

# Protecting the Environment of ABNJ through Marine Protected Areas and Area-based Management Tools

*Is the Glass Half Empty or Half Full and Whose Glass Is It Anyway?*

*Alex Oude Elferink*

## 1 Introduction\*

Existing political commitments and the current negotiation on an Agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ Agreement) indicate that there is widespread support for using marine protected areas (MPAs) and area-based management tools (ABMTs) to protect the environment of ABNJ. In drafts of the BBNJ Agreement that have been presented thus far, MPAs and ABMTs are closely related. Reference is generally made to ‘area-based management tools, including marine protected areas’. However, ABMTs and MPAs are two distinct terms that differ conceptually – one is a tool applicable to a specific area and the other characterizes the nature of a specific area – and their purpose is not the same.<sup>1</sup> ABMTs are primarily intended to regulate specific activities at a

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1 See also Elizabeth M De Santo, ‘Implementation challenges of area-based management tools (ABMTs) for biodiversity beyond national jurisdiction (BBNJ)’ (2018) 97 *Marine Policy* 34, 34–35. The terms ‘ABMTs’ and ‘MPAs’ are defined in the Revised draft text of the agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (Advance unedited version (27 November 2019) (Revised Draft Agreement; available at <[www.un.org/bbnj/sites/www.un.org/bbnj/files/revised\\_draft\\_text\\_a.conf\\_232.2020.11\\_advance\\_unedited\\_version.pdf](http://www.un.org/bbnj/sites/www.un.org/bbnj/files/revised_draft_text_a.conf_232.2020.11_advance_unedited_version.pdf)> accessed 11 May 2021), Annex, arts 1(3) and 1(10). For a brief discussion of these provisions see below text n 37 and following; see also Erik Molenaar, ‘Multilateral Creeping Coastal State Jurisdiction and the BBNJ Negotiations’ (2021) 36 *International Journal of Marine and Coastal Law* 5, 39–40. The overlap of these definitions and the conflation of MPAs and ABMTs in art 1(3) might be used to argue that the present distinction between MPAs and ABMTs is not justified. As different categories in the *IUCN Protected Area Categories System* indicate, there are huge difference between these various categories (see *Protected*

sectoral level, and their primary objective may be different from the protection of the marine environment. On the other hand, MPAs have the protection of the marine environment as their primary objective and may involve the regulation of different activities to also address cumulative impacts.

The present chapter is intended to further explore the relationship between ABMTs and MPAs. In order to do so, section 2 will first consider the development of the general framework applicable to both instruments, starting from the United Nations Convention on the law of the sea (LOSC)<sup>2</sup> and ending with a discussion of the Revised Draft Agreement, the current negotiating text for the BBNJ Agreement. Section 3 will consider the practice in relation to ABMTs and MPAs of a number of specific instruments and bodies. This section, among others, will consider how this practice relates to the development of the general framework as discussed in section 2 and what kind of legal issues have come to the fore in specific instruments and bodies. Section 4 provides a synthesis of the two preceding sections and discusses that synthesis in the framework of the overarching themes of the current volume. In light of these themes, the analysis in sections 2 and 3 will include a brief discussion of the legal bases for adopting MPAs and ABMTs, decision-making procedures, the mandate of the instruments and bodies concerned, and the role of knowledge in relation to the establishment of MPAs and ABMTs.<sup>3</sup> Apart from exploring the relationship between MPAs and ABMTs, this analysis will also allow assessing the progress the international community has been making in achieving existing political commitments in relation to the protection of the marine environment through these two instruments. Both these strands of the chapter's narrative will be revisited and further discussed in its final section.

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*Area Categories* available at <[www.iucn.org/theme/protected-areas/about/protected-area-categories](http://www.iucn.org/theme/protected-areas/about/protected-area-categories)> accessed 22 April 2021). In that sense, it is submitted that it would be possible to speak of a sliding scale, with IUCN category Ia 'Strict nature reserve' on the one side and an ABMT that regulates an activity to optimize use but without clear nature conservation benefits on the other. Sliding as it may be, both ends of the scale have very different implications. In any case, the conflation of MPAs and ABMTs in Revised Draft Agreement art 1(3) is a political choice that does not efface the different implications of both concepts as set out here in the main text.

- 2 United Nations Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
- 3 Due to the constraints a chapter-length analysis imposes, issues in relation to the management of MPAs and ABMTs will not be discussed.

## 2 Attributing Rights and Obligations in Relation to MPAS and ABMTs

The LOSC provides the logical starting point for assessing the rights and obligations in relation to the MPAS and ABMTs in ABNJ at the global level. The Convention continues to be recognized as the fundamental legal framework applicable to the oceans as currently reaffirmed by the BBNJ process.<sup>4</sup>

The LOSC does not employ the terms MPAS and ABMTs, but in a number of instances does point to the need or alludes to the potential of using these spatial management tools.<sup>5</sup> In addition, the LOSC's references to the right or obligation to regulate may also include the adoption of ABMTs or MPAS.<sup>6</sup> Without the need to go into a detailed discussion of all relevant provisions of the LOSC, a number of general points may be made about the regulatory framework provided by the LOSC. It is trite knowledge that the LOSC mostly takes a sectoral approach in regulating activities in the marine environment. Consequently, user States, which are involved in managing these activities, have a central role in standard setting, including in adopting ABMTs, (potentially) marginalizing other interests. The establishment of MPAS holistically protecting the marine environment from human impacts under this approach becomes problematic, to say the least. The LOSC does not endow any body with a competence to assess the need for comprehensive protection and mechanisms for cross-sectoral coordination are also lacking.

The centrality of user States is aptly illustrated by the LOSC's approach to high seas fisheries. The power to regulate fisheries is entrusted to States whose nationals are engaged in fishing activities.<sup>7</sup> It is these States that are required to cooperate in the adoption of conservation and management measures, which may include ABMTs. The focus on user interests is reconfirmed by the focus on the living resources that are subject to exploitation.<sup>8</sup> A similar focus on user interests applies in the case of mining activities in the Area, in respect of which the International Seabed Authority (ISA) has a central coordinating role. The Convention accords the ISA a broad regulatory mandate that also allows using ABMTs to protect the marine environment from harmful effects that may arise

4 See eg the relationship clauses contained in Revised Draft Agreement art 4(1). The term BBNJ process is used as a shorthand for referring to the work under the aegis of the United Nations General Assembly on the issue of biodiversity beyond national jurisdiction (BBNJ).

5 See eg LOSC arts 162(2)(x) and 194(5).

6 See eg *ibid* arts 117 and 194(1).

7 *ibid* arts 116 and 117.

8 *ibid* arts 118 and 119.

from mining activities.<sup>9</sup> Both in the case of fisheries and mining, the LOSC does not contain rules that contain specific guidance on the generation of knowledge that will be required to assess the need for ABMTs or MPAs. In the case of fisheries, the relevant provisions, among others, refer to the ‘best scientific evidence’.<sup>10</sup> The obligation to gather relevant information rests on the States involved in fishing activities.<sup>11</sup> Article 145, defining the environmental mandate of the ISA refers to the ‘necessary measures’, without specifying how the relevant knowledge base has to be generated.

Part XII of the LOSC, which addresses the protection and the preservation of the marine environment is also largely based on a sectoral approach. This is particularly the case for section 5, which deals with international standard setting on a ‘source-by-source’ basis in consecutive articles. The focus on the regulation of individual activities to protect and preserve the marine environment is also apparent from the general provisions of Part XII, section 1.<sup>12</sup> At the same time, Article 192 imposes a general duty on States ‘to protect and preserve the marine environment’ and their sovereign right to exploit their natural resources has to be exercised ‘in accordance with their duty to protect and preserve the marine environment’.<sup>13</sup> Section 1 of Part XII arguably also provides a basis for going beyond ABMTs regulating activities on a sectoral basis. Article 194(5) provides that States are required to take measures ‘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’. In addition, Article 197 contains a generally-worded provision on global and regional cooperation in relation to the protection and the preservation of the marine environment. That obligation also extends to the issues addressed by Article 194(5).<sup>14</sup> At the same time, the practical importance of these provisions should not be overstated. Both are formulated in a general manner and do not provide any specific guidance beyond the requirement that in case it is concluded that measures are necessary, they have to be taken.<sup>15</sup> Article 194(5) moreover

9 *ibid* art 145; see also *ibid* art 162(2)(x), which provides that the Council shall ‘disapprove areas for exploitation by contractors or the Enterprise in cases where substantial evidence indicates the risk of serious harm to the marine environment’.

10 *ibid* art 119(1)(a).

11 *ibid* arts 119–120.

12 See eg *ibid* arts 194, paras (1) to (3).

13 For a contrary view see the discussion in Poto (ch 6) in this volume.

14 For a further discussion of the relevance of arts 194 and 197 for MPAs in ABNJ see, eg, Ingvild Ulrikke Jakobsen, *Marine Protected Areas in International Law: An Arctic Perspective* (Brill 2016) 51–53.

15 See also Jeff A Ardron and others, ‘The sustainable use and conservation of biodiversity in ABNJ: What can be achieved using existing international agreements’ (2014) 49 *Marine*

is conditioned by Article 194(4), which provides that in taking measures States 'shall refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention'. In other words, this indicates that States engaged in activities in the marine environment in this case will also have a say in determining the content of specific measures. Finally, Article 194(5) does not entail a duty to protect and preserve fragile ecosystems and habitats as such, but in the context of regulating activities in the marine environment.<sup>16</sup> That is, it is an obligation that first of all rests on user States. As far as the generation of knowledge is concerned, Part XII similarly attributes primary responsibility to States engaged in activities.<sup>17</sup>

The Convention on Biological Diversity (CBD), which was adopted at the United Nations Conference on Environment and Development (Rio Conference) in 1992, does explicitly refer to the establishment of protected areas.<sup>18</sup> Article 8 requires contracting parties to '[e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity'.<sup>19</sup> This Article moves the obligation to establish protected areas significantly beyond the language of Article 194(5) of the LOSC. In particular, the reference to 'a system' implies the need to establish a coherent network of areas.<sup>20</sup> The reference to 'biodiversity' is more comprehensive than the reference to 'rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life' contained

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Policy 98, 106; Glen Wright, Julien Rochette and Elisabeth Druel, 'Marine protected areas in areas beyond national jurisdiction' in Rosemary Rayfuse (ed.), *Research Handbook on International Marine Environmental Law* (Elgar 2015) 272–73.

16 LOSC art 194(5) refers to 'measures taken in accordance with this Part'. The focus of Part XII is almost wholly on the prevention, reduction and control of pollution.

17 See eg LOSC arts 204 and 206.

18 Convention on Biological Diversity (signed 5 June 1992, entered in force 29 December 1993) 1760 UNTS 79 art 8. Agenda 21 (available at <<https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf>> accessed 11 May 2021), which was also adopted at the same time, in ch 17, dealing with the protection of the oceans, does not make such an explicit reference, although para 17.22 not only refers to the prevention, reduction and control of pollution, but also to the requirement to prevent, reduce and control degradation of the marine environment, indicating that in this connection it 'is necessary to ... [a]pply preventive, precautionary and anticipatory approaches. In general, Agenda 21 is largely focused on the regulation of activities.

19 The CBD defines a 'protected area' as 'a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives' (CBD art 2).

20 See further Lyle Glowka and others, *A Guide to the Convention on Biological Diversity* (IUCN – The World Conservation Union 1994) 39.

in Article 194(5).<sup>21</sup> In addition, Article 8(b) requires contracting parties to '[d]evelop, where necessary, guidelines for the selection, establishment and management of the areas concerned'. At the same time, it may be noted that the CBD's definition of protected areas allows for adopting different levels of protection.<sup>22</sup> This implies that, in managing these areas, user interest will likely be factored in, and in particular established interests may be expected to have a strong voice. Furthermore, the CBD was neither accorded the regulatory authority to deal with many aspects of the sustainable use and conservation of biodiversity nor a coordinating role in relation to the sectoral bodies that have such authority. Finally, although it has been submitted that Article 8 is also applicable to ABNJ,<sup>23</sup> Article 4 provides that in ABNJ the Convention applies to 'processes and activities' and not to biological diversity as such. Although that focus does not prevent taking protective actions,<sup>24</sup> it could be used to argue that use and user States should play a prominent role in adopting such measures.

