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Marine protected areas in areas beyond national jurisdiction
The pioneering efforts under the OSPAR Convention

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Introduction

The international community has committed itself to establishing a coherent network of marine protected areas (MPAs) by 2012. Three basic requirements have been attached to this goal: the network of MPAs has to be coherent and representative, consistent with international law and based on scientific information.[1] All three requirements pose considerable challenges. Scientific knowledge about the marine environment, including human impacts, is limited, certainly if compared to terrestrial ecosystems. International law has always been characterized by a dichotomy between the land and the sea. In the former, including a narrow band of coastal waters – the territorial sea –, sovereignty is the paramount ordering principle. Beyond the territorial sea, the freedom of the high seas has traditionally existed: all States have equal access to the high seas and its resources. Jurisdiction over activities in the high seas is based on the principle of flag State jurisdiction: on the high seas vessels are in principle subject to the jurisdiction of the State whose flag they are entitled to fly. Cooperation will always be essential to effectively manage specific activities in the high seas or to protect the marine environment of the high seas.

Starting from the middle of the past century, a gradual extension of coastal State jurisdiction in respect of certain activities has taken place. Beginning around the 1960s, an international regime was developed in respect of the ocean floor beyond national jurisdiction. These developments in the international law which is applicable to the oceans have led to significant inroads in the freedom of the high seas and led to a multiplicity of overlapping regimes. As a consequence, the establishment of MPAs consistent with international law needs to deal with a number of questions. For instance, who is competent to identify and designate an MPA and to regulate specific human activities therein; and how can a holistic and coherent governance and regulatory framework for various activities in an MPA be achieved? The present article looks at these questions in respect of areas beyond national jurisdiction (ABNJ), namely the high seas and the 'Area' (the seabed and the ocean floor and subsoil thereof beyond the limits of national jurisdiction). In areas under coastal State jurisdiction these questions are less acute. Although difficulties also exist here, especially in respect of control and enforcement, the coastal State's competence

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1 Plan of Implementation of the World Summit on Sustainable Development (Johannesburg, 4 September 2002; <www.unep.org>) (JPOI), Para. 32(c).

to regulate most sea-based activities is undisputed. Conversely, different views exist in the international community about the answers to the above questions in ABNJ.

The present article proposes to address the abovementioned issues through a case study of the pioneering[2] experience in the North-East Atlantic Ocean. Regional cooperation on the protection of the marine environment in this area is carried out through the OSPAR Convention.[3] The Parties to the OSPAR Convention have initiated a process that is to result in the designation of MPAs in ABNJ and in that connection have been confronted with the questions identified above. Before looking into these efforts, however, the article will provide a short overview of the global regime which is relevant to the identification and designation of MPAs, including recent developments in global fora, such as the United Nations General Assembly (UNGA). Next, attention will be focused on the North-East Atlantic Ocean, looking at the steps that have been taken thus far under the OSPAR Convention to designate MPAs in ABNJ. This includes the issue of the possible involvement of other global and regional organizations. In this respect the North-East Atlantic Fisheries Commission (NEAFC)[4] is of particular interest. As fishing activities have major adverse impacts on marine biodiversity – within ABNJ fishing most likely has the most adverse impacts of all human activities –, the extent to which MPAs in ABNJ achieve their objectives is particularly dependent on the successful regulation of marine capture fisheries. This evidently requires an assessment as to how to regulate fisheries.[5]

There is currently no universally accepted definition for the term 'MPA'. However, the definition of an MPA adopted by the International Union for Conservation of Nature (IUCN) is the most widely used. This reads:

> 'Any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment.'[6]

The essence of this broad definition is that MPAs have a special status in comparison with the surrounding area due to their more stringent regulation of one or more human activities (*e.g.* shipping or fishing) by one or more measures (*e.g.* the prohibition of anchoring or bottom trawling) for one or more purposes (*e.g.* the preservation of habitats, the conservation of target species or safeguarding the area for marine scientific research). It is important to note that the identification of an area as an MPA does not necessarily mean that all human activities are prohibited. This can, *inter alia*, be deduced from the different IUCN categories of protected areas.[7] For these reasons, some instruments and fora prefer terms such as 'area-based management tools' or 'spatial measures'.

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2 See OSPAR press notice of 26 June 2008 *OSPAR pioneers the protection of the high seas, OSPAR on track to meet the new EU marine directive*.

3 Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in force 25 March 1998, <www.ospar.org>. Annex V, Sintra, 23 September 1998, in force 30 August 2000; amended and updated text available at <www.ospar.org>.

4 Established by the NEAFC Convention, note 51 *infra*.

5 The protection of vulnerable marine ecosystems in ABNJ, especially benthic ecosystems, such as deep-sea, cold-water coral reefs, from the adverse impacts of fishing activities is extensively considered at the global level at the among others the United Nations and in regional fisheries' management organizations (RFMOs) (for a recent discussion see Y. Takei, *Filling Regulatory Gaps in High Sea Fisheries: Discrete High Seas Fish Stocks, Deep -Sea Fisheries and Vulnerable Marine Ecosystems* (Doctoral dissertation, Utrecht University, December 2008; commercial edition forthcoming), *passim*.

6 Resolution 17.38 (1988) by the General Assembly of the IUCN, reconfirmed in Resolution 19.46 (1994).

7 These can be found at <www.unep-wcmc.org>. See also the Report of the Twenty-Seventh Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) (2008), Para. 7.16.

Defined as above, MPAs are not a radical innovation; not even in ABNJ. For ABNJ, many regional fisheries management organizations (RFMOs) have adopted MPAs in the form of 'closed areas' where all or certain fishing activities are prohibited for all or part of the year, the International Maritime Organization (IMO) has designated 'special areas' where special discharge standards apply and the International Whaling Commission (IWC) has adopted whale sanctuaries that apply in addition to the other restrictions on whaling. Conversely, this article focuses on integrated, multi-sectoral and multi-purpose (further: holistic) MPAs in ABNJ. Apart from the relatively small, near-shore Antarctic Specially Managed Areas (ASMAs) and Antarctic Specially Protected Areas (ASPAs) adopted within the Antarctic Treaty system and the special area approach in the Mediterranean,[8] no such holistic MPAs have yet been adopted for ABNJ. For several years now, efforts have been ongoing within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) towards establishing a system of MPAs for biodiversity conservation but significant hurdles still have to be cleared there as well.[9]

The present article starts with a description of the legal framework applicable to ABNJ to the extent that it is relevant for the establishment of MPAs in those areas. Before turning to the OSPAR Convention and its work on MPAs in ABNJ, attention will be paid to development in respect of the legal framework to manage MPAs in ABNJ at the global level. Next, these three sections will be brought together in a section looking at the work under the OSPAR Convention in the light of the global legal framework. Finally, the article offers some concluding remarks.

