It is also relevant to consider that the LOSC indicates specific forms of cooperation in a large number of cases, especially where sectoral measures are involved. It must be noted, that if a State or group of States were to declare a high seas MPA within the framework of the LOSC, this could only be legally binding on those nations setting up the MPA.⁵

Cross-sectoral Issues

The provisions on cooperation contained in the LOSC point to a number of conclusions which are of relevance in respect of MPAs in ABNJ. First, the provisions of the LOSC reflect a strong emphasis on the sectoral regulation of activities. Second, the LOSC allows cooperation in the protection of the marine environment in ABNJ on a regional basis, although Article 197 accords priority to the global level as it refers to cooperation “on a global basis, and, as appropriate, on a regional basis”. At the same time the Article specifically indicates that this cooperation is to take place “taking into account characteristic regional features”. Article 123 of the LOSC requires States bordering an enclosed or semi-enclosed sea to cooperate directly or through a regional organization, *inter alia*, to coordinate the management and conservation of the living resources of the sea and to coordinate the protection and preservation of the marine environment. As appropriate, other interested States or international organizations shall be invited to cooperate with them. With respect to ABNJ, this provision is only of relevance if the enclosed sea concerned encompasses areas of high sea, such as the Mediterranean Sea for the time being.

⁵ H Thiel, ‘Approaches to the Establishment of Protected Areas on the High Seas’, in A Kirchner (ed.) *International Maritime Environmental Law* (Kluwer Law International, The Hague, 2003) 182.

Article 119(1)(a) of the LOSC on the conservation of the living resources of the high seas states that in the establishment of specific conservation measures, States shall take into account “any generally recommended international minimum standards whether subregional, regional or global”. The relevant fora for standard-setting may often be organizations or bodies with a sectoral focus, whose interests will include but may not necessarily adequately cover the protection and preservation of the marine environment. The fact that such fora do have primary responsibility for standard-setting does not exclude the possibility for regional fora to consider specific related issues. However, it does indicate that coordination will be needed, for example in the process of establishing MPAs and sectoral area-based management measures.⁶

Convention on Biological Diversity

Regulatory Framework

The Convention on Biological Diversity⁷ (CBD) entered into force in December 1993. The conservation of biological diversity and the sustainable use of its components are amongst the CBD’s objectives.⁸

Article 2 CBD provides, *inter alia*, the following definitions:

“Biological diversity” means the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part: this includes diversity within species, between species and of ecosystems.

“Protected area” means a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.

Article 7 CBD on identification and monitoring and Article 8 CBD on *in-situ* conservation are important provisions for the protection of biological diversity. The first three sub-provisions of Article 8 specifically relate to protected areas. They require the Contracting Parties to:

- (a) establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity;

⁶ Molenaar and Oude Elferink, *supra* note 2, p. 10.

⁷ Convention on Biological Diversity, done in Rio de Janeiro, 5 June 1992, in force 29 December 1993, 1760 UNTS 79.

⁸ Article 1 CBD.

- (b) develop, where necessary, guidelines for the selection, establishment and management of protected areas or areas where special measures need to be taken to conserve biological diversity;
- (c) regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use.

The extent to which these provisions have relevance for ABNJ depends on whether protected areas and biological resources are considered to be “components of biological diversity”. If so, they would consequently fall outside the jurisdictional scope of the CBD as far as ABNJ are concerned, according to Article 4(a). However, it is without any doubt that if special measures need to be taken, as mentioned, for example, in the second part of sub-provisions of Article 8(a) and (b), Article 8 CBD is also applicable to ABNJ. After all, where such special measures would be used to regulate processes or activities, they could be applicable to ABNJ according to Article 4 (b) CBD. The same reasoning applies to Article 8(c); the regulation or management of biological resources might imply the regulation of processes and activities in ABNJ.

Another Article must also be mentioned with respect to the preceding reasoning, because Articles 7 and 8 mainly call upon the individual measures to be undertaken by each Contracting Party. However, individually the Parties do not have the competence to take such special measures for each type of sectoral process or activity. This gap can be overcome by using Article 5 CBD, which requires Parties, as far as possible and as appropriate to cooperate directly, or, where appropriate, through competent international organizations, in respect of ABNJ, for the conservation and sustainable use of biological diversity.

Institutional Framework

The CBD Conference of the Parties (COP) may consider and adopt protocols and additional annexes to the CBD, as well as consider and undertake any additional action that may be required for the achievement of the purposes of the CBD in the light of experience gained in its operation. The CBD COP can only adopt non-legally binding decisions, which consequently merely have the effect of recommendations to its Parties.

Spatial Scope of Application

It can be concluded from Article 4(a) CBD that the CBD provisions concerning components of biological diversity, such as specific habitats, do not apply

to ABNJ. With respect to ABNJ, Article 4(b) CBD restricts the application of its provisions to processes and activities, regardless of where their effects occur, carried out under the jurisdiction or control of a Contracting Party.

The CBD's Principle, as described in Article 3, states, *inter alia*, that States have the responsibility to ensure that activities within their control do not cause damage to the environment of areas beyond the limits of national jurisdiction.

Identification and Designation of Sites

In 1995, the CBD COP adopted the Jakarta Mandate on Marine and Coastal Biodiversity, under which Parties are to establish a global network of MPAs, building upon regional and national systems, by 2012.

Since the Jakarta Mandate of 1995, the CBD COP adopted several decisions on protected areas, but without paying any particular attention to MPAs in ABNJ. In May 2008, CBD COP-9 took a significant step forward by adopting the scientific "Azores criteria" for identification of Ecologically or Biologically Significant Marine Areas (EBSA) in need of protection, including in open-ocean waters and deep-sea habitats.⁹

As noted in Decision X/29 of CBD COP-10, a global process for the designation of MPAs in ABNJ does not exist yet in any global forum.¹⁰ The only and still ongoing effort undertaken by the CBD is the search for scientific criteria to identify priority areas for biological diversity in ABNJ.

CBD COP-10 adopted Decision X/29 in October 2010, wherein it noted the slow progress in establishing MPAs in ABNJ and emphasized the need to enhance efforts towards achieving the 2012 target, in accordance with international law, including the LOSC. In this respect, it recalled the role of the United Nations General Assembly and the *Ad Hoc* Open-ended Informal Working Group to Study Issues Relating to the Conservation and Sustainable Use of Marine Biodiversity Beyond Areas of National Jurisdiction (BBNJ Working Group), and urged Parties to take action as necessary to advance the work in the BBNJ Working Group.¹¹

In view of the CBD's activities on MPAs in practice, it seems that the CBD perceives a role for itself in developing scientific criteria for the selection of MPAs, and not, or not yet, for the actual designation of MPAs.

⁹ CBD (9-10-2008) Decision IX/20, 1, 7–12.

¹⁰ CBD (2010) COP 10 Decision X/29, Marine and Coastal Biodiversity, paragraph 33.

¹¹ *Ibid.*

Cross-sectoral Issues

Article 6(b) CBD requires that each Contracting Party, in accordance with its particular conditions and capabilities:

Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies.

Article 5 requires States, as far as possible and as appropriate, to cooperate with other Contracting Parties, directly or, where appropriate, through competent international organisations, in respect of ABNJ for the conservation and sustainable use of biological diversity.

International Maritime Organization

Institutional Framework

The main organ of the International Maritime Organization (IMO) is the Assembly, which consists of all Member States and meets every two years. Its functions are set out in Article 15 of the IMO Convention, including in Article 15(j) the recommendation to Members for adoption of regulations and guidelines, *inter alia*, concerning the effect of shipping on the marine environment.¹² Between the sessions of the Assembly, the Council of the IMO performs all the functions of the organization, except the function of making recommendations. Among its various committees, the Marine Environment Protection Committee (MEPC) is responsible for initiating and maintaining the mechanisms that IMO deploys in order to prevent, reduce and minimize damage to the environment caused by vessels.^{13 14}

Regulatory Framework

The 1973 International Convention for the Prevention of Pollution from Ships¹⁵ (MARPOL) provides for general rules to address multilaterally the

¹² Convention on the International Maritime Organization, done in Geneva, 6 March 1948, in force 17 March 1958, 289 UNTS 48.

¹³ MJ Kachel, *Particularly Sensitive Sea Areas: The IMO's Role in Protecting Vulnerable Marine Areas*. (Springer-Verlag, Berlin, 2008) 140.

¹⁴ Convention on the International Maritime Organization, Part V.

¹⁵ International Convention for the Prevention of Pollution from Ships, done in London, 2 November 1973, in force 2 October 1983, as amended by the 1978 Protocol, 1340 UNTS 61.

problem of vessel-source pollution of the marine environment. The six accompanying annexes make MARPOL work in practice. Each annex deploys a unique regulatory approach, but one of the similarities is the concept of special areas, which is intended to grant a higher level of protection to specific vulnerable parts of the oceans.¹⁶ The special area concept also has a predecessor (in name rather than in substance) in the 1954 OILPOL Convention,¹⁷ whose Annex A provides for so-called prohibition zones. Annex A was merely designed to define, and in some cases even limit, the geographical scope of application for the discharge restrictions set forth in Article III. By way of an amendment to OILPOL, the IMO designated in 1971 for the first time a prohibition zone, the Great Barrier Reef. However, it never entered into force, but was later incorporated in MARPOL Annex I.

Nowadays, two categories of protected zones can be distinguished. The first category comprises two types of protected zones under MARPOL: (1) special areas pursuant to MARPOL Annexes I, II and V; and (2) SOx Emission Control Areas (SECAs) introduced by MARPOL Annex VI.¹⁸ These special areas can be provided with a higher level of protection than other areas of the sea by “the adoption of special mandatory methods for the prevention of sea pollution by oil, noxious liquid substances, or garbage, . . .”¹⁹ Guidelines for the designation of special areas were included in chapter 2 of the Annex to Resolution A.720(17),²⁰ adopted by the IMO Assembly in November 1991. These Guidelines were superseded by the new 2001 Guidelines, included in Annex I to Resolution A.927(22).

The second category of protected zones is the Particularly Sensitive Area (PSSA). The PSSA concept complements the already existing concept of special areas in the 1973 MARPOL Convention. The development of the PSSA concept was encouraged by Resolution 9,²¹ adopted at the 1978 International

¹⁶ Kachel, *supra* note 13, p. 97.

¹⁷ International Convention for the Prevention of Pollution of the Sea by Oil, done in London, 12 May 1954, in force 26 July 1958, 327 UNTS 3.

¹⁸ Annex I: Prevention of pollution by oil; Annex II: Control of pollution by noxious liquid substances; Annex V: Prevention of pollution by garbage from ships; Annex VI: Regulations for the prevention of air pollution from ships.

¹⁹ Para. 2.1 of Resolution A.927(22).

²⁰ Resolution A.720(17). Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas. Adopted 6 November 1991. Available at: [http://www.imo.org/blast/blastDataHelper.asp?data_id=22581&filename=A720\(17\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=22581&filename=A720(17).pdf).

²¹ A copy of the original Resolution 9 “Protection of Particularly Sensitive Areas”, adopted in the International Conference on Tanker Safety and Pollution Prevention, done in London, February 1978, is available in G Peet ‘Particularly Sensitive Sea Areas—A Documentary History’ (1994) 9(4) *The International Journal of Marine and Coastal Law* 502–503 (Annex I). A partial citation from Resolution 9 is available on page 4 of Resolution A.720(17) adopted by

Conference on Tanker Safety and Pollution Prevention, which invited IMO to formulate new concepts for marine environmental protection. This non-binding Resolution was not included in a convention, and thus the identification of an area as a PSSA in itself cannot result in legal obligations.²² The PSSA concept was, with some delay, further discussed at subsequent MEPC sessions from 1986 to 1991.²³

In 1991 Resolution A.720(17) was adopted, which included Guidelines for the Identification of PSSAs in chapter 3. These Guidelines were subsequently revised in 1999 by Resolution A.885(21),²⁴ in 2001 by Resolution A.927(22),²⁵ and in 2005 by Resolution 982(24).²⁶ Where the 1991 and 2001 Resolutions included guidelines for special areas as well as for PSSAs, the 1999 and 2005 Resolutions exclusively dealt with guidelines for PPSAs.

The 1999 Resolution introduced the term “Associated Protective Measure” (APM), although the adoption of such a measure (named “special protective measure”) was already possible under paragraph 3.1.3 of the 1991 Resolution. Any application to the IMO for PSSA designation is expected to identify at least one APM, which must be submitted within two years of the approval in principle of the PSSA.²⁷ The 2001 Resolution added that where such a measure already exists to protect the area, the application should show how the area is already being protected by such measures.²⁸ By the adoption of the

the IMO General Assembly on 6 November 1991. Available at: [http://www.imo.org/blast/blastDataHelper.asp?data_id=22581&filename=A720\(17\).pdf](http://www.imo.org/blast/blastDataHelper.asp?data_id=22581&filename=A720(17).pdf).

²² H Lefebvre-Chalain, ‘Fifteen Years of Particularly Sensitive Sea Areas: A Concept in Development’ (2007) 13(47) *Ocean & Coastal Law Journal* 48. J Roberts, M Tsamenyi, T Workman, L Johnson, ‘The Western European PSSA Proposal: A “Politically Sensitive Area”’ (2005) 29 *Marine Policy*, 432. H Dotinga and A Trouwborst, *Juridische Bescherming van Biodiversiteit in de Noordzee. Internationaal, Europees en Nederlands Recht*. Onderzoek uitgevoerd ten behoeve van het Planbureau voor de Leefomgeving (CELP/NILOS, Utrecht, 2008) 55.

²³ Peet, *supra* note 21, p. 476.

²⁴ Resolution A.885(21). Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective Measures and Amendments to the Guidelines Contained in Resolution A.720(17). Adopted 25 November 1999. Available at: [http://www.imo.org/blast/blastDataHelper.asp?data_id=24275&filename=885\(21\).PDF](http://www.imo.org/blast/blastDataHelper.asp?data_id=24275&filename=885(21).PDF).

²⁵ Resolution A.927(22). Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Areas. Adopted 29 November 2001. Available at: http://www.gc.noaa.gov/documents/gcil_sad_imo_927.pdf.

²⁶ Resolution A.982(24). Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas. Adopted 1 December 2005. Available at: <http://www.gc.noaa.gov/documents/982-1.pdf>.

²⁷ Para. 4.3.4 of Resolution A.885(21); Para. 7.1 of Resolution A.927(22); Para. 1.2 and 7.1 of Resolution A.982(24).

²⁸ Para. 7.2 of Resolution A.927(22).

2005 Revised PSSA Guidelines, the IMO General Assembly revoked Annex II of Resolution A.927(22), recognizing “the need to clarify and, where appropriate, strengthen certain aspects and procedures for the identification and subsequent designation of [PSSAs] and the adoption of [APMs] . . .”.²⁹

APMs may, *inter alia*, include ships’ routing measures, discharge restrictions and prohibited activities, “and should be specifically tailored to meet the need of the area to prevent, reduce, or eliminate the identified vulnerability of the area from international shipping activities”.³⁰ If the proposed APMs “are not already available in an IMO instrument, information must be provided with regard to its legal basis and/or steps that the proposing Member Government has taken or will take to establish the legal basis”.³¹

Spatial Scope of Application

The IMO Convention, the Revised PSSA Guidelines, and the MARPOL Convention with its relevant annexes apply to all maritime zones.

