

Cooperation During the Designation and Management of the Dogger Bank

Analysis of Applicable Legal Instruments, Degree of Implementation and Possible Future Scenarios

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Keywords

Environmental law, Marine Protected Areas, Dogger Bank, International cooperation, Cooperation requirements.

Abstract

The Dogger Bank is a potential transboundary marine protected area (MPA) located in Dutch, German, Danish and UK waters. International and EU legal instruments contain provisions requiring cooperation during the designation and protection/management of the Dogger Bank as an MPA. Many of the cooperation requirements are not specified; therefore, Member States are left with a certain discretion as to the extent and form of the implementation of the required cooperation. Since this cooperation began taking place, the required standards seem to be being met. However, the exact meaning of the requirement for cooperation included in the Marine Strategy Framework Directive (MSFD) is questionable; it remains to be seen whether the current cooperation complies with this Directive. In order to optimise the current cooperation practice, an increasing role for the European Commission (EC) and the Habitats Committee within the process of the designation and management of the Dogger Bank as an MPA could be strived for. Furthermore, when looking at the relevant legal instruments an amendment of Oslo-Paris (OSPAR) Recommendation 2003/3 provides an option to further establish a specific legal basis for cooperation.

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I. Introduction

The designation and protection/management of marine protected areas (MPAs) among other means, are being used to improve the environmental situation in the North Sea.¹ Currently a protected area is considered by the International Union for Conservation of Nature (IUCN) as '[a] clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values'.²

Because of the transboundary nature of the marine environment, ecologically important sites that cross state boundaries exist, such as the Dogger Bank; the Dogger Bank is located in the exclusive economic zone (EEZ) of Germany, the UK, Denmark and the Netherlands. It can be described as a shallow sea area in the southern central North Sea which is about 300 km in extension and ranges in depth between 18 to more than 40 meters.³ The area can be characterised by the presence of a richer fauna bank and more and larger animals of a range of species occur on this bank when compared to more southerly sandbanks.⁴ As a result of the ecological features of this area, the Dogger Bank qualifies for designation as an MPA by several North Sea coastal states.

Since the Dogger Bank crosses boundaries of state jurisdiction, cooperation between the involved states is needed; proposals for designation will not only affect the initiating state but also the neighbouring countries.⁵ After designation, human activities and their impact on MPAs have to be regulated and managed. During transboundary cooperation, the interconnectedness and complexity of marine ecosystems can be taken into account and states can overcome barriers of diverging jurisdictions.⁶ Because of this, transboundary cooperation during the designation and protection/management of MPAs can improve the effectiveness of MPAs.⁷

This article focuses on cooperation during the designation of the Dogger Bank as a transboundary MPA and on cooperation during the protection/management of the area after designation.⁸ To begin with, the legal framework regarding (transboundary) MPAs will be analysed concerning the extent to which cooperation is required during the designation and protection/management of MPAs. Thereafter, the implementation of the identified cooperation obligations will be discussed. In addition, this article will consider the question of how the Member States could proceed in order to optimise transboundary cooperation regarding the designation and protection/management of the Dogger Bank. This is followed by a conclusion.

II. Cooperation requirements

The designation and protection/management of the Dogger Bank is covered by several international and EU legal instruments. Those legal instruments relevant to the designation and protection/management of the Dogger Bank are analysed regarding the extent to which they require cooperation.

A. International cooperation requirements

Global conventions that outline cooperation requirements applicable to the designation and protection/management of the Dogger Bank are the United Nations Convention on the Law of the Sea⁹ (UNCLOS), the Convention on Biological Diversity¹⁰ (CBD) and the Bonn Convention on the Conservation of the Migratory Species of Wild Animals¹¹ (CMS). For the protection and preservation of the marine environment, UNCLOS requires States Parties to cooperate on a global basis and

1 D d'A Laffoley (ed), *Towards Networks of Marine Protected Areas. The MPA Plan of Action for IUCN's World Commission on Protected Areas* (IUCN WCPA Switzerland, Gland 2008) 7.

2 *ibid* 7.

3 WWF Germany *Managing Across Boundaries: The Dogger Bank – a Future International Marine Protected Area* (Report) (September 2004) 19.

4 S Gubbay, MC Baker and BJ Bett *The Darwin Mounds and the Dogger Bank - Case Studies of the Management of Two Potential "Special Areas of Conservation" in the Offshore Environment* (Report) (May 2002) 39.