The global legal framework for ABNJ

The basic international legal framework governing the oceans is provided by the United Nations Convention on the Law of the Sea (UNCLOS).[10] The UNCLOS defines the extent of various jurisdictional zones and the rights and obligations of States in each of those zones. The Convention does not provide a detailed regulatory regime for most specific activities, but instead charges States and international organizations with the further elaboration of those regimes. As regards ABNJ, two of the UNCLOS's framework regimes are of particular relevance. Apart from the framework regime for the high seas contained in Part VII, this concerns the common heritage regime of Part XI, which is applicable to the Area. 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.[11] This implies that it may not always be clear whether a specific activity is covered by the regime of the high seas or by that of Part XI. For instance, there is no consensus within the international community on the question whether the living resources of the Area – which can be of interest for their genetic material – are covered by the framework regime of freedom of the high seas or the common heritage regime.[12] Under the latter regime, the possibilities of States to unilaterally use these resources would be limited by obligations owed to the international community resulting from the applicability of the concept of the common

8 Pursuant to the 1995 Barcelona Convention (Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995. In force 9 July 2004, <www.unepmap.org>) and its Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995. In force 12 December 1999, <www.unepmap.org>). Note that there are no marine areas in the Mediterranean which extend beyond 200 nautical miles from baselines.

9 See the Report of the 27th Meeting, *supra* note 7, Paras. 7.1-7.16.

10 United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, in force 16 November 1994, 1833 *United Nations Treaty Series* 396; <www.un.org/Depts/los>.

11 Art. 86 UNCLOS.

12 See *e.g.* Letter dated 15 May 2008 from the Co-Chairpersons 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 addressed to the President of the General Assembly (Doc. A63/79 of 16 May 2008), Para. 36.

heritage of mankind. The categorization of a specific activity under one or the other of these regimes might also have consequences for the competence of States to regulate them.

So, what are the main elements of both regimes? Article 87 UNCLOS provides that the high seas are open to all States. Freedom of the high seas is to be exercised under the conditions laid down by the Convention and by other rules of international law. The Article provides a non-exhaustive list of high seas freedoms, mentioning among others the freedom of navigation, the freedom of scientific research and the freedom of fishing. All freedoms of the high seas shall be exercised with due regard for the interests of other States in their exercise of the freedom of the high seas and due regard for the rights under the Convention with respect to mining activities in the Area. No State may subject any part of the high seas to its sovereignty.[13] The UNCLOS also sets out more detailed rules in respect of a number of activities. For instance, Section 2 of Part VII is concerned with the right to fish on the high seas, attaching particular importance to (regional) cooperation between States.[14]

The UNCLOS's Part XI on 'The Area' consists of two main components. Section 3 contains a detailed regime for mining activities. Mining in the Area can only take place in accordance with Sections 3 and 4, which set up rules for the development of the mineral resources of the Area and establish an international regulatory body, the International Seabed Authority (Authority).[15] The Authority is among other things charged with protecting the marine environment from the impacts of mining activities in the Area.[16] Article 145(b) UNCLOS requires the Authority to adopt, with respect to activities in the Area, appropriate 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.[17] It has been suggested that the competence of the Authority in relation to activities in the Area allows it to take a leading role in the establishment of MPAs in ABNJ.[18] Another argument is that a central role for the Authority would also facilitate an integrated approach in respect of the management of the Area.[19] The fact that the Authority is primarily intended to regulate mineral resource activities in the Area may make it less well-placed to address environmental concerns than, for instance, the Convention on Biological Diversity (CBD)[20] or regional treaties on the protection of the marine environment. That issue would certainly require consideration in any future regime on the protection and preservation of

13 Art. 89 UNCLOS.

14 These rules are in their turn operationalized in the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995, in force 11 December 2001, 1995 *International Legal Materials* 34, p. 1542; <www.un.org/Depts/los>) (Fish Stocks Agreement) and implemented by States individually, bilaterally or at the regional level by means of regional fisheries management organizations (RFMOs).

15 This regime has been substantially amended by Part XI Deep-Sea Mining Agreement (Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, New York, 28 July 1994, in force 28 July 1996, 1994 *International Legal Materials* 33, p. 1309; <www.un.org/Depts/los>). This Agreement is not of direct concern for the present discussion.

16 Art. 145 UNCLOS.

17 See also Art. 162(2)(x) UNCLOS.

18 See S. Kaye, 'Implementing high seas biodiversity conservation: global political considerations', 2004 *Marine Policy* 28, pp. 221-226 at p. 225; T. Scovazzi, 'Mining, Protection of the Environment, Scientific Research and Bioprospecting: Some Considerations on the Role of the International Sea-Bed Authority', 2004 *International Journal of Marine and Coastal Law* 19, pp. 383-409, at p. 396.

19 Study of the relationship between the Convention on Biological Diversity and the United Nations Convention on the Law of the Sea with regard to the conservation and sustainable use of genetic resources on the deep seabed (decision II/10 of the Conference of the Parties to the Convention on Biological Diversity); Note by the Executive Secretariat (reproduced in UNEP/CBD/SBSTTA/8/INF/3/Rev.1 of February 2003), at Para. 122.

20 Convention on Biological Diversity, Nairobi, 22 May 1992, in force 29 December 1993, 1992 *International Legal Materials* 31, p. 822; <www.biodiv.org>.

the marine environment and the conservation and sustainable use of marine biodiversity in ABNJ.

