Recognizing Recognition: An Indispensable Element in a Global Regime for High Seas Marine Protected Areas

By: Bastiaan Ewoud Klerk

Matter commented on: Recognition of regional and sectoral marine protected areas (MPAs) under the international legally binding instrument (ILBI) on biodiversity beyond national jurisdiction (BBNJ)

1 Introduction

In the midst of global biodiversity and climate crises, global policymakers are resuming negotiations for a new implementing agreement under United Nations Convention on the Law of the Sea (UNCLOS) for the conservation and sustainable use of biodiversity in areas beyond national jurisdiction (BBNJ) in August 2022 (UN General Assembly Resolution 76/564). Following the fourth session of the intergovernmental conference (IGC-) in March, which by some has been remarked the "most productive of the entire process" (IISD, IGC-4 summary, at p. 20), expectations for the fifth session of the IGC- (IGC-5) are high. Given the unprecedented decline of global biodiversity, with a recorded average 68% decrease in monitored populations of mammals, birds, amphibians, reptiles and fish between 1970 and 2016, (WWF Living Planet Report, 2020) there is an obvious and urgent need for a treaty that allows for better protection of high seas biodiversity. The high seas, covering approximately half the Earth and comprising nearly 95% of the ocean's total volume, are an indispensable link in global efforts to halt biodiversity loss (Parliaments for Global Action, 2020). They harbour diverse and abundant life and are essential to many species who migrate through and over them – whales, seals, tuna sharks, albatross, and many more. Yet, at present, only 1,2% of the high seas are covered by marine protected areas (MPAs) (Protected Planet Report, 2020).

Protecting the high seas is, admittedly, no easy task. It has often been said that we know less about the deep seas than about the surface of the moon. Indeed, scientific uncertainty as a consequence of the high seas' vastness and remoteness impedes the effective protection of the high seas. In a similar vein, the near absence of human presence and limited range of radar and communication equipment further complicates the task of monitoring and regulating activities in these areas. However, we know beyond a doubt that humankind has already had major negative impacts upon the ocean everywhere. The past thirty years have seen unparalleled expansion of human activities and impacts on the ocean, and on the high seas in particular (D. Freestone, 2019). This expansion is, at least to some extent, fostered by the relatively lenient regime that currently governs the high

seas. The existing legal scheme largely revolves around the high seas freedoms, as listed in article 87 of UNCLOS. The overall result is "a complex, loosely coordinated, and generally permissive regime" (E. Mendenhall et al, 2019). Indeed, the BBNJ negotiations arose from various concerns throughout the international community with regard to the inadequacy of the existing framework to sufficiently ensure the conservation and sustainable use of in areas beyond national jurisdiction (ABNJ).

This new international legally binding instrument (ILBI) will address four elements, collectively referred to as 'the package': (i) marine genetic resources (MGRs); (ii) area-based management tools (ABMTs); including MPAs; (iii) environmental impact assessments (EIAs); and (iv) capacity building and the transfer of marine technology (UN General Assembly Resolution 69/292). On the eve of IGC-5, this article looks ahead and reflects on an issue that has divided delegations since the early stages of the BBNJ process, but on which convergence can finally be observed: the institutional arrangements. This entails not only the institutional shape the ILBI will take, but also its relationship to existing regional and sectoral bodies, issues on which much ink has been spilled over recent years (see, for example, Z. Scanlon, 2019; K.D. Kraabel, 2019; N.A. Clark, 2020). One question that remains relatively unexplored, however, is what happens to existing high seas MPAs, as well as those that will be established in the future, through regional and sectoral bodies. This is the issue of *recognition*, and, although it has not been at the fore of discussions during IGC-3 and IGC-4, it is argued here that it needs to be very carefully considered, as it is a key element in the establishment of a legal structure that fosters the creation of an integrated and holistic global network of high seas MPAs.

This blog post is structured as follows. The ensuing section provides the required contextual background by discussing the BBNJ process more broadly, as well as the current state of affairs regarding the relationship of the ILBI vis-à-vis sectoral and regional bodies. Thereafter, section 3 zooms in on the issue of recognition. Its negotiating history is analyzed, and an argument is constructed as to why it should be included in the final text. Finally, section 4 offers some concluding remarks.