5 G Kelleher, *Guidelines for Marine Protected Areas* (Island Press 1999) 2.

6 WWF Germany (n 3) 6.

7 WWF Netherlands *The Dutch Case - A Network of Marine Protected Areas* (Report) (February 2008) 39.

8 For an overview of the designation of MPAs in the North Sea by the Netherlands, see HM Dotinga and A Trouwborst, 'The Netherlands and the designation of marine protected areas in the North Sea, Implementing international and European law' (2009) 5(1) *Utrecht Law Review* 21.

9 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 14 November 1994) 21 ILM 1261 (UNCLOS).

10 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 31 ILM 818 (CBD).

11 Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) 19 ILM 15 (CMS).

as appropriate on a regional basis, directly or through competent international organisations.¹²

The CBD, which contains a positive legal duty to designate MPAs,¹³ states that '[e]ach Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity'.¹⁴ It should be noted that the formulation of this provision leaves states with considerable discretion as to the extent and form of cooperation. With regard to cooperation and protected areas Conference of Parties (COP) Decision VII/28¹⁵, though not legally binding, is important to consider. In this decision it is recognised that in order to provide an enabling policy, institutional and socio-economic environment for protected areas Parties have to '[c]ooperate with neighbouring countries to establish an enabling environment for transboundary protected areas and for neighbouring protected areas across national boundaries and other similar approaches including regional networks'.¹⁶

According to the CMS, Parties have to cooperate by the establishment of AGREEMENTS (agreements for migratory species which have an unfavourable conservation status and which require international agreements for their conservation and species which would significantly benefit from international cooperation) and agreements (agreements to protect species that would benefit from international cooperation but are not (yet) listed as species with an unfavourable conservation status that would significantly benefit from international cooperation).¹⁷ It should be noted that the success of the Convention depends on the conclusion of these agreements¹⁸ and therefore highly depends on international cooperation. Relevant AGREEMENTS for the Dogger Bank are: Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (ASCOBANS)¹⁹ and AEW A. ²⁰ AGREEMENTS should provide for coordinated conservation and management plans.²¹ According to Article 2(1) ASCOBANS the Contracting Parties have 'to cooperate closely in order to achieve and maintain a favourable conservation status for small cetaceans'.²² AEW A requires Contracting Parties to 'take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status'²³ and states that parties have to 'coordinate their efforts to ensure that a network of suitable habitats is maintained'.²⁴ This coordination is especially important when wetlands extend over the area of more than one Party to the AEW A Agreement.²⁵

The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention)²⁶ and the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)²⁷ are regional conventions relevant when considering cooperation requirements during the designation and protection/management of the Dogger Bank.

The OSPAR Convention aims to prevent and eliminate pollution and to protect the maritime area against the adverse effects of human activities. Concerning requirements for cooperation, it is important to note that 'Annex V on the protection and conservation of ecosystems and biological diversity of the maritime area' of the OSPAR Convention states that Parties have to cooperate in adopting programmes and measures for the control of the human activities identified by the application of

12 UNCLOS, art 197.

13 V Frank, *The European Community and Marine Environmental Protection in the International Law of the Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff Publishers 2006) 278.

14 CBD, art 5.

15 Adopted at the Seventh Meeting of the Conference of the Parties (COP) to the Convention on Biological Diversity.

16 CBD COP 7, 'Decision VII/28 Protected Areas' (2004), arts 8 (a)-(e), para 3(1)(11).

17 CMS, art IV.

18 P Birnie, A Boyle and C Redgwell, *International law & the environment* (3rd edn, Oxford University Press 2009) 681.

19 Agreement on the Conservation of Small Cetaceans of the Baltic, North East Atlantic, Irish and North Seas (adopted 17 March 1992, entered into force 29 March 1994) <www.cms.int> (ASCOBANS).

20 Agreement on the Conservation of African-Eurasian Migratory Waterbirds (adopted 16 June 1995, entered into force 1 November 1999) <www.cms.int> (AEWA).

21 CMS, art V(5)(b).

22 ASCOBANS, art 2(1).

23 AEW A, art II.

24 AEW A, art III(2)(d).

25 *ibid.*

26 Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998) 32 ILM 1072 (OSPAR).