A similar shift towards wider environmental concerns is witnessed by the Fish Stocks Agreement, which was adopted in 1995 in the wake of the Rio Conference.<sup>25</sup> The Agreement among others incorporates the precautionary approach and refers to the need to protect biodiversity and the need of assessing not only the impacts of fishing, but also those of other human activities and environmental factors.<sup>26</sup> Perhaps most importantly, the Fish Stocks Agreement (UNFSA) further elaborates the duty to cooperate on high seas fisheries through the participation in or collaboration with regional fisheries management organizations and arrangements. The fact that having a 'real interest' provides the basis for participation,<sup>27</sup> seemingly further cements the central role of user States, which was already contained in the LOSC, in fisheries management.<sup>28</sup>

21 Arguably, the reference to 'other forms of marine life' could be said to imply that art 194(5) is formulated in a similarly inclusive manner.

22 See further Glowka (n 20) 22–23 and 39.

23 See Oude Elferink and Kerr (ch 7) in this volume.

24 See also *ibid.*

25 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (opened for signature 4 August 1995, entered into force 11 December 2001) 2167 UNTS 3 (UNFSA).

26 *ibid* art 5.

27 *ibid* art 8(3).

28 For a nuanced discussion of the implications of the concept of 'real interest' see Erik Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms' (2000) (15) *International Journal of Marine and Coastal Law* 475. Although Molenaar submits that the concept may not exclude other

At the political level, the international community committed itself to establishing MPAS, including representative networks by 2012 at the World Summit on Sustainable Development (WSSD) in 2002.<sup>29</sup> Three basic requirements were identified in relation to this goal: the networks of MPAS had to be representative, consistent with international law and based on scientific information.<sup>30</sup> This political commitment was further operationalized through Target 11 of the Aichi Targets adopted by the 2010 CBD Conference of the Parties (COP), which called for at least 10 percent of the world's coastal and marine areas to be conserved by 2020.<sup>31</sup> In particular, Target 11 provides that:

especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.<sup>32</sup>

A comparison of the WSSD outcome and Aichi Target 11 indicates a shift away from the concept of MPAS. While the WSSD outcome refers to representative networks of MPAS, Aichi Target 11 indicates that both MPAS and other ABMTs may be used to meet the 10 percent conservation target.<sup>33</sup>

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than fishing interests from being represented in RFMOs, he at the same time provides a number of arguments indicating the close link between the concept and fishing interests (ibid 529–31). The current participation in RFMOs does not point towards a diversification of membership following the adoption of UNFSA (relevant information may be accessed through the webpage *Regional Fishery Bodies (RFB)* available at <[www.fao.org/fishery/rfb/en](http://www.fao.org/fishery/rfb/en)> accessed 29 April 2021).

29 The skeleton of this paragraph is based on a paragraph included in Oude Elferink and Kerr (ch 7) in this volume.

30 Plan of Implementation of the World Summit on Sustainable Development, Johannesburg, 4 September 2002; (Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002 (United Nations publication, Sales No. E.03.II.A.1 and corrigendum), Res 2, para 32(c).

31 Decision Adopted by the Conference of Parties of the CBD at Its 10th Meeting, Decision X/2, Annex IV (UNEP/CBD/COP/DEC/X/2).

32 Almost identical language is included in para 2(c) of the Leaders' Pledge for Nature; United to Reverse Biodiversity Loss by 2030 for Sustainable Development, which was adopted at the United Nations Summit on Biodiversity on 28 September 2020 available at <[www.leaderspledgefornature.org/](http://www.leaderspledgefornature.org/)> accessed 10 March 2021.

33 Two points might be raised in this connection: First, Aichi Target 11 may be read in different ways. The qualifying phrase 'effectively and equitably managed, ecologically representative and well connected systems' may be read as referring to both MPAS and ABMTs or referring only to MPAS. The use of the word 'and' instead of the word 'or' suggests that former interpretation is more likely (see also *South China Sea (Philippines v China)*

MPAs and ABMTs have figured prominently in the debate concerning the conservation and sustainable use of BBNJ throughout the BBNJ process. Already during the first meeting of the so-called Ad hoc Working Group, there was broad agreement that '[ABMTs], including [MPAs] and temporal and spatial closures for fisheries management' constituted a 'key tool to improve integrated conservation and sustainable use' of BBNJ.<sup>34</sup> That is, already at the start of the BBNJ process, MPAs were classified as a subset of ABMTs.<sup>35</sup> Interestingly, non-governmental organizations presented a different perspective, arguing for 'a global network of marine protected areas, including both strictly protected areas and multi-use areas'.<sup>36</sup>

The current Revised Draft Agreement generally maintains the link between ABMTs and MPAs, using the formulation 'area-based management tools, including marine protected areas'.<sup>37</sup> Only in two instances does the Revised Draft Agreement refer to MPAs separately, and not as a subset of ABMTs. Article 1(10) provides a definition of the term 'MPA'. This definition quite closely resembles the definition of the term 'ABMTs, including MPAs' contained in Article 1(3), although arguably the focus of Article 1(10) is holistic, while Article 1(3) focuses on the regulation of specific activities.<sup>38</sup> The second separate reference to

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- (Award on Jurisdiction and Admissibility, 29 October 2015) PCA on Merits, paras 493–97). Secondly, the WSSD outcome also refers to MPAs in the context of a broader set of measures for managing and conserving the oceans. However, in this case a specific linkage to ABMTs similar to Aichi Target 11 is missing (see Plan of Implementation (n 30) para 32).
- 34 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; Transmittal letter dated 9 March 2006 from the Co-Chairpersons of the Working Group to the President of the General Assembly (UN Doc A/61/65) para 59.
- 35 For a discussion of the relationship between the two concepts see also n 1.
- 36 Report (n 34) para 58. The only non-governmental organization that is mentioned in the summary of the debate on this point in Earth Negotiations Bulletin is Greenpeace (see 25(25) Earth Negotiations Bulletin 4).
- 37 Revised Draft Agreement, *passim*. A number of delegations have proposed to delete the phrase 'including marine protected areas' from the definition of ABMTs contained in Revised Draft Agreement art 1(3) (see Textual proposals submitted by delegations by 20 February 2020, for consideration at the fourth session of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in response to the invitation by the President of the Conference in her Note of 18 November 2019 (UN Doc A/CONF.232/2020/3) available at <[www.un.org/bbnj/sites/www.un.org.bbnj/files/textual\\_proposals\\_compilation\\_article-by-article\\_-\\_15\\_april\\_2020.pdf](http://www.un.org/bbnj/sites/www.un.org.bbnj/files/textual_proposals_compilation_article-by-article_-_15_april_2020.pdf)> accessed 22 April 2021 11, 17–18).
- 38 The reference to 'conservation and sustainable use objectives' might be taken as indicating that an MPA should allow sustainable use of the area concerned. However, it is submitted that achieving sustainable use objectives in the broader marine environment may require closing certain areas to all human activities.

MPAS is in Article 14 of the Revised Draft Agreement, which sets out the objectives of its Part III, dealing with ABMTs, including MPAS. Article 14(d) provides that one of the objectives is to ‘[(d) Establish a system of ecologically representative marine protected areas that are connected [and effectively and equitably managed];]’.<sup>39</sup> Article 14(d) is an alternative to square bracketed Article 14(c), which provides for use and conservation of areas requiring protection by either ABMTs or MPAS. The choice for the approach contained in Article 14(d) in the final text of the Agreement would recognize that Part III cannot be effectively implemented by only adopting single-sector ABMTs. At the same time, the fact that the text of the Revised Draft Agreement in general refers to ABMTs and MPAS in conjunction and does not seem to provide clear guidance as to when either of these instruments should be used, indicates that the objective contained in current Article 14(d), if maintained in its current setting, in the specific case may result in discussions about whether designation of an area as an MPA is justified, or whether specific ABMTs would suffice.<sup>40</sup>

The Revised Draft Agreement contains detailed rules for the identification, designation and management (including monitoring and review) of areas that require a higher level of protection through ABMTs/MPAS. It is beyond the purposes of this chapter to go into a detailed discussion of Part III.<sup>41</sup> However, a couple of points may be observed. First, the objectives of Part III, which are listed in Article 14 and currently all are in square brackets, stress the need for a ‘holistic and cross-sectoral approach’. However, the importance of this objective arguably is downplayed by the fact that it is not presented as a free-standing

39 The use of square brackets in the text of the Revised Draft Agreement is explained as follows in a Note by the President of the Intergovernmental conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (IGC), preceding that text:

Square brackets have been used to indicate the following: (a) there are two or more alternative options within a provision; and (b) support has been expressed for a “no text” option, either within a provision or in relation to a provision as a whole. However, the absence of square brackets does not imply agreement on the ideas or specific language reflected in a provision. Equally, text that has not been revised should not be taken as indicating agreement on the unrevised text (Revised Draft Agreement (n 1) at Note by the President, para 7).

40 The EU has proposed to merge arts 14(c) and (d) of the Revised Draft Agreement and make it the first objective of art 14. The EU text would require setting up ‘a network of ecologically representative marine protected areas that are ecologically connected and effectively as well as equitably managed’ (see Textual proposals (n 37) 133).

41 In addition, much of the text at present is in square brackets, making a detailed discussion on the final outcome speculative.

objective, but as an outcome of enhanced international cooperation and coordination.<sup>42</sup> The other objectives display a certain tension between conservation and use. For instance, Article 14(h) refers to the safeguarding of 'aesthetic, natural or wilderness values', while Article 14(f) mentions the supporting of 'food security and other socioeconomic objectives'. While such a dual focus is in line with Part III's coverage of ABMTs, including MPAs, it allows foregrounding economic interests over conservation objectives and objecting against strict protective measures, including MPAs closed to human activities, because it allows arguing that ABMTs ensure meeting the objectives of Part III.

Draft Article 15 on international cooperation and coordination largely makes these activities complementary to the work being undertaken in the framework of existing instruments and frameworks. Article 15 moreover has to be read in light of the general relationship clause contained in Article 4(3) of the Revised Draft Agreement, which provides that the 'Agreement shall be interpreted and applied in a manner that [respects the competences of and] does not undermine relevant legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies'.<sup>43</sup> Depending on how the 'not undermine' requirement will play out in practice, it may to a lesser or larger degree complicate a holistic approach to the conservation and sustainable use of BBNJ. In this connection, it may also be noted that the Revised Draft Agreement gives the COP a rather weak coordinating role in relation to other instruments, frameworks and bodies.<sup>44</sup>

Article 15(4) furthermore provides that measures under Part III 'shall not undermine the effectiveness of measures adopted by coastal States in adjacent areas within national jurisdiction [(AWNJ)] and shall have due regard for the rights, duties and legitimate interests of all States'. Articles 16 to 18 contain detailed provisions on respectively the identification of areas, proposals on ABMTs, including MPAs, and consultation on and assessment of proposals. These Articles, among others, create procedures for operationalizing the requirements in relation to existing frameworks and instruments and coastal States as defined in general terms in preceding Articles. The initiative to identify specific areas and formulate proposals rests with individual States. In that

42 See Revised Draft Agreement art 14(a).

43 For a further discussion on the 'not undermine' requirement see eg Vito De Lucia and Philip Peter Nickels, 'Reflecting on the Role of the Arctic Council vis-à-vis a Future International Legally Binding Instrument on Biodiversity in Areas Beyond National Jurisdiction' (2020) 11 *Arctic Review on Law and Politics* 189.

