

# From Undermining to Strengthening: Implications of the Forthcoming Agreement on Biodiversity Beyond National Jurisdiction for MPA Governance in the North-East Atlantic

Bastiaan Ewoud Klerk | ORCID 0000-0003-4742-8752  
University of Tromsø, UiT The Arctic University of Norway, Tromsø, Norway  
[Bastiaan.e.klerk@uit.no](mailto:Bastiaan.e.klerk@uit.no)

## Abstract

Among the most pressing issues that remain unresolved in the process of negotiating a new international legally binding instrument (ILBI) on biodiversity beyond national jurisdiction (BBNJ) are the institutional arrangements, as they underpin the treaty as a whole. This article seeks to shed new light on the question of what institutional shape the ILBI should take, by closely analysing the pluralistic governance model that is reflected in the BBNJ Draft text and exploring its potential normative and institutional interactions with the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), under which a vast network of marine protected areas (MPAs) has been put in place. The BBNJ ILBI has great potential to strengthen regional bodies in their endeavours to establish MPAs as opposed to ‘undermine’ them.

## Keywords

biodiversity beyond national jurisdiction – OSPAR – marine protected areas – LOSC

## Introduction

At present, approximately 8.1 percent of the ocean is covered by marine protected areas (MPAs).<sup>1</sup> Notably, the vast majority of these MPAs are located in areas within national jurisdiction, whereas on the high seas, MPAs are designated that comprise only 1.5 percent of this vast area of ocean space.<sup>2</sup> Nearly a third of the MPAs in areas beyond national jurisdiction (ABNJ) are found in the North-East Atlantic region,<sup>3</sup> where a vast network of MPAs has been put in place under the Convention for the Protection of the Marine

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<sup>1</sup> ‘The Marine Protection Atlas’ (Marine Conservation Institute, 2022) available at <https://mpatlas.org>; accessed 2 December 2022.

<sup>2</sup> *Ibid.* It should be noted, however, that these percentages indicate the *designation* of MPAs, and say very little about the actual degree of protection. It is estimated that 2.4 percent of the ocean is ‘fully or highly’ protected, and less than 1 percent of ABNJ, and even these numbers have been said to be an overestimation. See, in this regard, E Sala *et al.*, ‘Assessing real progress towards effective ocean protection’ (2018) 91 *Marine Policy* 11–13, <https://doi.org/10.1016/j.marpol.2018.02.004>.

<sup>3</sup> In terms of coverage, they cover 1.060,36 km<sup>2</sup> out of 3.301.299 km<sup>2</sup>. See MPA Atlas (n 1); J Hennicke *et al.*, ‘Report and assessment of the status of the OSPAR network of marine protected areas in 2021’ in OSPAR, 2023: *The Quality Status Report for the North-East Atlantic* (OSPAR Commission, London, 2022) [2021 OSPAR MPA Status Report], available at <https://oap.ospar.org/en/ospar-assessments/committee-assessments/biodiversity-committee/status-ospar-network-marine-protected-areas/assessment-reports-mpa/mpa-2021/>; accessed 2 December 2022.

Environment of the North-East Atlantic (OSPAR Convention).<sup>4</sup> OSPAR did so despite the existence of significant discrepancies in the existing legal scheme governing ABNJ, due to which establishing comprehensive cross-sectoral MPAs is a complex endeavour. The existing regime largely revolves around the high seas freedoms as listed in Article 87 of the United Nations Convention on the Law of the Sea (LOS).<sup>5</sup> The overall result is ‘a complex, loosely coordinated, and generally permissive regime for governing ABNJ’.<sup>6</sup>

In response to various concerns throughout the international community with regard to the inadequacy of the existing framework to sufficiently protect biodiversity in ABNJ, international actors are currently negotiating a new implementing agreement under the LOS for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (BBNJ). At the time of writing, the process is nearing completion and the contours of the ILBI are becoming increasingly visible. All four scheduled intergovernmental conferences (IGCs) have been completed, during which, however, delegations were unable to reach consensus. A fifth IGC was therefore convened in August 2022, which was suspended to be resumed at a later date. The ILBI will address four elements, collectively referred to as ‘the package’: (i) marine genetic resources; (ii) area-based management tools (ABMTs), including MPAs; (iii) environmental impact assessments (EIAs); and (iv) capacity building and the transfer of marine technology.

On the eve of the resumption of IGC-5, the question arises how this new instrument could affect and relate to OSPAR’s network in ABNJ. This question will be addressed with a view to illuminate which elements of the ILBI are key to establish a normative and institutional structure that fulfils the stated objective of the ILBI to create a ‘comprehensive global regime to better address the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction’.<sup>7</sup> This can, of course, only be done tentatively, given that there is no definitive treaty text to be assessed.

Parties have, however, managed to find common ground on a variety of issues. Some topics nonetheless remain on which delegations are divided.<sup>8</sup> One such issue concerns the institutional arrangements, that is, ‘the architecture of the bodies and subsidiary bodies that will carry forward the work of the BBNJ Agreement, as well as to the relative role of the BBNJ Agreement within the broader constellation of international ocean governance organizations’.<sup>9</sup> Throughout the negotiation process, three institutional ‘models’ emerged: a

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<sup>4</sup> Convention for the Protection of the Marine Environment of the North-East Atlantic (22 September 1992, in force 25 March 1998) 2354 *UNTS* 67 [OSPAR Convention].

<sup>5</sup> United Nations Convention on the Law of the Sea (10 December 1982, in force 16 November 1994) 1833 *UNTS* 396 [LOS].

<sup>6</sup> E Mendenhall *et al.*, ‘A soft treaty, hard to reach: The Second Inter-Governmental Conference for Biodiversity beyond National Jurisdiction’ (2019) 108 *Marine Policy* 103664, <https://doi.org/10.1016/j.marpol.2019.103664>.

<sup>7</sup> United Nations General Assembly (UNGA) Res 69/292 (19 June 2015), 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, UN Doc A/RES/69/292.

<sup>8</sup> During IGC-5, issues on which convergence could not yet be observed included, *inter alia*, the inclusion of common heritage as a guiding principle; fair and equitable sharing of benefits from marine genetic resources; including a fallback decision-making mechanism if no consensus is reaching by the COP; consideration of transboundary and cumulative impacts in the conduct of EIAs; and the relationship between existing regional and sectoral bodies and the BBNJ COP and other institutions. See T Kantai, ‘Summary of the Fifth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 15–26 August 2022’ (2022) 25:240 *Earth Negotiations Bulletin* [IGC-5 Summary].

<sup>9</sup> NA Clark, ‘Institutional arrangements for the new BBNJ agreement: Moving beyond global, regional, and hybrid’ (2020) 122 *Marine Policy* 104143, at p. 7, <https://doi.org/10.1016/j.marpol.2020.104143>.

*regional* model, which places the burden of carrying forward the work of the ILBI on existing legal instruments, frameworks and bodies (henceforth: IFBs); a *global* model, wherein a global executive body is granted extensive powers to oversee the implementation of the BBNJ agreement, thus creating a hierarchical relationship with existing IFBs; and a *hybrid* model, which envisions a regime wherein the ILBI sets out standards and obligations at the global level, which could then be implemented by States through regional and sectoral frameworks.<sup>10</sup> These models have been a useful theoretical tool to guide the discussions about the institutional arrangements of the ILBI. However, as the negotiations progressed and morphed into more detailed discussions concerning the ILBI's institutions and their exact functions, prompted in particular when a Draft treaty was developed prior to IGC-3, they have arguably largely lost their value.

Taking a closer look at the institutional model reflected in the Draft text, and, in a way, *adding it to the mix* in the North-East Atlantic region, will facilitate analysis of the interactions that would occur between OSPAR and the ILBI. These institutional interactions cannot be viewed in isolation of the normative interplay between these instruments, which is an inherent part thereof. Therefore, the regulatory frameworks of both instruments for designing and implementing MPAs will be assessed, with a view to analyse their combined application to MPA governance in the North-East Atlantic. A key hypothesis that this study seeks to investigate is that the ILBI has great potential to strengthen regional bodies in their endeavours to establish MPAs in ABNJ as opposed to 'undermine' them.

To this end, the main *corpus* of this article is structured as follows: Starting from a detailed analysis of the OSPAR's MPA regime, various aspects of the ILBI are thoroughly examined in light of the most recent version of the Draft text. Following this, a joint analysis is conducted of the elements from the preceding sections with the aim of investigating how OSPAR may be affected by the ILBI. The final section offers some concluding remarks and reflects on the broader relevance of this analysis in light of the question of whether the forthcoming ILBI could 'undermine' the existing IFBs. Notably, given that the BBNJ negotiations are still pending, this analysis is of an inherently tentative character, based on the relevant data currently available.

A few remarks regarding the delimitation of scope should be made at the outset. Emphasis will be placed on Part III of the Draft text on ABMTs, including MPAs, as this is the part of the 'package' where the consequences of the institutional model described in the Draft text are most tangible. Moreover, this study focusses primarily on OSPAR and its institutions, examining how they may be affected by the ILBI. Apart from them, there are a variety of other competent bodies operating in the North-East Atlantic region that relate to the establishment of ABMTs and MPAs, such as the International Maritime Organization (IMO), the International Seabed Authority (ISA), and the North-East Atlantic Fisheries Commission (NEAFC). While the respective role of these bodies will be discussed to a certain degree, any detailed analysis of their competence and how they could be affected by the ILBI falls beyond the scope of this study.

### **OSPAR's MPA Governance in ABNJ**

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<sup>10</sup> KD Kraabel, 'The BBNJ PrepCom and institutional arrangements: The hype about the hybrid approach' in MH Nordquist, JN Moore, and R Long (eds), *The Marine Environment and United Nations Sustainable Development Goal 14: Life Below Water* (Brill Nijhoff, Leiden, 2019) 137–172, at p. 160.