Identification and Designation of Sites

A significant legal difference between a PSSA and a MARPOL 73/78 special area is that whereas a PSSA may be designated or amended by the IMO Assembly, on recommendation of the MEPC, the designation or amendment of a special area is in effect an amendment to MARPOL 73/78 itself and its respective annex. A special area or emission control area derives its legal authority directly from an international convention.³² The adoption of amendments to MARPOL 73/78 is accomplished through tacit acceptance that provides for the entry into force of an amendment without express consent of the Contracting Parties. Most of the IMO Member States are Parties to MARPOL. The decisions regarding MARPOL are therefore taken during the normal MEPC session.^{33 34}

²⁹ Resolution A.982(24), *supra* note 26, p. 2.

³⁰ Para. 7.5.2.4 of Resolution A.982(24).

³¹ Para. 7.5.2.2 of Resolution A.982(24).

³² World Maritime University, *PSSA in the Baltic Sea: Present Situation and Future Possibilities*, Monograph/Research Brief (2006) 12. Available at: http://www.balticmaster.org/media/files/general_files_706.pdf.

³³ However, from a strictly legal point of view, only MARPOL Parties decide on these matters. Hence, the usual MEPC is, for these circumstances, expanded by non-IMO Member States that are Parties to MARPOL. It is also for this reason that proposals for amendments are not set out in MEPC documents but rather in circular letters disseminated by the IMO Secretariat acting as the Secretariat for MARPOL.

³⁴ Kachel, *supra* note 13, p. 98.

The criteria for the identification of PSSAs and the criteria for the designation of special areas are not mutually exclusive. In many cases a PSSA may be identified within a special area and *vice-versa*.³⁵ To be designated with a Special Area status, an area must meet three cumulative criteria within the meaning of MARPOL: oceanographic, ecological,³⁶ and vessel traffic characteristics.³⁷ It is sufficient for a potential PSSA to meet just one of the PSSA clusters of ecological, socio-cultural-economic and scientific-educational criteria. Another difference is that under the Revised PSSA Guidelines, in some circumstances, a proposed PSSA may include a buffer zone to enhance the protection of the core area for which specific protection from shipping is sought.³⁸ As concluded by other scholars, compared with the special area concept, the PSSA concept has “a larger number and a more diversified range of measures”³⁹ available to protect a particularly vulnerable sea area against any damage that might be caused by shipping activities.⁴⁰

An application for designation of a PSSA may only be submitted by a Member Government or two or more member Governments having a common interest in a particular area. The unlimited geographical scope of the Revised PSSA Guidelines would allow for one or more Governments, in proximity⁴¹ to a high seas area which is vulnerable to damage by international shipping activities, to apply for designation of that area as a PSSA. As with the original PSSA Guidelines, an application has to meet at least one of the criteria listed in the Guidelines. The concept of PSSAs can be applied to ABNJ. It can be noted that some of the criteria listed have particular applicability to

³⁵ Particularly Sensitive Sea Areas, at: www.imo.org/ourwork/environment/pollutionprevention/PSSAs/Pages/Default.aspx, last accessed on 11 January 2011.

³⁶ The ecological conditions of an area are: Conditions indicating that protection of the area from harmful substances is needed to preserve:

- (1) depleted, threatened or endangered marine species;
- (2) areas of high natural productivity (such as fronts, upwelling areas, gyres);
- (3) spawning, breeding and nursery areas for important marine species and areas representing migratory routes for sea-birds and marine mammals;
- (4) rare and fragile ecosystems such as coral reefs, mangroves, seagrass beds and wetlands; and
- (5) critical habitats for marine resources including fish stocks and/or areas of critical importance for the support of large marine ecosystems.

³⁷ Resolution A.927(22), page 3, Annex I. Available at: http://www.gc.noaa.gov/documents/gcil_sad_imo_927.pdf.

³⁸ Resolution A.982(24), *supra* note 26, p. 8, para. 6.3.

³⁹ Lefebvre-Chalain, *supra* note 22, p. 59.

⁴⁰ Kachel, *supra* note 13, p. 97.

⁴¹ It must however be noted that the Revised PSSA Guidelines do not explicitly mention a ‘proximity requirement’.

ABNJ. The PSSA assessment and designation procedures within IMO are the same for all types of maritime zones.⁴²

When an area is recognized as a PSSA, the APMs approved by the IMO are recorded on charts, in accordance with the symbols and the methods of the International Hydrographic Organization. Thereafter, Member States “should take all appropriate steps to ensure that vessels flying their flag comply with the associated protective measures adopted to protect the designated PSSA”,⁴³ and to take appropriate action against violators.⁴⁴ The implementation of any PSSA designation for a marine ABNJ would rely heavily on flag State monitoring and enforcement procedures.

Several examples of APMs are already mentioned in this report. APMs may be combined in different ways in order to allow for tailor-made solutions for the PSSA concerned. According to Lefebvre-Chalaine, in many cases a balance is sought between environmental protection and shipping, which may result in only a “minimum protection” for the PSSA.⁴⁵ Another flexibility clause is included in paragraph 8.4 of the Revised PSSA Guidelines, which states that IMO should provide a forum for the review and re-evaluation of any APMs adopted, and continues:

Member Governments which have ships operating in the area of the designated PSSA are encouraged to bring any concerns with the [APMs] to IMO so that necessary adjustments may be made. Member Governments that originally submitted the application for designation with the [APM], should also bring any concerns and proposals for additional measures or modifications to any [APM] or the PSSA itself to IMO.

Similar to the CBD, the IMO at the moment seems to be mainly concerned with the development of criteria for the identification of protected areas, in relation to the high seas. None of the current PSSAs designated by IMO incorporate marine ABNJ. Two MARPOL special areas in the Antarctic area (south of latitude 60 degrees south) and the Mediterranean Sea were designated pursuant to Annexes I and V, and Annex I respectively,⁴⁶ which both include ABNJ.

⁴² Resolution A.982(24), *supra* note 26, pp. 4–5.

⁴³ *Ibid.*, p. 13, para. 9.3.

⁴⁴ Lefebvre-Chalain, *supra* note 22, p. 55.

⁴⁵ *Ibid.*, pp. 54–55.

⁴⁶ Special Areas under MARPOL, at: www.imo.org/ourwork/environment/pollutionprevention/specialareasundermarpol/Pages/Default.aspx. Last accessed on 11 January 2011.

Cross-sectoral Issues

The IMO Convention allows for close cooperation with other organizations by means of international agreements or arrangements, although these require the approval by a two-thirds majority vote of the Assembly. Articles 60, 61 and 62 consider, respectively, cooperation with specialized UN agencies, other intergovernmental organizations which are not specialized agencies of the UN, and non-governmental international organizations. According to Article 63, IMO may even take over functions, resources and obligations within the scope of IMO from other international organizations, as well as administrative functions from a Government.⁴⁷

Other Global Fora and Conventions

This section discusses efforts on MPAs and other area-based management measures within the context of the United Nations, as well as activities within several species-specific conventions.

UN General Assembly

The General Assembly is empowered to make only non-binding recommendations to States on international issues within its competence.⁴⁸ In 2002 the General Assembly paid special attention to the protection of vulnerable marine ecosystems and habitats in ABNJ. Resolution 57/141 the General Assembly called upon States to:

develop and facilitate the use of diverse approaches and tools, including... the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods... (paragraph 53)

The call is reiterated in Resolutions up until today. Moreover, the General Assembly encouraged States and relevant organizations to urgently consider ways to integrate and improve, on a scientific basis, the management of risks

⁴⁷ Convention on the International Maritime Organization, Part XV.

⁴⁸ The functions and powers of the Assembly are set out in Articles 10–17 of the Charter; see also Functions and Powers of the General Assembly, at: www.un.org/en/ga/about/background.shtml, last accessed 21 January 2011.

to marine biodiversity of seamounts and certain other underwater features within the framework of the LOSC (Resolution 57/141, paragraph 56). Subsequent calls also included cold water corals and hydrothermal vents as ecosystems of concern. In 2003 the General Assembly invited the relevant global and regional bodies to urgently investigate how to better address, on a scientific basis, the threats and risks to vulnerable and threatened marine ecosystems and biodiversity in ABNJ.⁴⁹ Moreover, the General Assembly invited the relevant global and regional bodies to investigate:

how existing treaties and other relevant instruments could be used in this process consistent with international law, in particular [the LOSC], and with the principles of an integrated ecosystem-based approach to management, including the identification of those marine ecosystem types that warrant priority attention; and to explore a range of potential approaches and tools for their protection and management (Resolution 58/240, paragraph 52).

In 2004 the General Assembly passed Resolution 59/24 (paragraph 73) to establish the BBNJ Working Group, whose tasks include the examination of the legal aspects of these issues and the indication of possible options and approaches to promote international cooperation and coordination.⁵⁰ The BBNJ Working Group convened in 2006, 2008, 2010, 2011, and a new session is scheduled for May 2012. The results of each session are discussed within the General Assembly.

In 2006 the General Assembly adopted Resolution 61/105,⁵¹ which requested RFMOs and, as appropriate, flag States to take a number of measures to protect vulnerable marine ecosystems (VMEs) from the adverse impacts of bottom fisheries no later than December 2008. This, *inter alia*, included measures concerning the identification of VMEs and the closure of such areas unless adequate conservation and management measures were in place. The General Assembly reviewed the implementation of Resolution 61/105 in 2009, which led to the adoption of Resolution 64/72,⁵² which

⁴⁹ Marine Biological Diversity Beyond Areas of National Jurisdiction, at: www.un.org/Depts/os/biodiversityworkinggroup/marine_biodiversity.htm, under heading 'Work of the United Nations General Assembly', last accessed on 20 January 2011.

⁵⁰ DK Leary, *International Law and the Genetic Resources of the Deep Sea* (Nijhoff, Leiden, 2007) 62–63.

⁵¹ 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; Resolution adopted by the General Assembly on 8 December 2006 (A/RES/61/105 of 6 March 2007), paras. 80–91.

⁵² 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

contained a further consideration of actions to address the impact of bottom fisheries on VMEs. States and RFMOs are, *inter alia*, urged to ensure that their actions in implementing the 2006 and 2009 General Assembly Resolutions are consistent with the FAO Guidelines.

BBNJ Working Group

The BBNJ Working Group has, *inter alia*, the mandate to explore options for cooperation in the establishment of area-based management measures, including representative networks of MPAs, beyond the limits of national jurisdiction.

BBNJ-1 (February 2006) stressed the need for a global network of MPAs, including both strictly protected areas and multi-use areas. It was noted that further cooperation was necessary to further develop criteria for the identification of EBSAs and the development of systems of MPAs. It was proposed that the General Assembly could assume a leading role in the identification of criteria for the establishment of MPAs, and that “such underutilized bodies as the Meeting of States Parties of the [LOSC] could be considered for this purpose”.⁵³ Further consideration should also be given to ways of establishing, managing and enforcing designations, recognizing in this context the existing role and mandate of such bodies as FAO, IMO, CBD and regional seas conventions. Views differed on whether a new regulatory and governance regime for the establishment and management of multi-purpose MPAs was needed or whether the existing regulatory regime would suffice.⁵⁴

BBNJ-2 (May 2008) made reference to the progress that had been made to implement area-based management tools in ABNJ, for example by the IMO, ISA, RFMOs and regional environmental bodies. However, as will be concluded in this report, the implementation refers only to the identification of scientific criteria and not to the actual designation of MPAs in ABNJ. Furthermore, BBNJ-2 discussed the options of building a register of areas that would meet the scientific criteria developed in the context of the CBD and a joint approach and guidance on the application of these EBSA criteria, for example

relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments; Resolution adopted by the General Assembly on 4 December 2009 (A/RES/64/72 of 19 March 2010), paras. 112–130.

⁵³ UN General Assembly, *Report of the BBNJ Working Group*, 20 March 2006, A/61/65, para. 60 at p. 16. Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/277/50/PDF/N0627750.pdf?OpenElement>.

⁵⁴ *Ibid.*, p. 16.

through the establishment of a liaison group or relevant organizations, including FAO, IMO and CBD, and facilitated by the United Nations.⁵⁵

BBNJ-3 (February 2010) recalled the work of FAO on criteria for the identification of VMEs. Several delegations called for the development of a common understanding of the methodology for the identification of MPAs, taking into account the criteria developed by FAO and the CBD, and for the development of an international list of EBSAs. A proposal was made that an inter-governmental process be established, possibly at the regional level, to identify priority areas. Further refinement of the work on bioregionalization was considered to be helpful in this respect. The view was expressed that such an identification process would not need to be delayed by the more complex and difficult task of determining applicable policy and management arrangements, which could eventually be considered separately by States and intergovernmental organizations within the context of their mandates.⁵⁶

BBNJ-4 (May/June 2011) continued discussions of the legal regime on MPAs in ABNJ. Following difficult negotiations, BBNJ-4 adopted by consensus a set of recommendations to initiate a process on the legal framework for the conservation and sustainable use of marine biodiversity in ABNJ, by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the LOSC. The recommendations also included a package of issues to be addressed as a whole in this process, including measures such as area-based management tools, including MPAs. Moreover, BBNJ-4 recommended that the General Assembly review the mandate of the BBNJ Working Group and to reconvene this Working Group in 2012.⁵⁷

Food and Agriculture Organization

The mandate of the FAO is to achieve food security for all. The 1993 FAO Compliance Agreement⁵⁸ sets out responsibilities for flag States to ensure that any fishing vessel flying its flag and operating in the high seas complies with

⁵⁵ UN General Assembly, *Report of the BBNJ Working Group*, 16 May 2008, A/63/79, 7–8.

⁵⁶ UN General Assembly, *Report of the BBNJ Working Group*, 17 March 2010, A/65/68, pp. 12–13.

⁵⁷ IISD, 'Summary of the Fourth Meeting of the Working Group on Marine Biodiversity beyond Areas of National Jurisdiction: 31 May-3 June 2011' (2011) 25(70) *Earth Negotiations Bulletin*, MBWG 4 final, pp. 1 and 6.

⁵⁸ 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, done in Rome, 24 November 1993, in force 24 April 2003 (1994) 33 ILM 968. Available at: <http://www.fao.org/legal/treaties/012t-e.htm>.

international conservation and management measures. To further urge Contracting Parties to exercise fishing in a more responsible and sustainable way, the voluntary FAO Code of Conduct for Responsible Fisheries was agreed in 1995. The latter urges Contracting Parties to cooperate through RFMOs. Furthermore, it requires in Article 7.6.9 States to take appropriate measures to minimize negative impacts on associated or dependent species, in particular endangered species. Such measures may include closed seasons and areas and zones reserved for selected fisheries.⁵⁹

In 2005 the Committee on Fisheries (COFI), a subsidiary body of the FAO Council, recommended that FAO develop technical guidelines on MPAs for fisheries management and to discuss the issue again in 2007. In response, FAO began to work on MPAs and organised an Expert Workshop on MPAs and Fisheries Management in 2006. The purpose of the FAO Technical Guidelines on MPAs and fisheries (the MPA Guidelines)⁶⁰ is not only to address MPAs when used directly for fisheries management, but also to discuss the implementation of multi-purpose MPAs, i.e., when fisheries management is one, but not the only objective. Guidance on MPA design, implementation, monitoring and adaptation is provided and the main challenges and opportunities relevant to these processes are discussed. As the other documents in the series FAO Technical Guidelines for Responsible Fisheries, the MPA Guidelines are developed in support of the implementation of the Code of Conduct for Responsible Fisheries. The document pays explicit attention to high seas MPAs in Chapter 5 and Annex I. Although prepared as a stand-alone document, the MPA Guidelines also complement the other Technical Guidelines to fisheries management.⁶¹ It must be noted that in the view of FAO there are almost always multiple choices with regard to available tools for achieving fishery management and conservation objectives, such as MPAs, allocation of rights, gear restrictions, access controls, fish size limits and time-area-gear type closures, and these should be selected and balanced within the relevant policy and management framework.

