

# **Lessons to be learned from OSPAR’s network of marine protected areas in areas beyond national jurisdiction, in light of the BBNJ negotiations**

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**Matter commented on:** BBNJ negotiations; lessons to be learned from OSPAR’s MPA regime in ABNJ.

## **I Introduction**

The first steps toward the adoption of an international legally binding instrument (ILBI) on biodiversity beyond national jurisdiction (BBNJ) were taken over fifteen years ago, with the establishment of the BBNJ Working Group by the [UNGA](#). Today, the process is in its final phase as three out of four scheduled intergovernmental conferences (IGCs) have been completed, and the contours of the ILBI are becoming increasingly visible. However, the wait for ‘the once and future treaty’ ([Tiller and others, 2019](#)) will inevitably be a bit longer due to the ongoing pandemic, as IGC-4 has been postponed and not yet rescheduled. To keep momentum going, President Lee decided to hold [intersessional work](#). On area-based management tools (ABMTs) including MPAs, this will be done, rather innovatively, through the use of an [online forum](#). This new form of negotiation will hopefully allow the delegations to cover enough ground, so that the process can be concluded at IGC4 as planned.

In the meantime, questions remain on how the forthcoming instrument will reshape the fragmented institutional landscape in ABNJ, in which there is no global body with competence to establish MPAs, and instead a variety of sectoral and regional bodies and instruments work within their own mandates – often uncoordinated. Establishing comprehensive cross-sectoral MPAs is therefore a complex endeavor, due for example to the existing legal regime that governs the *global commons*, which largely revolves around the high seas freedoms as listed in article 87 UNCLOS. The overall result is ‘a complex, loosely coordinated, and generally permissive regime for governing ABNJ’ ([Mendenhall et al, 2019](#)). Nonetheless, under the OSPAR Convention, a vast network of MPAs in ABNJ has been established, covering a total 864,337 square kilometers ([OSPAR 2018 MPA Status Report](#), p. 14). With over a decade of experience in establishing, implementing and managing these MPAs through trial and error,

OSPAR can offer some valuable lessons in relation to MPA governance in ABNJ. Against the background of the ongoing BBNJ negotiations, this post aims to identify these lessons. The findings are based on the author's [master's thesis](#), which carries out a more comprehensive assessment of the OSPAR Network, and discusses the future cooperation between OSPAR and ILBI at length.

The following section analyzes the regulatory framework that forms the foundation of OSPAR's MPA network, having particular regard for its Convention and its cooperation with other bodies. Section III addresses the MPAs in more detail, looking at three phases in MPA-governance: identification and designation; implementation and monitoring; and enforcement. Finally, section IV discusses the lessons that can be learned from OSPAR's MPA regime – with reference to the ongoing BBNJ negotiations.

## **II      OSPAR's regulatory framework**

The starting point of assessing OSPAR's MPA network in ABNJ is the OSPAR [Convention](#), which forms the foundation for all OSPAR's activities. The OSPAR Convention consists of 34 articles, containing general obligations and principles which are 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% of the total area ([OSPAR 2018 MPA Status Report](#)).

Annex V on 'The Protection and Conservation of the Ecosystems and Biological Diversity of The Maritime Area', has 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 of 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 (e.g. [OSPAR Decision 2010/01](#)).

OSPAR's key organ is the OSPAR Commission. The Commission meets annually, and is made up of representatives of each of the CPs (Article 10 OSPAR Convention). The Commission meetings can also be attended by Observers, which have no voting right but may participate and present information and reports (Article 11 OSPAR Convention). OSPAR currently has 64 Observers: 41 non-governmental organizations (NGOs) and 23 international organizations (IOs) (<https://www.ospar.org/organisation/observers>). The Commission can adopt binding decisions and non-binding recommendations (Article 13 OSPAR Convention). These are the tools through 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 geographical scope (e.g. OSPAR Decision 2010/2), is supplemented by a non-binding recommendation, which is more elaborate and contains provisions of a more normative nature - such as conservation objectives, reporting duties and entrance into force (e.g. OSPAR Recommendation 2010/13). It is noteworthy that the substantive part of the MPA is thus non-binding.

Due to UNCLOS' sectoral approach, a wide variety of organizations has competence to regulate different activities in ABNJ. OSPAR is therefore required to cooperate with these bodies, in its efforts to establish comprehensive cross-sectoral MPAs. It does so extensively, primarily by entering into memoranda of understanding (MoUs) with the [IMO](#), [ISA](#) and [NEAFC](#), in which matters such as exchange of information and attendance of each other's meetings are regulated. OSPAR's cooperation with NEAFC goes even further, through their cooperation in the '[Collective Arrangement](#)', which aims to become 'a collective and multilateral forum composed of all competent entities addressing the management of human activities in this region'. The Collective Arrangement differs significantly from the bilateral Memoranda of Understanding, as it is far more comprehensive and aims at wider participation.