Section 2 of Part XI of the UNCLOS is concerned with general principles governing the Area. The Area is designated as the common heritage of mankind. One of the consequences of this status is that engagement in a number of activities is premised on the condition that the benefit of mankind has to be taken into consideration. This first of all concerns mining activities in the Area, but the benefit of mankind requirement is also mentioned in relation to marine scientific research and archeological and historical objects found in the Area.[21]

Part XII of the Convention on 'The Protection and Preservation of the Marine Environment' is also applicable to activities carried out in accordance with the regimes of the high seas and the Area. Article 194 is directly relevant to the establishment of MPAs in ABNJ. Paragraph 5 of this Article 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.'

Paragraph 5 indicates that, on the one hand, States are to take *all* necessary measures and, on the other, that those measures have to be taken in accordance with Part XII. This implies in particular that, in taking measures, States have to respect the jurisdictional framework of Part XII, which builds on the jurisdictional framework of specific maritime zones contained in the Convention. In the case of ABNJ these are Parts VII and XI.

What conclusions does the jurisdictional framework contained in the UNCLOS allow as regards the competence to identify, designate and manage MPAs in ABNJ? As will be apparent from the short analysis of Parts VII and XI, it depends. The Authority has a central role in respect of regulating mining activities in the Area.[22] As will be further detailed below, that regulatory role also has consequences for MPAs in ABNJ. Part XI does not seem to affect the competence of States to act individually or jointly in respect of other activities for which Part XI's general principles are relevant. For those activities Part VII of the Convention on high seas freedoms (also) remains relevant.

The central tenet of Part VII of the Convention is that 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 whole international community. To establish the implications which flow from this premise, it is also relevant to consider that the Convention indicates specific forms of cooperation in a large number of cases.[23] In respect of a number of specific sources of pollution of the marine environment, the UNCLOS envisages the possibility of cooperation at the global and/or regional level.[24] This is also the case in respect of the general provision on cooperation for the protection and preservation of the marine environment contained in Article 197. Article 197 accords priority to the global level as it refers to cooperation 'on a global basis, and, as appropriate, on a regional basis'.

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21 See Arts. 143(1) and 149 UNCLOS.

22 A complication in this respect is that a number of States are not party to the UNCLOS and in principle are not bound by the Convention or actions in its implementation.

23 See also *e.g.* R. Churchill, 'Levels of implementation of the Law of the Sea Convention: an Overview', in: D. Vidas & W. Østreng (eds.), *Order for the oceans at the turn of the century*, 1999, pp. 317-325; V. Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea*, 2007, *passim*.

24 See Arts. 207 (land-based pollution), 208 (seabed activities subject to national jurisdiction), 210 (dumping) and 212 (atmospheric pollution) UNCLOS.

At the same time the Article, which is applicable to the entire marine environment – including therefore ABNJ –, specifically indicates that this cooperation is to take place 'taking into account characteristic regional features'. The provision on cooperation in respect of the conservation and management of living resources provides for collaboration, as appropriate, through subregional or regional fisheries organizations.[25] This focus is confirmed by the fact that cooperation is in particular required from States whose nationals exploit resources in the same area.[26] At the same time, the provisions on the conservation and management of living resources of the high seas indicate that in the establishment of specific conservation measures States shall take into account 'any generally recommended international minimum standards, whether subregional, regional *or global*' (emphasis added).[27] Only in respect of pollution from mining activities in the Area and vessel-source pollution is the emphasis in cooperation placed squarely at the global level. In the case of mining in the Area the focal point is the regime involving the Authority, created by the Convention itself. Article 211 of the Convention on vessel-source pollution refers to the 'competent international organization or general diplomatic conference'. It is generally understood that this concerns primarily the IMO and conferences convened within its framework. At the same time, these global frameworks in their implementation allow for, or even are dependent on, initiatives at the regional level or by individual States. For instance, measures adopted by the IMO to provide additional protection for specific sea areas from the adverse impacts of shipping result from proposals by one or more individual Member States from the region concerned to the organization.[28]

The provisions on cooperation contained in the UNCLOS point to a number of conclusions which are of relevance to the work of the OSPAR Commission in respect of MPAs in ABNJ. The UNCLOS allows cooperation in the protection of the marine environment of the ABNJ on a regional basis. Secondly, the provisions of the Convention reflect a strong emphasis on the sectoral regulation of activities. Although the Convention does not exclude a coherent and holistic approach, and its Article 197 on cooperation for the protection and preservation of the environment would seem to provide an argument that such an approach should be pursued, the Convention indicates that the relevant fora for standard-setting are in a number of cases bodies with a sectoral focus, whose primary interest is not necessarily the protection and preservation of the marine environment. The fact that other fora have primary responsibility for standard-setting does not exclude that a regional environmental mechanism would consider specific issues. It does indicate, however, that coordination will be necessary. In that connection the question will have to be considered how to achieve coordination. This concerns such issues as the competence to identify and designate MPAs and the regulation of activities therein. What is for instance to happen if the designating body and other actors differ over the designation of a specific area or the consequences this has?

Developments in respect of MPAs in ABNJ at the global level

Part of the answer to the questions identified above can be found in developments since the Convention was adopted in 1982. International cooperation in the protection and preservation of the marine environment has proliferated in the last couple of decades. The establishment of

25 Art. 118 UNCLOS. The Fish Stocks Agreement identifies RFMOs (or arrangements) as the preferred vehicle of cooperation.
26 *Ibid.*
27 Art. 119(1)(a) UNCLOS. A similar approach is contained in Art. 119(2).
28 See also *infra* on the possibilities under the OSPAR Convention to address matters for which the OSPAR Convention does not provide regulatory powers.