The 2009 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas⁶² particularly address the vulnerability of high seas

⁵⁹ FAO (1995) Code of Conduct for Responsible Fisheries, done in Rome, 31 October 1995, at the Twenty-Eight Session of the FAO Conference. Available at: <ftp://ftp.fao.org/docrep/fao/005/v9878e/v9878e00.pdf>.

⁶⁰ FAO (2011), Fisheries Management. 4. Marine Protected Areas and Fisheries. FAO Technical Guidelines for Responsible Fisheries. No. 4, Suppl.4 (Rome, FAO, 2011). Available at: <http://www.fao.org/docrep/015/i2090e/i2090e.pdf>.

⁶¹ FAO Technical Guidelines on MPAs (as a fisheries management tool), available at: www.fao.org/fishery/topic/16203/en.

⁶² Available at: <ftp://ftp.fao.org/docrep/fao/011/i0816t/i0816t.pdf>.

ecosystems to fishing activities and provide a set of rules, including the closure of areas to fishing, for minimising environmental damage.⁶³ The Guidelines are being used, as a voluntary tool, to implement Resolutions 61/105 and 64/72 of the General Assembly on bottom fisheries (as already mentioned in the section on the UN General Assembly of this report).

Convention on Migratory Species

The Convention on the Conservation of Migratory Species of Wild Animals,⁶⁴ also known as CMS or Bonn Convention, and in force since 1983, aims to conserve terrestrial, marine and avian migratory species throughout their range. It is an intergovernmental treaty, concluded under the aegis of the United Nations Environment Programme, concerned with the conservation of wildlife and habitats on a global scale. It particularly seeks to encourage its 114 Contracting Parties to cooperate on protection measures for wide-ranging species. These measures include the establishment of protected areas in critical habitats.

As the only global convention specializing in the conservation of migratory species, their habitats and migration routes, CMS complements and cooperates with a number of other international organizations. In this respect, CMS acts as a framework convention. Whereas Article II(3)(b) requires Parties to provide immediate protection to migratory species included in Appendix I, Article II(3)(c) states that Parties “shall endeavour to conclude Agreements covering the conservation and management of migratory species included in Annex III”. These Agreements may range from legally binding treaties (called Agreements) to less formal instruments, such as Memoranda of Understanding, and can be adapted to the requirements of particular regions.⁶⁵

Migratory species threatened with extinction are listed on Appendix I of the CMS. CMS Parties strive towards strictly protecting these animals, conserving or restoring the places where they live, mitigating obstacles to migration and controlling other factors that might endanger them.⁶⁶ Migratory species that need or would significantly benefit from international cooperation are listed in Appendix II of the CMS. For this reason, the CMS

⁶³ WWF, ‘High Seas MPAs: Regional Approaches and Experiences. Background Document for the High Seas’, MPAs side event at the 12th UNEP Global Meeting of the Regional Seas Conventions and Action Plans, 20 September 2010, UNEP(DEPI)/RS.12/INF.6.RS (2010) 4.

⁶⁴ Done in Bonn, 23 June 1979, in force 1 November 1983, 1651 UNTS 333.

⁶⁵ Introduction to the Convention on Migratory Species, at: www.cms.int/about/intro.htm, last accessed on 21 January 2011.

⁶⁶ Article III(4) CMS.

encourages the Range States to conclude global or regional Agreements.^{67 68} Article V(5)(e-g) of the CMS states that each Agreement, where appropriate and feasible, should provide for conservation, and where required and feasible, restoration of the habitats of importance; protection of such habitats from disturbances; maintenance of a network of suitable habitats appropriately disposed in relation to the migration routes; and where it appears desirable, the provision of new habitats favourable to the migratory species.

Within the CMS context no specific attention has been paid to MPAs or ABNJ, although these topics can be considered as falling potentially within CMS competence.

International Whaling Commission

The International Whaling Commission (IWC) was set up under the International Convention for the Regulation of Whaling⁶⁹ which was signed in 1946. The purpose of the Convention is to provide for the proper conservation of whale stocks and it applies to all waters where whaling is carried out. By the late 1960s and early 1970s, as environmental awareness increased, a significant number of former whaling countries began to push for whale conservation. Today, there are more than 70 countries that are members of the IWC.

The main task of the IWC is to keep under review and revise as necessary the measures laid down in the Schedule to the Convention which governs the conduct of whaling throughout the world. These measures, *inter alia*, provide for the complete protection of certain species; designate specified areas as whale sanctuaries; set limits on the numbers and size of whales which may be taken; prescribe open and closed seasons and areas for whaling; and prohibit the capture of suckling calves and female whales accompanied by calves.

Because of uncertainties in the scientific analyses and therefore the precise status of the various whale stocks, the IWC decided at its meeting in 1982 that there should be a pause (the 'moratorium') in commercial whaling for all whale stocks from 1985/86, which is still in force. Moreover, it declared the entire Indian Ocean as a whale sanctuary. A Revised Management Procedure (RMP) was developed subsequently, which the Commission accepted and endorsed in 1994 but has yet to implement. In 1994 the IWC declared the entire Southern Ocean to be a sanctuary for whales. The sanctuaries in the

⁶⁷ Several examples of regional Agreements, such as ACCOBAMS and ASCOBANS, are discussed in the section of this report on 'Cetacean Conservation Agreements'.

⁶⁸ Introduction to the Convention on Migratory Species, at: www.cms.int/about/intro.htm, last accessed on 21 January 2011.

⁶⁹ Done in Washington, 2 December 1946, in force 10 November 1948, 161 UNTS 74.

Indian and Southern Ocean will be reviewed every ten years. Two additional proposals for the establishment of sanctuaries in the South Atlantic and South Pacific have been submitted to the Commission for a number of years. To date, both have failed to achieve the three-quarters majority of votes needed to change the Schedule and become designated IWC sanctuaries.^{70 71}

OSPAR

Institutional Framework

The 16 Parties to the OSPAR Convention⁷² cooperate to protect the marine environment of the North-East Atlantic. The Parties are all coastal States bordering the North-East Atlantic except the Russian Federation, three States that are located upstream on watercourses reaching the OSPAR Maritime Area (Finland, Luxembourg and Switzerland), and the European Union (EU). Nevertheless, the OSPAR Convention specifically provides for the participation of other States, such as coastal States outside the OSPAR Maritime Area or States whose vessels or nationals are engaged in activities in the OSPAR Maritime Area. These can be invited by the Contracting Parties by unanimous vote to accede to the Convention and, if necessary, the spatial scope of the Maritime Area can even be redefined. Other States can also obtain observer status, although thus far the OSPAR observer community consists of inter-governmental and non-governmental organizations.⁷³

Spatial Scope of Application

By contrast with most other regional seas conventions, the OSPAR Maritime Area includes sizeable ABNJ. It is estimated that approximately 40% of the

⁷⁰ IWC Information, at: www.iwcoffice.org/commission/iwcmain.htm#history, last accessed on 21 January 2011. Whale Sanctuaries, at: www.iwcoffice.org/conservation/sanctuaries.htm, last accessed on 21 January 2011.

⁷¹ 'The IWC Considers Reopening Commercial Whaling', at: www.greenpeace.org/usa/en/campaigns/oceans/whale-defenders/iwc/, last accessed on 21 January 2011.

⁷² Convention for the Protection of the Marine Environment of the North-East Atlantic, done in Paris, 22 September 1992, in force 25 March 1998 (1993) 32 ILM 1072, and Annex 5, done in Sintra, 23 September 1998, in force 30 August 2000. Amended and updated text available at www.ospar.org.

⁷³ Molenaar and Oude Elferink, *supra* note 2, pp. 13–14.

OSPAR Maritime Area consists of ABNJ.⁷⁴⁷⁵ Most of these ABNJ are located to the west of the European mainland, to the south of Iceland and to the north of the Azores, including the northern part of the Mid-Atlantic Ridge (MAR).

Regulatory Framework

The OSPAR Commission may adopt measures and programmes in the form of legally binding decisions (for Contracting Parties), non-legally binding recommendations⁷⁶ and other agreements for all activities except fisheries and with some limitations for other activities such as shipping.⁷⁷ These measures and programmes can apply to the entire Maritime Area or to a specific (sub-)region.⁷⁸

With the adoption of Annex V to the OSPAR Convention in 1998, which deals with the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area, the Contracting Parties committed themselves to taking the necessary measures to protect and conserve the ecosystems and biodiversity of the Maritime Area, to restore marine areas which have been adversely affected and to cooperate in adopting programmes and measures for those purposes for the control of human activities.

The OSPAR Ministerial Meeting in 1998 agreed to promote the establishment of a network of MPAs. Following a period of preparatory work, the 2003 OSPAR Ministerial Meeting in Bremen adopted Recommendation 2003/3 on a network of MPAs with the purpose of establishing an ecologically coherent network of well-managed MPAs in the North-East Atlantic by 2010. An MPA is defined in Recommendation 2003/3 as:

an area within the maritime area for which protective, conservation, restorative or precautionary measures, consistent with international law have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment.

⁷⁴ OSPAR, 'Draft 2010 Status Report on the OSPAR Network of Marine Protected Areas', Agenda Item 2 of the Biodiversity Committee Meeting 15–18 June 2010 in Bonn, BDC 10/2/1 Add.5-E(L) (2010) 34.

⁷⁵ However, several Contracting Parties have filed submissions with the UN Commission on the Limits of the Continental Shelf (UNCLCS) with respect to the outer limits of their continental shelf, which will lead to a significant reduction of the seafloor beyond national jurisdiction ("the Area") in the Convention Area. Source: WWF, *supra* note 63, p. 6.

⁷⁶ Article 10(3) *juncto* Article 13(2) and (5) OSPAR.

⁷⁷ Article 4 OSPAR.

⁷⁸ Article 24 OSPAR.

The Recommendation states that the OSPAR Network of MPAs includes sites within national jurisdiction as well as “any area in the maritime areas outside the jurisdiction of the Contracting Parties which has been included as a component of the network by the OSPAR Commission.”

Thus it expressly envisages that the network will include sites in ABNJ. Furthermore, the aims of the OSPAR network of MPAs are:

- to protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities;
- to prevent degradation of, and damage to, species, habitats and ecological processes, following the precautionary principle; and
- to protect and conserve areas that best represent the range of species, habitats and ecological processes in the maritime area.

Finally, paragraph 3.3 of the Recommendation requires the Contracting Parties to develop for each area selected a management plan and to determine what management measures would be appropriate.

At the 2004 meeting of the Parties to Annex V, the Chairman invited the Parties to consider which areas in the high seas should be proposed to the OSPAR Commission for inclusion in the OSPAR network of MPAs and recommended that the support of all Contracting Parties be obtained for such proposals.

In 2010 OSPAR amended Recommendation 2003/3 by adopting Recommendation 2010/2 on a network of MPAs. Because the network of MPAs was not yet considered to be ecologically coherent throughout the entire OSPAR Maritime Area, new deadlines were agreed to replace the original deadline of 2010. By 2012 an ecologically coherent network of MPAs should be established, and by 2016 coherent management measures must have been set up and be implemented for MPAs that have been designated up to 2010. For any area selected after 30 June 2010, management measures are being implemented at the latest five years after its designation.⁷⁹

Identification and Designation of Sites

To assist work by Contracting Parties on developing the network, OSPAR 2003 adopted guidance documents on identifying and selecting sites to include in the OSPAR network and on managing MPAs as part of the network.

⁷⁹ OSPAR Recommendation 2010/2 on amending Recommendation 2003/3 on a network of MPAs, OSPAR 10/23/1, Annex 7.

OSPAR has since augmented this guidance through the development of the concept of ecological coherence. Several products have been issued, including guidance on developing an ecologically coherent MPA network, a scorecard to assist with MPA network design, and a background document on assessment of ecological coherence. OSPAR has also agreed a scorecard to assess the effectiveness of management of OSPAR MPAs and a guidance document on good practice for communicating with stakeholders in the establishment and management of MPAs.

OSPAR 2008 agreed on a roadmap setting out considerations and steps leading up to the possible adoption of MPAs in ABNJ in the OSPAR Maritime Area. Although the roadmap is drawn up in connection with future work on the Charlie Gibbs MPA, it can be applied by analogy to other proposals for MPAs in ABNJ in the OSPAR Maritime Area. The roadmap sets out the further work to be undertaken by OSPAR bodies and the nature of the involvement of other international institutions. The roadmap states that contacts with other organizations are necessary to obtain information on activities and existing and available measures under their mandate. Subsequently, the proposal for a MPA is to be submitted to the relevant competent organizations to solicit their comments. Finally, when the proposal for a MPA is further evaluated in the framework of the OSPAR Convention, it has to be established whether the proposal takes due account of the responses of the competent organizations.

The roadmap states that the actual process of establishing the content of the management regime is to be developed by OSPAR bodies. This includes the definition and adoption of conservation objectives, the consideration of appropriate associated protective management measures and examining the initial consideration of monitoring requirements. The final step that is envisaged by the roadmap is the consideration by the OSPAR Meeting “whether the proposal is ready for adoption and identifies steps to be taken to prepare for establishing MPAs in ABNJ as part of the OSPAR network”.^{80 81}

Sites in ABNJ in the OSPAR Maritime Area have been under consideration since 2007. In 2008, OSPAR unanimously endorsed in principle the proposal for the “Charlie Gibbs MPA” on the Mid-Atlantic Ridge, and in 2009 they endorsed the conservation objectives for the site. OSPAR 2009 also agreed that six other areas in the ABNJ should be approved, in principle. The Charlie Gibbs Fracture Zone, Reykjanes Ridge, Southern MAR, Altair Seamount,

⁸⁰ Molenaar and Oude Elferink, *supra* note 2, pp. 16–17.

⁸¹ General outline of roadmap for further work on the Charlie Gibbs Fracture Zone/Mid-Atlantic Ridge proposal 2008/09, Meeting OSPAR Commission 23–27 June 2008 in Brest, France, Ref. 7.24d, Annex 10.

Antialtair Seamount, Milne Seamount Cluster and Josephin Seamount were reviewed scientifically by the International Council for Exploration of the Sea (ICES). At that time, these areas were thought to lie beyond national jurisdiction. As a result of the submissions to the CLCS by Iceland and Portugal in April and May 2009, respectively, their limits on the continental shelf now overlap with most of the seabed in six of these areas.

