



Ecologically or Biologically Significant Marine Areas (EBSAs): the identification process under the Convention on Biological Diversity (CBD) and possible ways forward

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THE GLOBAL PROCESS FOR THE IDENTIFICATION OF EBSAS AS SET UP BY THE CBD

In 2008, the Conference of the Parties to the Convention on Biological Diversity (CBD) adopted a list of seven scientific criteria for the identification of Ecologically or Biologically Significant Marine Areas (EBSAs) in need of protection in open-ocean waters and deep-sea habitats. This was completed in 2010 by the definition of an identification process under which regional workshops would be organised in order to facilitate the description of EBSAs. The summary reports of these regional workshops, once endorsed by the Conference of the Parties to the CBD, will be forwarded to the United Nations General Assembly (UNGA), the competent arena to discuss any future policy implication with respect to EBSAs identified in areas beyond national jurisdiction (ABNJ).

POLICY ISSUES RAISED BY THE PROCESS

The EBSA identification process is already well-engaged within the CBD but raises a number of issues with respect to its links with other processes already at play in various international organisations, such as the identification of Vulnerable Marine Ecosystems by Regional Fisheries Management Organisations or of Particularly Sensitive Sea Areas by the International Maritime Organisation. Although these processes serve different aims (the adoption of protective measures), the criteria they use are similar to the CBD criteria and compatible with them. But the major policy issue raised by this process is the role that the UNGA will play when defining the future of EBSAs.

POSSIBLE WAYS FORWARD

Summary reports of the regional workshops will be discussed within the UNGA and its working group on marine biodiversity in areas beyond national jurisdiction. As these arenas have not foreseen so far their role in this respect, this paper suggests a number of possible ways forward, including giving a specific mandate to the working group to consider the policy implications of the EBSAs process, grant them additional protection through the creation of marine protected areas or the application of other protection tools or use them as a basis for cooperative marine spatial planning. The paper concludes on the necessary complementary roles of the UNGA and of the CBD.

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Context

In 2011, IDDRI formed a partnership agreement with the French Marine Protected Areas Agency concerning the governance of marine biodiversity in areas beyond national jurisdiction. In this regard, IDDRI is focusing on the clarification of key questions for international events relating to the governance of marine biodiversity in areas beyond national jurisdiction and is also conducting various research projects. This working paper has been produced as part of the work programme established through this partnership agreement.

Disclaimer

The views expressed in this document are those of the author and do not necessarily reflect those of individuals or organisations consulted in the course of this study.

This article is the second version of a paper which has been updated following the 11th Conference of the Parties to the Convention on Biological Diversity held in Hyderabad, India, from 8 to 19 October 2012.



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EXECUTIVE SUMMARY

In 2008, the Conference of the Parties to the Convention on Biological Diversity (CBD) adopted a list of seven scientific criteria for the identification of Ecologically or Biologically Significant Marine Areas (EBSAs) in need of protection in open-ocean waters and deep-sea habitats. These criteria were completed, in 2010, by the definition of an identification process that would be led by States and intergovernmental organisations with the support, at the regional level, of the CBD Secretariat. From the beginning, it has been clear that the identification of EBSAs would be a scientific exercise, intended to provide a basis for determining which areas may be in need of a higher level of protection. Subsequent adoption of conservation and management measures in these areas will be a matter for States and competent intergovernmental organisations and not for the CBD. As the scientific process for the identification of EBSAs covers both areas within and beyond national jurisdiction, the policy implications with respect to their protection will be different: in areas within national jurisdiction, it will be up to States to decide, whilst in areas beyond national jurisdiction, more complex processes involving also global and regional organisations will need to be established.

The identification process itself involves *inter alia* the organisation of regional workshops to facilitate the description of EBSAs and the submission to the Conference of the Parties to the CBD of the summary reports of these regional workshops. With the EBSAs, the CBD is fulfilling its role of supporting the work of the United Nations General Assembly (UNGA) with respect to the protection of marine biodiversity in areas beyond national jurisdiction (ABNJ) by providing scientific and technical information and advice.

To date, five regional workshops to facilitate the description of EBSAs have already been organised: for the North-East Atlantic, for the Western South Pacific, for the Wider Caribbean and Western Mid-Atlantic, for the Southern Indian Ocean and for the Eastern Tropical and Temperate Pacific. Summary reports of the Western South Pacific and Wider Caribbean and Western Mid-Atlantic workshops as well as relevant information transmitted for the Mediterranean Sea were submitted to the last Conference of the Parties to the CBD, held in October 2012, where it was agreed that they will be included in a repository and transmitted to the UNGA. In the meantime, countries participating to the EBSA process in the North-East Atlantic have decided that the results of their regional workshop needed further scientific review and have agreed that the final summary report will be presented to the 2014 Conference of the Parties to the CBD. Other initiatives are ongoing, to ensure that all parts of the oceans and seas are covered by this exercise.

The future of the EBSA process with respect to the areas identified in areas beyond national jurisdiction raises a number of political and legal issues. In its Decisions, the Conference of the Parties to the CBD has foreseen that the summary reports of the regional workshops will be transmitted to the UNGA and in particular to its Ad-Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond national jurisdiction (BBNJ Working Group). These are the relevant arenas within which the future policy implications of the EBSA identification process are being discussed. However, there is one outstanding issue: neither the UNGA nor the BBNJ Working Group have foreseen what role they are to play with respect to EBSAs.

Therefore, in order to move ahead, there is a need to define what steps could follow on, once

the endorsed summary reports have been transmitted. In order to engage the discussions on EBSAs within the BBNJ Working Group, States willing to support this process need to keep in mind that the issues in this forum are all considered to be a single package and thus addressed together as a whole. Clearly, this means that showing willingness to make progress on other important issues (such as access and benefit sharing for marine genetic resources for example) will help to ensure that the possibility of adopting complementary measures to protect EBSAs is discussed within this Working Group.

One possible next step includes the possibility for States participating in the BBNJ Working Group to recommend to the UNGA, at their next meeting in 2013, that it mandates them to provide advice on which actions might be undertaken with respect to the endorsed summary reports forwarded by the CBD. Thereafter, several actions could be

envisaged. In the short term, these could include a UNGA Resolution calling upon States and competent intergovernmental organisations to grant additional protection to EBSAs through the creation of marine protected areas (MPAs) or the application of other protection tools, such as fisheries closures or environmental impact assessments. In the medium term, the EBSA process might also be considered in the discussions on the development of an implementing agreement to the United Nations Convention on the Law of the Sea (UNCLOS) on marine biodiversity in ABNJ.