27 Convention on the Conservation of European Wildlife and Natural Habitats (adopted 19 September 1979, entered into force 1 June 1982) European Treaty Series 104 (Bern Convention).

the criteria in Appendix 3.²⁸ With regard to this, Frank has stated that ‘Annex V does not contain detailed obligations for contracting Parties, but leaves them with ample discretion concerning whether and how to act’.²⁹ Frank also indicated that the required cooperation is primarily taking place within the Biodiversity Committee.³⁰ It can be argued that Annex V to the OSPAR Convention contains a general requirement for cooperation that applies to the protection and conservation of ecosystems and biological diversity of the maritime area.

In addition to Annex V, Recommendation 2003/3 on a Network of Marine Protected Areas is also important to consider. This non-legally binding recommendation has the purpose of establishing a network of MPAs in the OSPAR maritime area.³¹ No further detailed cooperation requirements are incorporated in this Recommendation. It can be concluded that pursuant to the OSPAR Convention cooperation is required but that in case of the designation and protection/management of MPAs the required cooperation is not further specified regarding the extent and form of cooperation.

The Bern Convention aims ‘to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the cooperation of several States, and to promote such cooperation’.³² In a non-binding recommendation established under this Convention, the objective to establish a pan-European network of protected areas (the Emerald Network) is formulated.³³ The Bern Convention places emphasis on cooperation in general; Parties have to undertake to coordinate as appropriate their efforts for the protection of the natural habitats of the wild flora and fauna species when these are situated in frontier areas.³⁴ Furthermore, it is stated that when carrying out the provisions of the Convention ‘the Contracting Parties undertake to co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under other articles of this Convention’.³⁵ These provisions entail obligations of effort and not obligations of result.

With regard to cooperation requirements applicable to the Dogger Bank included in international conventions, it can be concluded that as in case of the CBD, they often include formulations such as ‘as far as possible and as appropriate’. Backes et al. state that the importance of international conventions depends on how concrete the obligations of a convention are formulated.³⁶ It can be said that most provisions regarding cooperation found in international legal instruments are quite generic and the implementation thereof is not further specified. The formulation of these international provisions requiring cooperation leaves states with considerable discretion as to the extent and form of the implementation. Still, international conventions do require cooperation and Parties to these Conventions have to comply with the included obligations of conduct.

An international convention where the requirement for cooperation is further specified is the CMS. By requiring the establishment of agreements the CMS has specified and operationalized the included cooperation requirement. However, one should keep in mind that this Convention focuses on the conservation and effective management of certain migratory species and their habitats and not on the designation and protection/management of MPAs.

B. European cooperation requirements

With regard to cooperation requirements applicable to the designation of the Dogger Bank it is important to emphasize that the Habitats Directive,³⁷ requiring the establishment of a coherent European ecological network of protected sites,³⁸ does not provide a direct legal requirement for cooperation during the designation and protection/management of Natura 2000 sites. However, the requirement of a *coherent* network could imply a need for cooperation.

When designating Natura 2000 areas pursuant to the Habitats Directive, the Commission is involved. Member States have to propose Sites of Community Importance (SCIs). The ‘Guidelines for the establishment of the Natura 2000 network in the marine environment’ state that the ecological coherence of the Natura 2000 network *may* be used as an additional selection

28 OSPAR, annex V art 2(b).

29 Frank (n 13) 284.

30 *ibid.*

31 OSPAR Recommendation 2003/3: OSPAR Recommendation on a Network of Marine Protected Areas (2003) art 2(1).

32 Bern Convention, art 1.

33 Council of Europe Recommendation No. 16: Recommendation of the Standing Committee on Areas of Special Conservation Interest (1989).

34 Bern Convention, art 4(4).

35 Bern Convention, art 11(1)(a).

36 ChW Backes, AA Freriks and J Robbe, *Hoofdflijnen natuurbeschermingsrecht* (Sdu Uitgevers bv 2009) 43.

37 Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora [1992] OJ L 206 (Habitats Directive).

38 Habitats Directive, art 3(1).

principle for Member States when designating Natura 2000 areas.³⁹ Based on the suggestions of Member States, the Commission adopts a list of SCIs on the basis of criteria set out in Annex III (Stage 2) of the Habitats Directive.⁴⁰ Thereafter, it is for the Member States to designate the SCIs listed by the EC as a Natura 2000 site.