MPAs has been on the political agenda since the beginning of the 1990s. The international community has committed itself to establishing a representative network of marine protected areas by 2012.[29] As far as issues transcending specific activities are concerned, most of the debate on MPAs in ABNJ at the global level has taken place within the framework of the UNGA and the CBD.[30]

A number of decisions by the Conference of Parties (CoP) to the CBD address MPAs in ABNJ. These decisions recognize the UNCLOS as the primary relevant legal framework for this issue and the UNGA's central role in addressing options for the establishment of MPAs in ABNJ.[31] In May 2008 the 9th CoP to the CBD adopted scientific criteria for identifying areas in need of protection in open-ocean waters and deep-sea habitats as well as scientific guidance for designing representative networks of MPAs and agreed to convene an expert workshop that will provide guidance to Parties and the United Nations in identifying important areas that need protection in ABNJ as well as in the use and further development of biogeographic classification systems.[32]

The UNGA has addressed the issue of MPAs in ABNJ in its recent resolutions on oceans and the law of the sea.[33] The UNGA has recognized that the protection of the marine environment in ABNJ requires the involvement of all relevant global and regional bodies. It is also noted that existing treaties and other relevant instruments can be used consistent with international law, in particular with the UNCLOS. In its latest resolution the UNGA has reaffirmed, among other things:

> 'the need for States to continue and intensify their efforts, directly and through competent international organizations, to develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems, including the possible establishment of marine protected areas, consistent with international law, as reflected in the Convention, and based on the best scientific information available, and the development of representative networks of any such marine protected areas by 2012.'[34]

The consideration in the UNGA has thus far not led to any elaboration of the general legal framework relevant to MPAs in ABNJ going beyond these calls for consistency with international law. The debate on the implications of the UNCLOS and international law generally for MPAs in ABNJ has mostly taken place in 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 (BBNJ Working Group), which was set up by the UNGA

29 Chapter 17 of Agenda 21 adopted at the 1992 Rio Summit called upon States to identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and to provide necessary limitations on use in these areas, through, *inter alia*, the designation of protected areas (Para. 17.85). The focus in this respect was, however, not on the deep seabed (see *ibid.*). As far as the impact of activities in ABNJ is concerned the focus of Agenda 21 is to a major extent on fisheries. The JPOI, *supra* note 1, Para. 32(c) made the commitment contained in Paragraph 17.85 of Agenda 21 much more explicit, calling for the establishment of MPAs consistent with international law and based on scientific information, including representative networks by 2012.

30 For a further discussion of the legal issues in respect of MPAs generally and in ABNJ see *e.g.* Frank, *supra* note 23, pp. 331-349; T. Scovazzi, 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations' 2004 *International Journal of Marine and Coastal Law* 19, pp. 1-17; H. Thiel, 'Approaches to the Establishment of Protected Area on the High Seas', in: A. Kirchner (ed.), *International Marine Environmental Law*, 2003, pp. 169-192.

31 See *e.g.* Decision VII/5 (2004) 'Marine and coastal biological diversity', Paras. 29-31.

32 Decision IX/20 (2008), 'Marine and coastal biodiversity', Paras. 14 and 19.

33 For the most recent statement in this respect see Resolution A/RES/63/111 Oceans and the law of the sea adopted on 5 December 2008 (A/RES/63/111 of 12 February 2009), Paras. 121-135.

34 *Ibid.*, Para. 134.

in 2004.[35] The BBNJ Working Group has thus far met twice, in February 2006 and in April-May 2008.[36]

The BBNJ Working Group in its consideration of this matter has not advanced much beyond the UNGA Resolutions as far as the general legal framework for MPAs is concerned. Two approaches to the management of MPAs have been advanced at the meetings of the Working Group. Some delegations have proposed a focus on multi-purpose MPAs as a key tool to manage biodiversity beyond national jurisdiction.[37] Such an approach could be realized by an implementing agreement under the UNCLOS that would include, among other things, a new regulatory regime for the establishment and management of MPAs in ABNJ.[38] Other delegations considered that the establishment of such protected areas should take place within the framework of existing regulatory regimes.[39] In that connection, the existing role of such bodies as the Food and Agriculture Organization (FAO), the IMO, the Authority, the CBD and regional seas conventions has been recognized.[40] Some delegations have also stressed the importance of recognizing regional differences and the need to develop area-based management tools on a case-by-case basis.[41]

The BBNJ Working Group has also considered how coordination between various bodies dealing with MPAs in ABNJ might be achieved.[42] It was considered that the UNGA could assume a leading role in the identification of criteria for the establishment of MPAs.[43] The role of the General Assembly might consist of the 'consideration of issues in relation to the designation of applicable measures, the development of management objectives, monitoring and enforcement'.[44] An approach giving a coordinating role to the United Nations and other global institutions was also advanced.[45] On the other hand, some delegations focused attention on the role of existing regional and sectoral bodies towards the identification and designation of areas in need of protection.[46]

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35 See Resolution A/RES/59/24 Oceans and the law of the sea adopted on 17 November 2004 (A/RES/59/24 of 4 February 2005), Para. 73, setting out the mandate of the working group.

36 See Report 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 (Doc. A/61/65 of 20 March 2006); and the Letter from the Co-Chairpersons, *supra* note 12.

37 Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 61; Letter from the Co-Chairpersons, *supra* note 12, Para. 30.

38 Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 61. Such an approach is advocated by the European Union (see also COM(2007) 575 final, of 10 October 2007, *An Integrated Maritime Policy for the European Union*, p. 14, where it is noted that the 'Commission will propose an Implementing Agreement of UNCLOS on marine biodiversity in areas beyond national jurisdiction and work towards successful conclusion of international negotiations on Marine Protected Areas on the high seas').

39 Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 61; Letter from the Co-Chairpersons, *supra* note 12, Para. 30.

40 Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 60; Letter from the Co-Chairpersons, *supra* note 12, Para. 30.

41 Letter from the Co-Chairpersons, *supra* note 12, Para. 31.

42 The 2008 meeting of the Working Group also devoted considerable attention to coordination and cooperation among States as well as international organizations in respect of the conservation and management of marine biodiversity in ABNJ in general (see the Letter from the Co-Chairpersons, *supra* note 12, Paras. 20-25).

43 Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 60; Letter from the Co-Chairpersons, *supra* note 12, Para. 29. At the 2006 meeting reference was also made to the Meeting of States Parties of the Convention (Report of the Ad Hoc Open-ended Informal Working Group, *supra* note 36, Para. 60). In view of the controversies over the mandate of the Meeting this does not seem to be a viable option. During the 16th Meeting of States Parties, one delegation suggested a central role for the Authority in the protection and preservation of the marine environment (Report of the sixteenth Meeting of States Parties (Doc. SPLOS/148 of 28 July 2006), Para. 63). See also the recent progress within the CBD described in the text accompanying note 31 *supra*.

