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Area-based Protection beyond National Jurisdiction

Opportunities and Obstacles

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Abstract

This article provides a critical overview of the current international legal framework for the designation of area-based protection beyond national jurisdiction as well as selected examples of global and regional practice to date. It highlights some of the legal and other challenges in employing spatial management tools in a three dimensional and highly dynamic environment that lies beyond the jurisdiction of states or of any one overarching institution. The article concludes with a brief assessment of the various proposals that are currently under discussion as part of the negotiations for an instrument to support the conservation of biodiversity beyond national jurisdiction (the BBNJ negotiations) to create a global framework for the designation of MPAs and other area-based measures beyond the jurisdiction of states.

1 Introduction

Protecting marine ecosystems through spatial and area-based management tools is now a key component of marine environmental governance. In 2010, parties to the 1992 Convention on Biological Diversity (1992 CBD)[1] committed to protecting 10 percent of ocean and coastal ecosystems through protected area or other effective area-based conservation tools by 2020.[2] This target was reinforced in Sustainable Development Goal (SDG) 14.5, adopted by the United

1 *Convention on Biological Diversity*, adopted 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) (1992 CBD).

2 CBD Decision X/2 (2010) *The Strategic plan for biodiversity 2011 – 2020 and the Aichi Biodiversity Targets*, Target 11.

Nations General Assembly (UNGA) in 2015.[3] Significant progress has been made towards this target, with 7.44 percent of global ocean space (26,937,551 km^2) designated as under the protection of 15,345 marine protected areas by January 2019.[4] Nevertheless, given the rate of progress to date, it seems unlikely that the 2020 target will be met. Concerns over progress were expressed at the most recent conference of the parties to the CBD, where it was specifically noted that "not all eco-regions of the world are adequately covered by protected areas, most protected areas are not well connected, and most Parties have not assessed the management effectiveness of the majority of their protected areas…".[5] Moreover, whilst 17.3 percent of waters under the jurisdiction of states are protected through area-based mechanisms, only 1.18 percent of the marine environment beyond national jurisdiction has protected area status.[6] This is unsurprising, given that far less is known about the ecosystems of the high seas than coastal regions. More fundamentally, however, there is currently no global process or even a clear mandate for the designation of marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ), still less mechanisms for their management and enforcement. In order to respond to this lacuna – among other matters – is a proposed legally binding instrument under the 1982 United Nations Convention on the Law of the Sea (UNCLOS)[7] for the conservation and use of biodiversity beyond national jurisdiction, negotiations for which, began in September 2018.[8] The agreed package of topics for the instrument comprises area-based management tools including MPAs, alongside more general principles of conservation and sustainable use, environmental impact assessment, capacity building and transfer

3 General Assembly Resolution 70/1, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (15 September 2015) available at undocs.org.

4 Available at https://www.protectedplanet.net/marine.

5 CBD Decision 14/1 (2018) *Updated assessment of progress towards selected Aichi Biodiversity Targets and options to accelerate progress* para. 14.(i).

6 Available at https://www.protectedplanet.net/marine.

7 *United Nations Convention on the Law of the Sea*, adopted 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCLOS).

8 A formal preparatory committee to develop a binding instrument was established in 2016 pursuant to General Assembly Resolution 69/292, *Development of 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*, A/RES/69/292 (19 June 2015) and formal negotiations were instituted by General Assembly Resolution 72/249, *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 Statement of financial implications*, A/RES/72/249 (24 December 2017). Both available at undocs.org.

of technology and marine genetic resources including questions of access and benefit sharing.[9]

This article provides a critical overview of the current international legal framework for the designation of area-based protection beyond national jurisdiction as well as selected examples of global and regional practice to date. It will highlight some of the legal and other challenges in employing spatial management tools in a three dimensional and highly dynamic environment that lies beyond the jurisdiction of states or of any one overarching institution. This article will conclude with a brief assessment of the various proposals that are currently under discussion as part of the negotiations for an instrument to support the conservation of biodiversity beyond national jurisdiction (the BBNJ negotiations) to create a global framework for the designation of MPAs and other area-based measures beyond the jurisdiction of states.

2 Marine Protected Areas beyond National Jurisdiction

There is no one definition of an MPA or of area-based protection more generally. The most widely applied definition was developed by the IUCN, and broadly defines a protected area as "a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values".[10] Within the framework of the 1992 CBD, an MPA in particular, is similarly described as "any defined area within or adjacent to the marine environment, together with its overlaying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings."[11] The term "other effective area-based conservation measures" (OECM), which was inserted into Aichi Biodiversity Target 11 in the final stages of negotiations,[12] has been recently described by the parties to the CBD as "a

9 General Assembly Resolution 66/231, *Oceans and the Law of the Sea*, A/RES/66/231 (24 December 2011), [166] and Annex available at undocs.org.

10 Nigel Dudley (ed) *Guidelines for Applying Protected Area Management Categories* (IUCN, 2008), 8. See also Day J., Dudley N., Hockings M., Holmes G., Laffoley D., Stolton S. & S. Wells, *Guidelines for applying the IUCN Protected Area Management Categories to Marine Protected Areas* (IUCN, 2012).

11 Report of the Ad Hoc Technical Expert Group on Marine and Coastal Protected Areas, of 13 February 2003 (doc. UNEP/CBD/SBSTTA/8/INF/7), [30].

12 Dan Laffoley, Nigel Dudley, Harry Jonas et al, 'An introduction to 'other effective area-based conservation measures' under Aichi Target 11 of the Convention on Biological Diversity:

geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values."[13] From a functional perspective, there is little if any difference between an MPA and an OECM in terms of their objectives, and the distinction appears to relate only to the absence of a formal protected area designation in respect of the latter in contrast to the former. This is useful in the context of MPAs, as an area within which fishing is restricted or prohibited altogether (often referred to as no-take zones) for example, can be categorized as an OECM for the purposes of the CBD. Finally, marine spatial planning (MSP), which is defined by UNESCO as "a public process of analyzing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, economic and social objectives that are usually specified through a political process",[14] is similarly area-based, but focuses more on the management of multiple activities within an area rather than protection of that area per se.

The IUCN identifies six categories of protected area ranging from a strict nature reserve where human activities are tightly controlled (including wilderness areas) through to areas where low-level non-industrial resource use is compatible with the nature of protection imposed.[15] Marine Protected Areas vary from zones within which a single activity, such as fishing, is regulated, to zones where multiple activities are managed in order to meet overarching conservation aims. The more sophisticated the multi-use regulation the more likely the MPA is designated as part of a broader process of MSP. In contrast to land-based MPAs, it is not generally possible to prohibit *all* activities within an MPA, as controls on navigation and freedom of passage in particular, are limited under international law. MPAs may be established in order to: protect a vulnerable species or ecosystem such as coral reefs; to protect a valuable ecosystem,

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Origin, interpretation and emerging ocean issues' (2017) 27(S1) *Aquatic Conservation: Marine and Freshwater Ecosystems.* 130 – 137, at 131.