In order to adopt a list of SCIs the Commission has to make an assessment of the Community importance of the sites included on the national lists.⁴¹ The criteria to be considered by the Commission include the contribution to the coherence of the Natura 2000 network.⁴² Proposed Sites of Community Interest (pSCI) playing a relevant role to ensure the coherence (as well structural and functional) of the Natura 2000 Network should be more likely to be designated as Natura 2000 sites.⁴³ Playing a relevant role includes, among others, sites which constitute sets of pSCIs covering a continuous ecosystem situated on both sides of one or more internal Community frontiers.⁴⁴ From this it can be deduced that Natura 2000 sites are intended to contribute to the coherence of the protected network, but that it is mainly up to the Commission to ensure this coherence. However, the 'Guidelines of the European Commission for the establishment of the Natura 2000 network in the marine environment' state that ensuring coherence of proposed SCIs and SPAs⁴⁵ will be undertaken by the Commission in partnership with the Member States concerned.⁴⁶ This indicates that Member States also have a certain responsibility for the establishment of a coherent network of protected areas. In order to achieve coherence cooperation is needed. Therefore, it can be argued that an indirect requirement for cooperation during the designation of the Dogger Bank can be found in the Habitats Directive.

These non-binding guidelines of the EC also state that establishing boundaries of SPAs that extend into the maritime zones of two or more Member States need to be subject of cooperation.⁴⁷ When considering the need for cooperation according to the Habitats Directive, the aim of the Directive - to create a coherent network of protected areas⁴⁸ - should be emphasized. This aim points out coherence as an important aspect for Member States to take into account. This creates an obligation for Member States to cooperate. The question remains how strict this legal obligation for cooperation is since no further clarification of the meaning of 'coherent' can be found in the Directive or guidelines to the Directive.

With regard to the requirement of coherence it should be noted that one of the criteria of Annex III of the Habitats Directive, which Member States have to consider when selecting SCIs, is a measure of how typical a site is for a particular habitat.⁴⁹ The guidance document 'Criteria for assessing national lists of pSCI at biogeographical level' states that the selected sites have to cover 60% of the distribution of a given habitat type or a given species.⁵⁰ This suggests that as long as 60% of a habitat type is covered, Member States have a justified reason not to designate a certain area. Therefore, it seems unlikely that the Commission can require Member States to include a particular site on the national list of protected sites because of coherence. However, since no such case has yet occurred the point of view of the EC remains unknown.

Besides the Habitats Directive, the relatively new Marine Strategy Framework Directive (MSFD)⁵¹ is important to consider with regard to EU cooperation requirements applicable to the designation and protection/management of the Dogger Bank as an MPA. This Directive provides a clearer legal basis for cooperation.

The Dogger Bank is located in the subregion of the MSFD 'the Greater North Sea'. According to Article 5 of the MSFD, Member States sharing such a subregion have to cooperate to ensure that the marine strategies of all involved states are coherent and coordinated across the marine subregion concerned, in order to achieve or maintain a good environmental status.⁵²

39 Commission, 'Guidelines for the Establishment of the Natura 2000 Network in the Marine Environment: Application of the Habitats and Birds Directives' COM (2007) 45.

40 Habitats Directive, art 4(2).

41 Habitats Directive, annex III Stage 2.

42 Habitats Directive, annex III Stage 2(2).

43 Habitats Committee, 'Criteria for Assessing National Lists of pSCI at Biogeographical Level' (1997) Hab 97/2 rev 4 6.

44 *ibid.*

45 SPAs: Special Protection Areas which are classified under article 4 of the Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [1979] OJ L 103 (Birds Directive) and are part of the Natura 2000 network.

46 Commission (n 39) 23.

47 *ibid* 75.

48 Habitats Directive, Preamble and art 3.

49 Habitats Directive, annex III Stage 1 A(a).

50 Habitats Committee (n 45).

51 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for Community action in the field of marine environmental policy [2008] OJ L 164 (MSFD).

52 MSFD, art 5(2).

This obligation makes use of the term 'shall' which indicates a strict legal obligation.⁵³ Because of this it can be said that Member States have individual (the establishment of for instance marine strategies) and shared (the requirement of coordination and cooperation) responsibilities.⁵⁴ The obligation to cooperate amongst Member States can be seen as an obligation of result.⁵⁵ Member States *shall* cooperate in order to achieve the result of coherent and coordinated marine strategies.