44 Letter from the Co-Chairpersons, *supra* note 12, Para. 29.

45 *Ibid.*

46 *Ibid.*, Para. 30.

The OSPAR Convention and MPAs in ABNJ

The OSPAR Convention contains a set of basic rules and principles which are elaborated in its five Annexes and three accompanying Appendices. The four Annexes that were adopted together with the Convention deal with pollution from land-based sources (Annex I), pollution by dumping or incineration (Annex II), pollution from offshore sources (Annex III) and the assessment of the quality of the marine environment (Annex IV). Annex V on the Protection and Conservation of Ecosystems and Biological Diversity of the Maritime Area was adopted in 1998, together with Appendix 3 containing criteria for identifying human activities for the purpose of Annex V, and it entered into force in 2000. The main pillars to guide the implementation of the OSPAR Convention and its Annexes are the six strategies that were reaffirmed and updated in 2003, including the Biological Diversity and Ecosystems Strategy (OSPAR Biodiversity Strategy).[47]

Contrary to most of the other 'regional seas' conventions,[48] the OSPAR Maritime Area also encompasses sizeable ABNJ.[49] Most of these ABNJ are located to the west of the European mainland, the south of Iceland and the north of the Azores and this includes the northern part of the Mid-Atlantic Ridge (MAR).[50] The large spatial overlap of the OSPAR Maritime Area with the NEAFC Convention[51] Area and the ICES Convention[52] is conducive to integrated, cross-sectoral ecosystem-based ocean management. The existing and newly established cooperative arrangements between NEAFC, OSPAR and ICES are aimed at enhancing this conduciveness.[53]

There are currently 16 Parties to the OSPAR Convention: all coastal States bordering the North-East Atlantic[54] except the Russian Federation, three States (Finland, Luxembourg and Switzerland) that are located upstream on watercourses reaching the OSPAR Maritime Area and the European Community (EC). 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,

47 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic, Chapter I (OSPAR Agreement 2003/21; Summary Record OSPAR 2003, OSPAR 03/17/1-E, Annex 31).

48 These are the conventions established pursuant to the regional seas programme of the United Nations Environment Programme. Exceptions are the Barcelona Convention (Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, Barcelona, 10 June 1995, in force 9 July 2004, <www.unepmap.org>) and the Antarctic Treaty system. See also H. Dotinga & E. Molenaar, 'The Mid-Atlantic Ridge: A Case Study on the Conservation and Sustainable Use of Marine Biodiversity in Areas Beyond National Jurisdiction', *IUCN Marine Law and Policy Paper* no. 3 (2008), available at <www.iucn.org> and K. Gjerde *et al.*, 'Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction', *IUCN Marine Law and Policy Paper* no. 1 (2008), available at <www.iucn.org>), pp. 5-6.

49 See Art. 1(a) of the OSPAR Convention. For a depiction see <www.ospar.org>.

50 Three smaller high seas areas within the OSPAR maritime area are located in the Norwegian Sea (the 'Banana Hole'), the Barents Sea (the 'Loop Hole') and to the north of the 200-nautical-mile zone of Greenland (high seas enclave in the central Arctic Ocean). Most of the seabed of these areas is probably not part of the Area, but part of the coastal States' continental shelves beyond 200 nautical miles.

51 Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, London, 18 November 1980, in force 17 March 1982, 1285 *UNTS* 129; <www.neafc.org>. 2004 Amendments (Art. 18bis), London; 12 November 2004, not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <www.neafc.org>. 2006 Amendments, London (Preamble, Arts. 1, 2 and 4), 11 August 2006, not in force, but provisionally applied by means of the 'London Declaration' of 18 November 2005; <www.neafc.org>.

52 Convention for the International Council for the Exploration of the Sea, Copenhagen, 12 September 1964, in force 22 July 1968, 652 *UNTS* 237; <www.ices.dk>.

53 The Draft Memorandum of Understanding (MOU) between NEAFC and OSPAR as adopted by the OSPAR Commission is contained in Annex 13 to Summary Record OSPAR 2008, OSPAR 08/24/1-E, at Annex 13. See also Para. 7.23(f). The MOU entered into force on 5 September 2008.

54 Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom.

if necessary, the spatial scope of the Maritime Area can even be redefined.[55] Other States can also obtain observer status.[56] So far, this has not occurred.

The OSPAR Convention covers the regulation of all human activities which can have an adverse effect on the ecosystems and the biodiversity in the North-East Atlantic, with the explicit exception of fisheries management and with certain limitations for the regulation of shipping.[57] Nevertheless, while these limitations significantly restrain the competence of the OSPAR Commission to adopt effective programmes or measures for these activities, both maritime activities are given due consideration in the context of the assessment of the quality status of the marine environment in the region conducted in accordance with Article 6 of and Annex IV to the OSPAR Convention. These assessments are holistic in scope and include data on all human activities, including the effects of fisheries and shipping. Currently, a new Quality Status Report for the entire North-East Atlantic is being preparation and is due to be completed by 2010. The OSPAR Convention and Annex V, in particular, provide a comprehensive legal framework for the implementation of Part XII of the UNCLOS and the CBD and its work programme on marine and coastal biodiversity at a regional level.[58] The OSPAR Convention mandates the application of the precautionary principle, which is also seen as a central part of the ecosystem approach.[59]

The OSPAR Commission can adopt measures and programmes in the form of legally binding decisions, non-legally binding recommendations and other agreements[60] for all activities except fisheries and with some limitations for other activities such as shipping. These measures and programmes can apply to the entire Maritime Area or to a specific (sub-)region.[61] It should be noted, however, that so far the OSPAR Commission has not imposed measures on non-Parties.

Even though the OSPAR Convention does not explicitly refer to the ecosystem approach, the OSPAR Commission has defined it and agreed to apply it and to further develop the measures which are necessary for its implementation.[62] The OSPAR Commission has already developed a set of ecological quality objectives that (can) serve as a tool to implement the ecosystem approach (to date only applied to the North Sea, but their application to other parts of the North-East Atlantic is being considered). Other tools such as marine spatial planning are under consideration, but not yet operational.