13 CBD Decision 14/8 *Protected areas and other effective area-based conservation measures* (2018), [2].

14 C Ehler and F Douvere, *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-Based Management*, (Intergovernmental Oceanographic Commission and Man and the biosphere Programme, IOC Manual and Guides No. 53, ICAM Dossier No. 6 2009), 18.

15 The six categories are: Ia strict nature reserve; 1b wilderness area; II national park; III natural monument or feature; IV Habitat/ species management area; V protected landscape or seascape; VI protected areas with sustainable use of natural resources. See Nigel Dudley (ed) *supra* note 10, at 8.

for example, a mangrove forest[16]; to directly control a specific threat such as overfishing or mining; or to minimize a range of cumulative threats in order to increase resilience against the risks of pollution or climate change. More recently, the creation of climate refugia has been advocated: the protection of wilderness areas or highly connected ecosystems that are well placed to resist and recover from the impacts of climate change.[17] This is particularly relevant to the creation of MPAs in ABNJ as 13.2 percent of the oceans (approximately 55 million km^2) is classified as "global wilderness"[18] with the majority of that wilderness located in the high seas, particularly in the Southern Hemisphere and at extreme latitudes.[19] However, it is estimated that only 0.06 percent of the high seas classed as "wilderness" is currently protected.[20]

There is an inherent tension in using what is essentially a static, place-based measure within a three dimensional highly dynamic environment. Activities in the marine environment may take place simultaneously on the surface, within the water column or on or under the seabed, and each location may vary in vulnerability thus requiring different levels of protection. In ABNJ there is no one organisation with responsibility for marine conservation, and area-based protection is likely to involve the interests of multiple entities including, but not limited to, the International Seabed Authority (ISA), regional fisheries management organisations (RFMOs), regional seas organisations, the International Maritime Organisation (IMO) and adjacent coastal states. The nature of the distinction between the water column and the seabed means that MPAs could be designated on the high seas above an area of continental shelf that is subject to the exclusive jurisdiction of a coastal state. The dynamic nature of the marine environment may require a temporal as well as a spatially sensitive response, and the impacts of climate change, along with ocean acidification, are likely to affect the distribution of species and composition of ecosystems over time. Adaptive management and processes for regular review are thus fundamental to the effectiveness of area-based protection in the marine environment. One of the challenges associated with contemporary MPAs and other area-based measures is that they are typically designated on the basis of

16 For example, the designation of MPAs in order to enhance CO_2 storage in seagrass or mangrove forest ecosystems. See Jennifer Howard, Elizabeth McLeod, Sebastian Thomas et al, 'The potential to integrate blue carbon into MPA design and management' (2017) 27(S1) *Aquatic Conservation: Marine Freshwater Ecosystems.* 100 – 115.

17 Jones et al, 'The Location and Protection Status of Earth's Diminishing Marine Wilderness' (2018) 28 *Current Biology* 2506 – 512, at 2506.

18 This is defined by Jones et al, as "biologically and ecologically intact seascapes that are mostly free of human disturbance", *ibid* at 2506.

19 *Ibid.*

20 *Ibid*, at 2508.

current environmental conditions rather than on the conditions that are likely to be in place in the future.[21] Moreover, MPAs tend to be ecologically connected to large areas and subject to impacts from activities taking place outside of the management area and thus beyond the control of "managers".[22] The necessity for connectivity at the genetic, population, community and ecological level[23] thus calls for the creation of MPA networks or the protection of spatially distinct ecosystems within a single MPA.[24] Although these challenges are associated with all MPAs (within and beyond national jurisdiction), designating MPAs in ABNJ creates additional difficulties, particularly in relation to implementation and enforcement. More fundamentally, there are conceptual and procedural challenges associated with establishing area-based and essentially "territorial" measures in an area that is not subject to territorial jurisdiction. For example, the constrained jurisdictional basis – largely restricted to nationality – for the adoption of measures and enforcement of those measures.

3 The Current Global Framework for Establishing MPAs in ABNJ

There is currently no explicit global regulatory mandate for the designation of MPAs in areas beyond national jurisdiction. This lacuna has been used by some states on occasion to argue that MPAs may *not* be established in ABNJ. For example, during the negotiations to establish an MPA in the Ross Sea region within the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) the Ukraine, in 2013, asserted that "[t]he UN Convention on the Law of the Sea (ratified by Ukraine) provides the opportunity for establishing MPAs only within the coastal waters in the areas of jurisdiction of those countries. Therefore, at this stage we cannot see any legal possibility for establishing MPAs in the high seas of the World Ocean containing areas for which CCAMLR is responsible."[25] However, the Ross Sea MPA was eventually established on the basis of a consensus decision by CCAMLR, including the Ukraine, in 2016.[26] There is now an emerging consensus of

21 David Johnson, Maria Adelaide Ferreira and Ellen Kenchington, 'Climate change is likely to severely limit the effectiveness of deep-sea ABMTs in the North Atlantic' (2018) 87 *Marine Policy* 111 – 122, at 112.

22 See Mark H Carr, Sarah P Robinson, Charles Wahle et al, 'The central importance of ecological spatial connectivity to effective coastal marine protected areas and to meeting the challenges of climate change in the marine environment' (2017) 27(S1) *Aquatic Conservation: Marine Freshwater Ecosystem* 6 – 29.

23 *Ibid.*, at 8 – 11.

24 *Ibid.*, at 13.

25 *Report of the Second Special Meeting of the CCAMLR Commission* (2013) at [3.26].

26 See further below in Section IV.

states and commentators[27] that an implicit mandate to establish MPAs and other area-based measures exists at the international level. This mandate can arguably be found in the 1982 UNCLOS, which provides the overarching framework for the law of the sea as well as the 1992 CBD that establishes the framework for global biodiversity conservation. The practice of states, and more particularly, global and regional organisations, also supports the existence of a global mandate.[28] Moreover, the global target to protect 10 percent of coastal and marine areas, that is not qualified by any jurisdictional nexus, and which was adopted by both the parties to the 1992 CBD and the UNGA, presupposes a right if not an obligation to establish MPAs in ABNJ.