### ***OSPAR's Regulatory and Institutional Framework***

The starting point for assessing OSPAR's MPA network in ABNJ is the OSPAR Convention, which forms the foundation of all OSPAR activities. The OSPAR Convention consists of 34 articles, containing general obligations and principles which are further elaborated in its five annexes and three appendixes. OSPAR's 'maritime area' is defined in Article 1(a) and encompasses extensive areas of ABNJ in the wider Atlantic and the Arctic, covering roughly 40 percent of the total area.<sup>11</sup>

Annex V, entitled 'The Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area', has the most relevance in relation to MPAs. Article 2 of Annex V provides that Contracting Parties (CPs) shall take, individually and jointly, the necessary measures to protect the maritime area against the adverse effects of human activities. Moreover, Article 3(1)(b)(ii) formulates a duty for the OSPAR Commission 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'. Neither of these provisions provide directly for the establishment of MPAs in ABNJ. These provisions are, however, mentioned in the preamble of the decisions creating MPAs in ABNJ, and thus seem to be interpreted as the legal basis for their establishment.<sup>12</sup> Importantly, pursuant to Article 4 of Annex V, matters relating to fisheries and shipping are excluded from OSPAR's competence, and issues of such nature are to be brought to the attention of the IMO or NEAFC. As observed by Matz-Lück and Fuchs, the OSPAR Commission is thus 'not entitled to regulate either the most prominent form of extraction of biomass from the oceans or one of the main sources of marine pollution'.<sup>13</sup> Indeed, this provision forms a significant gap in OSPAR's competence. This is, however, inherent to the current regime under the LOSC and its 'sectoral' approach.<sup>14</sup> As will be discussed below, OSPAR seeks to take a leading role in coordinating the various sectoral bodies operating in the North-East Atlantic through the 'Collective Arrangement'.

OSPAR's key organ is the OSPAR Commission, which meets annually and is made up of representatives of each of the CPs.<sup>15</sup> The Commission meetings can also be attended by Observers, who have no voting right, but they may participate and present information and reports.<sup>16</sup> The Commission can adopt binding decisions and non-binding recommendations.<sup>17</sup> These are the tools by means of which OSPAR's MPAs in ABNJ are established. A binding decision—which is fairly brief and merely states the purpose of the MPAs and its

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<sup>11</sup> OSPAR Commission, '2018 Status Report on the OSPAR Network of Marine Protected Areas' available at <https://oap.ospar.org/en/ospar-assessments/committee-assessments/biodiversity-committee/status-ospar-network-marine-protected-areas/assessment-reports-mpa/2018/>; accessed 8 January 2022.

<sup>12</sup> E.g., OSPAR Decision 2010/2 on the Establishment of the Charlie Gibbs South Marine Protected Area.

<sup>13</sup> N Matz-Lück and J 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*, <http://dx.doi.org/10.1016/j.marpol.2013.12.001>.

<sup>14</sup> That is, the establishment of specific regimes and institutions for various sectoral activities, such as fisheries, shipping and deep seabed mining.

<sup>15</sup> OSPAR Convention (n 4), Article 10.

<sup>16</sup> *Ibid.*, Article 11. For an in-depth analysis of the prominent role of NGOs within OSPAR's MPA regime, and how a similar system could be useful for the BBNJ ILBI, see BE Klerk, 'Lessons to be learned from OSPAR's network of marine protected areas in areas beyond national jurisdiction, in light of the BBNJ negotiations' (*The NCLOS Blog*, 18 December 2020) available at <https://site.uit.no/nclos/2020/12/18/lessons-to-be-learned-from-ospars-network-of-marine-protected-areas-in-areas-beyond-national-jurisdiction-in-light-of-the-bbnj-negotiations/>; accessed 16 August 2021.

<sup>17</sup> OSPAR Convention (n 4), Article 13.

geographical scope (e.g., OSPAR Decision 2010/2)—is supplemented by a more elaborate, non-binding recommendation that contains provisions of a more normative nature, such as conservation objectives, reporting duties and entry into force.<sup>18</sup> It is noteworthy that the substantive part of the MPA is thus non-binding.

The OSPAR Commission is supported by five main committees, some of which are in turn supported by working groups. The most important committee for present purposes is the Biodiversity Committee (BDC) and its Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA). Further, OSPAR has a permanent Secretariat, located in London, United Kingdom.

### ***OSPAR's MPA Network in ABNJ***

OSPAR has been actively expanding its MPA network since 2003. The so called 'OSPAR Network' comprises of a total of 583 MPAs, covering an area of 1.490.552 km<sup>2</sup>, 11 percent of OSPAR's maritime area.<sup>19</sup> Eight of those MPAs are located in ABNJ, as shown in Table 1.

TABLE 1      OSPAR MPAs in ABNJ<sup>20</sup>

<b>Name</b>	<b>Established</b>	<b>Size km<sup>2</sup></b>	<b>Located entirely in ABNJ</b>
Charlie-Gibbs South MPA	OSPAR Ministerial Meeting in 2010	146,032	Yes
Mid-Atlantic Ridge North of the Azores High Seas MPA	OSPAR Ministerial Meeting in 2010	93,570	No, overlaps Portugal's submission to the CLCS for its extended continental shelf
Milne Seamount Complex MPA	OSPAR Ministerial Meeting in 2010	20,914	Yes
Josephine Seamount High Seas MPA	OSPAR Ministerial Meeting in 2010	19,363	No, overlaps Portugal's submission to the CLCS for its extended continental shelf
Altair Seamount High Seas MPA	OSPAR Ministerial Meeting in 2010	4,384	No, overlaps Portugal's submission to the CLCS for its extended continental shelf
Antialtair High Seas MPA	OSPAR Ministerial Meeting in 2010	2,807	No, overlaps Portugal's submission to the CLCS for its extended continental shelf
Charlie-Gibbs North High Seas MPA	OSPAR Ministerial Meeting in 2012	178,094	No, overlaps Portugal's submission to the CLCS for its extended continental shelf
North Atlantic Current and Evlanov Sea basin MPA	OSPAR Ministerial Meeting in 2021	595,196	Yes

<sup>18</sup> See, e.g., OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area.

<sup>19</sup> 2021 OSPAR MPA Status Report (n 3).

<sup>20</sup> *Ibid.*

These MPAs will be reviewed through the examination of the three phases in OSPAR's MPA governance: identification and designation; implementation and monitoring; and enforcement and compliance. The ensuing analysis is based on the decisions and recommendations by means of which these MPAs are established,<sup>21</sup> as well as on the wider constellation of contextual documents such as guidelines, agreements, and official records of various meetings of the OSPAR Commission and its sub-committees and working groups.

### *Identification and Designation*

As for the first phase, the review of relevant policy documents sheds some light on the processes OSPAR has in place with regard to identifying sites and establishing MPAs. The 'Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area'<sup>22</sup> set out a two-stage process to identify sites, using two sets of identification criteria: ecological and practical. Although it is provided that the Identification Guidelines are applicable to all MPAs, the document appears to be drafted for those within national jurisdiction. Very specific information about the possible sites is required, which in many cases will not be available for the generally more remote sites in ABNJ. Moreover, Appendix 4, which describes a detailed process for digitally nominating sites, is not applicable to sites in ABNJ. As an alternative, it is merely provided that the OSPAR Commission is responsible for data validation and final approval.

Given the limited guidance that Agreement 2003-17 provides for the selection of sites in ABNJ and considering the unique nature of these MPAs, a single mechanism to cover both types of MPAs seems sub-optimal. This was recognised by the CPs at the 2011 OSPAR ICG-MPA meeting where it was noted that there is 'no coordinated approach by CPs to select any further sites with a view to enhancing the ecological coherence of the OSPAR MPA Network in ABNJ'.<sup>23</sup> The shortcomings of this process are illustrated by the fact that no CP has hitherto made a proposal for an MPA in ABNJ following the procedure under the Identification Guidelines. Five MPA proposals were prepared by the University of York, in collaboration with OSPAR and sponsored by Germany, whilst all other proposals were initiated by non-governmental organizations.<sup>24</sup>

### *Implementation and Monitoring*

In order to ensure that MPAs in ABNJ are not just 'paper parks',<sup>25</sup> and actually achieve their conservation objectives, implementation of measures and monitoring their effects on the marine environment are of vital importance. The decisions and recommendations establishing the MPAs do not entail any strong legal obligations. The decision merely sets out the coordinates, purpose, and scope of the MPA, whereas the (non-legally binding)

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<sup>21</sup> These documents are virtually identical for all OSPAR MPAs in ABNJ.

<sup>22</sup> OSPAR Agreement 2003-17, Guidelines for the identification and selection of Marine Protected Areas in the OSPAR Maritime Area.

<sup>23</sup> Summary record 2011 OSPAR Intersessional Correspondence Group on Marine Protected Areas (ICG-MPA 11/10/1-E) 5–7 September 2011, para 4.16.

<sup>24</sup> The Charlie-Gibbs Fracture Zone was proposed by WWF (Summary record 2007 OSPAR Commission meeting (OSPAR 07/24/1-E) 25–19 June 2007, para 6.17); the Arctic Ice MPA was proposed by Greenpeace and is currently under consideration in collaboration with the Arctic Council (Summary record 2016 OSPAR Commission Meeting (OSPAR 16/20/1-E) 20–24 June 2016, para 6.27); and the NACES MPA was proposed by BirdLife (Draft nomination proforma for a 'North Atlantic Current and Evlanov Seamount' MPA in the OSPAR Maritime Area (ICG-MPA 19/4/3 Addendum 1).

<sup>25</sup> Matz-Lück and Fuchs (n 13).

recommendation provides that CPs *should* implement the ‘management framework’ (i.e., the decision and the recommendation) for the MPA. Although the recommendation continues with a detailed set of ‘conservation objectives’ in its annex, these are of limited practical value given that implementation is not mandatory and is therefore largely left to the discretion and goodwill of the CPs.