44 See Revised Draft Agreement art 48(4)(c). For a further discussion of this provision see also Barnes (ch 10) in this volume.

sense the procedure could be used pro-actively both by States primarily pursuing conservationist objectives or by States that want to secure access to an area by focusing on ABMTs. The consultation procedure contained in Article 18 is inclusive and proponents of proposals are bound to ‘consider the contributions received during the consultation period and shall either revise the proposal accordingly or continue the consultation process.’<sup>45</sup> However, consultations cannot be dragged out for an indefinite period of time, as they are time-bound.<sup>46</sup> The fact that it is up to the proponents of a proposal to revise it on the basis of the consultation, would give them some leeway in case of continued disagreement over the content of the proposal.<sup>47</sup> Proposals as revised will be assessed by the scientific and technical body and be forwarded to the COP for taking a decision.<sup>48</sup> Text that currently still is in square brackets indicates that decisions of the COP in principle shall be taken by consensus. Only if all efforts to reach consensus have been exhausted, decision-making will be non-consensual.<sup>49</sup> The monitoring and review procedures contained in Article 21 of the Revised Draft Agreement may contribute to the effectiveness of the measures adopted under Part III. Although it is upon States parties to report on implementation, the reporting shall be made publicly available by the Agreement secretariat. This should facilitate the input from other actors in the review of existing measures.

### 3 Practice in Relation to MPAS and ABMTS

#### 3.1 Introduction

There is a wealth of practice of global and regional frameworks, instruments and bodies in relation to MPAS and ABMTs. It is beyond to scope of a book chapter to present a comprehensive discussion of such practice. At the same time, in considering the approach to this section, I felt that providing a general overview of all relevant practice would only be skimming the surface and not provide a meaningful basis for discussion. For that reason, I have chosen to

45 Revised Draft Agreement art 18(4).

46 *ibid* art 18(5). However, no specific time frame is mentioned in this connection. The elaboration of the modalities for the consultations is deferred to a decision after the entry into force of the Agreement, see *ibid* art 18(7).

47 This aspect of the consultation process may also be subject to further clarification through the procedure envisaged by Revised Draft Agreement art 18(7).

48 *ibid* arts 18(6) and 19.

49 *ibid* art 48(3 bis).

focus on certain aspects of the practice of a number of bodies and instruments and in this way provide the reader with a more detailed discussion of the pertinent issues. Sections 3.2 and 3.3 respectively discuss the ISA and the CBD's work on EBSAs, both relevant examples of developments at the global level, while section 3.4. discusses two specific regions, the Northeast Atlantic Ocean and the Southern Ocean, involving respectively the OSPAR Convention<sup>50</sup> and the OSPAR Commission, and the CAMLR Convention<sup>51</sup> and the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

### 3.2 *The ISA and Mining in the Area*

Apart from fisheries, and perhaps shipping, mining potentially is the activity *in* ABNJ that may have most impact on the marine environment and BBNJ.<sup>52</sup> The ISA currently has concluded 30 exploration contracts with 21 contractors in areas in the Atlantic, Indian and Pacific Oceans.<sup>53</sup> Although, according to Secretary-General Lodge of the ISA, in 2018 exploration contracts only covered less than 1 per cent of the Area,<sup>54</sup> localized impacts may be significant and may extend beyond the area covered by an exploration contract or future exploitation contracts.<sup>55</sup> The ISA, like other sectoral bodies, seemingly is concerned about the impact the future BBNJ Agreement might have on its mandate. Secretary-General Lodge at the first session of the IGC in 2018 argued that the ISA, having specialized knowledge, was best placed to develop ABMTs

50 Convention for the Protection of the Marine Environment of the North-East Atlantic (opened for signatures 22 September 1992, entered into force 25 March 1998) (OSPAR Convention).

51 Convention on the Conservation of Antarctic Marine Living Resources (opened for signature 20 May 1980, entered into force 7 April 1982) (CAMLR Convention).

52 See further Kathryn A Miller and others, 'An Overview of Seabed Mining Including the Current State of Development, Environmental Impacts, and Knowledge Gaps' (2018) 4 *Frontiers in Marine Science* 418.

53 For a list of these contractors see *Exploration Contracts* available at <[www.isa.org.jm/exploration-contracts](http://www.isa.org.jm/exploration-contracts)> accessed 3 March 2021.

54 Statement on Measures such as Area-based Management Tools at the Intergovernmental Conference on an international legally binding instrument under the United biological diversity of areas beyond national jurisdiction. Section III (4) of the President's aid to discussions (UN Doc A/CONF.232/2018/3); 7 September 2018, New York available at <[www.isa.org.jm/files/documents/EN/BBNJ/2018/Stats/ABMT.pdf](http://www.isa.org.jm/files/documents/EN/BBNJ/2018/Stats/ABMT.pdf)> accessed 3 March 2021.

55 In addition, it should be realized that BBNJ is also localized. For instance, one source reports that active hydrothermal vent fields in total cover some 50 square kilometers: The Pew Charitable Trusts, *Deep-Sea Mining on Hydrothermal Vents Threatens Biodiversity Protections could safeguard ecosystems that lie beyond national jurisdiction* (2019) available at <[www.pewtrusts.org/-/media/assets/2019/09/deep-sea\\_mining\\_on\\_hydrothermal\\_vents\\_fact\\_sheet\\_vi.pdf](http://www.pewtrusts.org/-/media/assets/2019/09/deep-sea_mining_on_hydrothermal_vents_fact_sheet_vi.pdf)> accessed 3 March 2021).

in relation to mining activities in the Area.<sup>56</sup> Perhaps not surprisingly, in that connection he referred to the ‘risk of undermining the careful balance of competences established in the [LOSC]’.<sup>57</sup>

Whether the ISA is properly equipped to carry out its environmental mandate at the moment may be open to questioning. This was, among others, highlighted by the first periodic review of the functioning of the mining regime and the ISA. Two of the recommendations respectively dealt with enhancing the environmental expertise of the secretariat and more extensive engagement of the ISA with the deep-sea scientific community and deep-sea scientific projects.<sup>58</sup> Another recommendation was to set up an environmental working group under the Legal and Technical Commission (LTC).<sup>59</sup> All of these recommendations were endorsed by the Assembly of the ISA.<sup>60</sup> According to a report on the meeting, NGOs were critical of the latter recommendation, as it would not create ‘a self-standing body with the necessary expertise, which is the usual feature of other multilateral environmental agreements’.<sup>61</sup> Recent reports on the work of the ISA express continued concern about whether the ISA is properly equipped to deal with environmental aspect of mining activities in the Area.<sup>62</sup> All these considerations point to the importance of creating an adequate knowledge base and the involvement of relevant stakeholders. In that connection, it should also be realized that much of the relevant data is generated by the users that engage in the activities having potentially adverse impact on the marine environment.<sup>63</sup> It is essential that the ISA guarantees

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56 Statement (n 54) 2.

57 *ibid.* At the same time, Lodge acknowledged the need for cooperation, referring to the existing cooperation of the ISA with global and regional organizations (*ibid.*).

58 See ISBA/23/A/5/Rev.1, recommendations 6 and 7.

59 See *ibid.* recommendation 14.

60 See ISBA/23/A/13, sections E.5, G.1 and H.

61 See 25(151) Earth Negotiations Bulletin 17.

62 See 25(185) Earth Negotiations Bulletin 11; Andrew Friedman, ‘After Chaotic Year, Seabed Mining Oversight Body Must Strengthen Policies’ The Pew Charitable Trusts (12 February 2021) available at <[www.pewtrusts.org/en/research-and-analysis/articles/2021/02/11/after-chaotic-year-seabed-mining-oversight-body-must-strengthen-policies](http://www.pewtrusts.org/en/research-and-analysis/articles/2021/02/11/after-chaotic-year-seabed-mining-oversight-body-must-strengthen-policies)> accessed 25 July 2021.

63 For instance, ISA Secretary-General Lodge has observed that in particular the scope of environment baseline studies by contractors in the exploration phase ‘would determine the success of [regional environmental management plans]’ *Developing a Framework for Regional Environmental Management Plans for Polymetallic Sulphide Deposits on Mid-Ocean Ridges* (ISA Technical Study No. 22) 12. See also Michael Lodge, ‘Measures such as area-based management tools, including marine protected areas’ (Statement to the Intergovernmental Conference on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and

that relevant data will be gathered, shared with the ISA and relevant stakeholders and be acted upon.<sup>64</sup>

Over the last decade, the ISA has gradually developed a spatial management approach, in particular through regional environmental management plan (REMPs) and areas of particular environmental interest (APEIS).<sup>65</sup> That development has been lagging behind the regulation of mining activities in general. Interestingly, as has also been acknowledged by the ISA, the initiative for gathering scientific information in relation to the development of environmental management plans in the middle of the last decade had been taken by contractors and other stakeholders, not the ISA itself.<sup>66</sup> These initiatives may have contributed to the ISA pursuing this matter more actively. As the Preliminary Strategy in relation to the development of REMPs observes:

While external scientific initiatives are to be welcomed, it is considered important, given the mandate and role of the Authority, including in relation to the conduct of marine scientific research in the Area, that regional environmental management plans be developed under the auspices of the Authority, in a transparent manner, and with the full engagement of the relevant organs of the Authority.<sup>67</sup>

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sustainable use of marine biological diversity of areas beyond national jurisdiction, Friday 7 September 2018) 2.

64 It may be noted that the ISA is in the process of developing a Communications and Stakeholder Engagement Strategy (a draft of the Strategy, which was circulated in early December of 2020) is available at <[https://isa.org.jm/files/files/documents/Draft\\_Comms\\_and\\_Stakeholder\\_Engagement\\_Strategy.pdf](https://isa.org.jm/files/files/documents/Draft_Comms_and_Stakeholder_Engagement_Strategy.pdf)> accessed 8 March 2021. For a critical review of the draft Strategy see the letter of 28 January 2021 of Andrew Friedman, 'Seabed Mining Project' The Pew Charitable Trusts (available at <[www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2021/01/28/pew-suggests-ways-to-improve-stakeholder-engagement-at-the-international-seabed-authority](http://www.pewtrusts.org/en/research-and-analysis/speeches-and-testimony/2021/01/28/pew-suggests-ways-to-improve-stakeholder-engagement-at-the-international-seabed-authority)> accessed 8 March 2021).

65 While the ISA has characterized REMPs as a type of ABMTs, REMPs are at the same time intended to allow for the adoption of ABMTs for specific areas in the region concerned (ISBA/24/C/3), para 5). This includes APEIS, which offer a higher level of protection than surrounding areas. The Secretary-General of the ISA has observed that the designation of APEIS helps the Authority 'to meet internationally agreed targets, such as Aichi Biodiversity Target 11' (ibid paras 5–6).

66 ISBA/24/C/3, para 8.

67 ibid.