3.1 *1982 UNCLOS*

The global framework for marine environmental protection is provided by Part XII of UNCLOS. Article 192 imposes a general obligation on all parties to "protect and preserve the marine environment" and that obligation is by no means restricted to a coastal state's own waters. This obligation is reinforced by a general obligation to cooperate on a global or regional basis in order to protect the marine environment,[29] and a specific obligation to take measures "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."[30] Article 194(5), like Article 192, is as applicable to ABNJ as it is to waters under the jurisdiction of coastal states. Moreover, although it is titled "measures to prevent, reduce and control pollution of the marine environment" the UNCLOS Annex VII Tribunal has recently confirmed that "Article 194 is… not limited to measures aimed strictly at controlling pollution and extends to measures focussed primarily on conservation and the preservation of ecosystems."[31] The Tribunal expressly confirmed that the designation of an MPA is such a measure for the purposes of Article 194(5).[32]

27 See for example, Petra Dranker, 'Marine Protected Areas in Areas beyond National Jurisdiction' (2012) 27 *International Journal of Marine and Coastal Law* 291 – 350; Kristina M Gjerde and Anna Rulska-Domino, 'Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead' (2012) 27 *International Journal of Marine and Coastal Law* 351 – 373; ; Karen N. Scott, 'Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Area' (2012) 27 *International Journal of Marine and Coastal Law* (Special Issue: The 1982 Law of the Sea Convention at 30) 849 – 857; Tullio Scovazzi, 'Marine Protected Areas on the High Seas: Some Legal and Policy Considerations' (2004) 19 *International Journal of Marine and Coastal Law* 1 – 17.

28 See Section IV, below.

29 1982 UNCLOS, Art. 197.

30 1982 UNCLOS, Art. 194(5).

31 *In the matter of the Chagos Marine Protected Area Arbitration* (*Mauritius v. UK*) before an Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea (Award 18 March, 2015), [538].

32 *Ibid* [538].

Furthermore, there is no rule expressly prohibiting the designation of MPAs in ABNJ and, applying the controversial but recently resurrected *Lotus* principle,[33] the absence of such a prohibition arguably creates a general permission under international law.[34] Nevertheless, as noted above, there is no global body with an express mandate to designate MPAs on the high seas although institutions such as the IMO may adopt area-based measures within a particular field (in this case shipping)[35] and a number of regional institutions have claimed a mandate to designate multi-use MPAs or activity-specific area-based management measures.[36] By contrast, UNCLOS has established a global institution that can adopt area-based measures on the seabed beyond the limits of national jurisdiction, known as the Area. Under Article 145 of the Convention, the Authority has a mandate to take necessary measures for the protection of the environment in the Area,[37] including the prevention of damage to flora and fauna of the marine environment.[38] Moreover, this provision has recently been given effect to through the provisional designation of Areas of Particular Environmental Interest by the ISA Council in the Clarion-Clipperton Zone in the Eastern Pacific Ocean.[39]

Nevertheless, a right under UNCLOS to designate MPAs in ABNJ is by no means absolute. Article 194 specifically requires states, when taking measures under the provision, to "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."[40] The rights of other states include, at the very least, the freedoms of the high seas, comprising navigation, overflight, the laying of submarine cables and pipelines, the construction of

33 *Lotus* Judgment No. 9, 1927 PCIJ Ser. A. No. 10.

34 This controversial proposition was effectively relied upon to justify the lawfulness of a unilateral declaration of independence by the ICJ in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, p. 403 and to suggest (obiter) that an arrest warrant could be issued in respect of a crime subject to universal jurisdiction under customary law in circumstances where the subject of the warrant is outside of the jurisdiction of the authorities issuing the warrant in *Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), *Judgment*, ICJ. Reports 2002, p. 3.

35 This is briefly discussed below in Section IV, below.

36 For example, in the North East Atlantic, the Mediterranean and the Southern Ocean. Selected examples of regional practice are discussed in Section IV below.

37 The Area is defined as the "seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction" (1982 UNCLOS, Art.1(1)).

38 1982 UNCLOS, Art. 145 and, in particular, paragraph (b).

39 ISBA/18/C/22 *Decision of the Council relating to an environmental management for the Clarion Clipperton Zone* (adopted at the Eighteenth Session of the ISBA, 16 – 27 July 2012).

40 1982 UNCLOS, Art. 194(4).

artificial islands and platforms, fishing and scientific research.[41] These rights in turn must be exercised with due regard for the interests of other states and for other rights under the Convention, particularly in relation to the Area.[42] Establishing MPAs in ABNJ under the UNCLOS framework therefore requires a delicate balancing of rights and obligations associated with environmental protection and the freedom of the seas and other rights.

Today, the freedom to fish is probably the most constrained of the high seas freedoms. The 1995 Fish Stocks Agreement[43] creates far-reaching obligations on flag states in respect of fishing on the high seas and, in particular, requires flag states to ensure their vessels operating within an area subject to an RFMO mandate comply with the rules of the RFMO irrespective of whether they are a member of the organisation itself.[44] Therefore, in principle, the freedom of fishing in respect of states party to an RFMO as well as states party to the 1995 Fish Stocks Agreement[45] can be limited by any area-based management tools such as MPAs adopted by the RFMO.

By contrast, constraints on the freedom of navigation are limited[46] and are generally applicable to states only via adoption at the international level[47] by the IMO through instruments such as MARPOL 73/78[48] and SOLAS 74.[49] Typically, requirements and restrictions on international navigation in respect of vessels operating in ABNJ are not area-based, although the International Polar Code for Ships Operating in Polar Waters (Polar Code) that entered into

41 1982 UNCLOS, Art. 87

42 1982 UNCLOS, Art. 87(2).

43 *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*, adopted 4 August 1995, 2167 UNTS 88 (entered into force 11 December 2001) (1995 Fish Stocks Agreement).

44 1995 Fish Stocks Agreement, Art 17.

45 As of January 2018, there are 89 parties to the 1995 Fish Stocks Agreement.

46 For an introduction to issues associated with navigation posed by MPAs see Fabio Spadi, 'Navigation in Marine Protected Areas: National and International Law' (2000) 31 *Ocean Development and International Law* 285 – 302.

47 Unusually, the members of the Antarctic Treaty System have addressed selected issues associated with navigation and vessels safety in the Southern Ocean. However, these measures are either recommendatory only, are binding on vessels flagged to parties to the Antarctic Treaty or adopted in conjunction with international instruments under the auspices of the IMO.

48 *International Convention for the Prevention of Pollution from Ships 1973 as Modified by the Protocol of 1978 relating thereto*, adopted 2 November 1973/ 17 February 1978, 1340 UNTS 62 (entered into force 2 October 1983) (MARPOL 73/78).