It is also important to emphasize that Annex V allows the OSPAR Commission to adopt programmes and measures to safeguard against harm to marine ecosystems and biodiversity resulting from all other existing or new activities. This allows the OSPAR Commission to act as an 'authority by default' in the absence of a competent international organization at the global level and for new and emerging activities.[63] This has led, *inter alia*, to the adoption of the non-legally binding 'Code of Conduct for Responsible Marine Research in the Deep Seas and High Seas of the OSPAR Maritime Area' in 2008.[64]

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55 Art. 27(2) of the OSPAR Convention.
56 Art. 11 of the OSPAR Convention.
57 Art. 4 of Annex V to the OSPAR Convention.
58 Art. 2 of Annex V to the OSPAR Convention.
59 Art. 2(2)(a) of the OSPAR Convention and Art. 3(1)(b)(ii) of Annex V.
60 Arts. 10(3) and 13 of the OSPAR Convention.
61 Art. 24 of the OSPAR Convention. It should be noted that recommendations carry, in practice, almost the same weight as legally binding decisions and they are often endowed with similar features such as deadlines and reporting requirements. Arts. 10(3) and 13 of the OSPAR Convention.
62 The definition is contained in the Statement on the Ecosystem Approach to the Management of Human Activities (Joint Meeting of the Helsinki & OSPAR Commissions 2003, Record of the Meeting, Annex 5), Para. 5.
63 See also Dotinga & Molenaar, *supra* note 48, pp. viii and 14.
64 Summary Record OSPAR 2008, OSPAR 08/24/1-E, at Annex 6.

The Parties to the OSPAR Convention have agreed to establish a network of MPAs by 31 December 2010.[65] In accordance with its overall role under the Convention, the OSPAR Commission has a central role in implementing this objective. In its work on MPAs, the Commission has also addressed the establishment of MPAs in ABNJ. The procedures that have been adopted in respect of MPAs in areas within national jurisdiction and those in ABNJ illustrate some of the uncertainties that remain in the latter case. OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas envisaged that the network would consist of MPAs within national jurisdiction and in ABNJ.[66] The Recommendation recognizes that Contracting Parties are competent to designate MPAs in areas under their jurisdiction and to adopt management measures for such MPAs.[67] In respect of MPAs in ABNJ, however, the Recommendation only noted that MPAs in ABNJ might be included in the network.[68] Further guidance in respect of MPAs in ABNJ in the OSPAR Maritime Area was included in the 2003 Strategies of the OSPAR Commission.[69] This document requires the OSPAR Commission to undertake a number of actions to complement those of the Contracting Parties. One such action is:

> 'to consider reports and assessments from Contracting Parties and observers on possible components of the OSPAR network and on the need for protection of the biodiversity and ecosystems in the maritime area outside the jurisdiction of the Contracting Parties, in order to achieve the purposes of the network as described in paragraph 2.1 of OSPAR Recommendation 2003/3.'[70]

Following the consideration of such reports and assessments, the Commission is charged:

> 'if appropriate, and in accordance with [the Convention], [to] consider, in consultation with the international organisations having the necessary competence, how such protection could be achieved for areas identified (…) and how to include such areas as components of the network.'[71]

This approach is much more reserved in identifying the competent bodies to designate MPAs than is the case for MPAs in areas under national jurisdiction. Although OSPAR Recommendation 2003/3 recognizes that coastal States are not competent to unilaterally regulate certain matters in waters within national jurisdiction,[72] this was apparently not considered to exclude the designation of MPAs by States individually.[73] On the other hand, Agreement 2003/21 does not accord the OSPAR Commission the same role as individual States in areas within national jurisdiction, but instead indicates that the process after the identification of a potential MPA has to be carried out in consultation with the competent international organizations. That procedure, which might involve half a dozen or more organizations, might make the whole process rather

65 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas requires the OSPAR Commission to develop and evaluate by 2010 an ecologically coherent network of well-managed protected areas in the maritime area.
66 Para. 1.1.
67 OSPAR Recommendation 2003/3, Para. 3. On the latter point see also the discussion included below.
68 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, Para. 1.1.
69 OSPAR Agreement 2003/21, *supra* note 47.
70 *Ibid.*, Chapter I, Para. 4.4(d).
71 *Ibid.*
72 OSPAR Recommendation 2003/3, Para. 3.3(b)(ii).
73 For an example of limitations on coastal State powers in this respect see Art. 211(6) UNCLOS.

cumbersome, but much will depend on how the consulting requirements will be implemented in practice.

Currently, work in the OSPAR Commission on MPAs in ABNJ of the OSPAR Maritime Area is concerned with two closely connected topics. A number of areas in ABNJ have been identified as potential sites for MPAs. Secondly, the OSPAR Commission and its subsidiary bodies have been considering the procedures to be followed in designating MPAs in ABNJ and how a regulatory regime should be adopted and implemented. Currently, eight sites of potential MPAs in ABNJ are under consideration.[74] The consideration of one of those areas on the Mid-Atlantic Ridge/Charlie Gibbs Fracture Zone (MAR/CGFZ) is the furthest advanced.[75] The proposal for an MPA on the MAR/CGFZ was first tabled by the World Wildlife Fund (WWF) in 2006, but it is currently also sponsored by Germany, France, the Netherlands and Portugal.[76] During its 2008 Meeting, the OSPAR Commission considered how the proposal for an OSPAR area of interest for establishing an MPA on the MAR/CGFZ could be taken forward.[77] The Contracting Parties expressed substantial political support for further work on the proposal[78] and the OSPAR Commission approved the CGFZ/MAR as a potential MPA in ABNJ.[79] The Commission agreed on a roadmap setting out considerations and steps leading up to the possible adoption of MPAs in ABNJ at the OSPAR Ministerial Meeting scheduled for 2010.[80] Although the roadmap is drawn up in connection with future work on the MAR/CGFZ, 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.[81] The roadmap indicates that contacts with other organizations (for example NEAFC, IMO, FAO, the North Atlantic Treaty Organization (NATO), the North Atlantic Marine Mammals Commission (NAMMCO), the North Atlantic Salmon Conservation Organization (NASCO), the Authority and the United Nations Division on Ocean Affairs and the Law of the Sea (DOALOS)) are necessary to obtain information on activities and existing and available measures under their mandates. Subsequently, the proposal for an MPA is to be submitted to the relevant competent organizations to solicit their comments. Finally, when the proposal for an MPA will be further evaluated in the framework of the OSPAR Convention, it has to be established if the proposal takes due account of the responses of the competent organizations. The roadmap indicates that the actual process of establishing the content of the