OSPAR 2010 adopted management measures for the southern part of the originally proposed Charlie Gibbs MPA, for which the seabed and superjacent waters are situated in ABNJ. Moreover, measures to establish and manage four MPAs, where the seabed is subject to a submission by Portugal to the CLCS, were adopted thanks to the cooperation of Portugal.⁸²

Cross-sectoral Issues

Article 4 of Annex V to the OSPAR Convention states that where the OSPAR Commission considers action is desirable in relation to the management of fisheries, it shall draw the issue to the attention of the authority or international body competent for that question. Where action within the competence of the OSPAR Commission is desirable to complement or support action by those authorities or bodies, the Commission shall endeavour to cooperate with them. Regarding questions concerning maritime transport, the OSPAR Commission shall draw such questions to the attention of the IMO. The Contracting Parties of the OSPAR Convention who are IMO members shall endeavour to cooperate with the IMO, taking into account of any IMO Guidelines on the designation of special areas, the identification of PSSAs or other matters.

Annex V to the OSPAR Convention underlined that programmes and measures concerning fisheries management or maritime transport are specifically excluded from the OSPAR Commission's responsibilities. However, where it considers that action is desirable on these matters within the maritime area, it must draw that question to the attention of the responsible fisheries management organisation or the IMO.

Paragraph 3.3(b) of Recommendation 2003/3 on a network of MPAs requires the Contracting Parties to determine (i) where they have the competence to adopt management measures or (ii) where the competence to adopt such measures lies with another authority or international organization, or where the consent of an international organization is needed for the adoption.

⁸² Bergen Statement, OSPAR Ministerial Meeting, 23–24 September 2010, p. 5, available at www.ospar.org.

As the case may be, the Contracting Parties are required to take steps to seek the adoption by the international organization of those measures or, as the case may be, the consent of the international organization to those measures. Any such steps should be reported to the OSPAR Commission.

In terms of interacting with other competent organizations, the OSPAR Convention does not contain rules of procedure for such cooperation, thus the OSPAR Commission should be free to adopt the most appropriate and effective mode of interaction in accordance with the general objectives of the Convention. The mode might be different from organization to organization and range from awareness-raising, encouraging mutual observer status, using instruments such as MoUs, to concrete proposals for action. Also, OSPAR Contracting Parties may, individually or jointly, bring the issue to the attention of another competent authority. This may often be necessary to facilitate the adoption of legally binding measures by these other organizations.⁸³

Several examples of cooperation agreements can be mentioned here. In November 1999 the IMO Assembly approved an Agreement of Cooperation with OSPAR. A MoU between OSPAR and the North East Atlantic Fisheries Commission (NEAFC) has been applicable since September 2008 (OSPAR Agreement 2008-4). According to the annual report 2008 of the Secretary-General of the ISA, the OSPAR Heads of Delegation welcomed a suggestion to develop a MoU between the OSPAR Commission and the ISA in order to ensure appropriate coordination of measures between the two organizations.⁸⁴

At the Annual Meeting of NEAFC in November 2010, a discussion was held on a proposal for a collective arrangement between international competent authorities on the management of MPAs in ABNJ, which was the output of an informal meeting on options for the management of the CGFZ-MPA. OSPAR needed more time to consider and agree on the approaches for implementing this collective agreement, which would be the first in its kind in the world. The concern of many OSPAR Contracting Parties was that the arrangement overstepped the competences of the participating organization, fisheries management being clearly excluded from OSPAR competences. The EU, possessing different competences in fisheries and environmental issues, reserved

⁸³ OSPAR, 'OSPAR's Regulatory Regime for Establishing MPAs in ABNJ of the OSPAR Maritime Area', Annex 6 to the Meeting of the OSPAR Commission, 22–26 June 2009 (2009) pp. 1–13.

⁸⁴ D Owen, 'Interactions Between Management of a Water Column MPA in the High Seas of the OSPAR Maritime Area and the Exercise of Sovereign Rights Regarding Subjacent Outer Continental Shelf: A Report for WWF Germany' (2010) 44–45. Available at: http://www.ngo.grida.no/wwfneap/Publication/Submissions/OSPAR2010/WWF_WG_Charlie_2_Report.pdf.

its position, pending a legal assessment. OSPAR perceived the initiative as currently being in a ‘making aware’ phase which may move forward.⁸⁵

Barcelona Convention

Institutional Framework

After the creation of the Regional Seas Programme in 1974, the Mediterranean became the first region to adopt an Action Plan (MAP) in 1975, which is directly administered by the United Nations Environment Programme (UNEP). This was quickly followed by the adoption of the Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention)⁸⁶ in 1976, which entered into force in 1978, and a succession of various protocols. Six Regional Activity Centres (RACs) are responsible for the implementation of respective components of the MAP under the supervision of the Co-ordinating Unit (MEDU) and in accordance with the decision of the meeting of Contracting Parties. The Specially Protected Areas Regional Activity Centre (SPA/RAC) was established in 1985 under the SPA Protocol, and is located in Tunis. In 1996 the Mediterranean Commission on Sustainable Development was set up as an advisory body for defining a regional sustainable development strategy for the Mediterranean Sea.⁸⁷ With regard to the relationship with third parties, Article 28 of the SPA and Biological Diversity Protocol states that: “The Parties shall invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation of this Protocol.”

Regulatory Framework

Article 10 of the Barcelona Convention states that:

The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve biological diversity, rare or fragile ecosystems, as

⁸⁵ NEAFC, Report of the Permanent Committee on Management and Science—PECMAS, 30 September—1 November 2010, London (2010) 17–18. Available at: <http://www.neafc.org/system/files/PECMAS%20sep%20oct%202010%20%20report%20fin%20.pdf>.

⁸⁶ Convention for the Protection of the Mediterranean Sea against Pollution, done in Barcelona, 16 February 1976, in force 12 February 1978, 15 ILM 290.

⁸⁷ Mediterranean—Governing Instruments—Regional Profile, Brochure ‘Mediterranean Region’, pp. 2–3 and pp. 15–18, available at: http://www.unep.org/regionalseas/programmes/unpro/mediterranean/instruments/r_profile_med.pdf.

well as species of wild fauna and flora which are rare, depleted, threatened or endangered and their habitats, in the area to which this Convention applies.

The Protocol concerning Specially Protected Areas (SPA Protocol)⁸⁸ was adopted in 1982 and entered into force in 1986. This Protocol was ratified by all Contracting Parties, except for Montenegro. Since 1995 the MAP and Barcelona Convention have been amended to reflect the emphasis on sustainable development and biodiversity conservation, following the 1992 Earth Summit in Rio. In 1995, MAP Phase II was adopted by the Contracting Parties to replace the Mediterranean Action Plan of 1975. At the same time, an amended version of the Barcelona Convention of 1976 was adopted, renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean.⁸⁹ Moreover, the SPA and Biological Diversity Protocol (SPA/BD Protocol)⁹⁰ was adopted in 1995 and entered into force in 1999, replacing the SPA Protocol. As of 31 December 2011, it is ratified by all Contracting Parties, including the EU, except for Bosnia and Herzegovina, Greece, Israel and Libya.⁹¹

Annex I to the SPA/BD Protocol states that:

All areas eligible for inclusion in the SPAMI⁹² List must be awarded a legal status guaranteeing their effective long-term protection.

And:

In the case of areas situated, partly or wholly, on the high sea or in a zone where the limits of national sovereignty or jurisdiction have not yet been defined, the legal status, the management plan, the applicable measures and the other elements provided for in Article 9, paragraph 3, of the Protocol will be provided by the neighbouring Parties concerned in the proposal for inclusion in the SPAMI List.⁹³

⁸⁸ Protocol concerning Specially Protected Areas, done in Geneva, 3 April 1982, in force 23 March 1986.

⁸⁹ Done in Barcelona, 10 June 1995, entry into force of amendments 9 July 2004, reprinted in OJ L 322/34. Available at: <http://www.unepmap.org/index.php?module=content2&catid=001001004>.

⁹⁰ Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, done in Barcelona, 10 June 1995, into force 12 December 1999.

⁹¹ Signatures and Ratifications of the Barcelona Convention and its Protocols as at 31 December 2011. Available at: <http://195.97.36.231/dbases/webdocs/BCP/StatusOfSignaturesAndRatifications.doc>.

⁹² Specially Protected Areas of Mediterranean Importance.

⁹³ Protection concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Annex I: Common Criteria for the Choice of Protected Marine and Coastal Areas that could be included in the SPAMI List, para. C(1) and (3).

In the same line, Article 9(2)(b) of the SPA/BD Protocol provides that proposals for inclusion in the SPAMI List may be submitted by two or more neighbouring Parties concerned if the area is situated, partly or wholly, on the high sea. With respect to consultation, Article 9(3) of the SPA/BD Protocol states that where a proposal is formulated under Article 9(2)(b), the neighbouring Parties concerned shall consult each other with a view to ensuring the consistency of the proposed protection and management measures, as well as the means for their implementation.

It must be noted that only the neighbouring States Parties can prepare the proposal for an area to be included in the SPAMI List. However, the other Parties do have the opportunity to intervene in the decision-making process on the inclusion of the proposed area, as well as on the management measures, by the Meeting of the Contracting Parties to the Barcelona Convention, which decides on these issues by consensus. The latter is of crucial importance, because once an MPA is adopted as a SPAMI by the Meeting of the Contracting Parties, its regulations will be binding not only for the citizens of the State(s) which has (have) proposed it, but also for the citizens of all States which are Party to the SPA/BD Protocol.⁹⁴

Spatial Scope of Application

Article 1(3) of the Barcelona Convention states that any Protocol to the Barcelona Convention may extend the geographical coverage to which that particular Protocol applies. Indeed, Article 2(1) of the SPA/BD Protocol states that the area to which the Protocol applies shall be the area of the Mediterranean Sea as delimited in Article 1 of the Barcelona Convention, and that it also includes, *inter alia*, the seabed and its subsoil.

The listed SPAMI and their geographical distribution must be representative of the Mediterranean region and its biodiversity, as is stated in paragraph A(c) of Annex I to the SPA/BD Protocol.

COP14 of the Barcelona Convention recommended in 2005 to the Contracting Parties:

⁹⁴ UNEP/MAP, Guidelines for the Establishment and Management of Marine Protected Areas for Cetaceans, 15th Ordinary Meeting of the Contracting Parties to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean and its Protocols, Almeria (Spain), 15–18 January 2008, UNEP(DEPI)/MED IG.17/Inf.14, 14 December 2007 (2007) 14 (hereinafter MPAs Cetaceans Guidelines).

To consider the establishment of new marine protected areas (MPAs) both in coastal waters and in particular on the high seas, where appropriate, on the basis of existing scientific knowledge...⁹⁵

At the RAC/SPA meeting on SPAMIs promotion, in 2006, the appointed participants from the Contracting Parties suggested enhancing the SPAMI Network, by including further ABNJ. That input progressed to a 2007 recommendation to RAC/SPA to promote the creation of high seas SPAMIs, embracing appropriately sensitive habitats beyond 12 nautical miles, as well as multiparty SPAMIs including high seas areas, in collaboration with pertinent institutions.⁹⁶

Finally, it must be noted that a large proportion of the Mediterranean basin currently is beyond national jurisdiction, because most surrounding States have not yet used the possibility of declaring an EEZ up to 200 nm from their coasts. The existence of high seas in the Mediterranean is likely to be a transient condition. When all Mediterranean coastal States have declared their EEZs, the high seas will disappear from the Mediterranean.⁹⁷

Identification and Designation of Sites

In 2005 the Contracting Parties to the Barcelona Convention requested RAC/SPA to develop a programme of work for the development of MPAs aimed at supporting the Parties to implement by 2012 a representative network of MPAs in the Mediterranean Sea, thereby achieving the target as set by CBD in 2004. RAC/SPA recommends adopting a three-step hierarchical planning approach, which begins at the largest scale and focuses in on ever-smaller scales.

At the widest scale, that of the Mediterranean Basin, large-scale ecological units (or sub-regions) should be identified. RAC/SPA recommends a review of existing classifications. At the next scale, priority conservation areas should be identified within each ecological unit, by means of seven selection criteria. These areas would not constitute MPAs themselves, but would be focal areas for individual MPA networks. Then the task of identifying sites to develop

⁹⁵ Report of the 14th Ordinary Meeting of the Contracting Parties to the Barcelona Convention and its Protocols, 8–11 November 2005, UNEP(DEPI)/MED IG.16/13, 30 November 2005, Annex III, paragraph II.B.2(3) and (4), pp. 21–22.

⁹⁶ UNEP/MAP, Report of the Joint Management Action of the European Community with UNEP/MAP on the Identification of Possible SPAMIs in the Open Seas, including Deep Seas. Ninth Meeting of Focal Points for SPAs, Malta, 3–6 June 2009, UNEP(DEPI)MED WG.331/Inf.7, 11 May 2009 (2009) 3.

⁹⁷ UNEP/MAP, MPAs Cetaceans Guidelines, *supra* note 94, p. 14.

ecological networks can be initiated. Individual sites within these networks should protect what is ecologically most important, i.e., “habitats where a concentration of ecological processes results in a high diversity of species”.⁹⁸ To be included in the SPAMI List, a protected area must have a management body, endowed with sufficient powers as well as means and human resources to prevent and/or control activities likely to be contrary to the aims of the protected area.⁹⁹

The Contracting Parties to the Barcelona Convention approved the inclusion of the first twelve areas in the SPAMI list in November 2001. Only one of these, the French-Italian-Monegasque Sanctuary for Marine Mammals (Pelagos Sanctuary), is partially located in a high seas area. This Sanctuary was established in 1999 by a treaty between France, Italy and Monaco, and adopted as a SPAMI in 2001 in recognition of its Mediterranean importance. A joint management plan was approved in 2004, and an international management office and permanent secretariat were created and have been operational since 2006 and 2007, respectively. Some management measures have been agreed by the Parties, and the General Fisheries Commission for the Mediterranean (GFCM) closed the Pelagos Sanctuary to fishing with towed dredges and bottom trawl nets in 2006. However, a stronger integration with the objectives of other organizations seems to be required, as well as a stronger mandate, competences and resources of the executive secretariat as expressed in the original trilateral Agreement, in order to establish more effective management actions.¹⁰⁰

Regional Project on the Identification of SPAMIs

In order to promote the establishment of a representative ecological network of MPAs in the Mediterranean, through the SPAMI system, including high seas sites, RAC/SPA achieved the endorsement of a regional project. This project, funded by the European Commission, aims at the identification of SPAMIs in the Mediterranean ABNJ. The first phase of the project was implemented in 2008 and 2009. Its objective involved assessing the feasibility of identifying, on the basis of currently available information, sites beyond

⁹⁸ UNEP/MAP, Regional Working Programme for the Coastal and Marine Protected Areas in the Mediterranean including the High Sea, Meeting of MAP Focal Points, Athens, Greece, 7–10 July 2009, UNEP(DEPI)/MED WG.337/14, 16 June 2009 (2009) 5. Available at: http://195.97.36.231/acrobatfiles/09WG337_14_eng.pdf.