49 *International Convention for the Safety of Life at Sea* 1974, adopted 1 November 1974, 1184 UNTS 278 (entered into force 25 May 1980) (SOLAS).

force in 2017 is an exception to this, being of application to defined regions in the Arctic Ocean and Southern Ocean only.[50] Special Areas may be designated under MARPOL 73/78, within which there are operational constraints on vessels in respect of the discharge of oil, noxious liquid substances, sewage, garbage and air pollution,[51] and several of these, notably in the Mediterranean[52] and the Southern Ocean, cover high seas areas. Moreover, the IMO has a mandate to designate Particularly Sensitive Sea Areas (PSSAs) expressly in order to manage sensitive areas from the risks of shipping, including the management of navigation.[53] In principle, there is no reason why a PSSA cannot not be established in ANBJ,[54] and the Southern Ocean arguably provides an ideal location for the first high seas PSSA,[55] complementing the recently adopted Polar Code. However, none of the 15 PSSAs established to date are located beyond the jurisdictional waters of coastal states.[56]

3.2 *1992 Convention on Biological Diversity*

Just as the 1982 UNCLOS provides the global framework for the law of the sea, the 1992 CBD establishes the overarching framework for the conservation and sustainable use of biodiversity. Article 8 of the Convention requires parties, as far as possible and as appropriate, to establish a system of protected areas, and to manage those areas consistent with the aims of conservation. As noted above, the parties to the CBD agreed a target of protecting 10 percent of marine

50 International Polar Code for Ships Operating in Polar Waters (Polar Code), *Report of the Marine Environmental Committee* [*of the IMO*] *on its 68th Session* (2015) MEPC 68/21/Add.1 Annex 10, page 3. The Polar Code has been implemented via amendments to the 1973/78 MARPOL, 1974 SOLAS and the 1995 STCW.

51 1973/78 MARPOL Annexes I to VI respectively.

52 High seas areas exist in the Mediterranean owing to a number of states, which have yet to delimit an EEZ.

53 IMO Resolution A. 720(17), *Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Area*, 6 November 1991, consolidated and revised by IMO Resolution A. 982(24), *Revised Guidelines for the identification and designation of Particularly Sensitive Sea Area*, 1 December 2005; and IMO Resolution. 927(22), *Guidelines for the Designation of Particularly Sensitive Sea Areas*, 29 November 2001. See also IMO Resolution A. 885(21), *Procedures for the Identification of Particularly Sensitive Sea Areas and the Adoption of Associated Protective Measures and Amendments to the Guidelines contained in Resolution A.720(17), 25 November 1999.*

54 See J. Roberts, A. Chircop and S. Prior 'Area-based Management on the High Seas: Possible Application of the IMO's Particularly Sensitive Sea Area Concept' (2010) 25 *International Journal of Marine and Coastal Law* 483 – 522.

55 See K.N. Scott 'Safety of shipping in the Southern Ocean' (2010) 16 *Journal of International Maritime Law* 21, 32 – 40.

56 For a list of the adopted PSSAs see: http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx.

and coastal environments through protected areas or other effective area-based conservation measures by 2020.[57] The parties to the CBD adopted scientific guidance for establishing a network of MPAs in open water and deep-sea habitats in 2008[58] and, also in that year, developed criteria for the identification of ecologically or biologically significant marine areas in need of protection (EBSAs).[59] EBSAs are not in of themselves MPAs and there is no obligation to turn an EBSA into an MPA,[60] but they constitute "a scientific process aiming, notably, to give support to and facilitate the designation of MPAs in ABNJ".[61] Fifteen regional workshops have been held to date and, by 2014, over 250 million km^2 of ocean area (around two-thirds of the oceans) had been assessed and 204 EBSAs described.[62] Thirty-one lie solely within ABNJ and a further 35 straddle areas within and beyond national jurisdiction.[63] The CBD does not, however, provide for any designated process or institution capable of actually establishing MPAs within ABNJ.

4 Current MPAs and Other Area-based Conservation Measures in ABNJ

As noted above, no global instrument establishes an explicit process for the designation of MPAs or indeed for marine spatial planning[64] in ABNJ. Several international instruments provide for more limited area-based conservation measures, which nevertheless might be classified as OECMs for the purposes of Aichi Biodiversity Target 11. These include special areas under 1973/78 MARPOL, Areas of Particular Environmental Interest in the Area under Part XI of UNCLOS and whale sanctuaries in the Indian and Southern Oceans established

57 Aichi Biodiversity Target 11 (2010).

58 CBD Decision XI/20 *Marine and Coastal Biodiversity*, Annex II.

59 *Ibid.*, Annex I.

60 DC Dunn, J Ardron, N Bax et al, 'The Convention on Biological Diversity's Ecologically or Biologically Significant Areas: Origins, Development and Current Status' (2014) 49 *Marine Policy* 137 – 145, at 143.

61 Marta Chantal Ribeiro, 'South Atlantic Perspectives on the Future International Legally Binding Instrument under the LOSC on Conservation and Sustainable Use of BBNJ' (2017) 32 *The International Journal of Marine and Coastal Law* 733 – 764, at 760.

62 N J Bax, J Cleary, B Donnelly et al, 'Results of Efforts by the Convention on Biological Diversity to Describe Ecologically or Biologically Significant Marine Areas' (2015) 30 *Conservation Biology* 571 – 581, at 572.

63 *Ibid*., 574.

64 See generally, Vasco Becker-Weinberg, 'Preliminary Thoughts on Marine Spatial Planning in Areas beyond National Jurisdiction' (2017) 32 *The International Journal of Marine and Coastal Law* 570 – 588.

by the International Whaling Commission pursuant to the 1946 Whaling Convention.[65]

At the regional level, area-based protection in the form of no or limited take zones have been established by a number of RFMOs, including CCAMLR, the North East Atlantic Fisheries Commission (NEAFC), the North West Atlantic Fisheries Organization (NAFO), the South East Atlantic Fisheries Organization (SEAFO), the General Fisheries Commission for the Mediterranean (GFCM) and the Southern Indian Ocean Deepsea Fishers' Association (SIODFA).[66]

One RFMO, or quasi-RFMO given its strong conservation mandate, has gone beyond establishing no-take zones, and has adopted a process for designating MPAs designed to manage multiple, albeit limited, activities under its jurisdiction. CCAMLR adopted a general framework conservation measure for the designation of MPAs within the CCAMLR area in 2011.[67] The Conservation Measure sets out the key criteria for designating MPAs, with an emphasis on protecting vulnerable ecosystems and establishing reference areas for long-term monitoring with particular focus on climate change. Designated MPAs must be accompanied by an associated management plan, and measures designed to support the objectives of the MPA must be identified in the plan. The first CCAMLR MPA was in fact established prior to the adoption of CCAMLR Conservation Measure 91–04 (2011), in 2009. The South Orkney Islands Southern Shelf MPA[68] extends just short of 94,000 km^2 and provides for additional controls on fishing, on scientific research relating to fishing and on discharges and dumping from fishing vessels. Nine planning domains were identified in 2011,[69] following a bioregionalization study of the Southern Ocean, which was initiated in 2007,[70] and it was intended that a network of MPAs around Antarctica would be established.