### **III OSPAR's MPA network in ABNJ**

OSPAR's MPAs in ABNJ will be reviewed by looking at three phases in its MPA governance: identification and designation; implementation and monitoring; and enforcement and compliance. This section aims to identify the main elements of OSPAR's MPA regime that are illustrative in relation to the purpose of this post – namely to identify lessons that can be learned from this regime from the perspective of the BBNJ negotiations.

### *Identification and designation*

As for the first phase, the review of relevant policy documents sheds some light on the processes OSPAR has in place in regards to identifying sites and establishing MPAs. The ‘Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area’ ([OSPAR Agreement 2003-17](#)) sets 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 MPAs 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 Agreement 2003-17 provides for the selection of sites in ABNJ and taking into account the unique nature of these MPAs, a single mechanism to cover both types of MPAs seems sub-optimal. This was recognized by the parties at the 2011 OSPAR Intersessional Correspondence Group on Marine Protected Areas (IGC-MPA), where it was noted that there is ‘no coordinated approach by CPs to select any further sites with a view to enhance the ecological coherence of the OSPAR MPA Network in ABNJ’ ([2011 ICG-MPA](#), par. 4.16). The shortcomings of this process are illustrated by the fact that to date, no CP has made a proposal for an MPA in ABNJ following the procedure in 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 NGOs.

This special role of NGOs in the MPA process deserves a closer look. What allows NGOs to contribute to the MPA process in such an extent, is their participation in OSPAR’s subsidiary bodies, such as the Intersessional Correspondence Group on Marine Protected Areas (IGC-MPA) and the Biodiversity Committee (BDC). Here, proposals are made and prepared before they are eventually brought before the Commission. Interestingly, the formal basis for their involvement in these meetings cannot be found in the OSPAR Convention, which merely provides that Observers are allowed to attend Commission meetings, nor in the Identification Guidelines – that do not even mention Observers. It can instead be found in Annex 31 of the [2003 Commission meeting](#), outlining the ‘strategies of the OSPAR Commission for the Protection of the Marine Environment of the North-East Atlantic’. Here, it is provided that the OSPAR Commission shall consider reports and assessments from CPs *and observers* on

possible components of the OSPAR network. Notably, this loose basis for their involvement evidently does not form an obstacle for NGOs to have a major impact on OSPAR's MPA processes.

### *Implementation and monitoring*

In order to ensure that MPAs in ABNJ are not just 'paper parks' ([Matz-Lück Fucks, 2014](#)) and actually achieve their conservation objectives, implementation of measures and monitoring their effects on the marine environment are of key importance.

On implementation of decisions, the OSPAR Convention provides that decisions shall, where appropriate, contain provisions specifying the timetable by which they shall be implemented (Article 13 OSPAR Convention). 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 implementation, anchored in article 5 of the Recommendation. This article provides that CPs should report annually on the implementation of the management measures. These reports are submitted to the ICG-MPA. The amount of reports that are received are generally very low, ranging from only 5 in 2013 ([2013 ICG-MPA](#), par 5.2) to 11 in 2015 ([2015 ICG-MPA](#), par 5.2). The results of these reports are not made publicly available, and can thus not be assessed. Very little information in this regard is published by OSPAR, which raises questions regarding the implementation of measures. In the [2016 MPA status report](#), 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 in the cooperation with NEAFC and that 'further work is required; in particular with regard to seabed mining, cable laying and military activities'. The [2018 MPA Status report](#) provides that no new information on the management status of MPAs in ABNJ has been received since the 2016 data call.

The reporting obligation of the CPs is anchored in the OSPAR Convention in article 22. Building upon this, OSPAR has an extensive and detailed program in place to monitor and assess the status of the OSPAR maritime area ([OSPAR Agreement 2016-01](#)). However, no monitoring programs are in place specifically for the MPAs in ABNJ. The recommendations provide that CPs should 'identify suitable mechanisms for monitoring the achievement of the conservation objectives for the area' ([OSPAR Recommendation 2010/13](#)). However, as can be derived from the 2016 and 2018 MPA Status reports, progress in this regard is non-existent. In the 2016 Report it is stated that, given the lack of dedicated site condition monitoring programs

in place, it is unknown if the MPAs in ABNJ are moving towards its conservation objectives. No progress in this regard is shown by the 2018 Report.

### *Enforcement and compliance*

Enforcement of measures in ABNJ is a complex task. At first sight, it appears that the UNCLOS framework merely allows for flag State enforcement, which has severe limitations (it can be easily circumvented by using ‘flags 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’ ([OSPAR 2003-18](#)) 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, enforcement is not mentioned. Given this 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 ([Sands and Peel](#), 2018), its dependence on the reports issued by the CPs is problematic, given the low level of reports issued by CPs in regards to MPAs in ABNJ.

OSPAR’s efforts to establish MPAs in ABNJ have been marked as pioneering by some, ([Molenaar Oude Elferink, 2009](#)) while others argue that it falls short of its potential ([Matz-Lück Fucks, 2014](#)). In the author’s view, the latter argument is 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 can be considered pioneering, as it arguably paved the way for other regional organizations to do the same. However, when looking deeper into the content of these MPAs, it becomes evident that much work is to be done for them to be more than just a ‘paper park’. 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.