The first REMP, for the Clarion-Clipperton Zone (CCZ) in the Pacific Ocean, was only adopted by the ISA in 2012.<sup>68</sup> More recently, the ISA started the process of elaborating REMPs for other regions.<sup>69</sup> Both for the CCZ and other areas, the ISA had already concluded exploration contracts previously. The mandate of the ISA to develop and designate REMPs is provided by Articles 145 and 162(1) of the LOSC. The latter provision empowers the Council to develop specific policies in relation to 'any question or matter within the competence of the Authority'.<sup>70</sup> This mandate has not been open to question, but questions do exist in relation to the status of REMPs and their relationship to the (draft) regulations for the exploitation of minerals.<sup>71</sup>

Prior to the decisions of the ISA Council on the environmental management plan for the CCZ, the ISA had not adopted a general framework in relation to the purposes and content of such plans. Those decisions explain the reason for adopting the plan for the CCZ in the following terms:

*Considering* that the implementation of a comprehensive environmental management plan at the regional level is one of the measures appropriate and necessary to ensure effective protection of the marine environment of [the CCZ] from harmful effects that may arise from activities in the Area and that such a plan should include provision for the establishment of a representative network of [APEIS].<sup>72</sup>

In its Preliminary Strategy for the development REMPs adopted in 2017, the objective of REMPs and APEIS was further elaborated, as providing the ISA, contractors and sponsoring States:

with a proactive area-based management tool to support informed decision-making that balances resource development with conservation. [REMPs] provide the Authority with a clear and consistent mechanism to identify particular areas thought to be representative of the full range of habitats, biodiversity and ecosystem structures and functions within

68 Decision of the Council relating to an environmental management plan for the Clarion-Clipperton Zone (ISBA/18/C/22). For a further discussion of the legal framework in relation to REMPs see ISBA/17/LTC/7 and ISBA/18/C/11.

69 See further below.

70 See eg ISBA/18/C/22, 2nd and 3rd preambular consideration.

71 For further discussion of this point see below.

72 ISBA/17/C/19, 6th preambular consideration; ISBA/18/C/22, 6th preambular consideration.

the relevant management area, and provide those areas with appropriate levels of protection, thus helping the Authority to meet internationally agreed targets, such as Aichi Biodiversity Target 11.<sup>73</sup>

As their definition and objectives indicates, APEIS are similar to ABMTs as defined in the Revised Draft Agreement. REMPs seek to balance conservation and use from a mining perspective.

The starting point for the designation of APEIS in the REMP for the CCZ was a workshop that was convened in Honolulu in 2007.<sup>74</sup> According to Wedding and others, the workshop identified three scenarios for the designation of 9 MPAs in the CCZ.<sup>75</sup> This identification was done on the basis of 'guiding scientific principles developed at the workshop' while minimizing overlap with areas of contractors and reserved areas<sup>76</sup> and 'mitigate[ing] the potential impact of sediment plumes from deep-sea mining'.<sup>77</sup> Under all three proposed scenarios, the MPAs did not overlap with areas of contractors, but a number of them overlapped to a considerable extent with reserved areas.<sup>78</sup> The summary of the workshop provided by an LTC document does not present the three scenarios as developed by the workshop, but instead includes a figure that 'shows one of many options for location of preservation reference areas'.<sup>79</sup> Only one of these areas overlapped in part with reserved areas.<sup>80</sup>

The LTC, '[a]fter an initial review of the workshop outcomes, [amended] the locations of the proposed [APEIS] ... in the light of the current distribution of contracts and reserved areas'.<sup>81</sup> The document concerned does not provide a further explanation in this connection. The APEIS in the REMP as elaborated

73 ISBA/24/C/3, para 5.

74 See ISBA/14/LTC/2, para 1; Lisa M Wedding and others, *From principles to practice: a spatial approach to systematic conservation planning in the deep sea* (Proceedings of the Royal Society B 2013) 3 and 8.

75 *ibid* 7 and figure 3.

76 Applications for exploration by (contractors sponsored by) a developed State must contain two areas that can be mined, one of which will be set aside for mining by developing States or the Enterprise, the organ of the ISA that is to carry out mining operations (see LOSC, Annex III, art 8).

77 Wedding (n 74) 7.

78 *ibid* figure 3.

79 ISBA/14/LTC/2, 4, figure 2. The references to MPAs, preservation reference areas and APEIS might suggest that this concerns different types of areas. However, this rather concerns an inconsistent use of terminology to refer to the same type of areas, albeit located differently geospatially. See also ISBA/17/LTC/7, para 26.

80 ISBA/14/LTC/2, 4, figure 2.

81 ISBA/17/LTC/7, 8.

by the LTC and endorsed by the Council, do not have any overlap with areas of contractors or reserved areas.<sup>82</sup> The decision of the Council on the location of APEIS in the REMP CCZ suggests that the contractual rights of contractors, 'in particular their security of tenure over areas allocated for exploration',<sup>83</sup> may have been an important consideration in this respect. Designating parts of reserved areas as APEIS, potentially closing them for future mining activities, might arguably be said as resulting in contractors not meeting their obligations in relation to reserved areas as defined in the LOSC.<sup>84</sup>

The REMP CCZ was initially adopted for a period of three years and was reviewed by the LTC in 2016.<sup>85</sup> The review, among others, notes that many of the proposed actions under the REMP remain to be implemented, that additional data in relation to the APEIS indicates that their location may not be optimal and suggests the establishment of two additional APEIS for areas that are not covered well.<sup>86</sup>

Following the approval of the REMP CCZ, the ISA has been considering the development of REMPs for other regions, in first instance focusing on areas covered by exploration contracts.<sup>87</sup> Little progress was made on this matter until the end of 2017.<sup>88</sup> In January 2018, the Secretary-General of the ISA presented the Preliminary Strategy for the development of regional environmental management plans for the Area.<sup>89</sup> On the basis of the budgetary and other constraints the Authority was facing in developing REMPs, the Strategy envisaged that work would start in relation to the 'Mid-Atlantic Ridge, the Indian Ocean triple junction ridge and nodule-bearing province, as well as the North-west Pacific and South Atlantic for seamounts'.<sup>90</sup> This selection was made taking into account current exploration activities in the Area.<sup>91</sup> Since

82 See ISBA/17/LTC/7, 17, figure II; ISBA/18/C/22, 5, figure 'Exploration areas, areas reserved for the authority and areas of particular environmental interest in the Clarion-Clipperton Fracture Zone'.

83 ISBA/18/C/22, 7th preambular consideration.

84 See LOSC, Annex III, Article 8.

85 See ISBA/22/LTC/12.

86 See *ibid.*, paras 13 and 17–19. A 2019 workshop further considered the issues in relation to the designation of these two additional APEIS. The results of this workshop will be taken into consideration by the LTC in its future work on additional APEIS in the CCZ (see *Environmental Management Plan* available at <[www.isa.org.jm/minerals/environmental-management-plan-clarion-clipperton-zone](http://www.isa.org.jm/minerals/environmental-management-plan-clarion-clipperton-zone)> accessed 25 July 2021).

87 See ISBA/24/C/3 para 3.

88 See *ibid.* para 4.

89 ISBA/24/C/3. Subsequently, the development of REMPs was included in the Authority's strategic plan for the period 2019–2023 (see ISBA/24/A/10, 10, Strategic direction 3.2).

90 ISBA/24/C/3, paras 9–12.

91 *ibid.* para 12.

January 2018 the Authority has, among others, been partnering a number of workshops for developing REMPs for specific regions.<sup>92</sup> The outcomes of a June 2018 Workshop relating to REMPs for polymetallic sulphide deposits on mid-ocean ridges indicates that the question of the location of APEIS in relation to contract areas and reserved areas remain a topic needing further consideration.<sup>93</sup> More in general, the outcomes of this workshop indicated that many of the parameters for assessing the effectiveness of REMPs remained to be developed.<sup>94</sup>

Although the Authority has prepared a guidance document in relation to the development of REMPs,<sup>95</sup> there have been criticisms that there is not a standardized approach setting out the requirements for the procedure for the development of REMPs and their content.<sup>96</sup> Germany, the Netherlands and Costa Rica addressed this issue in a proposal that was considered by the Council in January 2020.<sup>97</sup> In response, the Council requested the LTC to develop 'a standardized approach, including a template with indicative elements' in relation to the requirements for REMPs.<sup>98</sup> During the discussion of this matter there was considerable support for a standardized approach.<sup>99</sup>

Recent discussions at the ISA have also touched upon the questions whether REMPs should be mandatory and binding, and should be in place prior to the issuance of exploitation contracts.<sup>100</sup> Both these positions have received support, but are not generally accepted.<sup>101</sup> These questions also touch upon the relationship between the regulations for the exploitation of

92 See an overview see ISBA/25/C/3.

93 ISA Technical Study No. 22 (n 63) 22. See also *ibid* 12–13.

94 *ibid* 28.

95 *Guidance to facilitate the development of regional environmental management plans* available at <[www.isa.org.jm/files/files/documents/rem\\_p\\_guidance\\_.pdf](http://www.isa.org.jm/files/files/documents/rem_p_guidance_.pdf)> accessed 10 March 2021.

96 See Andrew Friedman, 'Global leaders must act to protect ocean life from seabed mining impacts' The Pew Charitable Trusts (12 November 2020) available at <[www.pewtrusts.org/en/research-and-analysis/articles/2020/11/12/global-leaders-must-act-to-protect-ocean-life-from-seabed-mining-impacts](http://www.pewtrusts.org/en/research-and-analysis/articles/2020/11/12/global-leaders-must-act-to-protect-ocean-life-from-seabed-mining-impacts)> accessed 10 May 2021; Harald Ginzky, Pradeep A Singh and Till Markus, 'Strengthening the International Seabed Authority's knowledge-base: Addressing uncertainties to enhance decision-making' (2020) 114 *Marine Policy* 103823, 9.

97 See ISBA/26/C/6 and ISBA/26/C/7.

98 See ISBA/26/C/10, para 1; ISBA/26/C/7.

99 See 25(224) *Earth Negotiations Bulletin* 7.

100 For a discussion of the status of REMPs and their relationship to the (draft) exploitation regulations see also ISBA/25/C/4.

101 See 25(185) *Earth Negotiations Bulletin* 5 and 11; 25(224) *Earth Negotiations Bulletin* 7 and 12.

mineral resources, which are being developed by the ISA, and REMPS.<sup>102</sup> The proposal of Germany, the Netherlands and Costa Rica on REMPS as a matter of fact aimed at making the proposed approach part of the draft regulations. In the debate, opposition to this approach argued that this might delay the timeline for adopting the exploitation regulations.<sup>103</sup> As noted above, the Council referred further consideration of the approach to REMPS to the LTC, instead of considering it further in its consideration of the draft exploitation regulations. The current draft exploitation regulations do include several references to REMPS. They are mentioned as part of the framework for providing effective protection of the marine environment in accordance with Article 145 of the LOSC.<sup>104</sup> Environmental impact statements to be prepared prior to mining operations are required to be '[i]n accordance with the objectives and measures of the relevant regional environmental management plan'.<sup>105</sup> The same condition applies to the Environmental Management and Monitoring Plan that is to be prepared prior to such activities and Closure plans.<sup>106</sup> These references to REMPS in the draft exploitation regulations point to the need to have a REMP in place before the planning of exploitation in a specific area starts and the need to have standardized procedures in relation to the elaboration and the need to elaborate clearly the requirements that flow from a REMP for operators.<sup>107</sup>

### 3.3 *The CBD and EBSAs*

As discussed in chapter 7 of this volume, the CBD has played a significant role in getting the BBNJ process on track and, as is argued in that chapter, its mandate would have allowed it to play a significant role in setting up mechanisms for international cooperation on all elements of the package on the table at the BBNJ process, including MPAs and ABMTs. As is also detailed in chapter 7, the CBD's role in relation to MPAs and ABMTs, apart from adopting Aichi Target 11, in practice has been limited mostly to developing criteria for the identification

102 See *ibid.*

103 See 25(224) Earth Negotiations Bulletin 12.

104 Draft regulations on exploitation of mineral resources in the Area (ISBA/25/C/WP.1), Regulation 2(e).

105 *ibid* Regulation 47(3)(c).

106 *ibid* Regulation 48(3)(b); *ibid* Annex VIII, para 1. A Closure Plan 'shall set out the responsibilities and actions of a Contractor for the decommissioning and closure of activities in a Mining Area' (*ibid* Regulation 59(1)).