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65 *International Convention on the Regulation of Whaling*, adopted 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) (1946 ICRW). A proposed sanctuary for the South Atlantic Ocean has been proposed at annual meetings of the IWC regularly since 1998 but has consistently failed to be adopted by the Commission.

66 On the role of area-based protection and fisheries see Bonnie J. McCay and Peter J. S. Jones, 'Marine Protected Areas and the Governance of Marine Ecosystems and Fisheries' (2011) 25 *Conservation Biology* 1130 – 1133.

67 CCAMLR CM 91–04 (2011) *General Framework for the establishment of CCAMLR Marine Protected Areas.*

68 CCAMLR CM 91–03 (2009) *Protection of the South Orkney Islands Southern Shelf.*

69 *Report of the Thirtieth Meeting of the Commission*, Hobart, Australia, 24 October – 4 November 2011, [7.4].

70 *Report of the 2007 Workshop on Bioregionalisation of the Southern Ocean* reproduced in Annex 9 of the *Report of the Twenty-Sixth Meeting of the CCAMLR Scientific Committee,* Hobart, Australia, 22 – 26 October 2007.

Practice has however, proven more challenging than theory, and it took five years and significant political capital before the Ross Sea MPA was adopted in 2016.[71] The Ross Sea MPA is currently the largest MPA by area at 2,060,058 km^2, and comprises a general protection zone, a special research zone and a krill research zone.[72] It is intended to contribute to the conservation of ecosystems, ecosystem processes and habitats important to native mammals, birds, fishes and invertebrates, to provide reference areas for monitoring long-term change, and to promote research and other scientific activities.[73] The MPA restricts and manages fishing for toothfish and krill according to zone, prohibits transhipment and recommends that dumping of waste from fishing and scientific vessels be minimized.[74] Unusually, and as a consequence of political compromise, the Ross Sea MPA is designated for 35 years and will terminate unless a consensus decision is taken within CCAMLR to reaffirm or modify the MPA.[75] Negotiations are underway for the designation of MPAs in East Antarctica, the Weddell Sea, the Antarctic Peninsula region and sub-Antarctic areas of the Atlantic and Indian Ocean.[76] Progress is slow however, with China and Russia in particular, criticising perceived insufficient data or process issues associated with MPA designation.

In a distinct, but related innovative development, CCAMLR adopted, in 2017, a conservation measure designed to establish time-limited Special Areas for Scientific Study in marine areas on the Antarctic Peninsula that become newly exposed as a consequence of the retreat or collapse of ice shelves owing to climate change.[77] This is a precautionary area-based measure designed to protect changing ecosystems, and at the 2018 CCAMLR Meeting, the UK notified the meeting that 300 km^2 of ice had very recently calved from the Pine Island Glacier and that it intended to submit a formal notification of a proposed Special Area for Scientific Research in due course.[78]

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71 CCAMLRCM 91–05 (2016) *Ross Sea region marine protected area.* For background to the process of establishing MPAs in the Southern Ocean see Karen N. Scott, 'Protecting the Commons in the Polar South: Progress and Prospects for Marine Protected Areas in the Antarctic' in Keyuan Zou (ed), *Global Commons and the Law of the Sea* (Brill Nijhoff, 2018) 326 – 343.

72 CCAMLRCM 91–05 (2016) *Ross Sea region marine protected area.*

73 *Ibid.*, [3].

74 *Ibid.*, [7 – 11].

75 *Ibid.*, [20].

76 For progress on these negotiations see the *Report of the Thirty-seventh Meeting of the Commission* (Hobart, Australia, 22 October to 2 November 2018), 21 – 35.

77 CCAMLRCM 24–04 (2017) Establishing time-limited Special Areas for Scientific Study in newly exposed marine areas following ice-shelf retreat or collapse in Statistical Subareas 48.1, 48.5 and 88.3.

78 Report of the Thirty-seventh Meeting of the Commission (Hobart, Australia, 22 October to 2 November 2018) para. 8.20.

Four regional seas conventions – or their equivalent – have developed an express or implicit mandate to designate MPAs in areas beyond national jurisdiction covered by the Convention area. In the South Pacific, the 1986 Nouméa Convention[79] permits the designation of specially protected areas[80] anywhere in the Convention area, which is defined as including high seas areas that are enclosed from all sides by the EEZs of the parties listed in Article 2(a)(i) of the Convention.[81] No specially protected areas on the high seas have been designated to date, however.[82] In the Mediterranean, the 1995 SPA Protocol[83] to the Barcelona Convention[84] explicitly provides for the designation of Specially Protected Areas of Mediterranean Importance (SPAMI)[85] wholly or partly on the high seas.[86] Of the 35 SPAMIs established to date only one, the Pelagos Sanctuary for the Conservation of Marine Mammals, includes an area of high seas.[87] The Pelagos Sanctuary was originally established in 1999 and is regarded as the first MPA located (in part) in ABNJ.[88] In the Antarctic, Annex V of the 1991 Environmental Protocol[89] to the 1959 Antarctic Treaty[90] provides for the creation of Antarctic Specially Protected Areas (ASPAs) and Antarctic Specially Managed Areas (ASMAs) in the Antarctic Treaty Area, which extends south of 60° South Latitude.[91] Whilst Annex V expressly stipulates that protected areas may be established in any marine area,[92] the designation of MPAs under the

79 *Convention for the Protection of Natural Resources and Environment of the South Pacific Region*, adopted 24 November 1986), (1987) 26 ILM 41 (entered into force 22 August 1990) (1986 Nouméa Convention).

80 1986 Nouméa Convention, Art. 14.

81 1986 Nouméa Convention, Art. 2(a)(ii).

82 Alex G. Oude Elerink, 'Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC' (2018) 33 *The International Journal of Marine and Coastal Law* 437 – 466, at 456.

83 *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, adopted 10 June 1995, (1995) 6 *Yearbook of International Environmental Law* 887 (entered into force 12 December 1999) (1995 SPA Protocol).

84 *Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean*, adopted 10 June 1995, 1102 UNTS 27 (entered into force 9 July 2004) (1995 Barcelona Convention).

85 1995 SPA Protocol, Art. 8.

86 1995 SPA Protocol, Art. 9(1).

87 Source: http://www.rac-spa.org/spami.

88 Elisabeth Druel, Raphaël Billé and Sébastien Treyer, 'Applying Foresight Methodologies to the Governance of Marine Protected Areas in Areas beyond National Jurisdiction: The State of Play' (2012) 27 *The International Journal of Marine and Coastal Law* 179 – 185, at 180.

89 *Protocol on Environmental Protection to the Antarctic Treaty*, adopted 4 October 1991, (1991) 30 ILM 1461 (entered into force 14 January 1998) (1991 Environmental Protocol), in force 14 January 1998.