As regards the implementation of the decisions, the OSPAR Convention provides that such decisions shall, where appropriate, contain provisions specifying the timetable by which they shall be implemented.<sup>26</sup> Remarkably, the decisions that establish MPAs in ABNJ do not contain such provisions. The only mechanism in place to urge CPs to implement the MPAs is their obligation to report on the implementation, anchored in Article 5 of the recommendation.<sup>27</sup> This article provides that CPs should report annually on the implementation of the management measures, by filling out a form for each individual MPA. These reports are submitted to the ICG-MPA. Notably, the number of reports received is generally very low, ranging from only 5 in 2013<sup>28</sup> to 11 in 2015.<sup>29</sup> During the 2015 ICG-MPA meeting,<sup>30</sup> it was agreed to change the reporting format so that only a single report for all ABNJ MPAs should be produced yearly by each CP. However, this has not yet happened, and during the 2020 ICG-MPA meeting the United Kingdom voiced criticism, describing the reporting process as ‘unfocussed’.<sup>31</sup>

A second issue arising in this context is how this (limited) information is processed. Results of the implementation reports are not made publicly available, and therefore cannot be assessed. Very little information in this regard is published by OSPAR, which raises questions regarding the implementation of the measures. In the 2016 MPA status report,<sup>32</sup> implementation of MPAs in ABNJ is briefly addressed. The question ‘are measures to achieve conservation objectives being implemented?’ is answered by merely stating that progress has been made with regard to the OSPAR-NEAFC collective arrangement and that ‘further work is required; in particular with regard to seabed mining, cable laying and military activities’.<sup>33</sup> The 2018 and 2021 MPA status reports<sup>34</sup> merely state that no new information on the management status of MPAs in ABNJ has been provided since the 2016 data call.<sup>35</sup>

Monitoring has been described as a key strength of the OSPAR Commission.<sup>36</sup> The obligation for the CPs to report is enshrined in Article 22 of the OSPAR Convention. Building upon this, OSPAR has an extensive and detailed programme in place to monitor and assess

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<sup>26</sup> OSPAR Convention (n 4), Article 13.

<sup>27</sup> For example, OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area.

<sup>28</sup> 2013 OSPAR Commission: Report of the meeting of ICG-MPA (ICG-MPA 13/9/1-E) 21–23 January 2013, para 5.2.

<sup>29</sup> 2015 OSPAR Commission: Report of the meeting of ICG-MPA (ICG-MPA 15/9/1-E) 13–15 October 2015, para 5.2.

<sup>30</sup> *Ibid.*

<sup>31</sup> 2020 OSPAR Commission: Report of the meeting of ICG-MPA (ICG-MPA 20/9/1) 20–22 October 2020, para 5.2.

<sup>32</sup> OSPAR Commission 2017, ‘2016 Status Report on the OSPAR Network of Marine Protected Areas’ available at <https://oap.ospar.org/en/ospar-assessments/committee-assessments/biodiversity-committee/status-ospar-network-marine-protected-areas/assessment-reports-mpa/2016/>; accessed 5 October 2021.

<sup>33</sup> *Ibid.*, at p. 43.

<sup>34</sup> 2018 OSPAR MPA Status Report (n 11), at p. 48.

<sup>35</sup> *Ibid.*, at p. 48; 2021 MPA Status Report (n 3), at p. 54.

<sup>36</sup> D Johnson, ‘Can competent authorities cooperate for the common good: Towards a collective arrangement in the North-East Atlantic’ (2012) *Environmental Security in the Arctic Ocean NATO Science for Peace and Security Series C: Environmental Security* 333, [https://doi.org/10.1007/978-94-007-4713-5\\_29](https://doi.org/10.1007/978-94-007-4713-5_29).

the status of the OSPAR maritime area.<sup>37</sup> However, no such monitoring programmes are in place for MPAs in ABNJ. The recommendations provide that CPs should ‘identify suitable mechanisms for monitoring the achievement of the conservation objectives for the area’.<sup>38</sup> However, as can be derived from the 2016 and 2018 MPA status reports, no progress has been made in this regard. The 2016 report states that, given the lack of dedicated site condition monitoring programmes in place, it is unknown if the MPAs in ABNJ are moving towards their conservation objectives.<sup>39</sup> No progress in this regard is shown by the 2018 and 2021 reports.<sup>40</sup>

#### *Enforcement and Compliance*

The existing legal framework governing ABNJ does not lend itself well for enforcement of MPAs. The primary available tool is flag State enforcement, which can be easily evaded by registering under a ‘flag of convenience’. Perhaps for this reason, the legal framework surrounding OSPAR’s MPAs lacks enforcement measures of any kind. In a 2003 policy document, the ‘MPA Management Guidelines’,<sup>41</sup> CPs are encouraged to adopt enforcement tools such as warnings, penalties and fines, however only with regard to MPAs within national jurisdiction. In the decisions and recommendations establishing the MPAs in ABNJ, no such enforcement tools are mentioned. Given the lack of enforcement mechanisms of any kind, a strong compliance procedure is arguably required. OSPAR does have a compliance mechanism: by virtue of Article 23, the Commission can ‘take measures to assist a CP to carry out its obligations’, based on the implementation reports of the Parties. Although this provision has been said to go beyond the provisions of many other international environmental agreements,<sup>42</sup> its dependence on the reports issued by the CPs is problematic, given the low level of reports issued by CPs with regard to MPAs in ABNJ.

#### *Relationship to Other Conventions and Cooperation*

The OSPAR Convention does not contain a conflict clause. Its position in the institutional landscape of the ocean can best be understood by reference to Article 197 of the LOSC, which calls upon States to cooperate ‘as appropriate’ on a regional basis for the protection and preservation of the marine environment. Within the broader LOSC framework, OSPAR can be put on the same footing—and thus has a non-hierarchical relationship to—other regional instruments and sectoral bodies. The LOSC does not provide any mechanisms through which these institutions can cooperate in the achievement of the objectives set out in Part XII. However, for the establishment of comprehensive cross-sectoral MPAs, cooperation with such bodies is necessary.

OSPAR has been doing so actively, and has taken the lead in enhancing cooperation in the North-East Atlantic by initiating the ‘Madeira Process’, a series of informal meetings

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<sup>37</sup> OSPAR Coordinated Environmental Monitoring Programme (CEMP) (OSPAR Agreement 2016-01), and OSPAR Joint Assessment and Monitoring Programme (JAMP) 2014–2023.

<sup>38</sup> OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area, para 3.3.3 d.

<sup>39</sup> 2016 OSPAR MPA Status Report (n 32), at p. 43.

<sup>40</sup> Whereas the 2016 Report dedicated a specific section to monitoring of MPAs in ABNJ, no such section is present in the 2018 and 2021 Reports.

<sup>41</sup> OSPAR Commission, ‘Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area’ (OSPAR 2003-18).

<sup>42</sup> P Sands and J Peel, *Principles of International Environmental Law* (4<sup>th</sup> edn, Cambridge University Press, Cambridge, 2019) 272–290, at p. 162.

with the aim of ensuring a high level of conservation of selected areas in the North-East Atlantic beyond national jurisdiction.<sup>43</sup> The first meeting was held in 2010, and attended by a variety of international organisations.<sup>44</sup> A draft 'Collective Arrangement' was adopted, setting out the joint principles and specifications for a collaborative management of selected aspects of biodiversity protection.<sup>45</sup> The OSPAR Commission endorsed the text in 2011.<sup>46</sup> In 2014, NEAFC entered the Arrangement, which led to the adoption of a renewed and more extensive Arrangement in 2014.<sup>47</sup> The aim of this revised Collective Arrangement is to become 'a collective and multilateral forum composed of all competent entities addressing the management of human activities in this region'.<sup>48</sup> Thus, it differs significantly from the bilateral Memoranda of Understanding (MoU) as it aims at achieving wider participation.<sup>49</sup> The aim of the Collective Arrangement is to cooperate and seek coordination in order to ensure that suitable measures for the conservation and management of certain areas are implemented, informed by the conservation objectives established for these areas.<sup>50</sup> The Collective Arrangement applies to selected areas beyond national jurisdiction in the North-East Atlantic. A list of all areas which are closed by NEAFC for the protection of vulnerable marine ecosystems, as well as a list of all OSPAR MPAs in ABNJ, are included. All relevant areas are specified with coordinates and conservation measures that are applicable.

The first meeting under the Collective Arrangement was held in 2015, which was described as very successful by the OSPAR Parties, leading to 'much better mutual understanding of working methods, approaches to conservation and potential for better collaboration and complementary actions'.<sup>51</sup> Since then, the meeting is held on an annual basis, steadily gaining attraction from a growing number of international organisations. The most recent meeting in 2019 was attended by representatives from the UN Food and Agriculture Organization; the Baltic Marine Environment Protection Commission (HELCOM); the International Commission for the Conservation of Atlantic Tunas; the International Council for the Exploration of the Sea; the North Atlantic Marine Mammal Commission; and the UN Environment Programme (UNEP).<sup>52</sup> Despite efforts by NEAFC and OSPAR, neither the IMO nor the ISA have entered the Collective Arrangement to date. Remarkably, after the third Collective Arrangement meeting in 2017, NEAFC and OSPAR secretariats invited both the IMO and ISA to participate in the fourth meeting,<sup>53</sup> but they did not attend.<sup>54</sup> Besides the continuing efforts to strengthen the Collective Arrangement, OSPAR has sought to formalise

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<sup>43</sup> Johnson (n 36).

<sup>44</sup> Summary record 2010 Biodiversity Commission (BDC 10/11/1-E) 15–18 June 2010, para 4.7.

<sup>45</sup> G Wright, J Rochette and E Druel, 'Marine protected areas in areas beyond national jurisdiction' in R Rayfuse (ed) *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2015) 272, <https://doi.org/10.4337/9781781004777>.