The report concludes on the need to move beyond the competitive relationship that now exists between the CBD and the UNGA when it comes to marine biodiversity in ABNJ. In this respect, the EBSA process highlights that these two arenas have, in fact, complementary roles and must work hand in hand towards internationally agreed common goals.

1. INTRODUCTION

The Convention on Biological Diversity (CBD), which was adopted in 1992 and entered into force in 1993, did not originally contain a specific article on marine and coastal biodiversity. This gap was filled in 1995 with the adoption by the Conference of the Parties of the “Jakarta mandate” on the conservation and sustainable use of marine and coastal biodiversity.¹ This mandate is implemented through a multi-year work programme adopted in 2004.²

The question of the direct applicability of the CBD to marine biodiversity conservation in areas beyond national jurisdiction (ABNJ) has been under debate over recent years.³ However, several articles of the Convention itself are unquestionably relevant with respect to this issue. They include:

- Article 4 on the jurisdictional scope: *“Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party: (a) in the case of components of biological diversity, in areas within the limits of national jurisdiction; (b) in the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control within the area of national jurisdiction or beyond the limits of national jurisdiction.”*
- Article 5 on cooperation: *“Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting parties, directly*

or, where appropriate, through competent international organisations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”

Since 2004, the Conference of the Parties (COP) to the CBD has been discussing issues related to the conservation of marine biodiversity in ABNJ. For example, during COP 7 held in 2004, the Contracting Parties adopted a decision to heighten the global attention given to the impacts of deep seabed trawling on fragile ecosystems located in ABNJ⁴ and highlighted the urgent need for international cooperation to establish marine protected areas (MPAs) in ABNJ.⁵ Over the past years, the Conference of the Parties has also several times underlined the role of the CBD with respect to marine biodiversity in ABNJ, especially for aspects related to science and knowledge. In

1. CBD COP 2, Decision II/10 on the Conservation and Sustainable Use of Marine and Coastal Biodiversity.

2. CBD COP 7, Decision VII/5 on Marine and Coastal Biodiversity, Annex I.

3. For more information, see Gjerde K.M. and Rulska-Domino A., (2012), “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead”, *The International Journal of Marine and Coastal Law* 27, pp. 9-11.

4. CBD COP 7, Decision VII/5 on Marine and Coastal Biological Diversity, §61: *“Calls upon the General Assembly and other relevant international and regional organisations, within their mandate, according to their rules of procedures, to urgently take the necessary short-term, medium term and long-term measures to eliminate/avoid destructive practices, consistent with international law, on scientific basis, including the application of precaution, for example, consideration on a case by case basis, of interim prohibition of destructive practices adversely impacting the marine biological diversity associated with areas with seamounts, hydrothermal vents, and cold-water corals, other vulnerable ecosystems and certain other underwater features.”*

5. CBD COP 7, Decision VII/5 on Marine and Coastal Biological Diversity, § 30: *“Agrees that there is an urgent need for international cooperation and action to improve conservation and sustainable use of biodiversity in marine areas beyond the limits of national jurisdiction, including the establishment of further marine protected areas consistent with international law, and based on scientific information, including areas such as seamounts, hydrothermal vents, cold-water corals and other vulnerable ecosystems.”*

Decision VIII/24 on Protected Areas adopted in 2008,⁶ the Conference of the Parties recognised that “*the Convention on Biological Diversity has a key role in supporting the work of the General Assembly with regards to marine protected areas in areas beyond national jurisdiction by focusing on provision of scientific and, as appropriate, technical information and advice relating to marine biological diversity, the application of the ecosystem approach, and in delivering the 2010 target*”. In the meantime, it also recognised “*the United Nations General Assembly’s central role in addressing issues relating to the conservation and sustainable use of biodiversity in marine areas beyond national jurisdiction*”.⁷

In 2002, at the World Summit on Sustainable Development, world leaders adopted targets for applying the ecosystem approach by 2010⁸ and facilitating the establishment of marine protected areas (MPAs) consistent with international law and based on scientific information, including representative networks by 2012.⁹ In order to contribute to the fulfilment of these globally agreed targets, the Conference of the Parties to the CBD developed, through a series of decisions, a set of criteria for the identification of ecologically or biologically significant areas (EBSAs) and established a process for their identification (section 2). At the regional level, a series of workshops have been organised by the CBD and other competent regional organisations in order to facilitate the description¹⁰ of these EBSAs through the application of CBD and other relevant scientific criteria (section 3). What will happen next raises several political questions (section 4), also linked to the complementary roles of the CBD and of the United Nations General Assembly (UNGA) to protected marine biodiversity in ABNJ (section 5).

2. THE GLOBAL PROCESS FOR THE IDENTIFICATION OF EBSAS

2.1. EBSA criteria and aims

In 2006, the Conference of the Parties to the CBD called for the convening of an expert workshop “*to refine and develop a consolidated set of scientific criteria for identifying ecologically or biologically significant marine areas in need of protection in open-ocean waters and deep-sea habitats, building upon existing sets of criteria used nationally, regionally and globally*”¹¹ and following the conclusions,¹² **adopted in 2008 seven scientific criteria for the identification of EBSAs in need of protection in open-ocean waters and deep-sea habitats**,¹³ together with scientific guidance for selecting areas to establish a representative network of MPAs, including in open-ocean waters and deep-sea habitats.¹⁴

The seven scientific criteria adopted are:

- Uniqueness or rarity
- Special importance for life history of species
- Importance for threatened, endangered or declining species and/or habitats
- Vulnerability, fragility, sensitivity, slow recovery
- Biological productivity
- Biological diversity
- Naturalness

In the 2008 Decision, scientific guidance for the design of representative networks of MPAs identified five key network properties and components: (i) ecologically and biologically significant areas; (ii) representativity; (iii) connectivity; (iv) replicated ecological features¹⁵ and (v) adequate and

6. CBD COP 8, Decision VIII/24 on Protected Areas, §42.

7. CBD COP 9, Decision IX/20 on Marine and Coastal Biodiversity, Preamble.

8. Johannesburg Plan of Implementation, §30.

9. Johannesburg Plan of Implementation, §32.

10. The description of areas meeting the EBSA criteria can be facilitated through the organisation of regional workshops, while their formal identification and the selection of conservation and management measures is a matter for States and competent intergovernmental organisations. Hence, the distinction between the terms “identification” and “description” made by the CBD.

11. CBD COP 8, Decision VIII/24 on Protected Areas, Annex II. According to the Global Open Oceans and Deep Seabed (GOODS) Biogeographic Classification of the Intergovernmental Oceanographic Commission of UNESCO, “the deep seabed is a non-legal term commonly understood by scientists to refer to the seafloor below 200-300m. In other words, it is a non-shelf area” and “open ocean is a non-legal term commonly understood by scientists to refer to the water column beyond the continental shelf, in other words, non-coastal. Open ocean may occur in areas within national jurisdiction in States with a narrow continental shelf”.