90 *Antarctic Treaty*, adopted on 1 December 1959, 402 UNTS 71 (entered into force 23 June 1961).

91 1959 Antarctic Treaty, Art. VI.

92 1991 Environmental Protocol, Annex V, Art. 2.

Environmental Protocol has been slow with less than 20 percent of ASPAs established having a marine component.[93] The most sophisticated network of MPAs located in ABNJ to date has been adopted by the parties to the 1992 OSPAR Convention[94] in the North East Atlantic.[95] The OSPAR ABNJ MPA network that was initiated in 2010[96] now comprises 7 MPAs that are either located wholly beyond national jurisdiction,[97] or in the high seas above an area of continental shelf claimed by a coastal state.[98] The OSPAR MPA network is notable in that it demonstrates a rare example of cooperation between a regional seas organisation (OSPAR) and an RFMO (North East Atlantic Fisheries Commission, NEAFC) in respect of area protection in ABNJ.[99]

Nevertheless, the limits of what is indubitably the most sophisticated ABNJ MPA network to date demonstrate more generally the parameters of taking action at the regional level. Even under OSPAR measures cannot be taken against foreign vessels and there are restrictions on the scope of enforcement.[100]

93 Karen N. Scott, 'Marine Protected Areas in the Southern Ocean' in Alex Oude Elferink, Erik Molenaar and Donald R. Rothwell (eds), *The Law of the Sea and Polar Regions: Interaction between Global and Regional Regimes*, (Martinus Nijhoff, 2013), 113 – 137, at 128.

94 *Convention for the Protection of the Marine Environment of the North-East Atlantic*, adopted 22 September 1992, 2354 UNTS 67 (entered into force 25 March 1998) (1992 OSPAR Convention).

95 See generally, B.C. O'Leary, R. L. Brown, D. E. Johnson et al, 'The first network of marine protected areas (MPAs) in the high seas: The process, the challenges and where next' (2012) 36 *Marine Policy* 598 – 605.

96 The creation of a network of MPAs in the North East Atlantic was agreed in 1998 and objectives of the network and associated processes were set out in *Recommendation 2003/3 on a network of marine protected areas*.

97 The Charlie-Gibbs South MPA and the Milne Seamount Complex MPA. Source: https://www.ospar.org/work-areas/bdc/marine-protected-areas/mpas-in-areas-beyond-national-jurisdiction.

98 The Mid-Atlantic Ridge north of the Azores High Seas MPA, the Altair Seamount High Seas MPA, the Antialtair High Seas MPA, the Josephine Seamount Complex High Seas MPA, and the Charlie-Gibbs North High Seas MPA. Source: Ibid. Three further MPAs comprise the seabed of continental shelf areas beyond 200 nautical miles that are subject to a submission to the LOSC Commission on the Limits of the Continental Shelf by an OSPAR contracting party (The Rainbow Hydrothermal Vent Field, the Hatton Bank SAC and the Hatton-Rockall Basin. Source: *Ibid*).

99 In respect of the Charlie Gibbs North High Seas MPA. See further K. Hoydal, D. Johnson and H. H. Hoel, 'Regional governance: The case of NEAFC and OSPAR' in Serge M. Garcia, Jake Rice and Anthony Charles (eds), *Governance of Marine Fisheries and Biodiversity Conservation: Interaction and Coevolution* (Wiley-Blackwell, 2014), 225 – 238 and Ingrid Kvalvik, 'Managing institutional overlap in the protection of marine ecosystems on the high seas. The case of the North East Atlantic' (2012) 56 *Ocean Development and International Law* 35 – 43.

100 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 – 166, at 156.

Ultimately, all regional and indeed global regimes are limited by the *pacta tertiis* rule, which precludes states not party to a treaty from being bound by that treaty without their express consent. The only means of addressing this limitation, outside of the creation of customary law, is the development of a global framework that directly creates MPA obligations for all states or indirectly applies regional or other rules to states party to that global mechanism in the manner of the 1995 Fish Stocks Agreement. Such a global agreement is currently under negotiation and the potential options for managing MPAs in ABNJ at the international level will be discussed in the final part of the Chapter, below.

5 Area-based Management and the BBNJ Negotiations

The question of devising mechanisms, principles and processes for conserving biodiversity beyond the jurisdiction of states has been under consideration by the UNGA for well over a decade. In 2015, the UNGA took the decision to establish a formal preparatory committee for the purpose of developing a binding instrument under the auspices of UNCLOS on the conservation and sustainable use of biodiversity beyond national jurisdiction,[101] and formal negotiations were instituted in December 2017.[102] The first of four scheduled rounds of negotiations took place in September 2018. The Agreement will cover five broad areas comprising conservation and sustainable use of biodiversity in ABNJ; marine genetic resources including questions on the sharing of benefits; area-based management tools including MPAs; environmental impact assessment; capacity building and transfer of technology.[103] While the issue of marine genetic resources and the sharing (or otherwise) of their benefits is the most contentious matter under negotiation, area-based protection is arguably the most complex. Any regime developed by the Agreement will inevitably intersect with those institutions noted above, and indeed others, and mechanisms

101 General Assembly Resolution 69/292, *Development of 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*, A/RES/69/292 (19 June 2015) available at undocs.org.

102 General Assembly Resolution 72/249, *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*, A/RES/72/249 (24 December 2017) available at undocs.org.

103 General Assembly Resolution 66/231, *Oceans and the law of the sea*, A/RES/66/231 (24 December 2011), [167] available at undocs.org.

and processes to manage those relationships will have to be designed so as to not undermine those institutions while simultaneously contributing to the very real enhancement of area-based protection in ABNJ. Navigating the oceans regime complex,[104] (and it is worth noting that there are at least 265 multilateral treaties with a mandate to manage marine resources),[105] will be a significant challenge in terms of both substantive obligations and associated processes.

The report of the fourth (and final) meeting of the Preparatory Committee in 2017 set out a series of elements to be considered as part of the negotiations for a legally binding text,[106] and these elements were developed in the so-called *Chair's Non-paper* on the elements of a draft text of a legally binding instrument.[107] While some progress was made at the first round of negotiations in 2018, little emerged in the way of consensus on any of the key questions or issues.[108] Essential matters that will have to be decided include (but are not limited to): a definition of area-based protection and criteria for the designation of MPAs; the process for MPA designation; the relationship between processes and institutions associated with MPA designation under the Agreement and existing institutions and processes under other global and regional regimes

104 A regime complex is a system of non-hierarchical but functionally overlapping institutions that continually affect one another's operations. See in particular, Thomas Gehring and Benjamin Faude, 'The Dynamics of Regime Complexes: Microfoundations and Systemic Effects' (2013) 19 *Global Governance* 119 – 130, at 120; Kal Raustiala and David G. Victor, 'The Regime Complex for Plant Genetic Resources' (2004) 58 *International Organisation* 277 – 309, at 279; and Karen J. Alter and Sophie Meunier, 'The Politics of International Regime Complexity' (2009) 7 *Perspectives on Politics* 13 – 24, at 13.