107 See also Ginzky (n 96) 9.

of EBSAs and being involved in regional workshops for considering the designation of specific areas meeting these criteria as EBSAs.<sup>108</sup>

Identification of an area as an EBSA in itself does not give that area protected status, but provides an indication that such an area may require/should be protected by ABMTs or designation as an MPA.<sup>109</sup> However, EBSA status does not automatically trigger a procedure for MPA designation or the taking of protective measures.<sup>110</sup> Discussions during the 23rd session of the Council of the ISA in 2017 illustrate the implications of this situation. The Netherlands reportedly

called for the Council to consider the work of other multilateral environmental agreements, including the CBD, and requested the LTC to address the issue of impacts on EBSAs in ... applications for approval of work plans and extension of exploration contracts, as well as in the exploration regulations.<sup>111</sup>

In reply, the LTC chair pointed to the absence of binding rules in relation to EBSAs. Furthermore, Argentina reportedly voiced opposition against incorporating criteria from other international instruments in the regulatory framework of the ISA provided by the LOSC.<sup>112</sup>

Several factors may have contributed to the specific role of the CBD in relation to MPAs and ABMTs. Although the CBD clearly spells out the obligations of States parties in relation to the designation of MPAs, it does not provide a clear mandate of the CBD in that connection. In addition, the CBD mandate does not directly allow regulating activities taking place in the marine environment, for which other instruments and bodies have primary responsibility. On the other hand, the CBD's role in relation to EBSAs is much more easily justified under its mandate and its role in the generation and dissemination of knowledge in relation to BBNJ.<sup>113</sup>

108 For a further discussion of the EBSA process see eg Daniel C Dunn and others, 'The Convention on Biological Diversity's Ecologically or Biologically Significant Areas: Origins, development, and current status' (2014) 49 *Marine Policy* 137.

109 See also Sarah M Watson, *Sustainable Development Goal 14's Marine Protected Area Target—Is it 'SMART' Enough to Conserve Marine Biodiversity in Areas Beyond National Jurisdiction?* 20–21, available at <[https://globalgoalsproject.eu/globalgoals2020/wp-content/uploads/2020/06/GlobalGoals2020\\_Watson.pdf](https://globalgoalsproject.eu/globalgoals2020/wp-content/uploads/2020/06/GlobalGoals2020_Watson.pdf)> accessed 28 April 2021.

110 A detailed discussion of the (possible) legal implications of the designation of an area as and EBSA is beyond the scope of this chapter.

111 25(151) *Earth Negotiations Bulletin* 7.

112 *ibid.*

113 See CBD arts 23(4)(b) and 25.

### 3.4 *Regional Practice of the OSPAR Convention and the OSPAR Commission and the CAMLR Convention and CCAMLR*<sup>114</sup>

#### 3.4.1 The OSPAR Convention and the OSPAR Commission<sup>115</sup>

The spatial scope of application of the OSPAR Convention is the North-East Atlantic and includes extensive areas of ABNJ.<sup>116</sup> In this connection, Article 1(a) provides that the Maritime Area includes ‘the sea beyond and adjacent to the territorial sea under the jurisdiction of the coastal state to *the extent recognised by international law*’.<sup>117</sup> In 1998, the Contracting Parties to the OSPAR Convention concluded Annex v to the Convention concerned with biodiversity.<sup>118</sup> Annex v requires the Contracting Parties to ‘develop means, *consistent with international law*, for instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to particular species or habitats’.<sup>119</sup> Annex v also provides that it is intended to implement the obligations of the States parties under the CBD. In this connection, Annex v does not refer explicitly to Article 8 of the CBD dealing with MPAs.<sup>120</sup> However, the Annex’s reference to the obligations under Article 6(a) of the CBD implies a cross-reference to Article 8.

During the BBNJ process, some concern has been expressed as regards the propriety of the OSPAR Commission designating MPAs in the high seas:

the view was expressed that the OSPAR Convention and other regional seas conventions did not have the competence under the United Nations Convention on the Law of the Sea, nor the legitimacy, to take measures in

<sup>114</sup> For a discussion of the experience of these regions in dealing with MPAs in ABNJ see also eg Wen Duan, ‘The International Legal Regime Relating to Marine Protected Areas in Areas Beyond National Jurisdiction: Identifying and Addressing Gaps’ (PhD Manuscript, Utrecht University 2021) 64–95 and 176–206; Nele Matz-Lück and Johannes Fuchs, ‘The impact of OSPAR on protected area management beyond national jurisdiction: Effective regional cooperation or a network of paper parks?’ (2014) 49 *Marine Policy* 155; Wright and others (n 15) 279–83.

<sup>115</sup> The discussion of OSPAR in part is based on Alex G Oude Elferink, ‘Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC’ (2018) *International Journal of Marine & Coastal Law* 437, 457–60.

<sup>116</sup> OSPAR Convention art 1(a).

<sup>117</sup> Emphasis added.

<sup>118</sup> Annex v on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area (opened for signature 23 July 1998; entered into force 30 August 2000) available at <[www.ospar.org/site/assets/files/1290/ospar\\_convention\\_e\\_updated\\_text\\_in\\_2007\\_no\\_revs.pdf](http://www.ospar.org/site/assets/files/1290/ospar_convention_e_updated_text_in_2007_no_revs.pdf)> accessed 25 July 2021.

<sup>119</sup> *ibid* art 3(1)(b)(ii) (emphasis added).

<sup>120</sup> *ibid* art 2. CBD art 6(a) refers to the ‘measures set out in this Convention relevant to the Contracting Party concerned’, which in this case includes the measures listed in art 8.

areas beyond national jurisdiction such as the establishment of marine protected areas.<sup>121</sup>

Although Article 197 of the LOSC in combination with Article 194(5) arguably offers a basis for the establishment of MPAs<sup>122</sup> and, as discussed in the preceding paragraph, OSPAR States parties rely on international law to justify their actions, this statement points to the existence of different views in this regard.

Following the adoption of Annex v, the OSPAR Contracting Parties have worked towards the designation of a network of MPAs in their maritime zones and in ABNJ of the Maritime Area. Two OSPAR documents from 2003 set up a framework for the designation of MPAs. This concerned OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas<sup>123</sup> and the 2003 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic.<sup>124</sup> Any Contracting Party may take the initiative to make a proposal to the OSPAR Commission to include MPAs in ABNJ in the OSPAR Network.<sup>125</sup> In practice, Contracting Parties have collaborated with NGOs in preparing proposals for MPAs in ABNJ.<sup>126</sup> Recommendation 2003/3, like Annex v, provides that the establishment of MPAs has to be consistent with international law, and adds that it has to be based on scientific information.<sup>127</sup> The Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area contained in OSPAR Agreement

121 Intersessional workshops aimed at improving understanding of the issues and clarifying key questions as an input to the work of the Working Group in accordance with the terms of reference annexed to General Assembly Res 67/78; Summary of proceedings prepared by the Co-Chairs of the Working Group (UN Doc A/AC.276/6), para 89. Similar concerns have been expressed by Ukraine in CCAMLR see Wright and others (n 15) 281.

122 Also see above. The 2010 OSPAR Strategy also refers to LOSC art 197 as the basis for cooperation on the protection of the marine environment, including that in ABNJ and submits that to achieve its objectives, OSPAR may designate MPAs in ABNJ (The North-East Atlantic Environment Strategy. OSPAR Agreement 2010–3, paras 1.1, 3.1 and 4.4 available at <[www.ospar.org/site/assets/files/1200/ospar\\_strategy.pdf](http://www.ospar.org/site/assets/files/1200/ospar_strategy.pdf)> accessed 25 July 2021.

123 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas (Summary Record OSPAR 2003; OSPAR 03/17/1-E, Annex 9).

124 2003 Strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic (Summary Record OSPAR 03/17/1-E, Annex 31).

125 See *ibid* paras 2.4–2.9, which contain the relevant amendments.

126 See eg, Sabine Christiansen, 'Marine Protected Areas in areas beyond national jurisdiction; Proposed High Seas MPAs in the North East Atlantic by WWF 1998–2006' WWF NEAME (August 2007) available at <[www.cbd.int/doc/meetings/mar/ewsebm-01/other/ewsebm-01-wwf-en.pdf](http://www.cbd.int/doc/meetings/mar/ewsebm-01/other/ewsebm-01-wwf-en.pdf)> accessed 22 March 2021.

127 OSPAR Recommendation 2003/3 on a Network of Marine Protected Areas, 5th preambular consideration available at <[www.ospar.org/documents?d=32867](http://www.ospar.org/documents?d=32867)> accessed 11 May 2021.

2003/17 as amended in 2007 indicate that the criteria for selection as an MPA should be considered and assessed 'based on best available scientific expertise and knowledge'.<sup>128</sup>

The OSPAR Commission has thus far included seven MPAs in ABNJ within the OSPAR Network.<sup>129</sup> Two of the MPAs designated by the OSPAR Commission in 2010 (Charlie-Gibbs South Marine Protected Area; Milne Seamount Complex Marine Protected Area) comprise the water column and seabed, which are both part of ABNJ. The other four areas designated in 2010 only concern the high seas water column superjacent to the continental shelf beyond 200 nautical miles of Portugal. All six decisions provide that they 'shall apply without prejudice to the rights and obligations of coastal States, other States and international organisations in accordance with [the LOSC] and customary international law'.<sup>130</sup>

In addition, the Preamble of all six decisions recognizes that they do not prejudice the rights of coastal States over their continental shelf.<sup>131</sup> In the case of the MPAs superjacent to the Portuguese continental shelf, the Preamble adds that the procedure for designation is not intended to set a precedent for such MPAs and that future designations 'will be decided on a case by case basis'.<sup>132</sup> The general safeguarding clause of the 2012 decision on the Charlie-Gibbs North High Seas MPA, which covers waters superjacent to the continental shelf of Iceland, is identical to that of the six 2010 decisions.<sup>133</sup> The rights of the coastal State are in addition safeguarded in more specific terms in the

128 Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area contained in OSPAR Agreement 2003/17 as amended in 2007, Appendix 1 available at <[www.ospar.org/documents?d=32398](http://www.ospar.org/documents?d=32398)> accessed 25 July 2021. The Guidelines are incorporated in Recommendation 2003/3 by cross-references in OSPAR Recommendation 2003/3 (n 123) paras 1.1 and 3.1.

129 OSPAR Decision 2010/2 on the establishment of the Charlie-Gibbs South Marine Protected Area (OSPAR 10/23/1-E, Annex 36); OSPAR Decision 2010/1 on the Establishment of the Milne Seamount Complex Marine Protected Area (ibid Annex 34); OSPAR Decision 2010/3 on the Establishment of the Altair Seamount High Seas Marine Protected Area (ibid Annex 38); OSPAR Decision 2010/4 on the Establishment of the Antialtair Seamount High Seas Marine Protected Area (ibid Annex 40); OSPAR Decision 2010/5 on the Establishment of the Josephine Seamount High Seas Marine Protected Area (ibid Annex 42); OSPAR Decision 2010/6 on the Establishment of the MAR North of the Azores High Seas Marine Protected Area (ibid Annex 44); OSPAR Decision 2012/1 on the establishment of the Charlie-Gibbs North High Seas Marine Protected Area (OSPAR 12/22/1, Annex 6).