The required cooperation should be in accordance with a plan of action described in Article 5(2). For this plan of action Member States concerned are expected to endeavour to follow a common approach. The use of the wording *endeavour* indicates this concerns an obligation of effort. However, the fact remains that Member States are required to cooperate to ensure coherent and coordinated marine strategies. This cooperation requirement applies to all measures taken to achieve the aim of the Directive⁵⁶ and since the designation and protection/management of MPAs pursuant the Birds and Habitats Directive can be considered to be part of these measures;⁵⁷ it can be stated that the cooperation requirement of the MSFD also applies to the designation and protection/management of Natura 2000 sites. This indicates that the requirement for cooperation included in the MSFD can have far reaching consequences. However, as the terms 'coherent and coordinated' are not clarified, their exact meaning remains unknown. It is still questionable whether the requirement for coherent and coordinated measures entails that Member States have to cooperate to ensure that transboundary sites are designated as an MPA by all involved Member States and whether conservation objectives and management measures have to correspond. Looking at the aim of the Directive and the importance given to cooperation during the preparation and development of programmes of measures, it seems reasonable that the intention was for transboundary sites to be required to be designated by all involved Member States. As case-law is lacking, no final conclusion can be drawn regarding this question.

In order to ensure the cooperation as described above, Member States shall, where practical and appropriate, use existing regional institutional cooperation structures.⁵⁸ For the North Sea the MSFD refers to the OSPAR Convention.⁵⁹

Also the Common Fisheries Policy (CFP) should be mentioned when considering EU cooperation requirements during the designation and protection/management of the Dogger Bank. The management of fisheries is under the exclusive competence of the EU implying that measures taken in the framework of the CFP are decided in a coordinated manner at EU level. Cooperation on the management of fisheries in the Dogger Bank therefore significantly differs, and should be distinguished from, cooperation on other management aspects of MPAs.

III. Implementation

Before considering the actual cooperation practice by the involved Member States, it should be noted that differences exist regarding the progress made by the respective Member States on the designation and protection/management of the Dogger Bank. The German part of the Dogger Bank has had the status of SCI since 2008.⁶⁰ From December 2009, the Dutch part of the Dogger Bank achieved the status of SCI. Before the area can be legally designated as a Natura 2000 site, the Dutch Nature Conservation Act needs to be amended in order to be applicable in the Dutch EEZ. It is expected that the Dutch part of Dogger Bank will be designated in 2011. The part of the Dogger Bank located in the UK is intended to be submitted to the European Commission (EC) as an SCI in 2011.⁶¹ This shows the differences in timelines followed by the respective Member States regarding the designation of the Dogger Bank as a Natura 2000 site. Differences can also be identified related to the formulation of conservation objectives. With regard to this it is most important to mention that the general objectives for habitat type 1110 of Germany⁶² include the words recover and restore.⁶³ The UK aims to restore while the Netherlands

53 Commissie van Advies inzake de Waterwetgeving, 'Kaderrichtlijn mariene strategie : kansen voor het mariene milieu' (2007) <www.cawsw.nl> accessed 17 March 2010.

54 *ibid* 19.

55 E Hey, 'Multi-Dimensional Public Governance Arrangements for the Protection of the transboundary Aquatic Environment in the European Union: The Changing Interplay between European and Public International Law' (2009) 6(1) *International Organizations Law Review* 191.

56 MSFD, art 5(2).

57 MSFD, art 13(4).

58 MSFD, art 6(1).

59 MSFD, art 3(10).

60 Bundesamt für Naturschutz, 'Erhaltungsziele für das FFH-Gebiet „Doggerbank“ (DE 1003-301) in der deutschen AWZ der Nordsee' (2008) <www.bfn.de> accessed 27 June 2010.

61 Offshore Possible SACs <http://www.jncc.gov.uk/page-4535> accessed 15 March 2011.

62 Habitat type 1110: sandbanks which are slightly covered by seawater all the time. This is the habitat type present in the Dogger Bank which is listed on Annex I 'Natural habitat types of Community interest whose conservation required the designation of Special Areas of Conservation' of the Habitats Directive.