2 The BBNJ ILBI vis-à-vis Regional and Sectoral Bodies

One issue that should be addressed at the outset, as it underpins the enduring uncertainty regarding the institutional arrangements of the ILBI, is the notion that the process of developing the ILBI should "not undermine" relevant existing legal instruments and frameworks and relevant global, regional, and sectoral bodies (henceforth: existing regional and sectoral bodies), set out in UNGA

resolution 69/292. The exact meaning of this phrase has been subject to debate since the very beginning of the negotiations and remains so to this date. This is aptly illustrated by a statement from President Rena Lee, reporting back from the 'Informal working group on cross-cutting issues' at IGC-3. She 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" (IGC-3 Closing Statement by the President, at p. 19). Throughout IGC-4, the need to not undermine existing organizations was reiterated on several instances, which did not, however, result in any further elaborations on the meaning of this phrase in the further revised draft that was released prior to IGC-5. Closer examination of the new draft reveals that progress in this regard has nonetheless been made, by means of convergence on the powers of the COP in the context of ABMTs, including MPAs. Indeed, rather than defining the phrase 'not to undermine' in the treaty text, its meaning will eventually be decided through the operationalization and implementation of the ILBI by its institutional arrangements, as those will influence the relationship of the ILBI vis-à-vis other instruments.

Discussions concerning the institutional arrangements were long facilitated by the use of three institutional 'models' that emerged throughout the negotiation process: a *regional* model, which places the burden of carrying forward the work of the ILBI on existing legal instruments, frameworks and bodies; 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 legal instruments, frameworks and bodies; 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 (K.D. Kraabel, 2018). 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, these models have largely lost their value. Negotiations have arrived at a stage where focus has shifted on to the functions of the ILBI's institutions, and delegations, traditionally occupying the far ends of the institutional spectrum, appear to be gravitating towards the centre. Particularly delegations previously supporting a strong global model appear to have changed their views, and joined forces with those supporting a hybrid regime, i.e., a combination of global oversight and regional implementation. Indeed, the draft that was released prior to IGC-4 did not contain any provisions reflecting a global model, nor were there any textual proposals of such a nature submitted prior to IGC-4 (Textual proposals submitted by delegations by 20 February 2020). Proponents of a regional approach have traditionally been less susceptible to compromise.

The Russian Federation and Iceland are the strongest remaining proponents of a regional approach and continued to resist centralized mechanisms throughout IGC-3, arguing that "decisions should take place within competent regional bodies", and further that "the mandates of relevant frameworks and bodies should not be undermined, calling for not establishing ABMTs in cases where such bodies exist" (IGC-3 Summary). In line with these statements, the pre-IGC-4 draft contained some provisions that reflected a regional approach. Article 19 on the decision-making powers of the COP in the context of ABMTs, including MPAs, for example, contained an option that recognized the "primary authority […] of relevant legal instruments and frameworks and relevant global, regional and sectoral bodies" (pre-IGC-4 draft).

During IGC-4, this issue proved controversial once more, as opinions differed on whether the COP or relevant global, regional, subregional, or sectoral bodies 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'" (IGC-4 Summary, at p. 6). This *parent vs sibling* dichotomy quicky gained popularity and was subsequently repeated several times throughout IGC-4. 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 good reason and going back to void terms like these would in effect be a step back. One delegation, seemingly cognizant of this, plead to "[shift] away from 'binary' positions and seeking a hybrid combination of global and regional mechanisms with the aim of the conservation and sustainable use of marine biological diversity" (IGC-4 Summary, at p. 6). It appears that this view ultimately prevailed, as the new draft no longer reflects a traditional 'regional' approach (i.e., the option emphasizing the primary authority of sectoral and regional bodies was removed), and instead contains two variants of article 19, both of which mandate the COP to take decisions on matters related to the establishment of ABMTs, including MPAs, as well as on measures complementary to those adopted under regional and sectoral instruments (pre-IGC-5 draft, at p. 20).

3 Recognition

The BBNJ COP is thus likely to be granted the competence to influence regional and sectoral MPA governance, in two ways. The first way is through the establishment of ABMTs, including MPAs, by taking decisions on MPA proposals submitted by Parties to the ILBI. Whereas previous versions of the draft limited this competence of the COP to regions where there were no regional bodies with competence to adopt MPAs, this distinction has now been removed from the text, following

proposals made to this end at IGC-4. Under both versions of article 19 included in the further revised draft, the COP's mandate in relation to the establishment of ABMTs, including MPAs, no such restriction is present. The second way is by taking decisions on measures *complementary* to those adopted under regional and sectoral bodies. This tool, which is included in both versions of article 19, thus allows the COP to improve existing MPAs. Its institutional machinery, which will include a Scientific and Technical Body, may allow it to scrutinize existing MPAs and identify gaps in their legal architecture or other deficiencies that induce ineffectiveness, which could then be addressed through the adoption of complementary measures. It remains unclear, however, whether such measures would be adopted through the process for adopting AMBTs, including MPAs, as set out in Part III of the text, or through another route (e.g., through COP decisions based on assessments by the Scientific and Technical Body).