<sup>46</sup> Summary record 2011 OSPAR Commission meeting (OSPAR 11/20/1-E) 20–24 June 2011, para 4.17.

<sup>47</sup> OSPAR Agreement 2014-09 (Update 2018): Collective Arrangement between Competent International Organizations on Cooperation and Coordination Regarding Selected Areas in Areas beyond National Jurisdiction in the North-East Atlantic [Collective Arrangement].

<sup>48</sup> 2018 OSPAR MPA Status Report (n 11), at p. 15.

<sup>49</sup> OSPAR, 'Collective Arrangement' available at <https://www.ospar.org/about/international-cooperation/collective-arrangement>; accessed 9 November 2021.

<sup>50</sup> Collective Arrangement (n 47).

<sup>51</sup> Summary record 2015 OSPAR Commission meeting (OSPAR 15/20/1-E) 22–26 June 2015, para 10.11.

<sup>52</sup> Summary record 2019 OSPAR Commission meeting (OSPAR 19/20/1-E) 24–28 June 2019, para 8.12.

<sup>53</sup> Summary record 2017 OSPAR Commission meeting (OSPAR 17/19/1-E) 26–29 June 2017, para 10.2 a.

<sup>54</sup> Summary record 2018 OSPAR Commission meeting (OSPAR 18/20/1-E) 25–29 June 2018, para 8.1.

working arrangements with other international organisations by entering into various MoUs with, *inter alia*, the IMO, NEAFC and the ISA.<sup>55</sup>

### **Reflections**

OSPAR's efforts to establish MPAs in ABNJ have been marked as pioneering by some,<sup>56</sup> while others argue that it falls short of its potential.<sup>57</sup> The latter argument appears to be most convincing. Due credit must be given, however, since OSPAR's high seas MPA network is the first of its kind. In this sense at least, OSPAR could be considered as pioneering, as it arguably paved the way for other regional organisations to do the same. Moreover, through the adoption of several MoUs and the establishment of the Collective Arrangement, OSPAR seeks to take a leading role in coordinating activities of different sectoral organisations operating in the ABNJ of the North-East Atlantic. However, when delving deeper into the content of these MPAs, it becomes evident that much work needs to be done for them to be more than just a 'paper park'.<sup>58</sup> Although establishing MPAs in ABNJ is inherently more challenging than establishing MPAs within national jurisdiction, due to the limited knowledge of these offshore areas and the shortcomings of the current legal framework, it can nonetheless be concluded that these MPAs fall short of their potential. Several gaps can be identified, including the lack of a clear identification and designation procedure; reliance on Parties goodwill for implementation of measures; weak reporting requirements; no site-specific monitoring programmes and the absence of any enforcement mechanisms.

### **The BBNJ Negotiations**

In order to assess the future cooperation between the OSPAR Commission and the BBNJ framework and its institutions in relation to MPAs, it is necessary to paint a picture of what this new framework will look like. Given that the negotiations are ongoing, there is no definitive treaty text to be assessed. However, a multitude of secondary materials are available, including the Draft text, negotiation reports and textual submissions from delegations. The material currently available forms a complex, comprehensive and incoherent web of documents, as it captures the wide-ranging views of all delegations. However, when examined closely, these documents reveal the contours of 'the once and future treaty',<sup>59</sup> as well as several pathways that will be further explored. Again, given that many issues remain under discussion, this analysis is inherently tentative, mainly attempting to identify those issues where convergence can be observed, as well as those where Parties are still heavily divided.

One issue that should be addressed at the outset as it underpins the discussions on the ILBI's MPA regime at both the normative and institutional level is the notion that the process of developing the ILBI should 'not undermine' relevant existing IFBs, set out in

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<sup>55</sup> For a full list of MoUs and cooperation arrangements, see <https://www.ospar.org/about/international-cooperation/memoranda-of-understanding>; accessed 8 January 2022.

<sup>56</sup> EJ Molenaar and AG Oude Elferink, 'Marine protected areas in areas beyond national jurisdiction: The pioneering efforts under the OSPAR Convention' (2009) 5 *Utrecht Law Review* 5-20, at p. 7, <https://doi.org/10.18352/ulr.92>.

<sup>57</sup> Matz-Lück and Fuchs (n 13), at p. 157.

<sup>58</sup> *Ibid.*

<sup>59</sup> R Tiller, E De Santo, E Mendenhall and E Nyman, 'The once and future treaty: Towards a new regime for biodiversity in areas beyond national jurisdiction' (2019) 99 *Marine Policy*, <https://doi.org/10.1016/j.marpol.2018.10.046>.

United Nations General Assembly resolution 69/292.<sup>60</sup> The exact meaning of this phrase remains unclear,<sup>61</sup> while, due to this very ambiguity, it has seemingly been introduced to break a deadlock in the negotiations.<sup>62</sup> Problematically, it is now anchored in several provisions throughout the draft text.<sup>63</sup> Scanlon has proposed two ways to interpret the term ‘undermine’, depending on whether ‘bodies’ or ‘instruments and frameworks’ are in focus.<sup>64</sup> The former interpretation suggests that the authority or mandate of existing IFBs be left intact, allowing them to continue to make decisions and adopt measures. According to the latter interpretation, the ILBI should not undermine the *effectiveness* of existing IFBs, thus allowing the ILBI to encroach upon the mandates of the institutions that operate within these frameworks, as long as this results in an overall increase in the effectiveness of their efforts. Scanlon goes on to argue that ‘regional and sectoral bodies appear best placed to regulate their particular activities or regions to protect biodiversity beyond national jurisdiction’,<sup>65</sup> and thus favours a narrow interpretation of the ‘undermining’ clause (i.e., to protect mandates). The discussion on which way of interpretation should prevail will be revisited in the final section of this article, as the ensuing analysis on the institutional arrangements of the ILBI and the practical implications thereof will shed more light on this matter.

### ***The Normative Dimension: Part III on AMBTs and MPAs***

Before delving into the complex and controversial debate regarding the institutional model of the ILBI, this section will assess the normative dimension, that is, the provisions setting out the process for identifying, establishing and implementing AMBTs, including MPAs. It should be emphasised at the outset that this discussion is underpinned by the enduring uncertainty regarding the institutional model of the ILBI and decision-making powers of its main body, the Conference of the Parties (COP), as discussed below. Ultimately, the worth of the provisions discussed here is contingent upon the question of whether and under which circumstances the COP will be mandated to directly establish MPAs, as well as complementary conservation measures.

Article 14 of the Draft sets out the objectives of Part III, that is, to ‘conserve and sustainably use areas requiring protection, including by establishing a comprehensive system of area-based management tools, including a network of ecologically representative and connected marine protected areas that are effectively and equitably managed’. Further it seeks to ‘enhance cooperation and coordination ... among States, relevant legal instruments

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<sup>60</sup> UNGA Res 69/292 (n 7).

<sup>61</sup> President Lee, reporting from the informal-informals on cross-cutting issues, noted that ‘a number of proposals were made in relation to how to address the need to not undermine relevant instruments, frameworks and bodies, which, I understand, were aimed at further clarifying how this might work in practice. This issue will require further consideration’. See UNGA, Statement by the President of the Conference at the Closing of the Third Session, UN Doc A/CONF.232/2019/10 (13 September 2019) 21.

<sup>62</sup> V De Lucia, ‘Reflecting on the meaning of “not undermining” ahead of IGC-2’ (*The NCLOS Blog*, 2019) 2, available at <https://site.uit.no/nclos/2019/03/21/reflecting-on-the-meaning-of-not-undermining-ahead-of-igc-2/>; accessed 16 August 2021.

<sup>63</sup> UNGA, Further Revised Draft Text of 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, UN Doc A/CONF.232/2022/5 (1 June 2022), preamble and Articles 4, 12, 19 [IGC-5 Draft].

<sup>64</sup> Z Scanlon, ‘The art of ‘not undermining’: Possibilities within existing architecture to improve environmental protections in areas beyond national jurisdiction’ (2017) 75 *ICES Journal of Marine Science* 405–416, at p. 408, <https://doi.org/10.18352/ulr.92>.

<sup>65</sup> *Ibid.*, at p. 414.

and frameworks and relevant global, regional, subregional and sectoral bodies', which will also promote a holistic and cross-sectoral approach to the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction'.<sup>66</sup> These objectives aptly reflect the delicate balance that the ILBI seeks to strike between conservation and sustainable use, and global and regional implementation.

Article 17bis delineates the process for identifying areas requiring protection through the establishment of ABMTs and MPAs. This provision incorporates various modern principles, as it sets forth the requirement to identify areas on the basis of the best available science, whilst taking into account the ecosystem and precautionary approaches.<sup>67</sup> It further refers to the identification criteria that will presumably be listed in an Annex to the ILBI, which includes references to climate change, and cumulative and transboundary impacts.<sup>68</sup>

Article 17 goes on to describe in detail the process for submitting proposals. These are to be submitted to the Secretariat by States individually or collectively.<sup>69</sup> Proposals shall include, *inter alia*, a geographic or spatial description of the area; description of proposed conservation measures; and a monitoring, research and review plan.<sup>70</sup>

Once submitted to the Secretariat, the proposal is forwarded to the Scientific and Technical Body (STB) for a preliminary review, the outcome of which is conveyed by the Secretariat to the proponent, who shall then re-submit the modified proposal 'having taken into account the preliminary review'.<sup>71</sup> Several measures to enhance transparency and inclusion are woven into the proposal procedure. A variety of different stakeholders, including adjacent coastal States, IFBs, indigenous peoples and local communities, the scientific community and civil society are invited to submit their views and inputs, while the proponent is required to consider the relevant contributions. Moreover, transparency is warranted by the requirement that the proposals and submitted views are to be publicly available.<sup>72</sup>

Article 20 sets forth the obligation for Parties to ensure that activities under their jurisdiction and control in ABNJ are conducted 'consistently with the decisions adopted under this Part'.<sup>73</sup> Article 21 concludes Part III by setting out a process for monitoring and review, pursuant to which State Parties shall report to the COP on implementation. These reports are made publicly available. Moreover, the STB undertakes to periodically monitor the ABMTs, including MPAs, and assess the 'effectiveness of measures and the progress made in achieving their objectives and provide advice and recommendations to the Conference of the Parties'. Lastly, IFBs are 'invited' to report on implementation.<sup>74</sup>

### ***The Institutional Dimension: BBNJ ILBI vis-à-vis IFBs***

Discussions concerning the institutional arrangements of the ILBI were long held in the form of 'regional approach vs. global approach', and later supplemented by the 'hybrid' model. This issue has been fraught with ideological tensions since the very beginning of the BBNJ negotiations, with powerful nations and negotiating blocks inhabiting opposing sides of the

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<sup>66</sup> IGC-5 Draft (n 63), Article 14.