74 See *Update on progress in establishing marine protected areas in the OSPAR maritime area beyond national jurisdiction* (Presented by Germany as the Chair of the Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA) (OSPAR 08/7/10-E, Para. 4 and Fig. 1)). The boundaries of seven of the areas have not yet been defined. A possible legal complication in respect of a number of these sites is that they are located in the proximity of the continental shelf beyond 200 nautical miles (see *Areas beyond national jurisdiction (ABNJ)* (presented by the Executive Secretary) (OSPAR 08/7/8-E), Para. 20). Until a coastal State has finally established the outer limit of its continental shelf beyond 200 nautical miles in accordance with Art. 76 UNCLOS, uncertainty is bound to exist concerning the exact extent of that continental shelf beyond 200 nautical miles. In view of the differences in the legal regime of the continental shelf and the Area and the consequences which States have drawn from those differences for designating and managing MPAs, that uncertainty is bound to complicate the designation and management of MPAs. The UNCLOS does not provide an interim solution to be applied in the absence of final limits of the continental shelf.

75 For the location of this proposed MPA see *e.g. Proposal for an OSPAR area of interest for establishing an MPA on the Mid Atlantic Ridge/Charlie Gibbs Fracture Zone* (Presented by WWF, the Netherlands and Portugal) (OSPAR 08/7/9-E), p. 3. The recent submission of Iceland of information on the limits of its continental shelf beyond 200 nautical miles in accordance with Art. 76 UNCLOS (see <http://www.un.org/Depts/los/clcs_new/submissions_files/isl27_09/isl2009executivesummary.pdf>) indicates that the continental shelf of Iceland overlaps to a considerable extent with the area of this proposed MPA. The authors of this article are not aware that Iceland has made reference to this overlap in the framework of the OSPAR Commission or NEAFC.

76 Information provided by A. van der Schans, 2 March 2009.

77 See OSPAR 08/7/9-E, *supra* note 75.

78 Denmark indicated at the meeting that it reserved it position with respect to the Faroe Islands and Greenland.

79 Summary Record OSPAR 2008; (OSPAR 08/24/1-E), Para. 7.24.

80 *Ibid.*

81 See *General outline of roadmap for further work on the Charlie Gibbs Fracture Zone (CGFZ)/Mid Atlantic Ridge proposal 2008/09* (*ibid.*, Annex 10).

management regime is to be developed by OSPAR bodies. This concerns, among other things, the definition and adoption of conservation objectives, the consideration of appropriate associated protective management measures and examining the initial considerations on monitoring requirements. In this regard, it must be assumed that OSPAR's role will not extend beyond that of an initiator and will respect the mandate of other competent global and regional organisations. The final step that is envisaged by the roadmap is the consideration by the OSPAR Meeting of 2009 'whether the proposal is ready for adoption and identify steps to be taken to prepare for establishing MPAs in ABNJ as part of the OSPAR network at the 2010 Ministerial Meeting.'[82]

The work under the OSPAR Convention assessed against the global legal framework

The designation of MPAs in ABNJ as part of an *OSPAR network by* the OSPAR Ministerial Meeting raises a host of legal and policy questions, such as the competence of the OSPAR Commission to designate MPAs in ABNJ and the consequences that would flow from such a designation for Parties and non-Parties to the OSPAR Convention and intergovernmental organizations having regulatory competence with respect to specific activities in ABNJ.

The OSPAR Commission has addressed the process of establishing MPAs, both in areas within national jurisdiction and in ABNJ through the adoption of non-legally binding instruments, but OSPAR's Jurists and Linguists Group has suggested that the legal procedure for OSPAR to designate MPAs in ABNJ would be an OSPAR Decision,[83] which is legally binding for the Parties to the Convention.[84] On the other hand, that decision would not modify the rights and obligations of non-Parties.[85] However, it may not be as simple as that. The UNCLOS contains a number of provisions on its relationship with other legally binding instruments, which results in specific rights and obligations of States Parties to the UNCLOS when acting outside the UNCLOS's regime. Article 237 provides that Part XII of the Convention is without prejudice to agreements which relate to the protection and preservation of the marine environment, which may be concluded in the furtherance of the general principles of the Convention. Specific obligations under such conventions should be carried out in a manner which is consistent with the general principles and objectives of the UNCLOS. A similar obligation is contained in Article 311(2) of the Convention, which is applicable to all international agreements, and which provides:

> 'This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.'

Article 311 of the UNCLOS goes as far as to allow two or more States Parties to conclude agreements modifying or suspending the operation of the provisions of the UNCLOS *inter se*. However, in this case conditions also apply:

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82 *Ibid.*

83 See the summary records of the Meeting of the Working Group on Marine Protected Areas, Species and Habitats (MASH) Baiona (Spain): 21-24 October 2008 (Doc. MASH 08/8/1, Para. 5.14(e)).

84 As already noted, Art. 13 of the OSPAR Convention envisages that the OSPAR Commission can also adopt legally binding decisions.

85 In that respect, an interesting parallel can be drawn with the designation of MPAs in areas within national jurisdiction. Coastal States are not competent to exhaustively regulate all activities in areas within national jurisdiction. However, there does not seem to be any opposition to the competence of the coastal State to designate holistic MPAs as such. However, for the implementation of measures to effectively regulate specific activities, such as shipping, the coastal State may have to rely on the relevant international regulatory frameworks.

> 'provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.'[86]

The gist of these provisions is that the UNCLOS leaves States a wide margin of discretion to conclude agreements *inter se*, but such agreements shall not affect the rights and obligations of other States and have to be in accordance with the general principles of the UNCLOS.