63 Bundesamt für Naturschutz (n 60).

aims to improve the habitat quality of the Dogger Bank.⁶⁴ The words ‘restore’ and ‘recover’ seem to refer to a reference state. The Netherlands uses the word ‘improve’ to avoid the use of a reference state. According to Verschuuren reference data from the past regarding the quality, quantity and surface of an area have to be taken into account during the formulation of conservation objectives by Member States.⁶⁵ This does not mean a Member State has to take the quality, quantity and/or surface at a certain moment in the past as an objective. According to Verschuuren the ecological possibilities of an area to achieve, for the species and habitat types present, a favourable conservation status should play a central role in determining the conservation objectives.⁶⁶ Based on this argumentation all three states seem to comply with Habitats Directive. Still, these differences are important to note when aiming at cooperation during the management of the Dogger Bank. It is also important to note that, besides the difference regarding the use of the words recover, restore and improve, the overall objectives of the UK, Germany and the Netherlands for habitat type 1110 seem to correspond.⁶⁷ This provides a good basis for future cooperation.

Up until 2011 the cooperation practice mainly included a trilateral cooperation process between the UK, Germany and the Netherlands. The Danish authorities are of the opinion that the westernmost part of the Danish North Sea cannot be regarded as an area that qualifies for designation as a Natura 2000 site⁶⁸ and as a result, they did not participate in the cooperation process. With regard to the designation of the Dogger Bank, the trilateral cooperation was aimed at streamlining boundaries and harmonizing the approach on conservation objectives.⁶⁹ Cooperation is also taking place regarding the management of the area. This mainly relates to designing fisheries measures for the Dogger Bank in the context of the CFP framework.⁷⁰ For this the Dogger Bank is considered as one ecological unit for which international management measures will have to be established. It is aimed at a common proposal by the involved Member States to the European Commission for fisheries measures in the Dutch, British and German parts of the Dogger Bank.⁷¹ Because of the Danish fishing interest in the area, Denmark is also involved in this process even though it does not designate their part of the Dogger Bank. The joint proposal for fishing measures is considered within the FIMPAS-project; a project started by the Netherlands to come up with fisheries measures in the Dutch North Sea that fit within the CFP. This project is subject to broader cooperation; also other flag states are involved in the FIMPAS-project. Besides the trilateral cooperation process and the FIMPAS-project the Dogger Bank is subject to bilateral cooperation between the respective states and communication between the involved states and the EC.⁷²

With regard to cooperation on the Dogger Bank, it should be noted that four factors can be identified which complicate the cooperation. First, the Dogger Bank covers the maritime areas of four different States of which three participate in cooperation. Secondly, there is not a single competent authority over the area; competences regarding the Dogger Bank are divided between the involved Member States and, with regard to fisheries between the Member States and the EC. Differences in competences also exist on the level of the individual States. A third restricting factor is the inherent tension between fisheries and nature protection. Finally, cooperation practice is restricted by national processes leading to different stages of implementation by the respective states.⁷³ These four factors are closely related and to a certain extent overlap. The importance of the fourth factor, national processes, has to be emphasized. National circumstances seem to have a major influence on the pace, and also content, of the cooperation process. It can be argued that national developments in the respective states can, to a certain extent clarify the process of the transboundary cooperation practice on the protection of the Dogger Bank.⁷⁴

64 JNCC, ‘Offshore Special Area of Conservation: Dogger Bank - SAC Selection Assessment Version 5.0’ (2010) <www.jncc.gov.uk> accessed 15 June 2010 and JNCC, ‘Offshore Special Area of Conservation: Dogger Bank - Draft Conservation Objectives and Advice on Operations Version 5.0’ (2010) <www.jncc.gov.uk> accessed 15 June 2010 and RG Jak, OG Bos, R Witbaard, HJ Lindeboom, ‘Conservation objectives for Natura 2000 sites (SACs and SPAs) in the Dutch sector of the North Sea’ (IMARES Wageningen UR 2009).

65 JM Verschuuren, ‘Instandhoudingsdoelstellingen Natura 2000 beoordeeld’ in N Teesing (ed), *Wie beschermt het natuurbeschermingsrecht?* (Boom Juridische Uitgevers 2008) 20.

66 *ibid.*

67 For an overview of the different conservation objectives see: MM van der Kooij, ‘Cooperation during the designation and management of the Dogger Bank. Analysis of applicable legal instruments, degree of implementation and possible future scenarios’ (Master’s thesis, Utrecht University 2010).

68 WWF Germany *Towards Good Environmental Status, A Network of Marine Protected Areas for the North Sea - Summary Version* (Report) (April 2009) 34.