Such a system, in which two channels of implementation exist, raises a fundamental issue that the ILBI will need to address. This issue relates to an existing concern, which is inherent to the establishment of high seas MPAs on a regional level, i.e., that these MPAs and their corresponding conservation measures are only binding *inter partes*, pursuant to the principle of *pacta tertiis nec nocent nec prosunt*. Thus, whereas members to the regional body in question are bound to these MPAs, third States are not bound to these restrictions, and can continue to freely exercise their high seas freedoms. Given that the ILBI will not fundamentally alter the existing legal regime governing ABNJ, this problem will endure. This issue of inequality is likely to be further amplified by the introduction of the ILBI, in two ways. Firstly, if the BBNJ COP will indeed be mandated to adopt complementary conservation measures, this could create an undesirable situation wherein all members to the ILBI are bound to the *complementary* conservation measures, whereas the measures adopted through the regional body would still only bind the members thereto. This could lead to a situation where, within a single MPA, different measures have different ranges of application, depending on the channel through which they were adopted. Secondly, a similar issue would occur if the BBNJ COP will be mandated to take decisions on proposals for the establishment of ABMTs, including MPAs. These MPAs would be binding upon all members to the ILBI, whereas MPAs adopted on a regional or sectoral level will only bind the members to the body through which it was adopted Such a situation is clearly not desirable, as it would lead to increased fragmentation of measures, making it more difficult for ocean users and managers to oversee what measures are in place in which areas of ocean space. This would unnecessarily obstruct legal certainty, which can negatively affect compliance.

Delegations do appear to be cognizant of these issues, and the draft contains several elements that seek to foster integration and coordination. For instance, Option I of article 19 calls upon the COP to "make arrangements for consultation to enhance cooperation and coordination with and among [regional and sectoral bodies]" (pre-IGC-5 draft article 19(3), Option I). Moreover, the text contains various obligations to cooperate and promote complementarity (e.g., pre-IGC-5 draft article 19bis (1) and 20 (4)). It remains to be seen, however, to what extent these mechanisms and obligations will actually result in increased coordination of measures. States are already under an obligation to cooperate for the protection and preservation of the marine environment, directly and through international organizations (UNCLOS article 197) – an obligation that is, however, not always put into practice. An example that aptly illustrates the discrepancy between legal obligations to cooperate and their practical application is that of OSPAR's collective arrangement, through which it seeks to enhance coordination of sectoral and regional conservation measures. Despite efforts by the North-East Atlantic Fisheries Commission (NEAFC) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), neither the International Maritime Organization (IMO) nor the International Seabed Authority (ISA) have entered the collective arrangement to date. This is not to say that the above-mentioned provisions are futile. On the contrary: they may prove to be efficient means to combat fragmentation and coordinate measures, however they do give States and international organizations a large degree of discretion in how to adhere to these obligations. They should therefore be complemented by a more rigid, formalized mechanism, i.e., a 'recognition' process.

The notion of 'recognition' entails bringing MPAs that are established under sectoral and regional bodies under the umbrella of the ILBI, making them binding upon all its Parties. It was first proposed during the PREPCOM phase, and received broad support during IGC-1, in particular by States in supporting a strong 'global' approach, including the Group of 77 and China (IGC-1 Summary). It was stressed by Argentina and Mauritius that the "a global MPA network requires recognizing ABMTs adopted by other competent organizations". Different ideas were put forward with regard to the process for the selection of eligible MPAs. Norway opted for automatic recognition according to certain procedures and requirements. CARICOM (Caribbean community), on the other hand, indicated that the ILBI should set out general provisions and criteria for the recognition of existing MPAs. The High Seas Alliance proposed to recognize existing MPAs that meet the ILBI's identification criteria. Following these lively discussions, the notion of recognition was subsequently incorporated into the 'President's Aid' (at p. 23) that was released prior IGC-2. The inclusion of a recognition process continued to receive support during IGC-2. The Like-Minded Latin American Countries, New Zealand, Canada, Singapore, and the

Philippines voiced their support for a legal framework that includes some type of recognition mechanism. There was also some resistance, however, by the Russian Federation and Australia (IGC-2 Summary, at p. 5). Surprisingly, the draft text that was released prior to IGC-3 does not mention recognition. As this text formed the basis of negotiations, recognition was – as far as can be derived from the negotiation reports – not discussed at IGC-3. This did not, however, mean that the inclusion of such a process was completely off the table. Prior to IGC-4, the EU, in its textual proposal for article 16 (at p. 19) on 'identification of areas requiring protection', 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". This proposal sought to reintroduce the issue of recognition to the negotiating agenda and is therefore not worked out in great detail. However, upon closer examination, there are some interesting elements to this proposal. For one, the EU submission proposes to use the identification criteria that are used for the establishment of new MPAs under the ILBI for the recognition of existing MPAs, an idea opted by the High Seas Alliance at IGC-1. The benefit of this is that it could induce uniformity, adding to the appealing idea of an ecologically representative global network of high seas MPAs. An alternative approach is the automatic recognition of existing MPAs, to which there is also some merit. It can be argued that regional and sectoral bodies are better equipped to identify areas that are of particular importance in the context of a specific region, or which are particularly vulnerable to an activity governed by a sectoral body (e.g., shipping), and that it is not up to the ILBI's institutions to 'cherry pick' MPAs that it deems deserving of its recognition. Another thing that stands out from the European proposal, is the reference to 'existing' MPAs. When interpreted restrictively, this term could be said to refer only to MPAs that were in place prior to the adoption of the BBNJ ILBI. It is, however, of critical importance that a potential recognition mechanism applies to *all* MPAs that are established under regional and sectoral bodies – irrespective of whether this is done prior or subsequent to the adoption of the ILBI – given that the ILBI will primarily be implemented through regional and sectoral bodies, and MPAs will thus continue to be adopted on this level.