105 Dalal Al-Abdulrazzak, Grantly R Galland, Loren McClenachan et al, 'Opportunities for improving global marine conservation through multilateral treaties' (2017) 86 *Marine Policy* 247 – 252, at 248.

106 Report of the Preparatory Committee established by General Assembly resolution 69/292: Development of 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, Fourth Session, New York, 10 – 21 July 2017, A/AC.287/2017/PC.4/2 (hereinafter, *Fourth Preparatory Report* (2017)).

107 Chair's streamlined non-paper on elements of a draft text of 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 (2017) available at: http://www.un.org/depts/los/biodiversity/prepcom_files/Chairs_streamlined_non-paper_to_delegations.pdf. (Hereinafter, *Chair's Non-paper* (2017)).

108 See 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, First session, New York, 4–17 September 2018, *Statement by the President of the conference at the closing of the first session*, A.CONF.232/2018/7 (hereinafter, *President Statement, First Session, 2018*).

(the regime complex); the role of coastal states in MPA designation processes; and implementation and enforcement.

At the first negotiation session in September 2018 "[t]here was general convergence that area-based management tools, including marine protected areas, are measures to achieve the objective of the international legally binding instrument, namely, the conservation and sustainable use of the marine biological diversity of areas beyond national jurisdiction."[109] The *Chair's Non-paper* proposed no less than five possible definitions of area-based management measures, all of which were broadly focused (and would include area-based protection established by RFMOs) and conservation-based.[110] The *Fourth Preparatory Report* identified a wide range of potential criteria for MPA designation including: uniqueness; rarity; special importance for life-stages of species; importance for threatened/ vulnerable species; vulnerability; fragility; sensitivity; biological productivity; biological diversity; representiveness; dependency; naturalness; connectivity; ecological processes; economic and social factors.[111] How these potential criteria relate to one-another, to the various categories of area-based protection and to criteria already in place under existing agreements are all important questions. Notably, "wilderness" is not a criterion (unless "naturalness" is regarded as the equivalent) and there is no explicit reference to climate refugia as a basis for MPA designation.

There is significant international practice on what should be included in any proposal for MPA designation and much of this is drawn on in the *Fourth Preparatory Report*, which suggests that proposals should include: a description of the area; known threats and vulnerabilities, including activities in the area; values, including socio-economic considerations; and ecological factors. Any proposal should be underpinned by scientific data, set out relevant conservation and sustainable use objectives, identify existing or adjacent measures and include a draft management plan including provision for monitoring and review.[112] A key question to be resolved is the types of activities that can be managed within the MPA: should they include navigation, scientific research, minerals extraction or fishing? This question inevitably rests on the scope of the proposed BBNJ Agreement and its relationship with other global and regional instruments.

The process for MPA designation is likely to prove a challenging issue to resolve. The 2017 *Chair's Non-paper* identifies three possible options. The most ambitious is the "global model", which envisages the creation of a global

109 *President Statement, First Session, 2018*, *ibid*., p. 12.

110 *Chair's Non-paper* (2017), *supra* note 107, [9].

111 *Fourth Preparatory Report* (2017), *supra* note 106, [4.3.1].

112 *Ibid*., [4.3.2].

overarching framework to enable the identification, designation, management and enforcement of area-based management tools, including MPAs.[113] At the other end of the spectrum is the "regional and/ or sectoral model", which would provide global level general policy guidance to promote cooperation, "while recognising the full authority, without oversight from a global mechanism, of regional and sectoral organizations in decision-making."[114] In between these two extremes is the "hybrid model" whereby general guidance and objectives would be developed at the global level in order to enhance cooperation, and a level of oversight would be provided to regional and sectoral institutions charged with decision-making on MPAs.[115] All three options raise questions and challenges for the existing framework of ocean governance. Of minimal impact is the regional/ sectoral model but equally, this model may also have minimal impact on the actual creation of MPAs within ABNJ. There would appear to be no obligation on regional institutions to designate MPAs and there is no mechanism for addressing areas that fall outside the remit of existing regional institutions. The latter issue is also relevant for the hybrid model although the introduction of "oversight" in this option potentially provides a mechanism to direct or persuade regional institutions to act. The term "oversight" however, is ambiguous and could mean anything from receiving information from regional bodies to directing the designation of MPAs by the institution in question. The introduction of "oversight" also raises the question of whether the regional and sectoral institutions themselves should consent to this process (as distinct from their member states) in their capacity as international organisations and institutions. The hybrid option also raises questions as to enforcement, particularly in respect of states not party to the relevant regional institution designating the MPA. One model that could be adopted is that developed in the 1995 Fish Stocks Agreement whereby parties to the FSA Agreement must abide by RFMO measures when fishing in the RFMO area whether they are a member of the RFMO or not.[116] The global model avoids many of these issues but raises other questions, not least whether a central process for MPA designation, implementation and enforcement can be reconciled with the Agreement's overall approach to not undermine or prejudice other regimes and organisations. Nevertheless, after the first round of negotiations in 2018 there seems to be "growing convergence on the need for a global

113 *Chair's Non-paper* (2017), *supra* note 107, [94].
114 *Ibid.*, [96].
115 *Ibid.*, [95].
116 1995 Fish Stocks Agreement, Art 17.

decision-making body"[117] as well as a mechanism to provide scientific advice and a secretariat to discharge administrative functions.[118]

Equally challenging is the question of who or what can propose new MPAs or other area-based management tools within ABNJ. At the first negotiating round in 2018 it was "broadly agreed" that proposals could be submitted by states party to the Agreement, individually or collectively, "including through competent organizations".[119] Other possible entities, around which no consensus has yet to emerge, include non-party states, the scientific and technical body established under the Agreement, civil society or "natural or juridical persons sponsored by a State party."[120] A process for coordination and consultation with states, including adjacent coastal states, and other stakeholders such as industry, traditional knowledge holders and local communities will also have to be developed.[121]

The most complex and, in some respects, most exciting challenge is situating the Agreement within the oceans governance regime complex, and managing its relationship with existing global and regional organisations with mandates covering area-based management.[122] It is agreed that the overall approach of the Agreement is to avoid prejudicing the "rights jurisdiction and duties of States under the Convention [UNCLOS]."[123] The purpose of the Agreement is to "promote greater coherence with and complement existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies"[124] and to that end the Agreement will be interpreted and applied "in a manner which would not *undermine* these instruments, frameworks and bodies."[125] The term "undermine" is ambiguous. Arguably an interpretation of the Agreement that is contrary to the object and purpose of a regional or sectoral institution can be said to "undermine" that institution. But does a measure, such as the designation of an MPA that supports the objects and purposes of an institution (for example, marine conservation), but is not specifically