⁹⁹ Protection concerning Specially Protected Areas and Biological Diversity in the Mediterranean, Annex I: Common Criteria for the Choice of Protected Marine and Coastal Areas that could be included in the SPAMI List, paragraph D(6).

¹⁰⁰ WWF, *supra* note 63; Agenda Item 5, Meeting of the OSPAR Commission, 20–24 September 2010, OSPAR 10/5/Info.12-E(L) (2010) 20–21.

national jurisdiction in the Mediterranean Sea that qualify as SPAMIs. The project intended to help the Contracting Parties to the Barcelona Convention to implement a network of SPAMIs in the Mediterranean high seas through:

- a general overview and analysis of the existing information on the presence of important elements of marine biodiversity in the Mediterranean High Seas, including the pelagic domain, seamounts, submarine canyons and the deep sea;
- the definition of operational criteria for the site selection process, harmonized with SPAMI selection criteria;
- the preparation of a shortlist of potential sites in the high seas which could be included in the SPAMI List; and
- the drafting of a roadmap for the elaboration of further proposals to be presented to the Contracting Parties for adoption.

In the second phase of the project, from 2010 to 2011, the results of the first phase are to be implemented. This implementation phase involves the drafting of presentation reports for the areas identified as candidates for inclusion in the SPAMI List. The “List of priority conservation areas lying in the open seas, including the deep sea, likely to contain sites that could be candidates for the SPAMI List” identifies twelve areas.¹⁰¹ It remains to be seen if or when the areas, as identified by external consultants, will be realized. Only a few of the Contracting Parties have signalled their willingness to pursue the implementation of SPAMIs in the waters adjacent to their national jurisdiction.¹⁰²

In 2010 the RAC/SPA Secretariat noted the evolution of the project, which was initially focused on ABNJ,

but which, as work began and having regard to the ecological and biological characteristics of importance for the conservation of the areas concerned, was seen to require taking in zones situated more generally in the open sea, including the deep seas, without regard to the legal status of those areas.¹⁰³

Thus, when a proposal has been made for an area that lies wholly or partially in the high sea or in areas where the boundaries of national jurisdiction or sovereignty have not yet been defined, the neighbouring Parties must consult

¹⁰¹ UNEP/MAP, Report of the Extraordinary Meeting of the Focal Points for SPAs, Istanbul, Turkey, 1 June 2010, UNEP(DEPI)/MED WG.348/5, 4 June 2010 (2010), Annex III (hereinafter SPAs Report).

¹⁰² WWF, *supra* note 63; OSPAR, *supra* note 100, p. 19.

¹⁰³ UNEP/MAP, SPAs Report, *supra* note 101, p. 4.

one another to ensure that the proposed protection and management measures, and means of implementation, are consistent. It is suggested that for each considered site an *ad hoc* working group be set up, made up of representatives from the countries bordering the area concerned. One of the activities to be carried out concerns the in-depth analysis of each area's legal status, "in order to check with great attention that the boundaries of the corresponding national jurisdiction or sovereignty are clearly defined and that there is no conflict regarding the concerned areas".¹⁰⁴

To facilitate this process, the RAC/SPA Secretariat presented the Concept Note for a Study on Legal and Institutional Issues Relating to the Setting Up and Management of SPAMIs Located Wholly or Partially in Mediterranean ABNJ. The three stages in the working methodology would be: listing the legal provisions dealing with MPAs in the high seas contained in international and regional conventions applicable to the Mediterranean Sea; analysis of the provisions regarding MPAs in the high seas; and development of an appropriate approach concerning legal setups with regard to the establishment and management of SPAMIs beyond national jurisdiction.¹⁰⁵

Cross-sectoral Issues

With regard to sectoral measures, the Barcelona Convention does not specifically refer to the regulation of fishery activities. However, with regard to pollution from ships, Article 6 requires the Contracting Parties to take all measures in conformity with international law and to ensure the effective implementation of the rules which are generally recognized at the international level relating to the control of discharges by ships. Moreover, Article 7 requires the Contracting Parties to take all appropriate measures with regard to pollution resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil.

COP14 of the Barcelona Convention recommended in 2005 to the Contracting Parties: "To assess and identify those SPAMIs which are exposed to environmental risks by international shipping activities and could be proposed for designation as PSSAs by the IMO."¹⁰⁶

COP16 of the Barcelona Convention adopted in 2009 the Decision "Regarding a regional working programme for the coastal and marine pro-

¹⁰⁴ *Ibid.*, pp. 4–5.

¹⁰⁵ *Ibid.*, pp. 7–8.

¹⁰⁶ Report of the 14th Ordinary Meeting of the Contracting Parties to the Barcelona Convention and its Protocols, 8–11 November 2005, UNEP(DEPI)/MED IG.16/13, 30 November 2005, Annex III, paragraph II.B.2(3) and (4) (2005) 21–22.

tected areas in the Mediterranean including the High Sea”. It calls on the MAP Secretariat and SPA/RAC:

To strengthen links with existing regional fisheries organizations (GFCM, ICCAT) and other relevant organizations in order to ensure sustainable management of resources, including on the high seas, as appropriate.¹⁰⁷

Regional Fisheries Management Organizations

Institutional Framework

Regional fishery bodies are a mechanism through which States or organizations that are parties to an international fishery agreement or arrangement work together towards the conservation, management and/or development of fisheries. Some regional fisheries bodies only have an advisory mandate; others also have a management mandate. The latter are called regional fisheries management organizations (RFMOs) and are discussed in this section. Currently, there are 44 regional fisheries bodies worldwide, 20 of which are RFMOs. In terms of institutional relationship with FAO, there are three categories of regional fisheries bodies: (1) established under FAO’s Constitution, either based on Article VI of the FAO Constitution or based on Article XIV—the differences are mainly in terms of finance, mandate and autonomy, whereby Article XIV bodies are more autonomous than the Article VI bodies; (2) established outside the FAO framework but with FAO depositary functions; and (3) established outside FAO’s framework, such as the Northwest Atlantic Fisheries Organization (NAFO) and NEAFC.¹⁰⁸

Identification and Designation of Sites

As discussed in this report, the identification of VMEs and the closure of such areas are included in Resolution 61/105 and Resolution 64/72 of the General Assembly as measures to be taken by RFMOs and, as appropriate, by flag States, to protect the VMEs from the adverse impacts of bottom fisheries. The area-based management measures taken so far by the various RFMOs, either

¹⁰⁷ UNEP, Report of the 16th Ordinary Meeting of the Contracting Parties to the Barcelona Convention and its Protocols, 3–5 November 2009, UNEP(DEPI)/MED IG.19/8, 24 November 2009, Annex II, Decision IG.19/13 (2009) 99.

¹⁰⁸ FAO, ‘FAO and Regional Fishery Bodies’ (2011), available at: www.fao.org/fishery/16918/en, last accessed on 25 February 2011.

to implement the resolutions of the General Assembly, or any other area-based protection initiative, are discussed below.

NEAFC

Already in 2002 NEAFC closed an area in the Rockall Area to protect juvenile fish and in 2004 NEAFC adopted an interim ban on bottom fishing in a larger area on the Reykjanes Ridge and four seamounts adjacent to the Ridge. In 2007 NEAFC closed five areas in the Hatton-Rockall Bank Area to bottom fishing to protect deep-water corals. In April 2009 NEAFC closed five areas on the Mid-Atlantic Ridge in the high seas in the North East Atlantic to bottom fisheries under its policy for area management.^{109 110} Approximately 50 per cent of seamounts at the Mid-Atlantic Ridge at fishable depths are currently closed in the North East Atlantic. However, all closures are only temporary and most areas of the high seas where bottom fishing has occurred in the recent past remain open to bottom fishing.¹¹¹

Area-based management is supplemented by comprehensive measures on bottom fishing activities in the NEAFC Regulatory Area. These were supplemented at the 2008 and 2009 NEAFC Annual Meetings with specific operational procedures.¹¹² NEAFC has outlined “existing bottom fishing areas” where bottom fishing has taken place and “new bottom fishing areas” where bottom fishing has not taken place. According to NEAFC, there is in most instances not enough research or data to identify VMEs in the new bottom fishing areas. Bottom fisheries in these areas is only authorised under strict conditions in an Exploratory Bottom Fisheries Protocol. Vessels authorised

¹⁰⁹ A Bossar, S Capanna, C Lucchini Gilera, J Von Der Weppen, ‘Update on MPAs beyond National Jurisdiction’. Document prepared by the Johns Hopkins School of Advanced International Studies (SAIS) for the International Union for Conservation of Nature (IUCN) within the framework of a project on High Seas Governance (2009) 4. Available at: http://cmsdata.iucn.org/downloads/sais_policy_brief_update_1_29_10_formatted_3.pdf.

¹¹⁰ NEAFC, Response to Letter from CMS, 19 May 2010, with respect to UNEP/CMS/Resolution 9.18 on By-catch. In: Call for information in follow-up of CMS Resolution 9.18 on by-catch. Response from NEAFC. Input prepared by Kjartan Hoydal to the 16th Meeting of the CMS Scientific Council, Bonn, Germany, 28–30 June 2010: UNEP/CMS/ScC16/Inf.11.2 (2010) Agenda Item 9.0 (hereinafter Response to Letter).

¹¹¹ M Gianni, ‘Setting TACs and Quotas for Deep-sea Fisheries: A Test Case for International Commitments for Sustainability and Reform of Fisheries Management. Presentation at Seminar “State of European Fish Stocks in 2010”, 14 September 2010. Available at: http://ec.europa.eu/fisheries/news_and_events/events/140910/matthew_gianni_en.pdf.

¹¹² NEAFC, Response to Letter, *supra* note 110; Recommendation XI by NEAFC at its Annual Meeting in November 2009 to Adopt the Recommendation on Operational Procedures for Fishing in Existing and New Bottom Fishing Areas.

under this protocol must have an observer on board who shall collect data in accordance with a Vulnerable Marine Ecosystem Data Collection Protocol.¹¹³

In July 2010 the Recommendation on existing and new bottom fishing areas was adopted by postal vote, modifying one and creating one new “existing fishing area” in the Hatton-Rockall Bank area, one new “existing fishing area” South of Josephine Bank and one new “existing fishing area” in the Barents Sea.¹¹⁴ In November 2010 a Recommendation was adopted to amend Recommendation XVI of 2008 on bottom fishing activities in the NEAFC Regulatory Area. It requires the Contracting Parties to submit an initial assessment of the known and anticipated impacts of its bottom fishing activities on VMEs, which should also address the proposed management measures to be used to prevent significant adverse impacts on VMEs.¹¹⁵ Moreover, a Recommendation in November 2010 was adopted by NEAFC on conservation and management measures by closing certain areas on the Hatton Bank, Rockall Bank, Logachev Mounds and West Rockall Mounds in the Regulatory Area in order to protect VMEs from significant adverse impacts in 2011.¹¹⁶

NAFO

In September 2010 the NAFO, with a commitment to apply an ecosystem approach to fisheries management, agreed to further refine its provisions to protect VMEs from significant adverse impacts of bottom fisheries, which includes the extended closure of six seamounts in international waters for the next four years.¹¹⁷ Furthermore, a compromise was worked out, exempting existing fishing areas from strict environmental impact assessment.¹¹⁸

¹¹³ NEAFC, Oral Statement by the NEAFC Secretariat to the Third Meeting of the *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, Kjartan Hoydal, February 2010 (2010) 1–2.

¹¹⁴ NEAFC, Recommendation 2010 on New and Existing Fishing Areas; Management Measures in Force in the NEAFC Regulatory Area (2010), available at: www.neafc.org/current-measures-list, last accessed 7 March 2011. See also: http://www.neafc.org/system/files/consolidated_bottomfishing_regulations.pdf.

¹¹⁵ NEAFC, Recommendation by the NEAFC at its Annual Meeting on 12 November 2010, in accordance with Article 5 of the NEAFC Convention, Amendments to Recommendation XVI of 2008; Management Measures in Force in the NEAFC Regulatory Area (2010), at: www.neafc.org/current-measures-list, last accessed on 7 March 2011.

¹¹⁶ NEAFC, Recommendation 14: 2011, Management Measures in Force in the NEAFC Regulatory Area, at: www.neafc.org/current-measures-list, last accessed on 7 March 2011.

¹¹⁷ NAFO, NAFO Takes Stock. Further Progress made on International Fishery Management. 2010 Annual Meeting Press Release, 24 September 2010.

¹¹⁸ NEAFC, Report of PECMAS, 30 September–1 November 2010, paragraph 7(c) (2010) 10.

GFCM

In 2006, the GFCM adopted the recommendation to prohibit trawling in three ecologically important deep-sea areas which have been identified as sites of particular ecological interest, of which two are located outside territorial waters.¹¹⁹

South East Atlantic Fisheries Organisation (SEAFO)

Several conservation measures under the SEAFO Convention¹²⁰ relate to area-based management measures. SEAFO agreed in October 2006 to close ten areas temporarily from 1 January 2007 to 31 December 2010, through the adoption of Conservation Measure 06/06, to all fishing activities for species covered by the SEAFO Convention. It was also agreed that the SEAFO Commission should consider reopening the designated areas to small-scale and restricted exploratory fishing from January 2008. If during such fishing hard corals are encountered, the area concerned would be immediately temporarily closed upon notification.¹²¹

In 2007 SEAFO adopted Conservation Measure 11/07, which stipulates that the ten closed areas will only be reopened under certain conditions.¹²² One of the conditions is that VMEs (including seamounts, hydrothermal vents and cold water corals) have been identified and mapped in the area and an assessment has been made of the impact of any resumption of fishing in such VMEs.¹²³

In 2007 a further three areas were proposed for closure by the SEAFO Scientific Committee, but thus far they remain open to fishing. Conservation Measure 17/09 on bottom fishing activities applies in all existing and new bottom fishing areas outside SEAFO closed areas, cf. Conservation Measure 06/06. It, *inter alia*, requires that where, in the course of fishing operations, evidence of VMEs are encountered, the Contracting Parties must report the

¹¹⁹ WWF, *supra* note 63; OSPAR, *supra* note 100, p. 17.

¹²⁰ Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean, done in Windhoek, 20 April 2001, in force 13 April 2003. Available at: <http://www.seafo.org/AUConventionText.html>.

¹²¹ Conservation Measure 06/06 on the Management of Vulnerable Deep Water Habitats and Ecosystems in the SEAFO Convention Area, Approved 10/2006, Annex I, 1–2, available at www.seafo.org.

¹²² FAO, Worldwide Review of Bottom Fisheries in the High Seas. FAO Technical Paper 522 Rev. 1 (2008) 55–56, available at www.fao.org (hereinafter High Seas Bottom Fisheries Review).

¹²³ SEAFO, Conservation Measure 11/07 Laying Down Conditions for the Resumption of Fishing Activities in Areas Subject to Closure Through Conservation Measure 06/06 (2007), available at www.seafo.org.

encounter, including the location and the type of ecosystem in question, so that appropriate measures can be adopted in respect of the relevant site.¹²⁴

Finally, Conservation Measure 18/10 on the Management of Vulnerable Deep Water Habitats and Ecosystems in the SEAFO Convention Area prohibits all fishing activities for fisheries resources covered by the SEAFO Convention from 1 January 2011 in the areas defined in Annex I.¹²⁵ It can be deduced from the Annex that those seamounts which are mentioned by name were also included in Conservation Measure 06/06 which ended in 31 December 2010. Other areas from the latter are absent in the new Conservation Measure and several new unnamed areas of seamounts are added to the new list of designated areas.