130 OSPAR Decisions 2010/1 and 2010/2 (ibid) para 2.2; OSPAR Decisions 2010/3 to 2010/6 (n 129) para 2.3.

131 OSPAR Decisions 2010/1 to 2010/6 (n 129) preamble.

132 OSPAR Decisions 2010/3 to 2010/6 (n 129) preamble.

133 OSPAR Decision 2012/1 (n 129) para 2.3.

body of the decision.<sup>134</sup> The preambular considerations of the 2012 decision are more elaborate on the point of the rights of the coastal State and other States than the 2010 decisions, but essentially confirm that the rights of the coastal State over its continental shelf and other States in the superjacent waters are defined in the LOSC.<sup>135</sup> The difference in wording between the 2010 and 2012 decisions is likely explained by the differences in approach of the coastal States concerned. Portugal has designated the parts of its continental shelf overlain by the water column concerned as MPAs, but Iceland has not.<sup>136</sup>

A proposal to the OSPAR Commission to designate an MPA in ABNJ in the part of the Maritime Area in the Arctic Ocean, identified as the OSPAR Arctic Ice High Seas MPA, failed, due to the opposition of Denmark, Iceland and Norway, who are both members the OSPAR Commission and the Arctic Council. During an OSPAR Commission Heads of Delegation meeting, the contracting parties agreed to not further consider the proposal for designation, but instead to refer it to the Arctic Council for information.<sup>137</sup> This implied the proposal likely would be shelved.<sup>138</sup> The Arctic Council does not have the required competence to designate MPAs in ABNJ and it seems excluded that it would have referred the matter back to the OSPAR Commission.<sup>139</sup>

At the 2016 meeting of the OSPAR Commission following the Heads of Delegation meeting, the issue was further discussed. Contracting parties disagreed about whether an MPA designation was the right means to protect the area concerned.<sup>140</sup> Denmark, Iceland and Norway justified their position by pointing out that all relevant Arctic Ocean coastal States had to be involved, including the US, Canada and the Russian Federation,<sup>141</sup> which are not

<sup>134</sup> *ibid* para 2.2.

<sup>135</sup> *ibid* preamble.

<sup>136</sup> For a further consideration of this point see Matz-Lück and Fuchs (n 114) 161–62.

<sup>137</sup> Meeting of the OSPAR Commission (OSPAR); Tenerife: 20–24 June 2016; Summary Record; Agenda Item 20 (OSPAR 16/20/1-E) para 6.24.

<sup>138</sup> In this context, it should be noted that the PAME Workgroup of the Arctic Council had prepared the *Framework for a Pan-Arctic Network of Marine Protected Areas* in April of 2015 available at <[https://pame.is/images/o3\\_Projects/MPA/MPA\\_Report.pdf](https://pame.is/images/o3_Projects/MPA/MPA_Report.pdf)> accessed 22 April 2021. Although the framework recognizes linkages to ABNJ, its focus is on MPA networks within the EEZs of the Arctic States (*ibid* 5 and 11).

<sup>139</sup> An enquiry of the author with the Arctic Council Secretariat (emails of 22 April 2021 and 10 May 2021; on file with the author) concerning whether the Arctic Council took any follow-up action upon receiving the information forwarded by the OSPAR Commission did not lead to a reaction from the secretariat.

<sup>140</sup> Summary Record (n 137) para 6.27.

<sup>141</sup> This position is in line with the claim of the Arctic States concerning their shared stewardship role in relation to the Arctic Ocean including its ABNJ as reflected in the Ilulissat Declaration (adopted 28 May 2008) at the Arctic Ocean Conference, available at

contracting parties to the OSPAR Convention. In this connection, Article 76 of the LOSC was also invoked.<sup>142</sup> In case the submissions of the coastal States to the Commission on the Limits of the Continental Shelf (CLCS) under Article 76(8) will be accepted, most of the seabed of the central Arctic Ocean beyond 200 nautical miles will be part of the continental shelf of the coastal States. Moreover, it was submitted that 'Arctic marine ecosystems [had to be assessed] in a coherent manner'. For these reasons the Arctic Council should take the lead in considering this issue.<sup>143</sup> Whether these arguments are fully convincing is open to doubt. First, as discussed above, OSPAR practice in designating MPAS in ABNJ has been careful in safeguarding the rights of coastal States over their continental shelf. These safeguarding clauses were acceptable to all OSPAR contracting parties, including Denmark, Iceland and Norway, which all had an interest in this matter.<sup>144</sup> Second, whether the designation of an area that meets the criteria for MPA designation by the OSPAR Commission threatens a coherent approach to Arctic ecosystems is questionable.<sup>145</sup> Other States disagreed that the Arctic Council should be given primacy, pointing to the clear mandate of the OSPAR Commission for the whole Maritime Area, including in the Arctic Ocean.<sup>146</sup> Denmark, Iceland and Norway indicated that they could not agree to reopening the issue at future OSPAR Convention meetings.<sup>147</sup> Reportedly, Norway even threatened to withdraw from the OSPAR Convention.<sup>148</sup>

The OSPAR Commission does not have the competence to comprehensively regulate activities in the MPAS in ABNJ it has designated. For instance, fisheries are regulated by the relevant RFMOS, in particular NEAFC, and the regulation of mining at the international level is the exclusive competence of the ISA. To ensure a comprehensive approach to the management of OSPAR MPAS in ABNJ, the OSPAR Commission has sought to establish cooperation

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<[www.regjeringen.no/globalassets/upload/ud/080525\\_arctic\\_ocean\\_conference\\_-\\_outcome.pdf](http://www.regjeringen.no/globalassets/upload/ud/080525_arctic_ocean_conference_-_outcome.pdf)> accessed 10 April 2021.

142 Summary Record (n 137) para 6.27.

143 *ibid.*

144 Denmark, Iceland and Norway have made submissions to the CLCS in relation to their continental shelf in the Maritime Area, and, as was discussed above, one of the previous MPA designations by the OSPAR Commission, the Charlie-Gibbs North High Seas MPA, is superjacent to the Icelandic continental shelf.

145 The *Framework for a Pan-Arctic Network of Marine Protected Areas* prepared by the PAME Workgroup of the Arctic Council suggests that the Council at the time also may not have had a comprehensive approach (see further above n 138).

146 Summary Record (n 137) para 6.27.

147 *ibid* para 6.30.

148 See Robin des Bois, *OSPAR loses the Arctic* (22 March 2017) available at <<https://robindesbois.org/en/ospar-perd-le-nord-5/>> accessed 11 March 2021.

with other relevant international instruments and organizations.<sup>149</sup> After a detailed analysis of the existing bilateral arrangements, Duan concludes that they in general remain 'to be operationalised by further concrete joint working arrangements'.<sup>150</sup> This conclusion does not apply to the so-called Collective Arrangement, which the OSPAR Commission and NEAFC concluded in 2014.<sup>151</sup> The Collective Arrangement is intended to achieve cooperation between all competent international institutions and instruments that have the competence to regulate human activities in the North-East Atlantic. The Collective Arrangement was one of the results of the aspiration of the OSPAR Commission and NEAFC to reach policy coherence. Although NEAFC and the OSPAR Commission have sought to include other institutions and instruments in the Collective Arrangement since 2010, they remain the only two participants to date.<sup>152</sup>

### 3.4.2 The CAMLR Convention and CCAMLR

The spatial scope of the CAMLR Convention consists of Antarctic waters up to the Antarctic Convergence as defined by the Convention.<sup>153</sup> Due to the existence of the Antarctic Treaty and its 'freezing' of claims to territory in the Antarctic continent,<sup>154</sup> most waters included in the spatial scope of application of the CAMLR Convention in practice are treated as high seas. CCAMLR has been set up as the main regulatory body under the Convention. There has been debate over the nature of the Convention and the Commission, ie, whether it is an RFMO or something different, eg a regional seas program.<sup>155</sup> Molenaar argues in detail that the Commission is best classified as the former, mainly because its mandate is mostly limited to fisheries and fisheries-related

149 For a detailed overview see Duan (n 114) 176–96.

150 *ibid* 217.

151 Collective Arrangement between competent international organisations on cooperation and coordination regarding selected areas in areas beyond national jurisdiction in the North-East Atlantic. An updated version of the Collective Arrangement is available at <[www.ospar.org/documents?v=33030](http://www.ospar.org/documents?v=33030)> accessed 15 March 2021; for a further discussion see Duan (n 114) 186–89.

152 *Collective Arrangement* available at <[www.ospar.org/about/international-cooperation/collective-arrangement](http://www.ospar.org/about/international-cooperation/collective-arrangement)> accessed 15 March 2021.

153 CAMLR Convention arts 1(1) and 1(4).

154 Antarctic Treaty (adopted on 1 December 1959, entered into force 23 June 1961) 402 UNTS 71, art IV. CAMLR Convention art IV reaffirms the obligations that parties to the Antarctic Treaty have undertaken under Antarctic Treaty art IV.

155 Erik Molenaar, 'Regional Fisheries Management Organizations' in Marta Chantal Ribeiro, Fernando Loureiro Bastos and Tore Henriksen (eds.), *Global Challenges and the Law of the Sea* (Springer 2020) 81–109, 93.

activities.<sup>156</sup> At the same time, contrary to other RFMOs, States do not have to engage in fishing in the Convention Area to be members of CCAMLR and the objective of the CAMLR Convention is phrased more broadly than that of 'typical' RFMOs, as being, as per Article II of the Convention, 'the conservation of Antarctic marine living resources', with the term 'conservation' including rational use.<sup>157</sup>

The somewhat atypical nature of CCAMLR as compared to other RFMOs is also reflected in its approach to ABMTs and MPAs. While other RFMOs have focused on ABMTs to regulate the impact of fishing activities on the marine environment,<sup>158</sup> CCAMLR has set up a process for establishing MPAs and a number of MPAs in the CAMLR Convention Area have been established. As the *General framework for the establishment of CCAMLR Marine Protected Areas* (General framework), which was adopted in 2011, indicates:

CCAMLR MPAs aim to contribute to sustaining ecosystem structure and function, including in areas outside the MPAs, maintain the ability to adapt in the face of climate change, and reduce the potential for invasion by alien species, as a result of human activity.<sup>159</sup>

The General framework indicates that the basis for the Commission's mandate to adopt measures establishing MPAs is Article IX(2)(g) of the Convention, which provides that measures may include measures concerning 'the designation of the opening and closing of areas, regions or sub-regions for purposes of

156 *ibid* 96ff. Molenaar also submits that CCAMLR is 'more than an RFMO'. However, that conclusion is not based on its subject-matter competence, but its being a part of the Antarctic Treaty System (see *ibid* 96). As is observed by Rayfuse, 'while CCAMLR may be something more than a *normal* RFMO, it functions as at least a *normal* RFMO' (Rosemary Rayfuse, 'Regional Fisheries Management Organizations' in Donald R Rothwell and others (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 450 (emphasis in the original)).

157 Molenaar, 'Regional Fisheries Management Organizations' (n 155) 92–93.

158 See eg, NEAFC Recommendation 19:2014 on area management measures for the protection of vulnerable marine ecosystems in the NEAFC Regulatory Area, as amended, available at <[www.neafc.org/system/files/Recommendation-19-2014-VME-protection-as-amended-by-%20Rec-09-2015-Rec-10-2018-Rec-10-2021.pdf](http://www.neafc.org/system/files/Recommendation-19-2014-VME-protection-as-amended-by-%20Rec-09-2015-Rec-10-2018-Rec-10-2021.pdf)> accessed 16 March 2021; SEAFO Conservation Measure 30/15 on Bottom Fishing Activities and Vulnerable Marine Ecosystems in the SEAFO Convention Area, available at <[www.seafo.org/media/8933d489-854c-4c99-895e-66573c7010a4/SEAFOweb/CM/open/eng/CM30-15\\_.pdf](http://www.seafo.org/media/8933d489-854c-4c99-895e-66573c7010a4/SEAFOweb/CM/open/eng/CM30-15_.pdf)> accessed 16 March 2021.