<sup>67</sup> *Ibid.*, Article 17bis.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, Article 17.

<sup>70</sup> *Ibid.*, Article 17(4).

<sup>71</sup> *Ibid.*, Article 18(2).

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, Article 20.

<sup>74</sup> *Ibid.*

institutional spectrum.<sup>75</sup> These discussions culminate in Article 19 of the Draft regarding the decision-making powers of the COP. Although the ILBI will almost certainly be equipped with considerable institutional machinery,<sup>76</sup> the COP will play a central role in implementing the ILBI and is therefore the focal point of this section. Article 19 forms the core of Part III and affects the application of all other provisions contained therein. It therefore merits closer examination.

The development of this provision over the course of the previous IGCs clearly illustrates the gradual disappearance of the traditional regional and global approaches, and a move towards a more nuanced and detailed institutional model with a ‘two-tiered approach’.<sup>77</sup> Following IGC-3, Article 19 of the Draft was rather messy and incoherent, and reflected two options. In the first option, the COP was mandated to take decisions on the establishment of ABMTs, including MPAs, following proposals made by Parties in accordance with Part III, and to adopt ‘complementary’ conservation measures, depending on whether there are IFBs that hold relevant competence.<sup>78</sup> The second option limited the COP’s decision-making powers to ‘matters related to identifying potential [ABMTs, including MPAs]’, and making recommendations relating to implementation, while recognizing the ‘primary authority of [IFBs]’.<sup>79</sup>

During IGC-4, Article 19 proved controversial once again, as opinions differed on whether the COP or IFBs should have the power to establish ABMTs, including MPAs. One delegation, supported by many, argued that ‘there should not be a hierarchical structure where the COP would be a ‘parent’ of existing bodies, including regional ones, but rather the COP should be a ‘sibling’.<sup>80</sup> This parent vs. sibling dichotomy quickly gained popularity and was subsequently repeated several times throughout IGC-4.<sup>81</sup> It does not, however, add anything to the complex discussions on the institutional arrangements. In fact, parent vs. sibling is just global vs. regional in disguise. This bifurcated approach was abandoned for

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<sup>75</sup> An exemplifying example is the discussions during the first session of the Preparatory Committee, where the Group of 77 and China called for ‘a global institutional mechanism to coordinate ABMTs’. The Russian Federation, on the other hand, stated that a ‘universal standard for MPA development is not possible’ (E Morgera, ‘Summary of the Second Session of the Preparatory Committee on Marine Biodiversity Beyond Areas of National Jurisdiction: 26 August – 9 September 2016’ (2016) 25:106 *Earth Negotiations Bulletin* 9[IGC-2 Summary]). More recently, the United States, in its textual proposal for Article 19 submitted prior to IGC-4, posited a provision which emphasises the mandates of IFBs, with a COP that ‘may’ take decisions on ‘matters related to’ ABMTs and MPAs. On the other hand, the European Union proposal for Article 19 clearly mandated the COP to directly establish ABMTs and MPAs. See UNGA, Textual Proposals Submitted by Delegations by 20 February 2020, for Consideration at [IGC-4], in Reponse to the Invitation by the President of the Conference in her Note of 18 November 2019 (A/CONF.232/2020/3), Article-by-Article Compilation, UN Doc A/CONF.232/2022/INF.1 (15 April 2020) 175, 183 [IGC-4 Textual Proposals].

<sup>76</sup> In addition to the COP, a Secretariat, Scientific and Technical Body, a clearing-house mechanism and various other subsidiary bodies will presumably be established. See IGC-5 Draft (n 63), Articles 49–51.

<sup>77</sup> UNGA, Report 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, UN Doc A/CONF.232/2022/4 (14 April 2022) 14.

<sup>78</sup> UNGA, Revised Draft Text of 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, UN Doc A/CONF.232/2020/3 (27 November 2019) [IGC-4 Draft].

<sup>79</sup> *Ibid.*, at p. 17.

<sup>80</sup> T Kantai *et al.*, ‘Summary of the Fourth Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 7–18 March 2022’ (2022) 25:225 *Earth Negotiations Bulletin* 6 [IGC-4 Summary].

<sup>81</sup> *Ibid.*

good reason, and going back to void terms like these would in effect be a step backwards. One delegation, seemingly cognizant of this, pleaded to '[shift] away from "binary" positions and [seek] a hybrid combination of global and regional mechanisms with the aim of the conservation and sustainable use of marine biological diversity'.<sup>82</sup> It appears that this view ultimately prevailed, as the Draft that was released following IGC-4 no longer reflects a traditional 'regional' approach (i.e., the option emphasizing the primary authority of sectoral and regional bodies was removed). Rather, it contains two variants of Article 19, which, as observed by the High Seas Alliance, 'do not reflect diametrically opposed approaches, but rather a more nuanced, generally structural difference'.<sup>83</sup>

The differences are, indeed, subtle. Whereas the first paragraph of option II provides that the COP shall take decisions on 'the establishment of [ABMTs, including MPAs], and related measures on the basis of the final proposal and in particular the draft management plan', under option I, it shall take decisions on 'matters *related* to measures such as [ABMTs, including MPAs] with respect to proposals submitted under this Part' (emphasis added). The wording 'related to' is rather ambiguous, and the question arises whether this includes the direct establishment of ABMTs, including MPAs, through the ILBI. Answering this question negatively would render Part III almost entirely futile. The alternative answer is thus more reasonable, and is supported by the former version of Article 19, which similarly referred to 'matters related to' and went on to include a list of such matters, among which were 'proposals submitted under this Part'.<sup>84</sup> It thus seems that both versions of Article 19 provide for direct establishment of ABMTs and MPAs through the ILBI, which, of course, does not mean that other options are definitively off the table.

At IGC-5, provisions relating to the COPs decision-making powers and relationship to IFBs were 'the most controversial', and some delegations still argued for a softer structure (e.g., one in which the COP only operates where there are no IFBs).<sup>85,86</sup> It is nonetheless likely that the mandate to directly establish ABMTs, including MPAs, will be vested in the COP. On top of that, both versions of Article 19 endow the COP with a mandate to adopt conservation measures 'complementary' to those adopted under IFBs.<sup>87</sup> This phrase is somewhat ambiguous, as it is not specified what such measures might entail. It appears, however, that this allows the COP to scrutinize existing MPAs, perhaps through the STB, and fill regulatory gaps through adopting complementary measures. Moreover, both versions of Article 19 allow the COP to make recommendations to its Parties to promote the adoption of measures through IFBs, in accordance with their mandates.<sup>88</sup> The most significant differences between both versions of Article 19 relate to the question of what happens to existing MPAs, and international cooperation and coordination, which are discussed below.

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<sup>82</sup> *Ibid.*

<sup>83</sup> UNGA, Textual Proposals Submitted by Delegations for Consideration at [IGC-5], UN Doc A/CONF.232/2022/5 (1 August 2022) 122 [ICG-5 Textual Proposals].

<sup>84</sup> IGC-4 Draft (n 78), Article 19.

<sup>85</sup> IGC-5 Summary (n 8), at p. 6. One delegate went one step further and argued that there is no UNGA mandate to create new structures, stating that the establishment of ABMTs is the prerogative of IFBs.

<sup>86</sup> At the time of writing, no new Draft had been released following IGC-5.

<sup>87</sup> IGC-5 Draft (n 63), Article 19(2).

<sup>88</sup> *Ibid.*

### ***Cooperation and Recognition***

With over 190 global or regional agreements currently in place, many of which have one or several institutions, the institutional landscape of ABNJ is highly fragmented.<sup>89</sup> This is particularly problematic in the context of Part III of the ILBI, given that, notwithstanding the COPs' potential competences as discussed above, IFBs will continue to play a central role in establishing MPAs in ABNJ and implementing the ILBI. The ILBI will therefore need to deal with the issue fragmentation. Delegations appear cognizant of this as there is widespread support for the inclusion of various textual references to cooperation and coordination,<sup>90</sup> as well as for more formalized arrangements to this end. During IGC-3, there was 'general convergence on the objective of enhancing cooperation and coordination'. This support was echoed in the textual proposals submitted prior to IGC-4 in which various delegations posited their ideas on what cooperation in the context of Part III should look like. The European Union, for one, proposes that the BBNJ COP establishes a 'cooperation and collaboration mechanism', which seems to imply that a single mechanism would be created (instead of individual mechanisms for every region).<sup>91</sup> In a similar vein, the International Union for the Conservation of Nature (IUCN) points out that the COP should be tasked with the establishment of such mechanisms to avoid unequal progress across regions.<sup>92</sup> To the contrary, Japan proposes that member States should have the discretion to decide whether or not they want to establish such a mechanism. The fact that none of these proposals specify the content of such 'arrangements' and 'mechanisms' is quite problematic. Iceland submitted an interesting proposal with regard to Article 6 (which thus applies to the ILBI as a whole, and not merely to Part III on MPAs):

States Parties shall establish regional consultation processes to enhance cooperation and coordination among relevant international legal instruments and frameworks and relevant global, regional, subregional and sectoral bodies and coordination among associated conservation and management measures adopted under such instruments and frameworks and by such bodies.<sup>93</sup>

The Icelandic proposal stands out from the others by its specificity. The second paragraph comprises a non-exhaustive list of IFBs that 'shall, as appropriate' participate in this process, which includes regional fisheries management organizations, intergovernmental organisations for the protection of the marine environment (e.g., OSPAR), the IMO and the ISA. Furthermore, it is provided that the consultation process shall be formalised, either by establishing a formal international body or by giving one of the participants the role of administrating and coordinating the work of the process.<sup>94</sup> Iceland's

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<sup>89</sup> E Bigagli, 'The international legal framework for the management of the global oceans social-ecological system' (2016) 68 *Marine Policy* 155–164, at p. 157, <https://doi.org/10.1016/j.marpol.2016.03.005>.