## **IV Lessons learned from OSPAR**

The above analysis shows that OSPAR’s MPA network in ABNJ is current still far away from being ‘ecologically coherent and well-managed’ – as it [aims](#) to be. It will be interesting to see

if the ILBI, once entered into force, will contribute to this (for an extensive reflection on the future cooperation between OSPAR and the BBNJ-institutions, see [here](#)), however this question is beyond the scope of this post. In any case, some valuable lessons can be learned from OSPAR's MPA regime, which it has been fine-tuning for over a decade. The three main points that offer useful inputs to the BBNJ negotiations are the role of NGOs; the importance of enforcement mechanisms; and the role of science.

#### *NGOs should be involved in the MPA process*

It has been shown that NGOs play a central role in the identification process of OSPAR's MPAs in ABNJ. Whereas the CPs have been very reluctant to make proposals for sites in ABNJ, NGOs have been actively doing so. This discrepancy is not surprising, given the different interests and purpose of NGOs as opposed to States. Whereas States are primarily concerned with their own (economic) interests, certain environmental NGOs revolve around their purpose to protect the (marine) environment. For States, the process of collecting data and making proposals for areas that are located far off their shores could be seen as burdensome, as it is not in their direct (economic) interest. It can therefore be expected that, similar to OSPAR, the BBNJ member States will not submit many proposals. Therefore, NGOs should arguably be allowed as Observers to the BBNJ-COP, thereby allowing them to get involved in the MPA-process. This would have three advantages: It creates a better balance of interests; it takes away some of the workload from the member States; and it will lead to more proposals being made. As shown in OSPAR, it suffices to merely allow NGOs to participate and provide information, without getting a right to vote. This model has proven to be successful, given the profound influence NGOs have had on OSPAR's MPA network in ABNJ.

Allowing participation of NGOs would be in conformity with a trend that can be observed in broader international law to allow different stakeholders to participate in law- and decision-making processes. Examples include the Aarhus [Convention's compliance committee](#), whose members can be nominated by NGOs or the unprecedented involvement of NGOs in the negotiations prior to the adoption of the 2015 Paris Agreement ([Sands and Peel](#), 2018). As a modern environmental agreement, the BBNJ ILBI should stick to this trend rather than diverging from it.

#### *Stringent enforcement mechanisms are key to effective MPAs in ABNJ*

It has been shown that OSPAR lacks enforcement mechanisms of any kind. This is not surprising, since international treaties and conventions generally do not contain such a mechanism, and the possibilities within the UNCLOS framework are limited. However, it is

arguably one of the primary reasons why OSPAR's MPAs in ABNJ fall short of their potential. In a 2008 study of 15 Italian MPAs, a clear connection between effectivity and enforcement measures was demonstrated ([Guidetti et al, 2008](#)). Similar effects can thus be expected for the ILBI if negotiating parties decide not to include an enforcement mechanism (which currently seems to be the case). Although it is clear that the ILBI will not drastically alter the legal regime in ABNJ, certain tools that are consistent with the current legal regime are already available. Firstly, satellite technology can be used to monitor the position of vessels. Vessel monitoring systems (VMS) are already widely used in fisheries management and could be equally valuable when used in relation to MPAs in ABNJ. The value of satellite tracking systems in relation to MPAs has been shown by WWF at the 2013 OSPAR ICG-MPA meeting ([2013 ICG-MPA](#), par. 5.14). WWF presented a document on the use of satellite Automated Information System (s-AIS) data as a tool to check compliance with bottom gear closures in OSPAR MPAs in ABNJ. The results indicated that there may be bottom fishing activities taking place at the Josephine seamount complex, which is also a closed area under NEAFC.

Secondly, port State measures (PSM) are a tool that has proven to be effective. Regional cooperation that builds upon the extensive port State jurisdiction that is granted to States by virtue of article 218 UNCLOS has been used extensively, primarily in relation to fisheries (e.g. the [Paris MoU](#)).

The ILBI, which will presumably take a 'hybrid' approach to implementation in which regional bodies play an important role, could promote the utilization of these tools by regional bodies. When combined, these tools can form a rigid enforcement mechanism for MPAs in ABNJ; violations can be traced through the use of satellite technology, and the vessel in questions can be inspected and prosecuted when it enters a port.

#### *Scientific inputs should be woven in to all stages of the MPA process*

It has been shown that OSPAR has no site-specific monitoring programs in place, and thus has no knowledge of whether its MPAs in ABNJ are moving towards their conservation objectives. Clearly, this situation is highly undesirable. To avoid a similar scenario in the BBNJ framework, scientific inputs should be woven into all stages of the MPA process. A promising element of the ILBI is that it will presumably have a Scientific and Technical Body. Its tasks, however, appear to be limited to assessing proposals ([BBNJ Draft](#), article 18 (2)). This would be a missed opportunity, as this body could play an important role of the identification and monitoring of sites. This would not only lead to increased insight in the effectivity of measures, it would also avoid over-'politization' of the MPA process, and increase transparency.

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