12. See document UNEP/CBD/SBSTTA/13/INF/14 for a full report of the Expert Workshop on Ecological Criteria and Biogeographic Classification Systems for marine areas in need of protection, 2 to 4 October 2007, Azores, Portugal.

13. CBD COP 9, Decision IX/20 on Marine and Coastal Biodiversity, Annex I.

14. CBD COP 9, Decision IX/20 on Marine and Coastal Biodiversity, Annex II.

15. According to Annex II of CBD COP 9 Decision IX/20, “replication of ecological features means that more than

viable sites. Finally, Annex II of Decision IX/20 describes four initial steps to be considered for the development of representative networks of MPAs:

1. *Scientific identification of an initial set of EB-SAs (...);*
2. *Develop/choose a biogeographic, habitat, and/or community classification system (...);*
3. *Drawing upon steps 1 and 2 above, iteratively use qualitative and/or quantitative techniques to identify sites to include in a network (...);*
4. *Assess the adequacy and viability of the selected sites (...).*

It was therefore clear from the outset that the identification of EBSAs would be a scientific exercise that could eventually support the designation of a network of MPAs, but which could also serve other purposes. In fact, the designation of an area as an EBSA would not automatically mean that the area would become an MPA. **The process is rather intended to provide a scientific basis for determining which areas may be in need of a higher level of protection and such protection could come from a range of conservation and management measures** (fisheries closures, MPAs, application of environmental impact assessments and other in-between measures...).

The process thus aims at informing decision-makers when it comes to complying with their obligations under the United Nations Convention on the Law of the Sea (UNCLOS) and other international instruments geared at protecting and preserving the marine environment.¹⁶ In this regard, States existing legal duties include, *inter alia*:

- Taking measures necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life (Article 194.5 of UNCLOS);
- Protecting marine biodiversity (Article 5 of the United Nations Fish Stocks Agreement);
- Conserving high-seas marine living resources (Articles 117–120 of UNCLOS);
- Identifying and monitoring processes and activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity (Article 7 of the CBD);
- Conducting impact assessments (Article 14 of the CBD; Articles 204–206 of UNCLOS).

one site shall contain examples of a given feature in the given biogeographic area. The term 'features' means 'species, habitats and ecological processes' that naturally occur in the given biogeographic area."

16. According to Article 192 of UNCLOS: "States have the obligation to protect and preserve the marine environment."

2.2. The EBSA identification process

CBD Decision IX/20 does not provide for a precise process for identifying EBSAs. It simply "urges Parties and invites other Governments and relevant organisations to apply, as appropriate, the scientific criteria in Annex I to the present decision (...) to identify ecologically or biologically significant and/or vulnerable marine areas in need of protection."¹⁷

A process for identifying areas of ecological or biological significance was developed more precisely in Decision X/29 adopted in 2010 in Nagoya.¹⁸ This Decision further reiterates that the application of the EBSA criteria "is a matter for States and competent international organisations, in accordance with international law, including the United Nations Convention on the Law of the Sea".¹⁹

It is extremely clear from these paragraphs that the CBD is not tasked with the identification of EBSAs but has a facilitating role.

In order to fulfil this role, the Executive Secretary of the CBD was requested to organise, in cooperation with the competent authorities, a series of regional workshops whose first aim would be to facilitate the description of EBSAs, using the seven scientific criteria already adopted and "other relevant compatible and complementary nationally and intergovernmentally agreed scientific criteria"²⁰. The results of these regional workshops would be made available to the Subsidiary Body on Scientific, Technical, and Technological Advice (SBSTTA)²¹ which would prepare summary reports "for consideration and endorsement in a transparent manner by the Conference of the Parties to the Convention, with a view to include the endorsed reports in the repository referred to in paragraph 39 and to submit them to the United Nations General Assembly and particularly its Ad-Hoc Open-ended Informal Working Group, as well as relevant international

17. CBD COP 9, Decision IX/20 on Marine and Coastal Biodiversity, §18. It is further stated in the paragraph that "these criteria may require adaptation by Parties if they choose to apply them within their national jurisdiction, noting that they will do so with regard to national policies and criteria."

18. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity. In 2010, Contracting Parties agreed to avoid references to open-ocean waters and deep-sea habitats, therefore enlarging the process to the EEZ of the Coastal States and not only to ABNJ.

19. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §26.

20. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §36.

21. The SBSTTA, established by Article 25 of the CBD, is an open-ended intergovernmental scientific body in charge of providing the Conference of the Parties with advice relating to the implementation of the Convention.

organisations, Parties and other Governments”.²² The creation of the above mentioned EBSA repository, as well as the creation of an information-sharing mechanism were also decided in 2010.²³

Summary reports of the regional workshops considered by the CBD COP can be included in the repository. Contracting Parties and other Governments were also invited to provide the repository and information-sharing mechanism with information regarding the application of the seven scientific criteria or other relevant compatible and complementary nationally and intergovernmentally agreed scientific criteria in the areas under their national jurisdiction before the 11th meeting of the Conference of the Parties, held in October 2012.²⁴ **Only summary reports of the regional workshops considered by the Conference of the Parties to the CBD will be transmitted to the UNGA** and, in particular, to the Ad-Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond national jurisdiction (BBNJ Working Group).²⁵

The 11th meeting of the Conference of the Parties to the CBD took place in India from 8 to 19 October 2012 and was a good opportunity to review the progress made so far in the implementation of the decisions adopted in 2008 and 2010 and to discuss future steps. **With respect to progress before the Conference of the Parties, five regional workshops to facilitate the description of**

EBSAs have already taken place: for the North-East Atlantic, for the Western South Pacific, for the Wider Caribbean and Western Mid-Atlantic, for the Southern Indian Ocean and for the Eastern Tropical and Temperate Pacific. In addition, Contracting Parties to the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean sent information to the Secretariat of the CBD on the work they have carried out with respect to the description of sites of particular interest in the Mediterranean that could meet the criteria for EBSAs. The outcomes of these workshops and plans for the organisation of future ones are discussed in more details in section 3 of this report. In the meantime, a prototype EBSA repository has been developed and is available online.²⁶ Meanwhile, the study on integrating traditional, scientific, technical and technological knowledge of indigenous and local communities into the description of EBSAs has been completed.²⁷

The final decision adopted by the Contracting Parties to the CBD on the EBSA issue in 2012 takes into consideration this progress.²⁸ Specifically:

- It requests the Executive Secretary of the CBD to include the summary reports of the regional workshops prepared by SBSTTA (held in Montreal from 30 April to 5 May 2012) in the repository²⁹ and to submit them to the UNGA and in particular to the BBNJ Working Group, to Parties, other Governments, relevant international organisations, the Ad Hoc Working Group of the Whole on the Regular Process for Global Reporting and Assessment of the State of the Marine Environment, including socio-economic aspects. The summary reports should also be provided as a source of information to the United Nations specialised agencies;
- It affirms that the scientific description of areas meeting the EBSA criteria is an open and evolving process that should be continued “to allow ongoing improvement and updating as improved scientific and technical information becomes available in each region”;

22. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §42.

23. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §39.

24. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §43. Although this paragraph mentions only the repository, it seems that a distinction should be made between this instrument and the information-sharing mechanism. At the last SBSTTA meeting, the Parties noted “the need to have a clear distinction between the repository containing the information included on the basis of endorsements by the Conference of the Parties as called for in paragraph 42 of decision X/29 and other information entered in the information-sharing mechanism” – see document UNEP/CBD/COP/11/3, p.14.

25. The BBNJ Working Group was created by UNGA Resolution 59/24 of 17 November 2004 and met in 2006, 2008, 2010, 2011 and 2012. Since 2010, it has had the mandate to present to the UNGA recommendations on the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction. In 2011, it agreed to recommend that the UNGA initiate a process “with a view to ensuring that a legal framework for the conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction effectively addresses those issues by identifying gaps and ways forward, including through the implementation of existing instruments and the possible development of a multilateral agreement under the United Nations Convention on the Law of the Sea.”

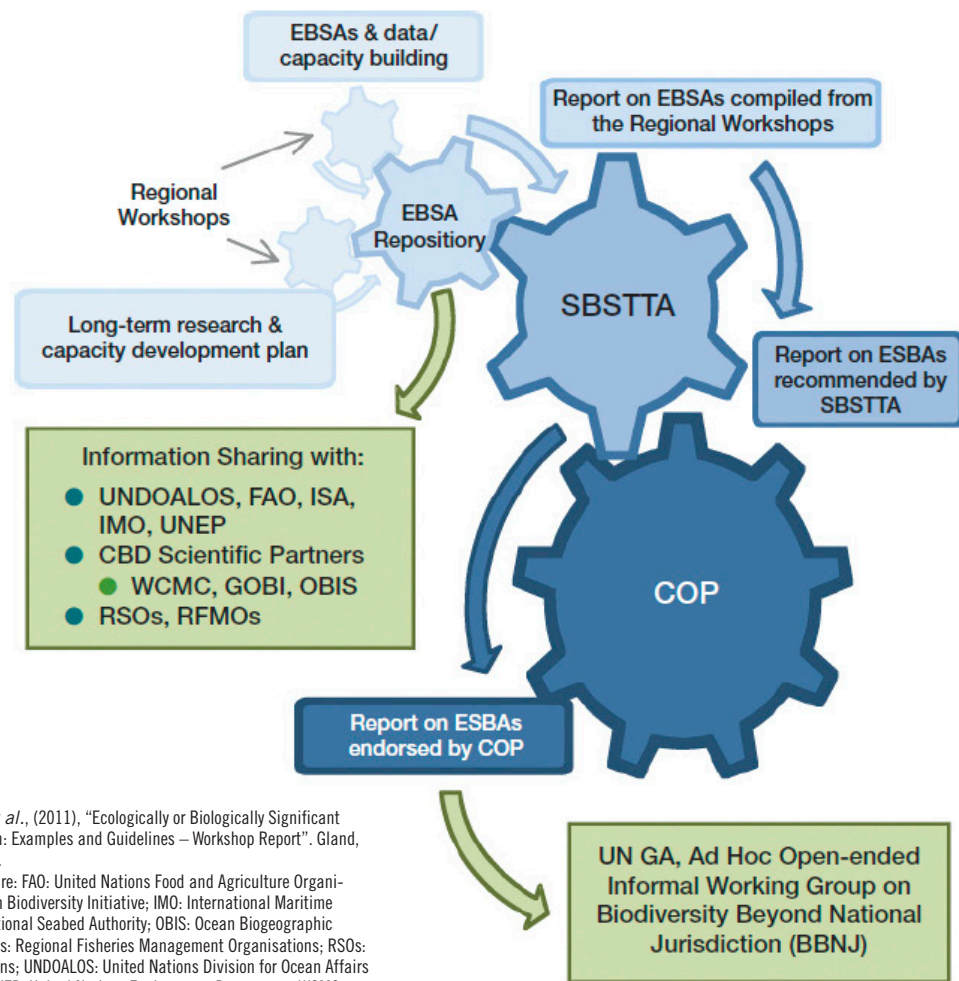
26. The EBSA prototype repository is available online at: <http://ebsa.cbd.int>.

27. See document UNEP/CBD/SBSTTA/16/INF/10.

28. See document UNEP/CBD/COP/11/L.29 of 18 October 2012, Marine and coastal biodiversity : ecologically or biologically significant marine areas – Draft decision submitted by the Chair of Working Group 1. At the time of revising this paper, the official text of the decisions was still not available on the CBD website.

29. Only the summary reports prepared by SBSTTA could be considered by the Conference of the Parties and included in the repository. The reports of the regional workshops themselves will be included in the information-sharing mechanism.

Figure 1. CBD EBSA identification and information-sharing process



Source: Dunn D.C. (ed.) *et al.*, (2011), "Ecologically or Biologically Significant Areas in the Pelagic Realm: Examples and Guidelines – Workshop Report". Gland, Switzerland, *IUCN*, p. 14.
 Acronyms used in this figure: FAO: United Nations Food and Agriculture Organisation; GOBI: Global Ocean Biodiversity Initiative; IMO: International Maritime Organisation; ISA: International Seabed Authority; OBIS: Ocean Biogeographic Information System; RFMOs: Regional Fisheries Management Organisations; RSOs: Regional Seas Organisations; UNDOALOS: United Nations Division for Ocean Affairs and the Law of the Sea; UNEP: United Nations Environment Programme; WCMC: World Conservation Monitoring Centre.

- It notes “the need to have a clear distinction between the repository containing the information included on the basis of decisions by the Conference of the Parties (...) and other information entered in the information-sharing mechanism”;
- It encourages the development of regional data inventories by Parties, other Governments and intergovernmental organisations.