<sup>90</sup> Article 6 of the Draft addresses international cooperation for the ILBI as a whole, containing a general duty to cooperate, 'including through strengthening and enhancing cooperation with and among [IFBs]', and parties to IFBs shall 'endeavour to promote' the ILBI when participating in the decision-making thereunder (IGC-5 Draft (n 63)). The provision is free of brackets, and generated only four textual proposals prior to IGC-5 (by the IUCN, WWF, Venezuela and the Holy See) (IGC-5 Textual Proposals (n 83)), 'delegates broadly supported text related to international cooperation' (IGC-5 Summary (n 8)).

<sup>91</sup> IGC-2 Summary (n 75), at p. 6.

<sup>92</sup> IGC-4 Textual Proposals (n 75), at p. 149.

<sup>93</sup> *Ibid.*, at p. 53.

<sup>94</sup> *Ibid.*

endeavours have not, however, had the desired effect, as the provisions relating to cooperation in the Draft bear little resemblance to its proposal. Both versions of Article 19 contain an obligation to ‘make arrangements for consultation to enhance cooperation and coordination with and among [IFBs] with regard to area-based management tools, including marine protected areas, as well as coordination with regard to related measures adopted under such [IFBs]’.<sup>95</sup> This provision introduces an obligation (‘shall’), the exact substance of which is, however, rather unclear, as it is not provided what such ‘arrangements’ could entail. Leaving member States with significant leeway to fulfil this obligation may lead to weak arrangements. States, regional and sectoral bodies may, for example, choose to fulfil this obligation by merely entering into MoUs, which, at least in the case of OSPAR, has not led to any significant degree of coordination.<sup>96</sup>

Even though the discussions on the form of the instrument are still ongoing, it seems reasonable to suggest that some type of cooperative mechanism will be included in the ILBI, and what remains to be seen is the particular form thereof.

A final matter that should be addressed is the implications that this type of governance model may have for the existing MPAs in ABNJ. A primary issue in this regard, which is inherent to the regime implemented through regional and sectoral bodies, is that the MPAs and corresponding conservation measures are only binding *inter partes*, pursuant to the principle of *pacta tertiis nec nocent nec prosunt*. This is problematic, since the ILBI will not fundamentally alter the existing legal regime governing ABNJ, leaving the regime of the ‘high seas freedoms’ largely intact.<sup>97</sup> However, this undoubtedly creates a problematic situation of inequality, as it is clearly undesirable that stricter measures only apply to certain States, whereas others may freely continue to exercise these freedoms. This is further complicated considering the possibility that the COP may directly establish conservation measures that are binding upon all Parties to the ILBI. This could lead to a situation in which certain conservation measures are binding on all members to the ILBI, whereas others only bind members to a certain regional or sectoral body. This difference could exist among, and even *within* MPAs. For OSPAR, for example, this would mean that existing conservation measures would continue to only bind its CPs, whereas complementary measures adopted through the ILBI would bind all members thereto. Such a situation is clearly not desirable, as it would unnecessarily obstruct legal certainty, which can negatively affect compliance.

A possible solution to this issue was tabled during the PREPCOM phase, in the form of a ‘recognition’ process, that is, ‘a separate procedure for the recognition of MPAs agreed by regional organisations that meet the agreed general criteria set out in the implementing agreement’.<sup>98</sup> This concept received broad support during IGC-1, in particular by States in supporting a strong global approach, including the Group of 77 and China.<sup>99</sup> It was

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<sup>95</sup> IGC-5 Draft (n 63), Article. 19(2) (option I) and 19(3) (option II).

<sup>96</sup> Although some coordination can be observed between OSPAR and NEAFC, this is largely due to the Collective Arrangement. On the other hand, cooperation with the IMO and ISA, formalized through MoUs, to date has not led to any coordination in the establishment of ABMTs and MPAs.

<sup>97</sup> LOSC (n 5), Article 87.

<sup>98</sup> Chair’s 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 (28 February 2017) 42.

<sup>99</sup> E Morgera, ‘Summary of the First Session of the Intergovernmental Conference on an International Legally Binding Instrument under the UN Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 4–17 September 2018’ (2018) 25:179 *Earth Negotiations Bulletin* 6.

subsequently included in the 'President's Aid'<sup>100</sup> that was released prior to IGC-2. Although the inclusion of a recognition process continued to receive support during IGC-2,<sup>101</sup> it was not included in the Draft and hence was not discussed at IGC-3. Prior to IGC-4, however, the European Union proposed to use the identification criteria listed in an Annex to the treaty 'for the recognition of existing area-based management tools, including marine protected areas, by a relevant body'.<sup>102</sup> This attempt to bring the issue back on the agenda proved successful as during IGC-4 it was addressed once more<sup>103</sup> and was subsequently included in the Draft. Article 19, Option II, provides that the COP can '[recognize], as appropriate, in accordance with the objectives and criteria laid down in this Part, area-based management tools, including marine protected areas, established under [IFBs]'.<sup>104</sup> Although this process is not worked out in any detail (a task that, if this mechanism is retained in the final text, will presumably be left to the COP), the references to the identification criteria and objectives of the ILBI are noteworthy, as these may foster the establishment of a truly global MPA network under the umbrella of the ILBI.

### ***Reflections***

The depiction of Part III as presented here yields a number of observations. Most significant is the fact that no textual options remain that reflects traditional 'regional' and 'global' approaches, and no pleas for such institutional models can be found in the textual submissions and negotiating reports. We may therefore cautiously conclude that these semantic containers have been surpassed. What remains is an institutional approach situated somewhere in between these models on the institutional spectrum, one that combines global implementation, oversight and coordination, and regional implementation, which could best be qualified as *pluralistic*, as it delicately embeds the ILBI's institutions among the already existing ones, creating an interactive rather than a hierarchical system. Significant decision-making powers are likely to be vested in the COP, an outcome to which some commentators are strongly opposed. Friedman, for example, describes the possibility that the COP may 'impose' measures on existing regimes as 'alarming',<sup>105</sup> arguing that such a regime would constitute 'undermining'. This is, however, not so clear-cut. The institutional model described here should be viewed in the wider context of Part III, as well as the ILBI in a whole. Article 19 does not exist in isolation, and the COP's decision-making will be part of an extensive, inclusive and transparent process, in all stages of which IFBs will play a central role. The following section will analyse more closely how this could play out in practice, illustrating that although the COP's decision-making powers are indeed considerable, it has great potential to strengthen regional MPA governance without undermining existing IFBs.

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<sup>100</sup> UNGA, President's aid to negotiations, UN Doc A/CONF.232/2019/1 (3 December 2018), para 4.2, Option I (4).

<sup>101</sup> The Like-Minded Latin American Countries, New Zealand, Canada, Singapore, and the Philippines voiced their support for the inclusion of a recognition mechanism. See IGC-2 Summary (n 75), at p. 5.

<sup>102</sup> IGC-4 Textual Proposals (n 75), at p. 139.

<sup>103</sup> IGC-4 Summary (n 80), at p. 6.

<sup>104</sup> IGC-5 Draft (n 63).

<sup>105</sup> A Friedman, 'Beyond "not undermining"' possibilities for global cooperation to improve environmental protection in areas beyond national jurisdiction' (2019) 76 *ICES Journal of Marine Science* 453, <https://doi.org/http://doi:10.1093/icesjms/fsy192>.

## **OSPAR *vis-à-vis* the BBNJ ILBI**

As indicated above, the institutional scheme governing ABNJ represents a rather diverse and complex system, in which a plethora of global and regional institutions operate. Due to the sectoral approach of the LOSC, these bodies often work in silos, as no cooperation mechanisms of any kind are provided. The section above outlined the theory underpinning the pluralistic institutional model that is reflected in the most recent Draft text. The question arises how this model will function in practice, and how it will place ILBI's institutions in this crowded institutional landscape. In order to answer this question, it is useful to experimentally 'apply' this institutional model to a certain region—in this case, the North-East Atlantic in which OSPAR holds the relevant competence.

Before embarking upon this analysis, two issues should be clarified. Firstly, it should be emphasised that this is merely a theoretical exercise which seeks to illuminate the practical application of this governance model, with a view to identify various elements that are key to establishing a legal framework that strengthens, rather than undermines, existing IFBs. The ensuing analysis is thus purely theoretical and does by no means attempt to predict the actual outcome and implications of the adoption of the ILBI.

Secondly, it must be recalled that the primary focus of this study is the OSPAR Convention and its MPA network in ABNJ. As indicated above, while there are many other competent regional and sectoral bodies in relation to ABMTs and MPAs, including NEAFC, the ISA and the IMO, their role will be discussed only to the extent necessary for this analysis, while any detailed examination thereof falls beyond the scope of this article. For present purposes, it suffices to say that the consequences for their respective mandates will largely be the same as for OSPAR.