159 Conservation measure 91-04 (2011); General framework for the establishment of CCAMLR Marine Protected Areas, 6th preambular consideration; see also *ibid* 1st preambular consideration and para 2.

scientific study or conservation, including special areas for protection and scientific study'.<sup>160</sup> The General framework also refers to Article II of the CAMLR Convention, explicitly recalling that 'conservation includes rational use'.<sup>161</sup> Conservation measures of the Commission relevant to MPAs 'shall be adopted and implemented consistent with international law, including as reflected in the [LOSC] ... [and] shall be established on the basis of the best available scientific evidence'.<sup>162</sup> Unlike Annex V to the OSPAR Convention, the General framework does not refer to the obligations of the member States of CCAMLR under the CBD.<sup>163</sup> However, it does refer to 'the aim of conserving marine biodiversity in the Convention Area' and 'the decision at the [WSSD] in 2002 to achieve a representative network of MPAs by 2012'.<sup>164</sup>

Notwithstanding the agreement of the members of CCAMLR on the General framework, the discussions on the adoption of conservation measures establishing specific MPAs in most cases have been arduous and time-consuming.<sup>165</sup> This is mostly explained by the existence of different perspectives on the right balance between fishing and conservation, while conservation measures can only be adopted by consensus.<sup>166</sup> It might be argued that the opposition between conservationist and fishing interests is included in the General framework itself by its reconfirmation of the inclusion of rational use as part of conservation under Article II of the Convention. Although that reference recalls the general objectives of the Convention, in the framework of a measure setting out the procedure for establishing MPAs it seems somewhat out of place. The reference to rational use is included in the chapeau of the list of objectives in relation to MPAs to be established by CCAMLR.<sup>167</sup> That reference could be used by fishing interests to argue that rational use is one of the main objectives in managing MPAs. At the same time, the other objectives listed by the General

160 *ibid* 2nd preambular consideration.

161 *ibid* para 2.

162 *ibid* paras 1–2.

163 This might be explained by the fact that not all members to the Commission are parties to the CBD.

164 *ibid* 1st preambular consideration.

165 See further Cassandra Brooks, 'Why are talks over an East Antarctic marine park still deadlocked?' *The Conversation* (3 November 2017) available at <<https://theconversation.com/why-are-talks-over-an-east-antarctic-marine-park-still-deadlocked-86681>> accessed 29 April 2021; Klaus Dodds and Cassandra Brooks, 'Antarctic Geopolitics and the Ross Sea Marine Protected Area' *E-International Relations* (20 February 2018) available at <[www.e-ir.info/2018/02/20/antarctic-geopolitics-and-the-ross-sea-marine-protected-area/](http://www.e-ir.info/2018/02/20/antarctic-geopolitics-and-the-ross-sea-marine-protected-area/)> accessed 10 March 2021.

166 CAMLR Convention art XII(1).

167 Conservation measure 91-04 (n 159) para 2.

framework have a clear focus on the protection and preservation of biodiversity, habitats and ecosystems.<sup>168</sup>

Proposals for MPAs to CCAMLR in general have been made by States having an interest in conservation, while all Antarctic claimant States have been involved in one or more proposals. States with fishing interests opposed (certain aspects of) these proposals.<sup>169</sup> In the case of the Ross Sea MPA, which currently is the largest MPA in the world and which was adopted in 2016,<sup>170</sup> the consideration of the proposal by CCAMLR led to a gradual diminution of the spatial extent of the MPA and the inclusion of a Special Research Zone and a Krill Research Zone.<sup>171</sup> In both these zones members of the Commission are allowed to fish for Antarctic krill and in the Special Research Zone for *Dissostichus* spp. (toothfish) under the conditions set out in conservation measure 95-01 (2016).<sup>172</sup>

At the 2020 meeting of CCAMLR three proposals for MPAs were on the table, for the Antarctic Peninsula (Domain 1), the Weddell Sea and East Antarctica. No decision was taken at the meeting and the proposals will be further considered during the next meeting of CCAMLR, which is scheduled to take place in October of 2021.<sup>173</sup> The proposal for the East Antarctic MPA has been under consideration since 2012. As originally proposed, the MPA would have covered 1.8 square million kilometers and included a network of seven areas. At present, the proposed MPA has an extent of some 1 million square kilometers and includes three separate areas.<sup>174</sup> The main opponents of the establishment of these three MPAs in their current form are the Russian Federation and China. Both have relied on the Convention's inclusion of rational use in conservation in the General framework's objective.<sup>175</sup> In that connection, China has also

168 *ibid.*

169 See Dodds and Brooks (n 165).

170 Conservation measure 91-05 (2016), Ross Sea region marine protected area.

171 The revised joint proposal New Zealand and the US submitted in 2012 covered an area of about 2.27 million km<sup>2</sup> (see Report of the Thirty-First Meeting of the Commission (CCAMLR-XXXI) para 7.70). The Ross Sea MPA as designated covers 1.55 million km<sup>2</sup> (*Ross Sea region Marine Protected Area* available at <[www.doc.govt.nz/about-us/international-agreements/antarctica-treaty-system/ross-sea-region-marine-protected-area/](http://www.doc.govt.nz/about-us/international-agreements/antarctica-treaty-system/ross-sea-region-marine-protected-area/)> accessed 22 March 2021).

172 Conservation measure 91-05 (n 170) paras 5–9 and 11.

173 For the discussion on the proposals at the 39th meeting of the Commission see Report of the Thirty-Ninth Meeting of the Commission (CCAMLR-39) paras 8.19–8.44; see also *ibid* paras 8.16–8.18.

174 See Brooks (n 165).

175 See CCAMLR-39 (n 172) paras 8.29 and 8.31; Report of the Thirty-Eighth Meeting of the Commission (CCAMLR-38) para 6.56.

referred to the fact that ‘MPAs are tools and not objectives in their own’.<sup>176</sup> Both the Russian Federation and China have also observed that further scientific data was required to justify the establishment of the additional MPAs.<sup>177</sup> Proponents of the MPA proposals during the 39th meeting of the Commission reiterated that they were based on the best available science.<sup>178</sup> France in relation to the East Antarctic MPA recalled that CCAMLR’s Scientific Committee both in 2011 and 2013 had concluded that it was based on the best available science.<sup>179</sup> China and the Russian Federation have also argued that MPAs should not be established in haste, but that more fundamental issues should be considered first.<sup>180</sup> The Russian Federation in that connection proposed ‘to develop an agreed definition of the term “MPA”, which may be designated in the CAMLR Convention Area, without prejudice to the [LOSC]’.<sup>181</sup> It may be questioned whether these suggestions are genuinely intended to help moving the debate forward or are intended to stall a decision on the specific MPA proposals. Taking into account that the protection of species, habitats and ecosystems was already included in the LOSC and the original target for a representative network of MPAs covering 10% of the ocean was 2012, it is difficult to argue that the international community has been acting in haste, not having met that target in 2020. Requiring more science in relation to a proposal that is based on the best available science also does not accord with existing legal

176 See CCAMLR-38 (ibid) para 6.56. See also CCAMLR-39 (n 173) para 8.31. It may be noted that this latter statement seems to be, or rather is, backtracking on the consensus expressed in Conservation measure 91-04 (2011) to the effect that:

Recalling its endorsement of the work program of the Scientific Committee to develop a representative system of Antarctic Marine Protected Areas (MPAs) with the aim of conserving marine biodiversity in the Convention Area, and in accordance with the decision at the World Summit on Sustainable Development (WSSD) in 2002 to achieve a representative network of MPAs by 2012 (Conservation measure 91-04, note 159 at 1st preambular paragraph).

177 See eg CCAMLR-38 (n 175) para 6.43; CCAMLR-39 (n 173) para 8.29.

178 See ibid paras 8.21–8.22, 8.25–8.27.

179 ibid para 8.27.

180 See CCAMLR-38 (n 175) para 6.56; CCAMLR-39 (n 173) para 8.29. As observed by China: Many practical and policy issues associated with establishing MPAs necessitate a pace allowing a well weighted pragmatic approach to decision-making, with a hasty approach may be detrimental to the purpose. CCAMLR’s leading role should be represented by the quality of the MPAs designated, in order to give effect to the objective and principles of the Convention, rather than the speed, number and size of MPAs. In the 10th anniversary of our first MPA, we strongly feel that it is the right time for all CCAMLR Members to take stock, to draw experience and lessons from our past practice, and to build common ground to facilitate future progress.

181 CCAMLR-39 (n 173) para 8.29.

and political commitments. It is also difficult to grasp why there is a need for an agreed definition of MPAS in the context of the CAMLR Convention at this point in time. CCAMLR has developed a comprehensive framework for establishing and managing MPAS without such a definition. Moreover, a definition of MPAS is likely to be included in the BBNJ Agreement, raising the question why CCAMLR would need to duplicate the work of the IGC.

#### 4 Discussion and Assessment

As the title of this chapter asks, is the glass half empty or half full as concerns the protection of the marine environment in ABNJ through MPAS and ABMTs? One could well argue that the legal framework for the establishment and management of MPAS and ABMTs and practice in relation to the same have shown a remarkable development since the adoption of the LOSC in 1982. This applies not only to AWNJ, but also to ABNJ. The LOSC provides the basis for ABMTs in relation to specific activities, and impliedly provides for the establishment of MPAS. One could further argue that the BBNJ process is likely on the way to adopting an implementation agreement to the LOSC that will provide detailed rules for the identification, designation/adoption and management of ABMTs and MPAS. Global and regional organizations have been adopting ABMTs for specific activities. In particular, the OSPAR Commission and CCAMLR have established a number of MPAS in ABNJ and are acquiring experience with managing these areas in cooperation with other relevant instruments, bodies and frameworks. That experience that may assist other regions in developing similar initiatives in ABNJ.

On the other hand, it could equally well be argued that the development of a legal framework for MPAS and ABMTs has been excruciatingly slow, has known considerable setbacks and may never meet the targets that are required to effectively protect and preserve marine ecosystems and biodiversity. To start with a bird's eye perspective, according to the International Union for Conservation of Nature (IUCN):

MPAS ... currently cover about 6.35% of the ocean. However only just over 1.89% of that area is covered by exclusively no-take MPAS that do not allow any fishing, mining, drilling, or other extractive activities. This is far from the commitments of States made in relation to the Convention on Biological Diversity's (CBD) Aichi Target 11 of 10% MPA coverage by 2020, and even further from the recommendations made at the IUCN World

Parks Congress 2014 that at least 30% no-take MPA coverage worldwide is needed.<sup>182</sup>

As the analysis in section 2 indicates, there arguably has been a shift away from MPAs towards ABMTs at the conceptual level. While the CBD and the political commitments at the 2002 WSSD could be said to have emphasized the significance of MPAs, MPAs seemingly are a subset of ABMTs in the Revised Draft Agreement. Although it could be argued that neither the CBD nor the WSSD commitments implied an exclusive focus on MPAs, it is submitted that this shift is not without importance. ABMTs, being tools to manage activities, imply a focus on (optimizing) use, while MPAs, being areas that require protection, imply a focus on conservation, without necessarily having to accommodate current or future use.<sup>183</sup> Formulated somewhat differently, ABMTs can be characterized as 'free-standing', ie, they have a specific activity as their object, without looking holistically at the state of the environment, while MPAs require the consideration of a set of measures that are needed to achieve a certain state of the environment.

The discussion of practice in relation to MPAs and ABMTs in section 3 illustrates some of the reasons why the international community has failed to meet Aichi Target 11. Preliminarily, it may be noted that apart from the examples discussed in that section, regional cooperation on the preservation and protection of the marine environment is mostly limited to AWNJ. The regional EBSA workshops co-organized by the CBD Secretariat have led to the identification of EBSAs in ABNJ in many regions, but that identification for the moment has received limited follow-up actions.<sup>184</sup> As the above discussion in relation to EBSAs indicates, that may at least in part be due to the status of the EBSA process, ie the absence of specific obligations that flow from EBSA status of an area in terms of regulating activities or MPA designation. The existing regional practice identifies a number of factors that have contributed to the slow progress in

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182 IUCN Issues Brief *Marine protected areas and climate change* available at <[www.iucn.org/resources/issues-briefs/marine-protected-areas-and-climate-change](http://www.iucn.org/resources/issues-briefs/marine-protected-areas-and-climate-change)> accessed 17 March 2021. See also Resolution WCC-2016-Res-047-EN Advancing conservation and sustainable use of biological diversity in areas beyond national jurisdiction adopted at the 2016 IUCN World Conservation Congress (*IUCN Resolutions, Recommendations and other Decisions World Conservation Congress; Honolulu, Hawai'i, United States of America 6–10 September 2016*, 112–13). For a further discussion of the significance of the 30% no-take MPA coverage in relation to MPAs in ABNJ see below n 191.