It is worth noting that the language contained in the recommendation on EBSAs prepared by SBSTTA 16³⁰30 slightly differs from the one eventually negotiated during the Conference of the Parties to the CBD. In the SBSTTA recommendation, and in conformity with the 2008 and 2010 decisions of the CBD on EBSAs, Contracting Parties were "endors-

ing" the summary reports of the regional workshops prepared by SBSTTA before the Conference of the Parties. Any reference to endorsement was removed from the final decision, as a consensus could not be reached on the subject between countries such as China, Japan or Peru which were opposed to this language and other countries such as Member States of the European Union, which supported it. The final consensus was that transmission of the summary reports prepared by SBSTTA 16 (for the Western South Pacific, the Wider Caribbean and Western Mid-Atlantic and Mediterranean) will still be made, notably to the UNGA and to the BBNJ Working Group, without any endorsement by the Conference of the Parties. Although reaching an agreement on the transmission has been considered as a success,³¹ the absence of consensus on the "endorsement" of the reports was

30. See document UNEP/CBD/COP/11/3, Report of the Sixteenth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice.

31. See: <http://www.cbd.int/doc/press/2012/pr-2012-10-20-cop-11-en.pdf>

Table 1. Examples of criteria already applied by international organisations

| Type of areas | Legal basis | Criteria |
|--|---|--|
| EBSAs | CBD COP 9, Decision IX/20 on Marine and Coastal Biodiversity, 2008, Annex I | <ol style="list-style-type: none"> 1. Uniqueness or rarity 2. Special importance for life-history stages of species 3. Importance for threatened, endangered or declining species and/or habitats 4. Vulnerability, fragility, sensitivity, or slow recovery 5. Biological productivity 6. Biological diversity 7. Naturalness |
| Vulnerable Marine Ecosystems (VMEs) | United Nations General Assembly Resolution 61/105, 2006, §83; FAO International Guidelines for the management of deep-sea fisheries in the high seas, 2008 | <ol style="list-style-type: none"> 1. Uniqueness, rarity 2. Functional importance of habitat 3. Fragility 4. Life history attributes of species 5. Structural complexity |
| Particularly Sensitive Sea Areas (PSSAs) | Resolution IMO A.982 (24), 2006; Marine Environment Protection Committee (MEPC) Circular MEPC.1/Circ. 510, 2006 | <p>3 cumulative conditions :</p> <ol style="list-style-type: none"> 1. The area must meet at least one of the following criteria: uniqueness or rarity; critical habitat; dependency; representativeness; diversity; productivity; spawning or breeding grounds; naturalness; integrity; fragility; bio-geographic importance; social or economic dependency; human dependency; cultural heritage; research; baseline for monitoring studies; education 2. The area must be vulnerable to damage by international shipping activities 3. There must be measures that can be adopted by IMO to provide protection to the area from these specifically identified international shipping activities |
| Special Areas of Mediterranean Interest (SPAMIs) | Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, 1995, Annex I (b) | <ol style="list-style-type: none"> 1. Uniqueness 2. Natural representativeness 3. Diversity 4. Naturalness 5. Presence of habitats that are critical to endangered, threatened or endemic species 6. Cultural representativeness |
| OSPAR MPAs | Article 3 (1) (b) (ii) of Annex V of the OSPAR Convention on the protection and conservation of the ecosystems and biological diversity of the maritime area, 1998, and Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area, 2003. | <p><u>Ecological criteria/considerations:</u></p> <ol style="list-style-type: none"> 1. Threatened or declining species and habitats/biotopes; 2. Important species and habitats/biotopes; 3. Ecological significance; 4. High natural biological diversity; 5. Representativity; 6. Sensitivity; 7. Naturalness; <p><u>Practical criteria/considerations</u></p> <ol style="list-style-type: none"> 1. Size 2. Potential for restoration 3. Degree of acceptance 4. Potential for success of management measures 5. Potential damage to the area by human activities 6. Scientific value |

rather deceiving, showing clearly that Contracting Parties did not take into account previous commitments made when they adopted, in 2010, a decision depicting the EBSA process.

The process used to identify EBSAs within the CBD is therefore clear and illustrated in Figure 1.

2.3. Co-existence between the EBSA process and other processes leading to the identification of areas in need of protection

EBSAs are not an isolated process: there are other identification processes conducted today in the oceans and seas. **Beyond the CBD, other organisations have developed their own sets of criteria** in order to identify vulnerable areas or areas that may require enhanced protection with the final aim of ensuring a more effective implementation of existing legal duties towards marine biodiversity. This is true at the regional level, where regional seas conventions for example have developed their own sets of criteria for the development of networks of MPAs, including in ABNJ (for example, Table 1 lists the criteria developed by the OSPAR Commission in the North-East Atlantic and by the Contracting Parties to the Barcelona Convention in the Mediterranean Sea). At the international level, organisations such as the Food and Agriculture Organisation (FAO) and the International Maritime Organisation (IMO) have also established their own sets of criteria to identify areas that may require enhanced protection (see Table 1 for some examples of the criteria developed by these organisations).

What appears clearly from this table is that the criteria used by all the organisations listed as examples are very similar to the EBSA criteria and include a large number of common elements. **Therefore, the application of these criteria should not be seen as a competing but rather as a complementary exercise to the one already carried out under the auspices of the CBD.** They do not contradict each other, but can serve different purposes (for example, the identification of areas subject to a specific threat linked to human activities, such as fisheries for VMEs). In fact, the CBD SBSTTA noted in 2010 that *“there are no inherent incompatibilities between the various sets of criteria that have been applied nationally and by various United Nations organisations (e.g. FAO, the International Maritime Organisation, the International Seabed Authority) and NGOs (e.g. BirdLife International and Conservation International). Consequently, most of the scientific and technical lessons learned about application of the various sets of criteria can be generalised.*

Moreover, some of the sets of criteria can act in complementary ways; because unlike the CBD EBSA criteria (Annex I to decision IX/20), some of the criteria applied by other United Nations agencies include consideration of vulnerability to specific activities.”

It must be emphasised that the identification processes conducted under these other sets of criteria, whether regional or global, are separate processes from the CBD EBSA process. The reason is that these processes serve different aims. For example, the OSPAR MPA criteria or the IMO PSSA criteria include some scientific criteria but also some more practical considerations which aim to determine if the extent of human impacts in a given area could justify the adoption of protective measures. But the scientific information gathered in the course of these various processes might also feed the identification process under the CBD (which, contrary to regional or sectoral experiences, will gain international recognition) and *vice versa*.

3. REGIONAL WORKSHOPS TO FACILITATE THE DESCRIPTION OF EBSAs

To date, five regional workshops to facilitate the description of EBSAs have already been organised. Others are planned and additional initiatives are ongoing. One important point to note is that workshops are purely scientific and technical exercises: threats to the areas under consideration and possible management issues are therefore not discussed within these arenas.