### ***Adding the ILBI to the Mix***

In the case that the ILBI adopts the pluralistic institutional model outlined in the previous section, OSPAR would, to a large degree, retain its competence to establish and implement MPAs in ABNJ. Paradoxically, this would inevitably entail some form of hierarchy between the existing bodies and the ILBI's institutions. To what extent this would be the case may vary depending on the modalities of the institutional model to be finally adopted. As discussed above, the institutional arrangements and decision-making powers of the COP remain among the most contentious issues. If, however, delegations continue on the path laid out by the most recent Draft, the COP will be mandated to directly establish MPAs, as well as complementary conservation measures. In the pluralistic model outlined in the Draft, competence to establish MPAs is shared between the COP and IFBs. OSPAR will thus, in any case, retain its competence to establish and implement new MPAs in ABNJ, allowing it to proceed with improving those already in existence through its existing institutional and legal structures. Although the BBNJ COP may, on paper, be able to directly establish MPAs in the North-East Atlantic region, this scenario is unlikely to materialize. It is highly unlikely that a proposal to this end will gain sufficient support within the COP,<sup>106</sup> unless it is submitted by

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<sup>106</sup> The voting mechanism of the COP remains contentious. At IGC-4, a proposal to include a voting system in the event that all efforts to reach consensus are exhausted received support, as well as opposition (IGC-4 Summary (n 80), at p. 82). It seems likely, however, that a fallback voting mechanism will be included. The

one of OSPAR's member States. However, these States will presumably not be keen on sidestepping their own mechanisms in favour of those established under the ILBI.

A far more likely scenario is that OSPAR will seek to improve upon its existing structures, bringing them in line with the objectives and principles enshrined in the ILBI, and continue to use those for the establishment of new MPAs in ABNJ, to then have them *recognized* under the ILBI. This may well be the scenario that the European Union, many of whose member States are also members to OSPAR, had in mind when it advocated for including a recognition mechanism. If such a mechanism is indeed included in the final treaty, this can have major implication for OSPAR, as its existing MPAs in ABNJ and their corresponding conservation measures could become binding upon all members to the ILBI. This would, at least to some extent, resolve one of the most fundamental issues underpinning OSPAR's MPA network ABNJ, that is, their non-applicability to third States. As previously noted, pursuant to the *pacta tertiis* principle, third States are not bound by these MPAs, and can thus freely exercise their high seas freedoms in these areas. However, if these MPAs are to be recognised through the ILBI, their range of application could be expanded significantly.<sup>107</sup>

A second potential competence of the COP is the adoption of binding conservation measures to complement existing measures adopted by OSPAR. What is somewhat problematic is that this approach does not correspond well to OSPAR's approach to implementing its MPAs. As indicated above, OSPAR does not adopt any concrete management plans or conservation measures, but instead sets out 'conservation objectives' which are to be achieved through the adoption of measures at the domestic level. It thus appears questionable whether having a single MPA with two different channels of implementation is desirable. This is an issue that should be carefully considered by the negotiators in case such institutional model is adopted.

A solution for this issue has, however, already been presented in the form of a strong and *formalised* consultation and coordination process, as proposed by Iceland. Through such a process, conservation measures adopted through the ILBI could be tailored to fit the conservation objectives adopted by OSPAR. The inclusion of such a mechanism could substantially enhance the effectiveness of the relevant measures. As established in the preceding analysis of OSPAR's MPA network in ABNJ, implementation is largely left to the goodwill of its CPs. Another issue arises from the fact that the objectives are phrased in rather broad terms (e.g., 'to prevent deterioration of the environmental quality of the bathypelagic and epipelagic water column'),<sup>108</sup> requiring the CPs to transform them into specific measures. Although this legal technique allows for some normative flexibility, the task of formulating and adopting specific measures that can adequately fulfil the rather vague conservation objectives is not a simple one. CPs are granted extensive leeway which, however, is not counterbalanced by any kind of assistance or oversight from OSPAR's institutions. In this respect, assuming that the ILBI's binding measures could give further substance to the conservation objectives of existing MPAs, the implementation process would be both simplified and strengthened. A further advantage of including such a process, especially from OSPAR's perspective, is that it already has the arrangements in place, in the

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relevant article in the Draft (n 63) contains two options, both allowing for an alternative voting system. Prior to IGC-5, textual proposals by the European Union and United States both favoured a fallback voting mechanism, however they disagreed on the modalities thereof (IGC-5 Textual Proposals (n 83), at pp. 105, 110).

<sup>107</sup> Assuming the ILBI will be widely ratified, which, of course, remains to be seen.

<sup>108</sup> OSPAR Recommendation 2010/13 on the Management of the Charlie-Gibbs South Marine Protected Area.

form of the Collective Arrangement. Indeed, it has been observed that Iceland's proposal closely mirrors the Collective Arrangement, the latter probably being what actually inspired the Icelandic delegation to draft this provision.<sup>109</sup> It would thus require only a few adjustments from OSPAR's side to fulfil these obligations.

It is, however, by no means a given that a consultation mechanism like that proposed by Iceland will be established. In any case, cooperation and coordination are a core objectives of the ILBI,<sup>110</sup> which will be anchored in various provisions relating to the instrument as a whole, as well as specifically in relation to ABMTs, including MPAs.<sup>111</sup> Thus, regardless of what type of cooperative mechanism will be established, the ILBI will almost certainly foster closer cooperation and coordination among IFBs in ABNJ. OSPAR has been struggling to coordinate its measures with other relevant IFBs in the North-East Atlantic, which have thus far been hesitant to join the Collective Arrangement (i.e., the IMO and ISA). The ILBI will provide a strong incentive, perhaps even an obligation, for such bodies to actively cooperate with OSPAR and coordinate measures and ABMTs, which can bolster the effectiveness of its MPA network in ABNJ and combat fragmentation.

Besides potentially adopting ABMTs and complementary conservation measures, the COP will be tasked with monitoring and keeping under review the implementation of the ILBI. Its competences will presumably include the adoption of decisions and recommendations to this end (e.g., setting out objectives, targets and guidelines), establishing subsidiary bodies where necessary, and promoting transparency.<sup>112</sup> The extent to which OSPAR will be affected by this is likely to be insignificant, given that the COP will presumably want to avoid a situation in which different regions have divergent levels of protection, thus it will focus primarily on regions that are less developed in terms of MPA governance. The North-East Atlantic is, however, among the most well-developed regions when it comes to MPA governance in ABNJ. Nonetheless, OSPAR will need to take note of the objectives set out at a global level, and act accordingly, where necessary. Besides, given the various correspondence groups and committees, such as the ICG-MPA and the BDC, OSPAR seems to have the channels in place to adequately respond to that need.

Moving on to the later stages of MPA governance, another way in which OSPAR would be affected by this type of ILBI (i.e., one that adopts a pluralistic governance model) becomes apparent. As pointed out above, OSPAR has no site-specific monitoring programmes in place, therefore it is actually unknown whether its MPAs in ABNJ are fulfilling their conservation objectives. Although a larger degree of scientific uncertainty concerning the status of the marine environment in ABNJ is inherent to the remote nature of such areas, the complete absence of information in OSPAR's case is one of the biggest weaknesses of its MPA regime.

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<sup>109</sup> V De Lucia, 'Squaring the oceanic circle? On regional approaches to the conservation of marine biodiversity in areas beyond national jurisdiction' (*The NCLOS Blog*, 2020) available at <https://site.uit.no/nclos/2020/05/09/squaring-the-oceanic-circle-on-regional-approaches-to-the-conservation-of-marine-biodiversity-in-areas-beyond-national-jurisdiction/>; accessed 16 August 2021.

<sup>110</sup> IGC-5 Draft (n 63), Article 2 sets forth the objective to 'further international cooperation and coordination'. This provision is undisputed and has remained largely unchanged throughout the IGC process.

<sup>111</sup> *Ibid.*, Articles 6, 19. As indicated above, discussion remains ongoing regarding the exact form of these provisions and mechanisms.

<sup>112</sup> *Ibid.*, Article 48.

On the other hand, the ILBI is likely to accord a more prominent role to science. A STB will almost certainly be established,<sup>113</sup> although there is some debate in regard to its exact functions.<sup>114</sup> As noted above, in the MPA process described in the Draft text, the STB plays an important role in the assessment of proposals. Moreover, Article 21 provides that ABMTs, including MPAs, shall be ‘monitored and periodically reviewed by the [STB],’<sup>115</sup> and further, that this review ‘shall assess the effectiveness of measures and the progress made in achieving their objectives and provide advice and recommendations to the Conference of the Parties’.<sup>116</sup> One ambiguity arising from this provision is that its applicability seems to be limited to ABMTs and MPAs ‘established under this Part, including related conservation measures’, thus excluding from its scope OSPAR’s MPAs and even complementary measures adopted through the ILBI. If this is the case, the STB would be able to exercise its monitoring powers primarily in lesser developed regions in terms of MPA governance, where MPAs are directly adopted through the ILBI. It thus seems to follow that the provision, in its current form, will be of little added value for OSPAR.

Instead, within the institutional model discussed here, it would arguably be more fitting if the STB is tasked with monitoring MPAs in *all* regions—and not only those which are less developed in terms of MPA governance—in light of the balance that is envisioned between regional implementation and global oversight and coordination. It is well established that monitoring of both species and habitat diversity in MPAs are a prerequisite for their effectiveness.<sup>117</sup> The scientific information derived therefrom can provide the COP with valuable inputs to facilitate its coordinating tasks and provide a solid factual foundation for discussions at regional and global cooperative mechanisms. If the ILBI is to achieve its objective to establish a ‘network of ecologically representative and connected marine protected areas that are effectively and equitably managed’, it cannot discard MPAs already in existence, nor those that will be established through IFBs in the future. OSPAR, more specifically, could cooperate with the STB in setting up site-specific monitoring programmes, and begin to close another fundamental gap in its MPA regime. Thus, the scope of Article 20 should be expanded to cover *all* MPAs in ABNJ, regardless of when and by whom they were established.