Southern Indian Ocean Fisheries Agreement (SIOFA)

No conservation and management measures are currently put in place by a regional fisheries body for the management of the high seas bottom fisheries in the Indian Ocean. However, in 2006 the four companies of the Southern Indian Ocean Deepsea Fishers' Association, from four different countries, decided to refrain voluntarily from bottom trawl fishing in 11 separate deep-sea areas, called Benthic Protected Areas, in order to protect cold-water corals. A number of national regulations also apply to high seas bottom trawl fisheries.¹²⁶

Cross-sectoral Issues

In some cases, RFMOs undertake their area-based management measures in concert with other regional arrangements or organizations focusing on conservation of the marine environment. This section will discuss several examples in this respect, in addition to the examples already mentioned in the sections on OSPAR and the Barcelona Convention.

NEAFC

When making recommendations, the NEAFC shall seek to ensure consistency between any measures and decisions taken by its Contracting Parties for the management and conservation of a stock or group of stocks with respect

¹²⁴ SEAFO, Conservation Measure 17/09 on Bottom Fishing Activities in the SEAFO Convention Area (2009), available at www.seafo.org.

¹²⁵ SEAFO, Conservation Measure 18/10 on the Management of Vulnerable Deep Water Habitats and Ecosystems in the SEAFO Convention Area, including Annex I, Adopted 15 October 2010 (2010) 1–5, available at www.seafo.org.

¹²⁶ FAO, High Seas Bottom Fisheries Review, *supra* note 122, p. 112.

to fisheries within the area under its jurisdiction. The appropriate Contracting Party and the NEAFC shall accordingly promote the coordination of such recommendations, measures and decisions.¹²⁷

Article 14(1) of the NEAFC Convention¹²⁸ provides that the NEAFC shall seek information and advice from ICES. Article 14(3) adds that the NEAFC may establish working arrangements with any other international organization which has related objectives. The latter has been put into practice by a Memorandum of Understanding¹²⁹ (MoU) between the NEAFC and the OSPAR Commission. In the MoU it was recognized that they have complementary competences, for fisheries management and environmental protection respectively, and that they both have an interest in the conserving the living resources of the seas including those located in ABNJ. In Article 1(d) of the MoU it is explicitly mentioned that NEAFC and the OSPAR Commission will cooperate regarding marine spatial planning and area management.

In an Oral Statement to the Third BBNJ Working Group, NEAFC expressed its belief in regional solutions and regional cooperation to move forward with respect to conservation of biodiversity including sustainable fisheries management. However, NEAFC considered the representation of regional organizations at the meeting of the BBNJ Working Group to be very patchy. NEAFC suggests that this could be because Regional Fisheries Bodies see the discussions in the BBNJ Working Group as duplication of discussions that have already taken place in FAO-COFI and the biennial RFB Secretariats meetings.¹³⁰

The EU submitted a proposal to the Annual Meeting of NEAFC in November 2010 for the establishment of a joint NEAFC-OSPAR Working Group on boundaries of protected areas for marine species. NEAFC did not take a decision on this matter, but will follow up on this.¹³¹

NAFO

The current NAFO Convention¹³² only addresses cooperation with non-Contracting Parties, whereas the new NAFO Convention¹³³ also mentions, in

¹²⁷ Article 5(2)(b) NEAFC.

¹²⁸ Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, done in London, 18 November 1980, in force 17 March 1982, 1285 UNTS 129.

¹²⁹ Available at: http://www.ospar.org/html_documents/ospar/html/mou_neafc_ospar.pdf.

¹³⁰ NEAFC, *supra* note 113, p. 3.

¹³¹ NEAFC, Final Report and Annexes of the 29th Annual Meeting of NEAFC, 8–12 November 2010 (2010) 8–9, available at www.neafc.org.

¹³² Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries, done in Ottawa, 24 October 1978, into force 1 January 1979, 1135 UNTS 369.

¹³³ Amendment to the Convention on Future Multilateral Cooperation in the Northwest

Article XVII, cooperation with other organizations, such as RFMOs and other intergovernmental organizations.

GFCM

Article VIII of the GFCM Agreement¹³⁴ states that the GFCM Commission shall cooperate closely with other international organizations in matters of mutual interest.

SEAFC

Article 18 of the SEAFC Convention mentions that the SEAFC Organization (1) shall cooperate, as appropriate, with the FAO and other specialized agencies and organizations on matters of mutual interests; (2) shall seek to develop cooperative working relationships with other inter-governmental organizations which can contribute to their work and which have an interest in ensuring the long-term conservation and sustainable use of living marine resources in the Convention Area; (3) may enter into agreements with the earlier mentioned organizations and with other organizations as may be appropriate; and (4) shall cooperate with other relevant fisheries management organizations and take account of their conservation management measures applicable in the region. Moreover, Article 6(12) states that the Commission shall take account of measures established by other organizations which affect living marine resources in the Convention Area, and, without prejudice to the objective of this Convention, shall seek to ensure consistency with such measures.

SIOFA

Article 16 of the Agreement¹³⁵ states that the Contracting Parties

shall cooperate closely with other international fisheries and related organizations in matters of mutual interest, in particular with the South West Indian Ocean Fisheries Commission and any other RFMO with competence over high seas waters adjacent to the Area.

Atlantic Fisheries, adopted 28 September 2007, not yet in force. Available at: <http://www.nafo.int/about/frames/con-index.html>.

¹³⁴ Agreement for the Establishment of a General Fisheries Council for the Mediterranean, done in Rome, 24 September 1949, in force 20 February 1952, 126 UNTS 239.

¹³⁵ Southern Indian Ocean Fisheries Agreement, done in Rome, 7 July 2006, not yet in force. Available at: <http://www.fao.org/Legal/treaties/035t-e.htm>.

Cetacean Conservation Agreements

ACCOBAMS

The Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Neighbouring Atlantic Area¹³⁶ (ACCOBAMS or the ACCOBAMS Agreement)¹³⁷ was concluded in 1996 and entered into force in 2001. A few States, including Turkey and Israel, and the EU have not ratified it yet.

The spatial scope of the ACCOBAMS Agreement is constituted by “all the maritime waters of the Black Sea and the Mediterranean and their gulfs and seas, and the internal waters connected to or interconnecting these maritime waters, and of the neighbouring Atlantic Area west of the Straits of Gibraltar”.¹³⁸ It must be noted that there are no high seas in the Black Sea, so ABNJ can be mainly found in the Mediterranean.

In June 2010, Spain and Portugal, both Parties to ACCOBAMS, presented their proposal for an extension of the ACCOBAMS Agreement area further into the Atlantic and the Bay of Biscay for the parts of waters which are under their jurisdiction. In November 2010 this proposal was adopted by an amendment to the ACCOBAMS Agreement.¹³⁹

It is the purpose of ACCOBAMS that Parties take coordinated measures to achieve and maintain a favourable conservation status for cetaceans. Area-based management measures, such as MPAs, are explicitly referred to in ACCOBAMS:

To this end, Parties shall prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of cetaceans and shall cooperate to create and maintain a network of specially protected areas to conserve cetaceans.¹⁴⁰

In addition, conservation and management measures concerning fisheries activities in ABNJ shall be applied in respect of any vessel under their flag or

¹³⁶ This name, adopted by Resolution A/4.1 in November 2010, replaced the original name “Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area”.

¹³⁷ Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, done in Monaco, 24 November 1996, into force 1 June 2001, (1997) 36 ILM 777.

¹³⁸ Article I(1)(a) ACCOBAMS.

¹³⁹ Resolution A/4.1 Amendments: Extension of the ACCOBAMS Geographical Scope.

¹⁴⁰ Article II(1) ACCOBAMS.

registered within their territory.¹⁴¹ However, these provisions do not affect the right of any Party to maintain or adopt more stringent measures for the conservation of cetaceans and their habitats.¹⁴² Furthermore, a sub-regional directory of important areas for cetaceans has to be facilitated by each Co-ordination Unit within ACCOBAMS.¹⁴³ Finally, the Conservation Plan in Annex II is a full part of the ACCOBAMS Agreement. One of the measures that Parties are required to undertake concerns habitat protection:

Parties shall endeavour to establish and manage specially protected areas for cetaceans corresponding to the areas which serve as habitats of cetaceans and/or which provide important food resources for them. Such specially protected areas should be established within the framework of the Regional Seas Conventions (OSPAR, Barcelona and Bucharest Conventions),¹⁴⁴ or within the framework of other appropriate instruments.¹⁴⁵

Various Resolutions have been adopted by ACCOBAMS with respect to protected areas and cetacean conservation. In 2004 the Second Meeting of the ACCOBAMS Contracting Parties charged the ACCOBAMS Scientific Committee to draft criteria for the selection of SPAs for cetacean conservation and to gather knowledge about the existence and location of sites containing cetacean habitats in the ACCOBAMS Area. The latter sites may be located within or beyond territorial waters, or in both areas, as appropriate. Moreover, the Meeting of the Parties urged the Mediterranean Parties, separately or jointly, to make a wide use of the SPAMI concept to protect areas with importance for cetacean conservation, particularly in transboundary areas or areas beyond their jurisdiction. Finally, the Secretariat was charged to liaise with the “Pelagos” Agreement management body (see the section on the Barcelona Convention) and any other similar organizations in the ACCOBAMS region in order to facilitate networking and synergies between them, in particular at the scientific level.¹⁴⁶

In 2007 the Third Meeting of the Contracting Parties adopted another Resolution on MPAs for cetaceans. Resolution 3.22 recommends that the Parties give full consideration to and, where appropriate, cooperate in the

¹⁴¹ Article II(3)(c), as well as the last sentence of Article II(3) ACCOBAMS.

¹⁴² Article XI(1) ACCOBAMS.

¹⁴³ Article V(2)(b) ACCOBAMS.

¹⁴⁴ Before the 2010 amendment to the geographical scope of the ACCOBAMS Agreement, this paragraph stated here that such SPAs should be established within the framework of the Convention for the Protection of the Mediterranean Sea against Pollution, 1976, and its relevant protocol.

¹⁴⁵ Annex 2, Conservation Plan, Article 3.

¹⁴⁶ Resolution 2.14: Protected Areas and Cetacean Conservation, Articles 1, 3 and 7, p. 2.

creation of MPAs for cetaceans in areas of special importance for cetaceans in the ACCOBAMS coverage area, within the framework of the relevant organizations, and invites non-Parties to do the same. The Resolution also provides a list of 18 areas of special importance for different cetacean species as identified by the Scientific Committee. It is not quite clear whether the list includes areas of special importance in ABNJ, but it seems that only the Alborán Sea is partly located in ABNJ. Furthermore, the Resolution contains a format for the proposal of protected areas for cetaceans. With respect to areas lying partially or totally on the high seas, paragraph 6.1.3 requires listing the proposed institutional arrangements.¹⁴⁷

Annex 2 to the Resolution contains Guidelines for the Establishment and Management of MPAs for Cetaceans. Paragraph 3.1 of this Annex states that fishery no-take zones are often the most effective tool for marine conservation. Paragraph 3.3 of Annex 2 states that for highly migratory species such as cetaceans, the creation of “dynamic MPAs” has been recommended by some authors. Dynamic MPAs are designed to change their location and size as they track a specific habitat feature associated with species movement or concentration. Examples exist of dynamic management measures which suggest that real-time ocean management is possible. However, other experts, recognizing the daunting management and legal implications of dynamic MPAs, suggest instead setting aside very large and well-selected fixed areas for conservation purposes. Paragraph 3.5 considers that given the pelagic habitats of most cetacean species found in the Mediterranean Sea, important portions of their critical habitat will be located in the Mediterranean high seas. This will cause the most prospective MPAs for cetaceans in the region to be located in waters beyond national jurisdiction.¹⁴⁸

In November 2010 the Fourth Meeting of the ACCOBAMS Parties adopted Resolution 4.15 on Marine Protected Areas of Importance for Cetaceans Conservation. Parties are urged to share their draft plans for MPA networks that include cetacean habitat, as well as to make additional proposals for MPAs with cetacean habitat. Moreover, the States concerned are urged to implement the development of high seas SPAMIs as part of a regional network, working in conjunction with UNEP-MAP RAC/SPA. The States concerned are also encouraged to promote the institution of the 22 areas of special importance for cetaceans in the ACCOBAMS areas, as listed in the Annex to the Resolution, and to ensure their effective management. Finally,

¹⁴⁷ Resolution 3.22, Marine Protected Areas for Cetaceans; Annex I: Criteria for the Selection of Protected Areas, including a Format for the Proposal of Protected Areas for Cetaceans.

¹⁴⁸ *Ibid.*, Annex II: Guidelines for the Establishment and Management of Marine Protected Areas for Cetaceans.

the recommendations related to MPAs as adopted in 2007 are repeated, which suggests that progress on these points has been slow.¹⁴⁹

ASCOBANS

Another agreement that deals with cetaceans, also concluded under the CMS, is the Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS or the ASCOBANS Agreement).¹⁵⁰ The ASCOBANS Agreement was concluded in 1991 and entered into force in 1994. Originally it covered only the North and Baltic Seas, but in 2008 an extension of the ASCOBANS area came into force. The spatial scope of application includes ABNJ as well as areas under national jurisdiction. Ten countries are Parties to ASCOBANS, which concerns only small cetaceans.

The purpose of the ASCOBANS Agreement is that the Parties cooperate closely in order to achieve and maintain a favourable conservation status for small cetaceans. In particular, each Party shall apply within the limits of its jurisdiction and in accordance with its international obligations, the conservation, research and management measures prescribed in the Annex. These measures must be considered to be a minimum; Parties do have the right to take stricter measures for the conservation of small cetaceans.¹⁵¹ One of the measures in the Annex concerns habitat conservation and management. The explanatory text on this measure only describes the objectives, but does not refer to the manner in which this habitat conservation and management can take place, such as by the establishment of MPAs.

The ASCOBANS Advisory Committee Meeting in May 2011 will discuss, *inter alia*, the extension of the work of the Agreement into the new Agreement area, including ABNJ.¹⁵²

¹⁴⁹ Resolution 4.15, Marine Protected Areas of Importance for Cetaceans Conservation; Annex on Areas of special importance for cetaceans in the ACCOBAMS area.

¹⁵⁰ Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, done in New York, 17 March 1992, into force 29 March 1994, 1772 UNTS 217. Amended by Resolution No. 4, done in Esbjerg, 22 August 2003, in force 3 February 2008. Available at: http://www.ascobans.org/the_agreement.html.

¹⁵¹ Article 2 ASCOBANS.

¹⁵² ASCOBANS, Provisional Agenda, 18th ASCOBANS Advisory Committee Meeting, Bonn, Germany, 4–6 May 2011, distributed 1 February 2011, AC18/Doc.1-02(S), Agenda item 5.4, www.ascobans.org.

Conclusions

Spatial Scope of Application

This report has examined how the spatial scope of application of various global and regional conventions and fora is formulated, in order to assess the possibilities of their Parties to decide on and to employ area-based management measures, in particular MPAs, in ABNJ.