Without going into a detailed discussion on the implications of these provisions of the UNCLOS, which lead to interesting legal questions such as when rights and obligations of other States are *affected*, it is submitted that they do not allow a simple yes or no with regard to the question whether two or more States are allowed to agree on legally binding instruments providing for the designation and management of an MPA in ABNJ. Such an answer will only be possible on the basis of a careful assessment of each individual case. In that respect it is possible to set out some general considerations. The point of departure of that analysis is that such action is allowed as long as it is compatible with the abovementioned provisions of the UNCLOS or other rules of international law. Secondly, Article 197 UNCLOS, discussed previously, lends support to the possibility of action at the regional level to protect the marine environment of ABNJ. To define the parameters for such regional action, an interesting analogy is provided by the regime for fisheries on the high seas.[87] The management of specific fisheries in general takes place in the framework of RFMOs or arrangements, but certain questions of a fundamental nature have been addressed at the global level at the UNGA or the FAO.[88] In the case of MPAs in ABNJ, this might be translated into the formulation of general principles at the global level and the identification and designation of areas at the regional level. To assure the acceptability of the latter approach, the process at the regional level should be transparent and allow for accountability and be in accordance with generally accepted procedures and standards.

Thirdly, in principle nothing under general international law prevents States from restricting the activities of their vessels or natural and legal persons in certain ABNJ or the maritime zones of other States.[89] This becomes different when such States – acting individually or collectively – exert pressure on vessels or natural or legal persons of other States to comply with such restrictions. It should in this context be noted that the mandates and legitimacy of the IMO and RFMOs are in principle beyond doubt and their spatial measures are therefore capable – at least potentially – of affecting the rights and freedoms of third States, even if not through non-flag enforcement on the high seas. By contrast, the current international legal framework relating to ABNJ does not assign a clear mandate to specific organizations or provide for a process for the designation of holistic MPAs as well as for the regulation of all human activities therein. In

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86 Art. 311(3) UNCLOS. Further conditions are contained in Paras. (4) to (6) of Art. 311.

87 See also R. Rayfuse & R. Warner, 'Securing a Sustainable Future for the Oceans Beyond National Jurisdiction: the Legal Basis for an Integrated Cross-Sectoral Regime for High Seas Governance for the 21st Century', 2008 *International Journal of Marine and Coastal Law* 23, pp. 399-421 at p. 411.

88 See also *supra* the discussion of the provisions of Part VII of the UNCLOS on fisheries.

89 See in this regard Council Regulation (EC) No. 734/2008 of 15 July 2008 on the protection of vulnerable marine ecosystems in the high seas from the adverse impacts of bottom fishing gears, *OJ* L 201/8, 30.7.2008, in particular Art. 8 entitled 'Area closures'. This Council Regulation implements Paras. 80-86 of UNGA Resolution A/RES/61/105 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 of 8 December 2006 (Doc. A/RES61/105 of 6 March 2007).

the absence of these, the designation of MPAs in ABNJ and the regulation of activities therein which do not have due regard for, or unjustifiably affect, the ability of third States to exercise the freedoms of the high seas will not be consistent with the UNCLOS and will thereby undermine the MPAs' ability to achieve their objectives.

A specific management regime for an area will require coordination between different organizations with management competencies in respect of the area concerned and the adoption of concrete measures by those organizations. A regional instrument such as the OSPAR Convention, which has competence to address all questions related to the protection and presentation of the marine environment, is the obvious candidate to coordinate the management of MPAs within its area of application. This would allow for a holistic approach, taking into account the combined impacts of all human activities (and natural phenomena, such as climate change) on the ecosystem. Agreement on this general premise may not be that difficult to attain. The other major question is how non-Parties and other organizations would have to deal with the position of a coordinating institution that specific measures would be required to effectively manage an MPA in ABNJ.[90] In that respect, participation in the various organizations will also play a role. States Parties to the relevant regional environmental instrument would be (legally or politically) bound by the commitments under that instrument. They will have to take these commitments into account in other frameworks. The difficulty which may arise in that respect is if different instruments might seem to require different actions from a State which is a party to both instruments. To give one example, could a State that is a party to an regional environmental agreement which has designated an MPA in ABNJ in the Authority vote against a decision to approve a mining operation, which is in accordance with all relevant provisions of the UNCLOS and regulations adopted by the Authority?

Another interesting aspect of the actions under the OSPAR Convention is the relationship between the proposals for MPAs in ABNJ – in particular the MAR/GCFZ proposal – and the international legal and policy framework for the governance and regulation of marine biodiversity in ABNJ. As already noted, some States see holistic MPAs in ABNJ as one of the principal features of a future implementing agreement to the UNCLOS.[91] The co-sponsors of the MAR/GCFZ are among these States and view the MAR/GCFZ proposal as a pilot project in this context.[92]

Concluding remarks

This article has shown that an effective regime for ABNJ in general and also for holistic MPAs in ABNJ requires complementary action at the global and regional levels. A coherent global general framework is desirable to ensure consistency between regional practices. The implementation of that general framework will always have an important regional component as it is simply not feasible to address this matter exhaustively at the global level. The analysis of the present global framework shows that it leaves ample scope for different approaches to set up a

90 In that respect it can be noted that the mandate provided by the UNCLOS to regional marine environmental protection organizations is much more limited than the mandate provided by the Fish Stocks Agreement to RFMOs and Arrangements with respect to their capacity to affect the behaviour of third States (see in particular Parts III and IV of the Fish Stocks Agreement).

91 See note 38 *supra* and accompanying text.

92 See also the 'stewardship objectives' listed in doc. MASH 08/8/1, Annex 6 'Background document on the conservation objectives for the potential OSPAR Marine Protected Area in the Charlie Gibbs Fracture Zone'. Reference can also be made to K. Gjerde *et al.*, 'Options for Addressing Regulatory and Governance Gaps in the International Regime for the Conservation and Sustainable Use of Marine Biodiversity in Areas beyond National Jurisdiction', *IUCN Marine Law and Policy Paper* no. 2 (2008), available at <www.iucn.org>), pp. vii and 8-9 on pilot MPA projects.

more detailed regime for the management of ABNJ and the OSPAR approach is without doubt one option in that respect.

The efforts under the OSPAR Convention to establish MPAs in ABNJ provide a fascinating example of the interaction between the regional and global level in the development of international law. On the one hand, if pursued carefully – among other things 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.