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<sup>113</sup> T Kantai, ‘Summary of the Third Session of the Intergovernmental Conference on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction: 19-30 August 2019’ (2019) 25:218 *Earth Negotiations Bulletin* 8–9 [IGC-3 Summary]. At IGC-3 there was broad support for the establishment of such a body by, *inter alia*, the European Union, G-77/China and the African Group. At IGC-4, discussions focused on its functions, with one ‘regional group’ suggesting a broad mandate to ‘provide scientific and technical advice to the COP’ and perform additional functions, which are to be further determined by the COP., see: IGC-4 Summary (n 80), at p. 15.

<sup>114</sup> IGC-3 Summary (n 113), at p. 8. At IGC-4 (n 80) there was some debate regarding the tasks of the STB, with one delegation proposing that it ‘shall provide scientific and technical advice to the COP, and perform such other functions as may be determined by the COP or assigned to it’. At IGC-5 (n 8) discussions focused on whether to include list of different areas of expertise, and a specific reference to technical advice.

<sup>115</sup> IGC-5 Draft (n 63), Article 21(2).

<sup>116</sup> *Ibid.*, Article 21(3).

<sup>117</sup> A Dunham *et al.*, ‘Contextualizing ecological performance: Rethinking monitoring in marine protected areas’ (2020) 30:10 *Aquatic Conservation* 2004–2011, <https://doi.org/10.1002/aqc.3381>; CN Bianchi *et al.*, ‘Biodiversity monitoring in Mediterranean marine protected areas: Scientific and methodological challenges’ (2022) 14:1 *Diversity*, <https://doi.org/10.3390/d14010043>.

## **Reflections**

Since the early stages of the BBNJ negotiations, powerful delegations strongly opposed the notion of a BBNJ COP that is mandated to adopt binding measures, concerns that were echoed in scholarly literature.<sup>118</sup> It is often considered that allowing the COP to encroach upon mandates of existing regional and sectoral bodies should be avoided, which was emphasised once more when delegations at IGC-4 resisted the idea of the COP as a ‘parent’, arguing that it should instead be a ‘sibling’ to existing bodies. This section attempted to add some nuances to this line of thought, by looking at the governance model that is enshrined in the most recent draft text, and ‘applying’ it, in a sense, to the North-East Atlantic region. This theoretical exercise yields a number of useful insights. One key takeaway is that the COP’s competence to adopt binding conservation measures is but one aspect of a broader governance model, which reflects a *pluralistic*, rather than hierarchical, institutional scheme, wherein existing IFBs retain their competences. Importantly, it has been shown that OSPAR’s MPA governance could be strengthened if the ILBI were to be adopted in such a form. Various regulatory and institutional gaps, as identified in the foregoing analysis of OSPAR’s MPA network in ABNJ, could be closed if the ILBI were to be introduced in such a form. For that to happen, however, three elements of the ILBI are of particular importance.

Firstly, a strong COP, as currently portrayed in the Draft text, is of crucial importance. Keeping in mind the objective of the ILBI to better address the conservation biodiversity beyond national jurisdiction, the COPs ability to directly establish new MPAs and to adopt complementary conservation measures in the institutionally more mature regions, such as the North-East Atlantic, is what allows it to actually have a meaningful impact on MPA governance and improve upon the *status quo*. It allows the ILBI’s institutions to scrutinise existing MPAs, identify their shortcomings and adopt tailor-made conservation measures with a view to bolster their effectiveness. Importantly, these measures should be adopted through an interactive and inclusive process, in which the member States to the region or body in question play a central role.

This brings us to the second element: a formalised cooperation mechanism. The inclusion of such a mechanism is key to ensure that MPAs and complementary conservation measures that are adopted through the ILBI are adopted in a cooperative and transparent fashion, rather than by ‘imposing’ them on existing IFBs. Rather, all those involved, in particular the regional body in question, should engage in discussions leading up to the adoption of ABMTs and complementary conservation measures, which would ideally be supplemented by scientific inputs from the STB. Moreover, such a mechanism could be an important tool to combat fragmentation, as it provides a forum for the coordination of strategies and the exchanges of views, experience and best practices.

Lastly, the ILBI should address the question what happens to existing MPAs in ABNJ, as well as those established under IFBs in the future. The inclusion of a recognition mechanism has not been at the fore of discussions in recent years, which is perhaps unsurprising, given the low number of MPAs that are currently in existence. However, following the European Union’s proposal prior to IGC-5, the issue made its way back to the IGC’s agenda, and its inclusion in the final text now seems to be a realistic prospect. In a pluralistic governance model, in which sectional and regional bodies dynamically interact with those of the ILBI and retain their competence to establish MPAs, which may then be complemented by conservation measures adopted through the ILBI, it is crucial that these measures do not have different ranges of application (i.e., some measures only apply to

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<sup>118</sup> See (n 75), Scanlon (n 64), and Friedman (n 105).

members to the IFB, and others apply to all members to the ILBI). Thus, a recognition mechanism should be put in place not just to strengthen MPAs that were previously established, but also for those that will follow.

## Conclusion

The main hypothesis that this study sought to investigate is that the BBNJ ILBI has great potential to strengthen regional bodies in their endeavours to establish MPAs as opposed to 'undermine' them. For OSPAR, this is indeed the case. The various normative and institutional intersections between OSPAR and the ILBI can potentially have synergetic effects, leading to a strengthening of various aspects of MPA governance. Although OSPAR formed the main object of this study, these findings have a broader relevance, and can to some extent be applied by analogy to other regions. It should be kept in mind that the North-East Atlantic is among the most well-developed regions in terms of MPA governance. It is therefore estimated that the ILBI will be most intrusive in this region, given that the mandates of existing IFBs (e.g., OSPAR, NEAFC) are far-reaching and, as such, they are likely to be encroached upon by the ILBI. Taking this one step further, if the pluralistic model that is discussed here has the potential to strengthen MPA governance in this region, as opposed to undermining it, one could reasonably argue that these effects will be even more significant in other regions of the world. Especially those in which a regional body by the likes of OSPAR is present—for example, conventions registered under UNEP's Regional Seas Programme—but has not yet established any MPAs in ABNJ, the ILBI potentially offers ample opportunities to further develop these bodies and to equip them for establishing MPA networks in their respective regions. The annual COP and potential subsidiary bodies (e.g., an implementation and compliance committee)<sup>119</sup> could provide guidance and oversight, while the cooperative mechanisms can provide fertile ground for the development of coordinated strategies and the exchanges of views and experiences. Further, the STB can deliver valuable scientific inputs, which is of vital importance for effective MPA governance.

The findings of this study also provide a novel perspective on the discussion concerning the 'undermining' of existing IFBs. As indicated above, there are essentially two different views on the correct meaning of the term 'undermine': (a) a narrow interpretation which emphasises the *effectiveness* of existing instruments and frameworks, and allows the ILBI to reorganise the normative and institutional scheme in ABNJ, and (b) a broad interpretation focusing on the *mandates* of existing relevant bodies and frameworks. Whereas Scanlon favours a broad interpretation, Gjerde, Clark and Harden-Davies argue that 'for the new agreement to achieve its stated goal of conserving and sustainably using marine biological diversity of areas beyond national jurisdiction, it must improve upon the status quo',<sup>120</sup> and propose that the term 'undermine' should be interpreted 'in a way that advances that aim'.

Indeed, the existing legal framework requires drastic adjustment in order to facilitate the establishment of holistic and cross-sectoral MPAs in ABNJ. Even though OSPAR, through an innovative use of law, has proven that there is such possibility, the analysis conducted in the present study has shown that these MPAs primarily exist 'on paper'—which is largely a

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<sup>119</sup> IGC-5 Draft (n 63), Article 48(4)(d).

<sup>120</sup> KM Gjerde, NA Clark and HR Harden-Davies, 'Building a platform for the future: The relationship of the expected new agreement for marine biodiversity in areas beyond national jurisdiction and the UN Convention on the Law of the Sea' (2019) 33 *Ocean Yearbook Online* 39, [http://doi.org/doi:10.1163/9789004395633\\_002](http://doi.org/doi:10.1163/9789004395633_002).

result of the existing legal framework governing ABNJ. In light of this, one could convincingly argue that the term ‘undermine’ should be explained in a way that facilitates a substantive change of the existing legal and institutional landscape, with emphasis on the effectiveness of existing *and* new institutions in light of the objectives of the LOSC and the ILBI. The case study conducted in the previous section further underlines this point. It shows that the current Draft text and the pluralistic governance model enshrined therein have potential to significantly strengthen MPA governance. Various elements that are key to achieving this have been identified, and, importantly, have already been tabled at some point during the BBNJ negotiations. Such a model is, however, not compatible with a broad interpretation of the term ‘undermine’, as the BBNJ COP is granted competence to directly establish MPAs and adopt complementary conservation measures, thereby encroaching on the mandates of existing IFBs, like OSPAR. A broad interpretation of the term ‘undermine’ would significantly restrict the parameters of the negotiations, effectively excluding the possibility of such an institutional structure from the outset. Discussions on the exact meaning of this phrase have divided delegations from the very beginning of the BBNJ negotiations and continue to do so.

The BBNJ negotiations have moved past the global, regional and hybrid models, and arrived in a stage where focus has shifted towards the *functions* of the institutions created by the ILBI. The next step should be to similarly overtake the issue of whether the ILBI will undermine existing IFBs, and instead focus on fine-tuning the Draft text in a way that facilitates a substantive change in the existing legal and institutional framework, placing emphasis on the effectiveness of existing *and* new institutions in light of the objectives set out both in the LOSC and the ILBI.

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