183 See also above text at n 38.

184 See also Dunn and others (n 108) 42.

establishing MPAS as opposed to ABMTs. These factors will be further discussed in revisiting the central themes of the current volume.

As the introductory chapter to this volume indicates, these four themes that frame the project are justice, space, knowledge and power. Justice, understood in terms of access and utilization of marine resources, both in terms of intra- and intergeneration equity, is obviously central to the issue of MPAS and ABMTs. In the context of ABMTs and in particular (no-take) MPAS, it is also, or even rather, an issue of denying access. Denying access to current activities will contribute to the conservation of ecosystems, habitats and biodiversity and safeguarding and rebuilding a healthy ocean for future generations. As the current discussion indicates, the balance seemingly is weighed against future generations and maintaining the ocean for future sustainable use. For instance, both the practice in the ISA and CCAMLR indicate how user interests impact significantly on the selection and designation of ABMTs/MPAS. Giving a meaningful voice to future generations, or, as is apparent from the discussion in chapter 6 of this volume, the ocean, remains a task that the power structure in which current international law operates makes difficult if not impossible to address. Even in the presence of political commitments of the international community to take action on MPAS and ABMTs, albeit falling short of what may be actually needed to effectively conserve BBNJ, implementation remains haphazard due to interests at play and the decision-making structures.

MPAS and ABMTs, being spatial instruments, are intrinsic to the theme of space. As already mentioned, how ocean space is currently used or may be used is an important factor in shaping the process of identifying, designating and managing MPAS and ABMTs. At a more fundamental level, the spatial division of the ocean in AUNJ and ABNJ is a critical factor in the developing regime for MPAS and ABMTs. On the one hand, coastal States are seeking to safeguard their perceived rights and interests by getting a say on MPAS and ABMTs in ABNJ as coastal States. The practice in the OSPAR Convention, both as regards the designation of MPAS in the OSPAR Maritime Area in the North East Atlantic, and the failure to designate an MPA in the OSPAR Maritime Area in the Arctic Ocean, attest to how coastal States may weigh in in practice. Perhaps one could say that the proposal for an MPA in the Arctic Ocean was bound to fail due to the geopolitical considerations that seemingly inspired Denmark, Iceland and Norway, but one may at the same time pose the question how their approach relates to their legal commitments under the OSPAR Convention. On the other hand, ABNJ remain characterized by a decentralized and mostly sectoral approach. As is apparent from the practice of the ISA and RFMOs, this is less of a problem in relation to ABMTs applying to specific activities. Such sectoral mandates are already clearly defined in positive law. The establishment of MPAS by regional

bodies, with a limited mandate, may be objected against by raising questions of legitimacy and requires setting up cooperation with other bodies and instruments having relevant regulatory competence and securing the cooperation of relevant third States.<sup>185</sup> The future BBNJ Agreement may contribute to resolving both of these issues by providing a further legal basis for a holistic approach to the conservation and use of ABNJ and requiring States parties to coordinate their actions across the sectoral and regional instruments in which they are participating.

Knowledge has been recognized as being central to the identification, establishment and management of MPAs and ABMTs. This makes it critical to establish what information is required, who is responsible for gathering it, and how it will be disseminated.<sup>186</sup> These questions are all the more relevant because much of the information concerned is being gathered in the execution of activities. The current legal framework provides that decisions are taken on the basis of the best available science. Moreover, the precautionary approach is relevant to regulating activities in the absence of sufficient scientific data concerning harmful impacts. Notwithstanding these general parameters, the discussion of CCAMLR shows that certain States have been attempting to defer decisions from being taken while justifying this by the absence of sufficient scientific data. Although urging for additional scientific data might seem to be laudable, it is difficult to square with the applicable legal framework. In light of the challenges to building a knowledge base for ABNJ, this approach likely will make the realization of the political commitments in relation to MPAs and ABMTs, which, it should be realized, not only includes a commitment to give a specific percentage of the ocean protected status, but also identifies qualitative objectives, a moving target. The building of an additional knowledge base in many cases likely will go hand in hand with new activities, which will lead to generating further vested interests that may block the adoption of protective measures.

The current chapter allows to identify a number of angles to the theme of power in relation to the issue of MPAs and ABMTs in ABNJ. First of all, while in AWNJ this issue is primarily the competence of individual coastal States, in ABNJ a variety of instruments and bodies deals with MPAs and ABMTs. As regards the competence of these instruments and bodies, a divide exists between ABMTs and MPAs. Although the LOSC does not explicitly refer to ABMTs, the

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185 As is discussed in section 3.4, both Annex V to the OSPAR Convention and the General framework of the CCAMLR refer to relevant global instruments that can be said to justify the establishment of MPAs, including in ABNJ.

186 See also the discussion in Morgera (ch 9) in this volume.

general competence of the sectoral bodies concerned, such as RFMOs and the ISA, comprises the competence to adopt ABMTs. The LOSC does not create a similar competence to identify, designate and manage MPAs.<sup>187</sup> In that sense, the division of decision-making power under the LOSC made the development of a comprehensive approach to the protection and the preservation of the marine environment in particular in ABNJ problematic.<sup>188</sup> The CBD, although providing a possible framework for such a comprehensive approach, was not given a clear mandate to deal with this matter, and as a matter of fact accepts the jurisdictional framework set out in the LOSC,<sup>189</sup> and as the discussion in chapter 7 of this volume details, the international community preferred to further address this issue in the framework of the law of the sea and the United Nations General Assembly, while the CBD in relation to MPAs made a more limited contribution through its practice in relation to EBSAs. Whether the BBNJ Agreement will be successful in addressing the absence of a competence to holistically manage MPAs remains to be seen, but the requirement of consistency with the LOSC and the apparent deferral to existing bodies and instruments through the ‘not-undermining’ requirement does not bode well. As discussed above, different options to deal with the relationship between MPAs and ABMTs have been tabled and the final choice in that respect may impact on the urgency that will be accorded to working towards a coherent network of MPAs. Similar considerations apply to the other provisions of the Revised Draft Agreement, which were discussed above, that will be relevant to defining the process for designating and managing MPAs.

As the practice of the ISA indicates, although the existence of a broad mandate allows the adoption of ABMTs, making use of this mandate in practice is not a given, suggesting the need for more detailed regulation at the outset. The ISA adopted a first REMP, for the CCZ in 2012, well after the initial phase of mining operations in this area. Mining interests impacted on the initial selection of APEIS in the CCZ, while their location was further adjusted to avoid any overlap with mining areas and reserved areas. The further development of REMPS continues lagging behind the development of mining activities.

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187 That approach would obviously have required curtailing the competence of sectoral bodies to act independently, something which could not have been achieved through the LOSC for bodies whose mandate is not defined by the Convention, but by their separate constitutive instruments. At the same, the LOSC could have contained more detailed obligations for its States Parties as regards cooperation and coordination between these bodies.

188 See also Ardron and others (n 15) 105–06 for a discussion on how to achieve a balance between sectoral and conservation interest and the problems involved.

189 CBD art 22.

Further initiatives for developing additional REMPs originally got underway beyond the ISA. The limited involvement of the ISA in part may have been due to insufficient funding. The ISA seemingly has gotten more directly involved at the time that the BBNJ process moved to the phase of the negotiation of the BBNJ Agreement at the IGC. This allowed the ISA to stake out a more convincing claim that it is successfully fulfilling its mandate under Article 145 of the LOSC.

The discussion of the OSPAR and CAMLR Conventions as well as their respective Commissions also vividly illustrates the impact of specific (user) interests on the process of establishing MPAs. In the context of the OSPAR Convention, this concerns, among others, the interest of coastal States over their maritime zones, including the continental shelf beyond 200 nautical miles, which is adjacent to the high seas water column. The discussion of the Arctic Ice High Seas MPA in the OSPAR Commission also highlights how individual (coastal) States may block an MPA designation due to political considerations. A similar consideration applies to CCAMLR, in which case a limited number of States with fishing interests have been able to drag out the consideration of MPA proposals for years. These examples also suggest that having a more specific regime for the identification, establishment and management of MPAs in ABNJ may not necessarily speed up the process. In that connection, it should be realized that rejecting the idea of working towards a network of MPAs as such is difficult to justify, both in terms of existing political commitments and the law.<sup>190</sup> However, raising objections in relation to, eg, the need for the designation of specific areas may even be supported by reference to the law. For instance, opponents may commit to cooperation on MPAs in the abstract, but at the same time argue that, in a given case, an MPA designation is not justified due to a lack of a sufficient scientific basis, or may reject specific management measures because they do not properly balance conservation and use. Even if such arguments on the law may not be altogether convincing, it is much easier to put public pressure on a State that rejects the idea of protecting the ocean as a matter of principle, than to 'name and shame' a State that avows to be committed to international cooperation, and only questions the appropriateness of specific measures.

The above discussion might suggest that meeting Aichi Target 11, or the more ambitious target of the IUCN of 30% no-take MPAs,<sup>191</sup> would be best served by

190 However, it may be noted that certain member States of the CCAMLR seemingly are backtracking on the commitments they assumed in this respect and a similar observation arguably is applicable to the OSPAR Commission.

191 It should be noted that this goal does not necessarily require that 30% of ABNJ are designated as no-take MPAs. A recent study finds that 'we could achieve 90% of the maximum

identifying and establishing such MPAs pro-actively, ie, before the interests of specific activities will have built up to such an extent that States representing these interests will be able to credibly block such a development. In itself, this might seemingly be part of a potentially successful strategy. At the same time, the experience in the OSPAR Commission and CCAMLR indicates that user States and coastal States – which most States in regional sea programs are – will also be following such developments with keen interest. The current framework – and the discussion of the Revised Draft Agreement indicates that the same will be the case under the BBNJ Agreement – offers these States ample room to impact on the process of establishing MPAs (and ABMTs).

In the end, whether the glass is half empty or half full as concerns the protection of the marine environment in ABNJ through MPAs and ABMTs remains to be seen. Agreement on specific ABMTs may be more easily secured than agreement on (no-take) MPAs, but may be tailored to user interests to a too large extent. At the level of principle, it will be critical how the international community and individual States will develop their perspectives on justice, knowledge, space and power. What weight will be given to serving justice to different interests, how will knowledge be gathered, shared and weighed in decision making, how much space are we prepared to set aside for nature and wilderness values and how will decision making be set up to contribute to realizing these goals?

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potential biodiversity benefits from MPAs by strategically protecting 21% of the ocean (43% of EEZs and 6% of the high seas) in Enric Sala and others, 'Protecting the global ocean for biodiversity, food and climate' (2021) 592 *Nature* 397, 398. This finding underlines the importance of also effectively managing AWNJ. As regards, ABNJ, the 6% figure may be put in proper perspective by realizing that currently less than 2% of the oceans are covered by no-take MPAs, while most of these MPAs are located in AWNJ (see above text at n 182). And as Sala and others (ibid 398) further observe:

We also find many priority areas in the high seas around seamount clusters, offshore plateaus and biogeographically unique areas such as the Antarctic Peninsula, the Mid-Atlantic Ridge, the Mascarene Plateau, the Nazca Ridge and the Southwest Indian Ridge.