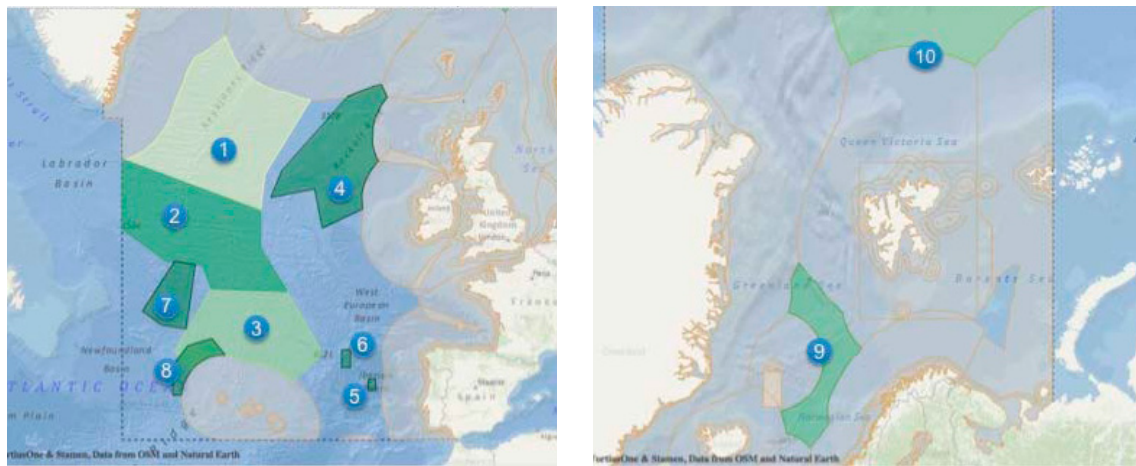
3.1. The North-East Atlantic regional workshop

The first regional workshop to facilitate the description of EBSAs covered the North-East Atlantic region and took place in Hyères, France, on 8 and 9 September 2011. This event was jointly organised by the OSPAR Commission³² and the North-East Atlantic Fisheries Commission (NEAFC) in collaboration with the Secretariat of the CBD. **The areas considered during this regional workshop were all areas located “in the high seas areas in the North-East Atlantic that are not yet included in the OSPAR network of MPAs”³³** as a result of

32. The OSPAR Commission is the governing body of the Convention for the Protection of the Marine Environment of the North-East Atlantic, which is the competent regional seas convention in this part of the world.

33. See Annex 15 of the Summary Record of the meeting of the 2011 Biodiversity Committee, *Terms of Reference for a joint OSPAR/NEAFC/CBD Scientific Workshop on the Identification of Ecologically or Biologically Significant*

Map 1. Results of the joint OSPAR/NEAFC/CBD EBSA workshop



1. Reykjanes Ridge south of Iceland EEZ
2. Charlie-Gibbs Fracture Zone and Sub-Polar Frontal Zone of the Mid-Atlantic Ridge
3. Mid-Atlantic Ridge north of the Azores
4. The Hatton and Rockall Banks and the Hatton-Rockall Basin
5. Around Pedro Nunes and Hugo de Lacerda Seamounts – IBAMA04

6. Northeast Azores – Biscay Rise – IBAMA03
7. Evlanov Seamount region
8. North-west of Azores EEZ
9. The Arctic Front–Greenland/Norwegian Seas
10. The Arctic Ice habitat–multiyear ice, seasonal ice and marginal ice zone

Source: Document UNEP/CBD/SBSTTA/16/INF/5, *Report of joint OSPAR/NEAFC/CBD scientific workshop on EBSAs*, p.8.

a political compromise reached before the workshop between OSPAR Contracting Parties. It led to the description of ten areas meeting the scientific criteria for EBSAs (see Map 1). However, since it was limited to the ABNJ of the North-East Atlantic, participants did not fully address the ecological linkages between ABNJ and EEZs.

After the workshop, NEAFC commissioned a peer-review of its results to the International Council for the Exploration of the Sea (ICES). This review underlined several issues³⁴ and its outcomes were shared with the OSPAR Commission. Both organisations (OSPAR and NEAFC) agreed to submit jointly the workshop report and the subsequent peer-review by ICES to the CBD Secretariat as information documents for the SBSTTA meeting held from 30 April to 5 May 2012. Due to a misunderstanding, a summary report of the North-East Atlantic workshop was included with the summary outcomes of other regional workshops. This led to discussions during the SBSTTA meeting

on the status of the North-East Atlantic workshop results, and to the inclusion of a specific paragraph on the subject in the final recommendations of SBSTTA. It recognised “that there is an ongoing scientific and technical process with respect to the areas in the North-East Atlantic described in UNEP/CBD/SBSTTA/16/INF/5 and UNEP/CBD/SBSTTA/16/INF/5/Add.1.”³⁵ This was further reiterated in the final decision adopted during the 11th Conference of the Parties to the CBD in October 2012.

During the last OSPAR Commission meeting, held from 25 to 29 June 2012, the issue of the EBSA process in the North-East Atlantic was again discussed in depth. Contracting Parties agreed to the following steps:

- Commission a comprehensive ICES review of the workshop outcomes;³⁶
- Send, in August 2012, a progress report to CBD COP 11;
- Using the second ICES review, revise the conclusions of the workshop, endorse them in 2013 and submit the final document to CBD COP 12 in 2014.

Marine Areas (EBSAs) in the North-East Atlantic, p.1.

34. See the review at http://www.ices.dk/committe/acom/comwork/report/2012/Special%20Requests/NEAFC_EBSA_review.pdf. The review summary underlines that “the main point is the lack of a clear methodology with regards to how the criteria were applied. (...) The report is an important first step toward a more fine-scaled evaluation inside these large areas. The next step should be a data-intensive process involving scientists with a broad range of expertise.”

35. See document UNEP/CBD/COP/11/3, *Report of the Sixteenth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, p.47.

36. It was felt by Contracting Parties that a second ICES review was needed, as the first one did not look in detail at the ten EBSAs nomination proformas. Therefore, a second review should conduct an analysis of these proformas.

Contracting Parties also emphasised that this exercise should be carried out jointly with NEAFC, as has been the case since the beginning of the process in the North-East Atlantic.