69 A joint spatial map for the Southern North Sea submitted by the Netherlands in cooperation with Germany, Belgium and the UK and Denmark, BDC 10/6/13-E(L). Meeting of the OSPAR Biodiversity Committee, Bonn: 15 – 18 June 2010, Agenda Item 6.

70 *ibid.*

71 *ibid.*

72 Van der Kooij (n 67) 49.

73 *ibid.* 54.

74 *ibid.* 57.

IV. Possible future scenarios

It has been established that legal provisions exist that require cooperation during the designation and protection/management of the Dogger Bank and that currently the cooperation processes in place for the Dogger Bank can be characterized by the trilateral cooperation process. When considering future scenarios for cooperation, an important aspect that has to be considered is to what extent each possible future scenario could lead to an increasing probability for achieving concrete agreements, also when taking into account the major influence of national processes on the transboundary cooperation.

The continuation of the current cooperation practice is a very realistic future scenario. If all involved parties are satisfied with the current cooperation, then there appears to be no need for changes. It seems that for the Netherlands the aim of the cooperation process, the establishment of a transboundary management plan for fisheries, will be achieved. This however does not mean the current cooperation practice cannot be improved. Several possibilities for cooperation in case of transboundary-protected areas can be identified.

The use of existing international instruments also provides a realistic possibility to extend cooperation. Possible existing agreements are ASCOBANS and AEWa. These existing international agreements can be useful when it comes to the protection of one specific category of species. However, they do not provide a complete framework for cooperation regarding the designation and protection/management of transboundary MPAs. If agreement exists on the appropriate use of these instruments they could provide an appropriate and realistic possibility for cooperation. However, it should be emphasized that the sole use of these instruments does not result in the protection and management of the entire Dogger Bank.

The MSFD is a relatively new Directive including cooperation requirements. Still, incorporating a provision on cooperation, including specific and concrete requirements for the implementation during the designation and protection/management of MPAs, into existing legal instruments could provide a new and solid legal basis for cooperation. If incorporated into binding legal instruments, such as the Birds and Habitats Directives, mentioned by Verschuuren as an option to improve cooperation,⁷⁵ States would have to comply with these requirements. A more realistic approach would be to include such a cooperation requirement in the OSPAR Recommendation 2003/3. It should be emphasized that incorporating a provision on cooperation in the Recommendation does not necessarily mean cooperation is in fact improved. It can be questioned to what extent this will result in concrete agreements in the near future regarding the Dogger Bank, which would not have been agreed upon within the current trilateral cooperation process. On the other hand, if concrete and specific cooperation requirements are included, it can be argued that there is a higher incentive for Member States to overcome national processes negatively influencing cooperation.⁷⁶

An increasing role for the EC and Habitats Committee could facilitate the trilateral cooperation. The EC already has a role related to the coherence of the Natura 2000 network during the selection of SCIs and during the management of fisheries since in the area of the conservation of marine biological resources under the CFP the EU has exclusive competence.⁷⁷ It can be said that the EC can contribute to the achievement of coherence during the beginning (the designation) and the final stage (the protection/management of the Dogger Bank); the Commission can oversee the process of the protection of the Dogger Bank as a transboundary MPA. An increasing role for the EC could increase the coherence of actions taken by the respective Member States for transboundary MPAs. Such an increasing role could include more responsibility for the Commission, together with the Member States that are represented in the Habitats Committee, regarding the delimitation of boundaries, the formulation of conservation measures and the establishment of management measures.⁷⁸ Since for the Dogger Bank the Netherlands aims to propose to the Commission a trilateral management plan for fisheries,⁷⁹ an increasing role of the Commission and Habitats Committee during the development of such a plan could facilitate the process and increase the probability of adoption at EU level of the fisheries measures for the entire Dogger Bank.

Another option for future cooperation is to restructure the OSPAR framework. Unger has provided a suggestion for reforming the OSPAR framework in order to develop an effective mechanism for the transboundary management of the Dogger Bank.⁸⁰ Unger argues that under the current BDC five additional working groups representing the five OSPAR regions should be

⁷⁵ Verschuuren (n 65) 20.

⁷⁶ Van der Kooij (n 67) 75.

⁷⁷ See section I on cooperation requirements.

⁷⁸ Van der Kooij (n 67) 75.

⁷⁹ See section III on implementation.