To invigorate this textual proposal, during IGC-4, one 'regional group' outlined the importance of "recognizing ABMTs and MPAs where relevant organizations do not have global recognition" (IGC-4 Summary, at p. 6). These efforts seem to have had the desired effect, as the pre-IGC-5 draft re-introduced the concept of recognition. Under article 19, Option II, the COP has competence to take decisions on "[…] recognizing, as appropriate, in accordance with the objectives and criteria laid down in this Part, [AMBTs, including MPAs], established under relevant legal instruments and frameworks and relevant global, regional, subregional or sectoral bodies"

(pre-IGC-5 draft). Notably, this version of a recognition process, although not worked out in great detail, opts for using the ILBI's identification criteria and objectives for recognizing MPAs, as opposed to automatic recognition. Moreover, and importantly, the term 'existing' is not incorporated in this text, which would allow for the recognition of MPAs regardless of *when* they are established (i.e., both prior to, as well as following the adoption of the ILBI).

4 Concluding remarks

In its decision to develop a legal instrument on BBNJ, the UN General Assembly stressed the need for a "comprehensive global regime" to address the conservation and sustainable use of marine biodiversity in ABNJ (UN General Assembly Resolution 69/292). With the fifth – and possibly final – IGC- around the corner, many pressing questions remain unanswered, of which those related to the institutional arrangements, and the relationship between the ILBI and existing regional and sectoral bodies more broadly, are arguably one of the most daunting. Whether the aforementioned objective will be achieved depends largely on how those questions will be answered. Similarly, the question whether a recognition process will be included in the final text correlates with the institutional form the ILBI will ultimately take. In the unlikely event that the COPs mandate is significantly watered down, leaving the burden of implementing the Agreement solely with regional and sectoral bodies – in other words, opting for a traditional 'regional approach' – it would make little sense to include a recognition mechanism. If, however, delegations continue along the path that has been laid out by the draft, creating a legal framework that combines global oversight and coordination with regional implementation, recognition of existing MPAs is arguably an essential element of such a framework. In such a regime, where the COP can directly establish ABMTs, including MPAs, as well as complementary conservation measures, there is a risk of increased fragmentation and inequality among regions, as there would be various channels of implementation and, consequently, ranges of application of measures. To combat this, all high seas MPAs should be brought under the same legal umbrella, as to create uniformity in application.

In any case, the concept of recognition presents a unique opportunity to reshape the legal framework governing ABNJ in a way that it better facilitates the establishment of high seas MPAs. As previously noted, the existing legal framework governing ABNJ – which is still a vague derivative of the *mare liberum* doctrine, granting States extensive freedoms – impedes the establishment of MPAs in ABNJ by regional and sectoral bodies, as non-parties to the body in question are not bound by these measures. These States can freely enjoy their high seas freedoms of fishing, navigation, and so on. It can reasonably be assumed that this is among the reasons why high seas MPA coverage is so low (1,2%). What is the point of establishing an MPA in a marine

area that is freely accessible and useable by all States, when only a select number of those States are bound by the measures that are put in place? Problematically, this problem will endure, even after the adoption of the ILBI. That is, if no recognition mechanism is included in the final text. Although the ILBI will presumably introduce a consultation mechanism, as well as various other safeguards that seek to induce coordination, this may not be enough to *really* address the daunting problem of fragmentation in international law. If, however, regional and sectoral bodies are given the opportunity to have their MPAs *recognized* under the ILBI through a formalized mechanism, their range of application could be extended significantly (although this does depend on the ILBI's degree of ratification), making them inherently more effective. On top of that, it can reasonably be assumed that for this very reason, regional and sectoral bodies will be less hesitant to establish high seas MPAs. Thus, regardless of what is decided on the institutional arrangements of the ILBI, it is evident that the benefits of a recognition mechanism are manifold, and inclusion thereof in the final text should be carefully considered.