It should also be noted that in 2010, the OSPAR Commission established the first network of MPAs in ABNJ,³⁷ comprising six MPAs to which a seventh was added in 2012. In 2011, the OSPAR Commission agreed to report the first six OSPAR MPAs in ABNJ to the CBD Secretariat for inclusion in the EBSA repository. In this respect, as was clarified during the last SBSTTA meeting, it seems that only EBSAs described in the endorsed summary reports of the regional workshops will be added to the repository and transmitted to the UNGA, while the others have to go into the information-sharing mechanism. In 2012, OSPAR Contracting Parties agreed that OSPAR MPAs in ABNJ should be included as areas meeting the CBD EBSA scientific criteria in the final report of the regional workshop to be transmitted to CBD COP 12.³⁸

The question of the extended continental shelf arose as a political issue during the discussions held on the EBSA process in the North-East Atlantic. In this region, several coastal States have made a submission for an extended continental shelf to the Commission on the Limits of the Continental Shelf (CLCS).³⁹ This includes:

- Ireland for the Porcupine Abyssal Plain (25 May 2005)
- France, Ireland, Spain and the UK for the Celtic Sea and Bay of Biscay (19 May 2006)
- Norway in the North-East Atlantic and the Arctic (27 November 2006)
- The UK for the Hatton Rockall Area (31 March 2009)
- Ireland for the Hatton Rockall Area (31 March 2009)
- Iceland in the Ægir Basin Area and in the western and southern parts of Reykjanes Ridge (29 April 2009)

37. See Druel E., "Marine protected areas in areas beyond national jurisdiction: the state of play", Working Paper No; 07/11, IDDRI, Paris, France, pp.12-14.

38. See document OSPAR 12/22/1 -E, Annex 8, *Further work on the description of areas meeting the CBD EBSA scientific criteria in ABNJ in the North-East Atlantic: Draft Roadmap II 2012-2014*.

39. Established by Annex II of UNCLOS, the CLCS is the body in charge of facilitating the implementation of the Convention in respect of the establishment of the outer limits of the extended continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. Following submissions made by the coastal States, the CLCS makes a recommendation on "matters related to the establishment of the outer limits of their continental shelf" (Article 76.8 of UNCLOS).

- Denmark in the area north of the Faroe Islands (29 April 2009)
- Portugal (11 May 2009)
- Denmark in the Faroe-Rockall Plateau Region (2 December 2010)
- Denmark in respect of the southern continental shelf of Greenland (14 June 2012)

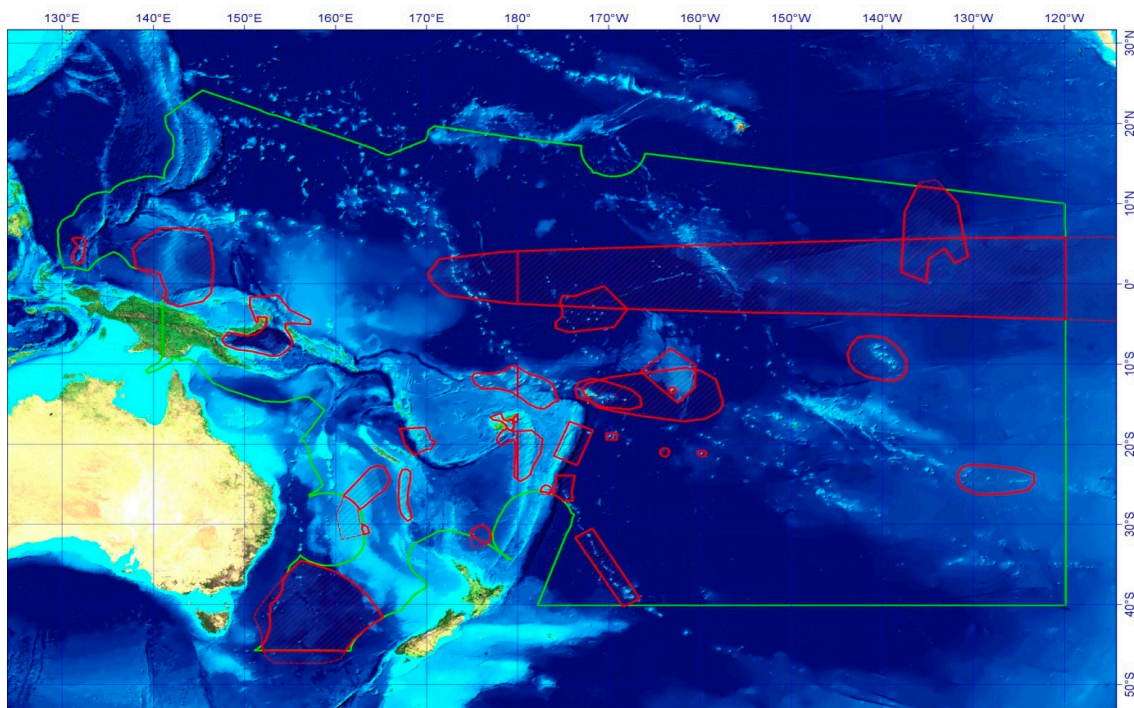
Only Norway has established the limits of its extended continental shelf in a final and binding manner: the recommendation of the CLCS concerning its submission was adopted on 27 March 2009. For other coastal States, some partial or joint submissions have been the subject of a recommendation by the CLCS, but the final picture is not yet in place. In addition, several submissions overlap to some extent: this is the case for the submissions made by Iceland, Ireland, the UK and Denmark in the Hatton-Rockall area. Solving this situation might take several years: according to the rules of procedures of the CLCS, "in cases where a land or maritime dispute exists, the Commission shall not consider and qualify a submission made by any of the States concerned in the dispute".⁴⁰ This means that the four coastal States involved in this dispute will have to agree on the delimitation of their respective extended continental shelves before the CLCS can make any recommendation.

The political sensitivity of the extended continental shelf issue in the region is not new. It has led, for example, to considerable discussion on the establishment of the seventh OSPAR High Seas MPA.⁴¹ The area concerned, Charlie-Gibbs North, is located in a water column that overlays an extended continental shelf for which Iceland has made a submission to the CLCS. It took several years for OSPAR Contracting Parties to finally reach, in June 2012, a political agreement on the establishment of this MPA. In order to avoid any further complication, the issue is currently debated within the OSPAR Commission with respect to the description of areas meeting the EBSA criteria that include areas subject to submissions to the CLCS. At the last OSPAR Commission meeting, in June 2012, Contracting Parties discussed the need to accommodate, at some point within the process, the concerns of the coastal States. Although they decided to move forward with the scientific case as it now stands (including areas subject to a CLCS submission), **they could not firmly decide whether the areas that will be reported to the**

40. See Rules of Procedure of the Commission on the Limits of the Continental Shelf, Annex 1, Article 5 (a).

41. See document OSPAR 12/22/1-E, *Draft summary record of the meeting of the OSPAR Commission*, p. 13.

Map 2. Results of the Western South Pacific workshop



Source: document UNEP/CBD/SBSTTA/16/INF/6, *Report of the Western South Pacific Regional Workshop to facilitate the description of ecologically or biologically significant marine areas*, p. 134.