⁸⁰ WWF Germany (n 3) 32.

set up. These working groups 'could undertake measures to promote policy cohesion, to foster international co-operation, to design and implement integrated programmes and to adopt focused strategies in a regional context'.⁸¹ Management plans for national and transboundary MPAs should be presented to the regional working groups and submitted to the OSPAR committees and Commission for adoption.⁸² Furthermore, Unger proposes that for transboundary MPAs area committees, such as a Transboundary Dogger Bank Committee, should be set up to create and implement joint management plans. These Committees could include national officials and experts and should subsequently submit their work to the respective regional working group. The areas committees' work should include supranational bodies and their policies such as the EU CFP and Birds and Habitats Directives.⁸³ Since the MSFD refers to the OSPAR Convention as the appropriate existing regional institutional cooperation structure for the North Sea to be used to achieve the cooperation required by the Directive, using the OSPAR Convention to facilitate cooperation during the designation and management of transboundary MPAs seems an appropriate method to facilitate the improvement of the current cooperation practice. However, under OSPAR no legal basis exists for the management of fisheries. Since the establishment of fisheries measures is needed in order to manage the area consistent with the (draft) conservation objectives for the Dogger Bank, it can be argued that the OSPAR Convention does not provide an appropriate framework for future cooperation regarding the management of the Dogger Bank.

The establishment of a transboundary agreement is also an option for further cooperation. This could include the establishment of a legally binding or a non-binding agreement. The establishment of a binding treaty to improve cooperation practice has the advantage of the possibility to create enforceable targets and timetables.⁸⁴ However, the negotiation of legally binding instruments is frequently a protracted process, in which the results are often disappointing in substantive terms. The creation of a binding agreement does not necessarily mean that the Contracting Parties have accepted substantively significant commitments. Many treaties include only shallow content while others require states to do little more than they would have done unilaterally without any agreement.⁸⁵ The establishment of a non-legally binding agreement for a transboundary MPA could be effective. This is shown by the Trilateral Wadden Sea Cooperation framework.⁸⁶ The fact that such an agreement has been achieved by the Netherlands, Germany and Denmark for the Wadden Sea indicates that it could also be possible to establish a non-binding agreement for the protection of Dogger Bank. The establishment of such an agreement has as an advantage that an element of good faith commitment, an expectation that the agreement will be adhered to if possible, is created.⁸⁷ However, taking into account the current cooperation process, the question remains as to whether it is realistic to aim at the establishment of an agreement for the Dogger Bank. Furthermore, it remains questionable whether such an agreement would result in more far-reaching agreements on cooperation compared to the current cooperation practice.

V. Conclusion

International and EU legal instruments contain provisions requiring cooperation during the designation and protection/management of MPAs. Many of the cooperation requirements are not further specified; Member States are left with a certain discretion as to the extent and form of implementation. Since cooperation is currently taking place regarding the designation and protection/management of the Dogger Bank, these general cooperation requirements seems to be complied with. However, a question lingers as to whether the current cooperation practice complies with the relatively new MSFD requiring cooperation to ensure 'coherent and coordinated' strategies, also applicable to the establishment of MPAs as is intended for the Dogger Bank. Since the meaning of 'coherent and coordinated' is not further clarified, it remains to be seen whether this provision is complied with.

Several options have been discussed with regard to the question of how the involved Member States could proceed in order to optimize transboundary cooperation in relation to the designation and protection/management of the Dogger Bank. Considering that it appears that the aim set by the Netherlands for the Dogger Bank cooperation process will be achieved, the continuation of the current cooperation practice is an appropriate scenario for future cooperation. Together with an increasing role for the EC and Habitats Committee the coherence of actions taken by the respective Member States for transboundary MPAs could be improved. Furthermore, when looking at the relevant legal instruments an amendment of the non-legally binding OSPAR Recommendation 2003/3 provides an option to further establish a specific legal basis for cooperation. ■

81 WWF Germany (n 3) 33.

82 *ibid.*

83 *ibid.*

84 L Nowlan, 'Arctic Legal Regime for Environmental Protection' (IUCN Environmental Law Programme 2001) 58.

85 E Benvenisti and M Hirsch, *The impact of international law on international cooperation: theoretical perspectives* (Cambridge University Press 2004) 53.

86 M Moser and A Brown, 'Trilateral Wadden Sea Cooperation – External Evaluation Report' (2007) <www.waddensea-secretariat.org> accessed on 17 July 2010.

87 Birnie, Boyle and Redgwell (n 18) 34.