With regard to ABNJ, the CBD only regulates processes and activities carried out under the jurisdiction or control of the Contracting Parties, but explicitly not the components of biological diversity itself. The IMO Convention and instruments adopted in its framework, such as the Revised PSSA Guidelines, the MARPOL Convention and its relevant annexes, have a sectoral focus. The work of the IMO is concerned with all maritime zones, hence including ABNJ. The species-specific CMS acts as a framework convention, which does not specifically address ABNJ, although it falls within its competence.

The other global species-specific convention discussed, the 1946 International Whaling Convention, also applies to ABNJ.¹⁵³ Furthermore, three multilateral fora must be mentioned in respect of their mandate to discuss ABNJ issues. Within the UN General Assembly all international issues relating to oceans and the law of the sea can be discussed. In contrast, the mandate of the temporary BBNJ Working Group is restricted to study issues relating to the conservation and sustainable use of marine biological diversity in ABNJ. Finally, within the FAO, fisheries management issues in ABNJ are discussed from the perspective of the flag States.

Regarding the regional conventions examined, the OSPAR Maritime Area and the Mediterranean basin under the Barcelona Convention include ABNJ. The latter might change if and when more Mediterranean coastal States declare their EEZs. All the RFMO conventions and the cetacean conservation agreements reviewed also apply to ABNJ.

Regulatory Framework and the Designation of Sites

The legal framework of the LOSC can be considered as the starting point when exploring the options for an integrated scheme to protect the biological diversity of MPAs in ABNJ. The LOSC contains general obligations for the protection and preservation of the marine environment, as well as general

¹⁵³ Article I(2) 1946 International Whaling Convention.

obligations in respect of cooperation, but it does not contain specific obligations to designate MPAs nor specific mechanisms to coordinate cooperation on MPAs in ABNJ. With respect to specific activities, the LOSC provides a more detailed regime, especially with respect to mining activities and fisheries. The regulation of mining activities is elaborated in Part XI of the LOSC and the 1994 Implementation Agreement, and the conservation and management of fish stocks in ABNJ is elaborated in the 1995 Fish Stocks Agreement, which makes reference to RFMOs for further cooperation between States.

The UN General Assembly adopted a Resolution in 2002, which called upon States to establish MPAs, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods. Furthermore, in 2003 the General Assembly invited the relevant global and regional bodies to urgently investigate how to better address the threats and risks to VMEs and how existing treaties and other relevant instruments could be used in this process. This request was strengthened and specified by the General Assembly in Resolution 61/105 of 2006, which urged RFMOs and, as appropriate, flag States to take measures to protect VMEs from the adverse impacts of bottom fisheries before 2009. This, *inter alia*, implied the closure of VME areas unless adequate conservation and management measures were in place. A further specification on actions to be taken in this respect was adopted by the General Assembly in 2009. However, the Resolutions so far were only concerned with fisheries and not with the establishment of (multi-purpose) MPAs as such.

The BBNJ Working Group has the mandate to explore options for cooperation in the establishment of area-based management measures in ABNJ, including representative networks of MPAs. The main topics of discussion in this platform are the identification of EBSAs and VMEs and the scientific criteria that should be used to identify these priority areas.

Under the CBD it is not possible to establish protected areas in ABNJ, but it does require Parties to cooperate regarding processes and activities carried out under their jurisdiction or control for the conservation and sustainable use of biological diversity in ABNJ. In recent years, CBD has been particularly active in developing scientific criteria for the selection of EBSAs. The CBD does not envisage the designation of MPAs in ABNJ. It may be questioned whether the CBD would be the most appropriate forum in this respect in the future.

The MARPOL Annexes provide the possibility to establish special areas and SO_x Emission Control Areas. An IMO Assembly Resolution also established the concept of PSSAs. Although a PSSA is merely a label for an area designated by IMO, it might serve as a basis on which APMs may be taken by

IMO. At least one APM, with a legal basis, must be identified in any application to the IMO for PSSA designation. Finally, it must be noted that the Revised PSSA Guidelines seem to suggest that PSSAs should primarily be considered as an additional protective layer for existing MPAs.

Regarding the designation of sites to be protected, there are different processes. The designation of a special area or emission control area has to be done by an amendment to the MARPOL 73/78 convention itself and its relevant annex by tacit acceptance. The designation procedure for a PSSA, in ABNJ or any other maritime zone, involves the submission of a request by one or more Member Governments to the IMO Assembly, which decides after consideration and recommendation by the MEPC. So far no PSSAs have been designated by IMO that include ABNJ and only two MARPOL special areas include ABNJ.

The 2009 FAO International Guidelines for the Management of Deep-Sea Fisheries in the High Seas addresses the protection of VMEs, *inter alia* by the closure of fishing areas. The more specific FAO Technical Guidelines on MPAs as a Fisheries Management Tool are still considered as a work-in-progress. Although the primary focus will be on fisheries and moreover not limited to ABNJ, these MPA Guidelines could possibly be useful for further discussions on multi-purpose MPAs in ABNJ.

The CMS contains appendices listing migratory species that are threatened with extinction and would benefit from international cooperation, including by taking area-based measures. Because of its framework character, its actual effectiveness depends on the willingness of its Parties to conclude legally binding treaties for specific species or regions for species included in Annex II or to take direct protection measures for species included in Annex I of the CMS. Within the CMS no specific attention has been paid to MPAs in ABNJ, but relevant measures have been taken within ACCOBAMS, one of the regional treaties in the CMS context.

Under the International Convention for the Regulation of Whaling, concrete measures are laid down in the Schedule to the Convention, such as the designation of specified areas as whale sanctuaries and the prescription of other closed areas for whaling. A moratorium is also in force for commercial whaling on all whale stocks.

Turning now to the regulatory competences and activities under regional conventions, first of all those within the OSPAR context are summarized. The OSPAR Commission can adopt measures and programmes in the form of legally binding decisions (for Contracting Parties) and non-legally binding recommendations for all activities except fisheries and maritime transport. Measures to protect and conserve the marine ecosystems and biodiversity fall

under Annex V to the OSPAR Convention. In 2003 a recommendation relating specifically to MPAs was adopted in order to establish a network of well-managed MPAs in the North-East Atlantic by 2010. In 2010 the end date to establish the network of MPAs was postponed for two years, while the management measures for existing MPAs must have been implemented by 2016. For any new MPAs (after 30 June 2010), management measures are required to be implemented within five years after designation.

The Barcelona Convention, together with the SPA and Biodiversity Protocol, provide for a legally binding framework for the establishment of marine areas to be protected. Annex I to the Protocol pays specific attention to the situation where a potential SPAMI is situated in ABNJ, by determining that its legal status, management plan and measures will be established by the neighbouring Parties. Once the SPAMI is adopted by the Meeting of the Contracting Parties, the regulations of the proposed SPAMI are binding for all Parties to the SPA Protocol. A weak point in the SPAMI system is the absence of a sanction mechanism regarding implementation and enforcement. However, currently the implementation process is still in the phase of the identification of potential SPAMIs and not much consideration has been given to high seas SPAMIs. The actual designation of high seas SPAMIs and the accompanying management plans and measures seems a bridge too far for the time being.

Since most other regional conventions, both those administered by UNEP and others, have not developed much activity regarding the establishment of MPAs in ABNJ, these are not discussed in the context of this report.

All the RFMOs discussed have the authority under their respective conventions to adopt recommendations and binding management measures. However, only the NEAFC, GFCM and SEAFO conventions explicitly refer to the possibility to establish closed fishing areas.

Within ACCOBAMS much attention is paid to the establishment and management of MPAs and the conservation of cetaceans, *inter alia* by the adoption of resolutions and guidelines, but mainly restricted to areas under national jurisdiction. This is also shown by Resolution 3.22 on Marine Protected Areas for Cetaceans. Although the most prospective MPAs for cetaceans in the Mediterranean are expected to be located in ABNJ, only one area of special importance identified in the Resolution is found partly in ABNJ. Regarding other areas, partly or totally, in ABNJ, the ACCOBAMS Parties are still at the stage of proposing institutional arrangements. It might be concluded that, as illustrated by the project on the establishment of SPAMIs specifically for cetaceans, the protected areas in the Mediterranean high seas are to be established within the framework of the Barcelona Convention,

while the competence of ACCOBAMS Parties is restricted to their flag State responsibilities. Theoretically the same reasoning applies to the competences under ASCOBANS, although within this organization no activities take place in relation to MPAs, let alone to MPAs in ABNJ.

Cross-sectoral Issues

The LOSC has a certain sectoral orientation. It refers for the elaboration of regulatory measures on various topics (such as fisheries and shipping) to the States Parties in the first instance and, as appropriate, to their cooperation in the context of international competent organizations. From the assessment of sectoral and regional conventions, it can be concluded that these conventions allow for the entering into agreements or arrangements with other international organizations. Concrete cross-sectoral cooperation is more advanced under some conventions than others. For example, within the Barcelona Convention strengthening links with other international organizations is greatly encouraged, but is in fact limited to *ad hoc* coordination with GFCM, while no cooperation agreements have been concluded with other international bodies. In contrast, the OSPAR Commission has concluded several concrete MoUs and other cooperation agreements with other international organizations.

The Conference of the Parties to the Barcelona Convention encouraged its Contracting Parties to take initiatives on proposing PSSAs to IMO, although without explicitly paying attention to proposing high seas PSSAs or joint initiatives, and to strengthen links with regional (fisheries) organizations to ensure sustainable management of resources, including on the high seas.

Within the context of OSPAR an Agreement of Cooperation was adopted with IMO already a decade ago, and a MoU with NEAFC is in force since a few years. Another MoU is under discussion with the ISA. Another collective agreement is under development between OSPAR, the EU and NEAFC for a unique management construction of the CGFZ-MPA.

For those species-specific conventions that have a spatial overlap in their application with other regional conventions, as is the case with ACCOBAMS and the Barcelona Convention, it is almost inevitable that intensive cooperation will be necessary and beneficial for an effective establishment and management of MPAs in ABNJ. This will especially be the case if the conventions concerned focus their initiatives on an ecosystem-based approach. Moreover, if regional conventions do not cooperate on MPAs located in the same marine areas, individual cooperation with (other) sectoral organizations, such as IMO, could create complicated and confusing situations in practice.

Further Considerations

The MPA Concept and Associated Measures

No single multilateral treaty exclusively deals with MPAs. The MPA concepts used in the various global and regional conventions primarily differ because they echo the scope and purpose of their underlying instrument. A first category of instruments aims to establish so-called multi-purpose MPAs to protect comprehensively an area from all possible sources of pollution or environmental degradation, and to provide facilities and infrastructure for its advantageous ecological development. They envisage the establishment of objective-based MPAs for the further protection of inter- and intra-ecosystem dependencies. The prime examples of instruments that fall into this category are developed under regional treaty regimes, such as OSPAR. On a global level scientific criteria are developed by the CBD for the identification of EBSAs. A second category comprises instruments envisaging the designation of MPAs that have a specified object of protection, such as the International Convention for the Regulation of Whaling. A third category, which identifies source-specific MPAs, focuses on environmental threats from a particular source, such as the tools set up by IMO and FAO on, respectively, shipping and fisheries.¹⁵⁴

Due to the specific focus of objective and source-specific treaties, neither category of treaties results in the creation of a regime for particular marine areas which effectively protects and preserves them against all potential threats. However, especially management measures which focus on the sources of environmental pollution are essential for the successful implementation of multi-purpose MPAs. The designation of MPAs, on the basis of scientific criteria, is one step, but it needs to be followed by effective management measures. These measures are mostly sector-specific and thus often fall under the competence of various organizations that each have their own (scientific) criteria and balance of interests.

The designation of an MPA is generally considered as an area-based management measure, which is one of the measures that might be taken to protect marine biodiversity. Theoretically, the establishment of MPAs could benefit from marine spatial planning (MSP). In general MSP is a tool to make strategic decisions about those marine areas where competing human activities occur and to manage the effects on the environment. It requires a cross-sectoral decision-making process for the joint setting of priorities on a regional

¹⁵⁴ Kachel, *supra* note 13, p. 245.

spatial scale. MSP prevents taking decisions for every individual activity or project *ad hoc* and without a clear overall vision on the long-term objectives and the mutual linkages and effects of the various activities. However, even within areas of national jurisdiction MSP is still in an early phase, especially within a legally binding framework, and is in many cases triggered by activities that require large investments, such as wind energy parks. Moreover, there is not much experience yet with cross-border MSP and there seems to be no competent international authority which can initiate and coordinate MSP in ABNJ.

In conclusion, comprehensive MSP in ABNJ could be considered as a potential interesting area-based management tool for the future, wherein the establishment of MPAs could benefit from more strategic cross-sectoral planning. In the short term, it could be recommended to start with bi-sectoral spatial planning in ABNJ, for example a strategic planning for fisheries and MPAs that goes beyond the establishment of individual MPAs and also fits in with the objective of General Assembly Resolution 57/141 to create a representative network of MPAs.

One conclusion of the research undertaken in this project might be that the designation of an MPA can be mainly considered as a symbolic action. On the one hand, it expresses the recognition by the organization(s) involved that biodiversity protection is highly needed for the selected area. On the other hand, it has an awareness-raising function, which might be useful for external communication to other organizations whose cooperation is needed for effective protection of the area concerned by the taking of associated (sectoral) management measures. Such concrete implementation measures are necessary in order to prevent MPAs that only exist on paper for many years.¹⁵⁵ For that reason it seems highly recommended for international organizations to follow the example of IMO, which requires that an application for PSSA designations must be accompanied by the identification of at least one APM, and that at least one APM must be submitted within 2 years after approval of the PSSA. Such a designation and implementation procedure could have partly prevented the slow implementation of protective measures for the designated MPAs by OSPAR. However, regional environmental organizations like OSPAR have the impediment that they are dependant upon sectoral organizations, such as IMO and RFMOs, for the implementation of protective measures.

¹⁵⁵ An illustration is the so-called territorial “Green Heart”, situated between the four largest cities of The Netherlands. Together with the easing of stringent regulations on the building of new residential areas, this spatial planning concept has lost its meaning to a large extent.

For comprehensive protection of an MPA, the different international organizations with an interest in the area concerned are mutually dependent. However, in many cases there is disagreement on the exact location of the MPA, the urgency to take measures and the type of measures necessary. A positive development would be agreement by the different organizations on the same scientific selection criteria for the identification of potential MPAs, such as the EBSA criteria of the CBD. This would especially be helpful for coordinating the identification processes for areas in need of protection within sectoral organizations, like the IMO and FAO, with those within Regional Seas conventions. The ideal would also be that all organizations work together from the beginning of the identification process. Since this appears not to be politically feasible in many cases, the conclusion of general MoUs and other (cross-sectoral) cooperation agreements between international organizations can be considered a good starting point, because the organizations involved already become acquainted with each other and it offers an opening for more concrete discussions on the topic of MPA establishment.