117 *President Statement, First Session, 2018*, *supra* note 108, at 12.
118 *Ibid.*
119 *Ibid.*, at 13.
120 *Ibid.*
121 *Fourth Preparatory Report* (2017), *supra* note 106, [4.3.2.(ii)].
122 A recent collection of articles published in volume (2107) 32(4) *The International Journal of Marine and Coastal Law* provides a review of the potential intersections between the proposed BBNJ Agreement and regional seas and other sectoral arrangements in the seas of the Southern Hemisphere.
123 *Fourth Preparatory Report* (2017), *supra* note 106, [4] and [4.2].
124 *Ibid.*
125 *Ibid.* Emphasis added.

supported by that institution for whatever reason, "undermine" that institution or regime? Furthermore, there remains significant disagreement on the role of the Agreement in respect of conservation associated with fisheries,[126] and distinct but no less complex issues are associated with activities for which there is no overarching global or regional body such as the laying of cables and pipelines.[127] Ultimately, the trade-off of respecting the regime complex is effectiveness: if "undermine" is restrictively interpreted to protect the status quo in all cases it is difficult to see how the Agreement will contribute to increasing area-based management coverage in ABNJ.

A related issue is coordination and cooperation with coastal states where MPAs or other area-based measures are adopted adjacent to their maritime zones or even in the water column above their continental shelf beyond 200 nautical miles. The issue parallels the debate that took place during the negotiations of the 1995 Fish Stocks Agreement, and centers on the delicate balance between the rights and interests of a coastal state with those of the international community in the conservation of adjacent or transboundary ecosystems. The role of coastal states in the designation of MPAs in ABNJ proved to be one of the most controversial issues during the Preparatory Committee meetings[128] and various principles for reconciling the various interests have been mooted including due regard, consultation, compatibility and adjacency.[129] At the first round of negotiations in 2018 there was "some convergence" on the need for consultations with coastal states in respect of MPAs and other measures adjacent to their zones, and the question was raised as to whether the consent of those states should operate as a pre-requisite to the designation of adjacent MPAs.[130]

The final challenge, which is by no means confined to area-based management measures, is the development of processes and mechanisms for the implementation and enforcement of those measures in ABNJ. As for any activity taking place on the high seas the flag state will first and foremost bear responsibility for ensuring vessels within its registry comply with obligations

126 See generally, Dire Tldi, 'The Proposed Implementing Agreement: Options for Coherence and Consistency in the Establishment of Protected Areas beyond National Jurisdiction' (2015) 30 *The International Journal of Marine and Coastal Law* 654 – 673.

127 See further Andrew Friedman, 'Submarine Telecommunication Cables and a Biodiversity Agreement in ABNJ: Finding New Routes for Cooperation' (2017) 32 *The International Journal of Marine and Coastal Law* 1 – 35.

128 Alex G. Oude Elferink, 'Coastal States and MPAs in ABNJ: Ensuring Consistency with the LOSC' (2018) 33 *The International Journal of Marine and Coastal Law* 437 – 466, at 439.

129 For an excellent discussion of the pros and cons of these various options see *ibid* at 440 – 448.

130 *President Statement, First Session, 2018*, *supra* note 108, at 11.

and measures it has agreed to. However, as demonstrated by all fields – from navigation to fishing – flag state enforcement is imperfect, and significant efforts within the law of the sea have been expended over the last couple of decades developing additional mechanisms to implement and enforce international rules, primarily although not exclusively through enhanced port state control.[131] One option therefore is the creation of a port state mandate to enforce MPA rules through controlling access to and activities of foreign vessels within a port, using the model of the 2009 Port State Measures Agreement to Deter IUU Fishing.[132] Another option is the development of at-sea enforcement, using the model of the 1995 Fish Stocks Agreement that permits the boarding and inspection of vessels suspected of IUU fishing by states authorized through relevant regional arrangements.[133] Where area-based measures or MPAs are adjacent to coastal states the question arises as to whether coastal states can or should have a role in the enforcement of those measures against foreign vessels and what that role might comprise. At the first round of negotiations in 2018 a compliance mechanism was proposed[134] although developing a mechanism that is able to navigate and enforce multiple regimes would be both novel and challenging.

6 Concluding Remarks

The development of area-based management tools, including MPAs, provides a textbook illustration of UNCLOS as a "living instrument",[135] able to 'grow and adapt to changing circumstances.'[136] Part XII of UNCLOS has evolved from a set of obligations focused on pollution prevention and control to a

131 See Erik J. Molenaar, 'Port and Coastal States' in (Donald R. Rothwell, Alex G. Oude Elferink, Karen N. Scott, Tim Stephens (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press, 2015) 280 – 302.

132 *2009 Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing*, adopted on 22 November 2009, [2010] ATNIF 41 (entered into force 5 June 2016).

133 1995 Fish Stocks Agreement, Art 21.

134 *President Statement, First Session, 2018*, *supra* note 108, at 14.

135 On UNCLOS as a living instrument and on evolutionary treaties more generally see Jill Barrett and Richard Barnes (eds), *Law of the Sea. UNCLOS as a Living Treaty* (BICL, 2016); Daniel Moeckli and Nigel D White, 'Treaties as 'Living Instruments' in Michael J Bowman and Dino Kritsiotis (eds), *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press, 2018) 136 – 171.

136 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion, 2 April 2015,* ITLOS Reports 2015, p. 4, Separate Opinion, Judge Lucky, [18].

modern conception of marine conservation that expands on those obligations to include precaution, environmental impact assessment and area-based protection. On the basis of a teleological approach to treaty interpretation as well as subsequent practice, a legal right to establish MPAs as well as other area-based measures beyond national jurisdiction indubitably exists. However, resistance to, and slow progress of, MPA designation beyond national jurisdiction also demonstrates the limitations of relying on the development of existing instruments by interpretation and subsequent practice alone. Creating a designated framework for area-based protection in ABNJ through a specific Agreement to UNCLOS is the most appropriate option for managing MPAs beyond national jurisdiction in the long term as well as meeting global area-protection targets. However, as the brief overview above demonstrates, developing a global framework for area-based protection within an already congested and, at times, competitive regime complex, will be far from straightforward. Ultimately, negotiators will need to balance the overall approach of the Agreement to not undermine the interests of states and relevant global, regional and sectoral bodies – which risks simply preserving the status quo – with the aims and objectives of the Agreement to improve the protection and conservation of the oceans beyond the jurisdiction of states.