A further step could be to conclude cooperation agreements specifically on the topic of MPAs and associated measures. Such cooperation could be facilitated and stimulated by the development of joint regional projects which require a more formal commitment of the organizations. Such cross-sectoral projects are more common in areas within national jurisdiction where national governments in many cases have a coordinating role, but for ABNJ a 'natural' lead partner is lacking, apart from the fact that some regions in ABNJ have major governance and/or regulatory gaps. In the beginning, the close cooperation of various organizations in such a project might slow down the decision-making process (*inter alia* because of the necessary mutual trust building and more complex situation), but in the end benefits are likely to arise in terms of efficiency and effectiveness. However, no general recipe can be given for the ideal cross-sectoral cooperation on MPAs in ABNJ; much depends on the specific situation.

Most initiatives with respect to MPAs in ABNJ are currently in the phase of the development of selection criteria and identification of potential areas in need of protection. Only a few organizations have actually designated MPAs in ABNJ, although implementation of APMs still needs to be realized. In other cases only sectoral protective measures, mainly related to bottom fisheries, have been decided with respect to ABNJ. Generally speaking, many decisions, both binding or non-binding, are taken on MPAs and/or sectoral measures, for example within the framework of the UN General Assembly, but they need to be implemented by their Parties or by other international organizations during the coming years. In this respect it must be noted that

national governments may act inconsistently in the various international fora, which is, *inter alia*, caused by sending representatives from different government departments or agencies, each having their own interests and priorities. Furthermore, the decision-making procedures, as well as the composition of the States Parties, differ between international organizations.

Global and Regional Interaction

Having examined the developments within OSPAR, it could be concluded that the regional approach is a promising way to proceed with the establishment of MPAs and APMs in ABNJ. However, it must be acknowledged that the regulations and initiatives under a regional convention cannot operate alone, but that it is necessary for an effective comprehensive MPA to establish governance linkages horizontally (e.g., with other regional conventions), as well as vertically with other international organizations (e.g., CBD, IMO), and individual States (e.g., neighbouring coastal States, distant fishing States).

During the BBNJ Working Group meeting in 2011, the EU suggested enabling a process for the global designation of MPAs and to provide a legal basis for this by including it in an implementation agreement to the LOSC. It was also observed that a global forum with the mandate for designating MPAs in ABNJ was lacking. Canada emphasized the responsibility of regional management bodies for selecting area-based management tools based on local conditions.¹⁵⁶ However, a mandate on the global level would not rule out the responsibilities of organizations on the regional level; interaction between these levels is expected to accelerate the establishment of MPAs in ABNJ and the implementation of associated measures.

The most likely organizations to fulfil a coordinating role on the implementation of associated measures are the regional marine environmental organizations, such as those established within the framework of the Barcelona Convention and the OSPAR Convention, although sectoral organizations might have another perspective on this. These perspectives are highly interrelated with the recognition of the ecosystem approach and how the different organizations interpret the ecosystem approach. It must be noted that this term is not in all cases explicitly included in the relevant conventions (in some cases, such as the LOSC, the convention was concluded before the ecosystem approach was introduced) or elaborated in further decision-making. It might be recommended to agree on a worldwide, cross-sectoral elaborated interpretation of the ecosystem approach.

¹⁵⁶ IISD, *supra* note 57, p. 4.

In addition, it is necessary that the various international organizations recognize that certain areas in ABNJ, either the bottom and/or the water column, are in need of greater protection for biological diversity purposes than the surrounding marine areas. When these areas to be protected are under pressure from various human activities, a multi-purpose MPA would be desirable and cross-sectoral protective measures need to be implemented, while in some cases an MPA with a sectoral focus on the source of pollution or the cause of environmental damage will be sufficient.

As already mentioned earlier, the efforts under the OSPAR Convention to establish MPAs in ABNJ provide an example of the interaction between the regional and global levels in the development of international law. On the one hand, if pursued carefully—e.g., by respecting the competence of other global and regional bodies—the OSPAR approach may have a decisive impact on the development of the global legal regime in respect of the role of regional environmental organizations in the management of ABNJ. On the other hand, implementation difficulties encountered by OSPAR may lead to a stalling of developments at the global level or broader support for a larger role for sectoral interests. However, even if the OSPAR Convention is perceived to be successful, consideration will still have to be given to the question whether it can be emulated by other regions which differ from the OSPAR region in terms of, for instance, socio-economic development and regional political integration. A final answer to these questions will depend on the further development at the global and regional level in the years to come.¹⁵⁷

Looking at the system of the Barcelona Convention, the SPA/RAC is quite a unique institution compared to other regional conventions. The role of the SPA/RAC is to facilitate the implementation of the components of MAP Phase II relating to Specially Protected Areas, while the decision-making competences rest with the Contracting Parties. The SPA/RAC can focus its attention on stimulating the establishment and implementation of protected areas. However, the ambitions and achievements of the SPA/RAC are inevitably associated with the cooperation and political will of the Contracting Parties. Hence the limited results in the field of protected areas in ABNJ cannot be attributed to the SPA/RAC. It might be interesting to follow any future discussions on management plans for SPAMIs lying entirely in ABNJ and the potential role of the SPA/RAC in the management of high seas SPAMIs.

Having discussed the potential advantages to be expected from interaction between the regional and global level, without overlooking the competences

¹⁵⁷ Molenaar and Oude Elferink, *supra* note 2, p. 20.

of the various international organizations, it must also be recognized that there are several complicating issues.

The first complicating issue is how to deal with States that are not a party to the relevant organizations. This issue is relevant for regional conventions as well as global conventions. Under international law, a State is not bound by the decisions of the Parties to a convention to which it is not a Party. Regulations promulgated under regional conventions, therefore, only apply to States that have ratified the convention concerned.¹⁵⁸

Another complicating issue is the various interests of States in the area to be protected (for example a neighbouring coastal State or a long-distance fishing State), as well as States which are party to a convention (and have a vote in relevant decision-making) but do not have a particular interest in the area to be protected. Such situations might result in friction between States about their status in the governing body of the convention concerned.

Finally, serious governance and regulatory gaps exist in certain high seas areas. Most high seas areas, including all of the Pacific Ocean, the Indian Ocean, and the majority of the Atlantic Ocean, are not covered by RFMOs with the authority to manage deep-sea bottom fisheries. Bottom trawl fishing in these regions is unregulated high seas fishing. As long there is not enough political support to establish an RFMO for these high seas areas, the governance gap could be overcome by States individually, or by groups of States, as demonstrated by the EU. It adopted Council Regulation No. 734/2008¹⁵⁹ on the protection of VMEs in the high seas, which applies to areas not subject to regulation by an RFMO or where no interim measures were put in place during negotiations for the establishment of an RFMO.

One of the regulatory gaps is that the vast majority of RFMOs lack the legal competence to impose restrictions on high seas bottom trawl fishing.¹⁶⁰ However, individual RFMO Parties can choose to apply stricter rules to their vessels and operators if they so wish. For example, the EU has declared that it reserves the right to adopt stricter rules for itself if it considers that the RFMO measures do not go far enough in preventing destructive fishing impacts.¹⁶¹

¹⁵⁸ Deep Sea Conservation Coalition, 'A Net with Holes: The Regional Fisheries Management System'. DSCC policy paper (undated) 3. Available at: <http://www.savethehighseas.org/publicdocs/RFMO.pdf>.

¹⁵⁹ OJ L 201 of 30 July 2008. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:201:0008:01:EN:HTML>.

¹⁶⁰ Deep Sea Conservation Coalition, *supra* note 158, p. 2.

¹⁶¹ European Commission, Communication from the Commission to the Council and the European Parliament. Destructive fishing practices in the high seas and the protection of vulnerable deep sea ecosystems. COM(2007)yyy [file number not mentioned on this version] final (2007) 8. Available at: <http://www.seas-at-risk.org/1images/CEC%20Communication%20>

See *infra* for an elaboration on this EU Council Regulation, which is meant to implement the UN General Assembly Resolution 61/105, as well as to fill the governance and regulatory gap in high seas areas where RFMOs are absent. This example illustrates how the responsibility of States as stewards of the global marine environment can be interpreted and applied in practice. Moreover, it must be noted that (non-)Parties to a convention are not exempted from their obligations as Parties to other conventions (such as the LOSC and the CBD) or their obligations under customary international law.

Case Study

Bottom Fisheries and Protection of VMES: Filling the Governance and Regulatory Gap

In 2008 the EU adopted Council Regulation No. 734/2008 on the protection of VMEs in the high seas from the adverse impacts of bottom fishing gears. This transposed the measures contained in the UN General Assembly Resolution 61/105 into EU law but also went further than the Resolution in certain respects. The Council Regulation applies to areas not subject to regulation by an RFMO or where no interim measures were put in place during negotiations for the establishment of an RFMO.¹⁶² The EU is the first regional organization to adopt such rules for ships flying flags of its Member States.¹⁶³ This action is in line with the stance of the EU during the debate within the UN General Assembly on high seas destructive fishing practices, which was marked by a proposal by certain UN Members to adopt a general moratorium on bottom trawling in the high seas, whereas other Members were initially reluctant to any collective action determined at global level. The EU promoted, successfully, an alternative proposal based on stringent regulation of bottom fishing activities that should inform the conservation and management measures adopted by RFMOs, and should also determine the discipline that flag States

HSBT%201007.pdf. Official version: SEC(2007) 1314, COM/2007/0604 final/, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0604:FIN:EN:HTML>.

¹⁶² Article 1(2) Council Regulation No. 734/2008.

¹⁶³ European Commission, Report from the Commission to the European Parliament and the Council on the implementation of Council Regulation No. 734/2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears, COM (2010)651 final, 10 November 2010. In: *Cover Note from the Secretary-General of the European Commission to the Secretary-General of the Council of the European Union*, 11 November 2010 (2010) 2. Available at: http://www.europa-nu.nl/id/vikb96w1b3zp/report_from_the_european_commission_to.

must apply in respect of their vessels when these operate in areas of the high seas not regulated by a RFMO.¹⁶⁴

Under Regulation No. 734/2008, EU fishing vessels are only allowed to conduct fishing activities with a special fishing permit.¹⁶⁵ Applications for this permit must be accompanied by a detailed fishing plan, whereupon the competent authorities assess the potential impacts of the vessel's intended fishing activities.¹⁶⁶ Article 6(1) prohibits the use of bottom gear in areas where no proper scientific assessment has been carried out and made available. The original Commission proposal to the Council contained additionally a restrictive provision on depth limits, which implied that the use of bottom gears at depths beyond 1000 m of depth should be prohibited. The Environment Committee of the European Parliament even suggested a depth limit of 800 m. However, in the plenary session of the European Parliament the provision on depth limits was deleted completely.¹⁶⁷ In the final Council Regulation the depth limits are indeed absent.

Article 8 of Regulation No. 734/2008 requires Member States to identify areas that shall be closed to fishing with bottom gear. Member States shall implement these closures without delay in respect of their vessels and immediately notify the Commission of the closure. Additionally, the Commission shall, where appropriate, submit proposals to the Council for the adoption of Community measures to implement area closures, either on the basis of the information notified by Member States or on its own initiative.

The Regulation mainly affects around 20 EU vessels, all belonging to a single Member State, namely Spain (with fishermen originating from Galicia). The fishery is developed in the Southwest Atlantic, where an RFMO has still not been set up, due to the political conflict between the United Kingdom and Argentina over the issue of the Falkland Islands.¹⁶⁸

¹⁶⁴ European Commission, Proposal for a Council Regulation on the Protection of VMEs in the High Seas from the Adverse Impacts of Bottom Fishing Gear, COM(2007)yyy final, Explanatory Memorandum (2007) 2. Official version: SEC(2007) 1315, COM/2007/605 final of 17 October 2007, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0605:FIN:EN:PDF>.

¹⁶⁵ Article 3(1) Council Regulation No. 734/2008.

¹⁶⁶ *Ibid.*, Article 4(1) and (2).

¹⁶⁷ European Parliament, Report on the Proposal for a Council Regulation on the Protection of VMEs in the High Seas from the Adverse Impacts of Bottom Fishing Gears, A6-0183/2008, 14 May 2008 (2008) 11 and 24. Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2008-0183+0+DOC+PDF+V0//EN>.

¹⁶⁸ European Association of Fish Producers Organisations, Observations by the EAPO Regarding the Proposed Regulation by the Council for the Protection of VMEs on the High Seas Due to the Adverse Effects of the Use of Bottom Catch Methods (COM 2007)605 final, Letter of 28 January 2008 (2008) 1. Available at: <http://eapo.com/UserFiles/File/EAPO08-05.pdf>.

According to Article 12(1) of Council Regulation No. 734/2008, Member States are required to communicate to the Commission for each half calendar year a report on, *inter alia*, their implementation of area closures. From the information received, only vessels from one Member State fell under the scope of the Regulation. In the assessment of the implementation of measures in 2010, the Commission concluded that the Member State concerned had not implemented the principle of prior impact assessment. In its general conclusion, it was the Commission's opinion that more stringent and accurate implementation of the Regulation is required to ensure that the measures prescribed in the General Assembly Resolution 61/105 and 64/72 are fully implemented by EU Member States flagged vessels fishing under the scope of the Regulation.

Furthermore, the Commission noted that some RFMO have been criticized for not having implemented adequate measures for the protection of VMEs, ignoring scientific advice and the precautionary approach. In some cases, measures requested by the EU have been rejected by other Parties to the RFMOs. Consequently, the Commission suggests that in such cases the scope of the Regulation could be extended to allow the adoption of unilateral measures applicable to EU fishing vessels fishing within RFMO regulatory areas, and going further than those adopted by the RFMO. Although this could be perceived as resulting in the lack of equal treatment between EU vessels and third-country vessels operating in the same area, this would ensure that a level playing field is established among EU vessels undertaking bottom fishing activities in different areas.¹⁶⁹

Questions for Discussion

- 1 What kind of division of work between the CBD and the UN General Assembly/BBNJ Working Group would be effective?
- 2 What kind of division of work would be effective between global and regional organizations (as well as between organizations on a horizontal level) in order to ensure a coherent regime and an effective network of MPAs?
- 3 Are there possibilities to 'export' the OSPAR experiences to other regions and what considerations are relevant in that connection?
- 4 How should the fact that most regional conventions do not apply to ABNJ, or have limited competences, be best addressed?

¹⁶⁹ European Commission, *supra* note 163, p. 7.

- 5 What are the most urgent governance and regulatory gaps with respect to MPAs in ABNJ?
- 6 Should a possibly future implementation agreement to the LOSC with a mandate for the global designation of MPAs also address associated measures for existing and new MPAs?
- 7 Is there sufficient international legal protection of living resources on and in the seabed (sedentary species, as well as plants, microbes, etc.)? To what extent are they included in the definition of 'vulnerable marine ecosystems' (VMEs)?
- 8 What do the provisions in the LOSC teach us about the balance between the exploitation and conservation of the biological resources in ABNJ and how could this be reflected in the management measures for MPAs in ABNJ?
- 9 Are there areas in ABNJ where the establishment of MPAs could benefit from MSP, which can be considered as a broader area-based management approach? And if so, which organizations should be involved and who could have a coordinating role?
- 10 What seems to be the most feasible option (in legal as well as in political terms) for an improvement and acceleration of the establishment of MPAs and APMs in ABNJ? And to what extent could it benefit from MSP on the one hand and from concrete cross-sectoral cooperation projects on the other hand?