CBD by OSPAR and NEAFC are to include areas subject to an extended continental shelf submission (and areas that overlay these submissions). Two main options exist: either, at some point, the coastal State gives its consent to the inclusion of the concerned areas in the joint report made to the CBD by OSPAR and NEAFC, or it reports the concerned areas to the CBD. The last case may cause some concern: only endorsed summary reports of the regional workshops considered by the Conference of the Parties to the CBD and included in the repository will be transmitted to the UNGA. Therefore, if the coastal State reports EB-SAs independently to the CBD, it is likely that they will simply be included in the information-sharing mechanism and excluded from the “to-be-defined” process under the auspices of the UNGA. This might be worrying particularly for areas where not only the seabed (subject to an extended continental shelf submission) but also the water column above (the high seas) are identified as being in need of protection.

3.2. The Western South Pacific regional workshop

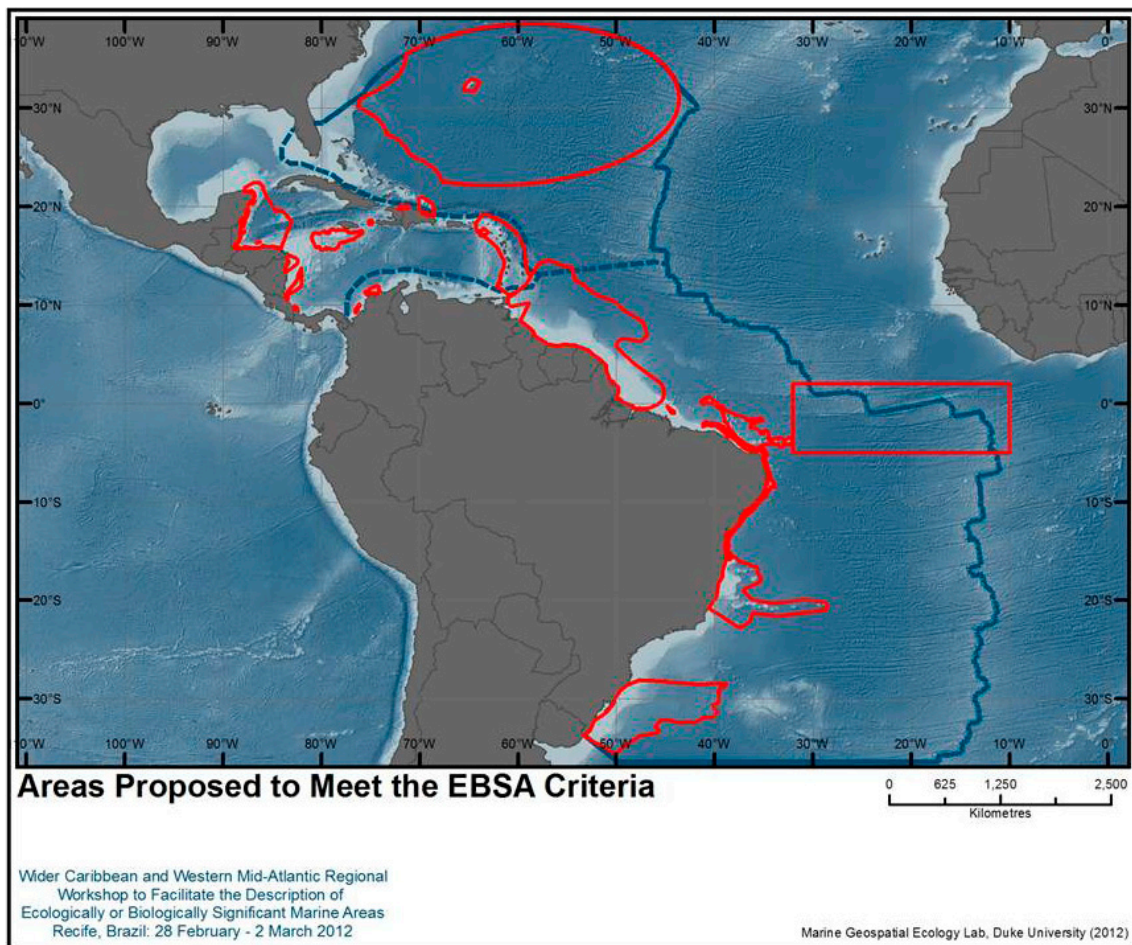
A regional workshop to facilitate the description of EB-SAs in the Western South Pacific was held from 22 to 25 November 2011 in Nadi, Fiji. This workshop

was jointly convened by the Secretariat of the CBD and the Secretariat of the South Pacific Regional Environment Programme (SPREP). It reviewed marine waters within and beyond national jurisdiction of SPREP member countries with the exception of Australia and New Zealand, where national processes are underway. In order not to diminish the integrity of the areas described, the boundaries or areas extending beyond the workshop’s geographic scope were identified with dotted lines. **It described 26 areas meeting the EBSA criteria** (see Map 2).⁴²

The summary report of the workshop prepared by SBSTTA was considered by the Conference of the Parties to the CBD held in India in October 2012 and it was decided that it will be included in the repository and transmitted to the UNGA and its BBNJ Working Group. Noteworthy, the fate of the outcomes of the regional workshop held in the Western South Pacific has not given rise to considerable legal debate, as in the case in the North-East Atlantic.

42. For a full report of the workshop, see document UNEP/CBD/SBSTTA/16/INF/6, *Report of the Western South Pacific Regional Workshop to facilitate the description of ecologically or biologically significant marine areas*.

Map 3. Results of the Wider Caribbean and Western Mid-Atlantic workshop



Source: document UNEP/CBD/SBSTTA/16/INF/7, Report of the Wider Caribbean and Western Mid-Atlantic Regional Workshop to facilitate the description of ecologically or biologically significant marine areas, p. 237.

3.3. The Wider Caribbean and Western Mid-Atlantic Regional workshop

A regional workshop to facilitate the description of ecologically or biologically significant marine areas in the Wider Caribbean and Western Mid-Atlantic region was convened by the Secretariat of the CBD in collaboration with the United Nations Environment Programme – Caribbean Environment Programme (UNEP-CEP) in Recife, Brazil, from 28 February to 2 March 2012. It reviewed marine waters within and beyond national jurisdiction of the UNEP-CEP member countries and Brazil, with the exception of the US where another national process is underway. **Twenty-two areas meeting the EBSA criteria were described.**⁴³

43. For a full report of the workshop, see document UNEP/CBD/SBSTTA/16/INF/7, Report of the Wider Caribbean

The summary report of the workshop prepared by SBSTTA was considered by the Conference of the Parties to the CBD held in India in October 2012 and it was decided that it will be included in the repository and transmitted to the UNGA and the BBNJ Working Group.

3.4. The Southern Indian Ocean regional workshop

A regional workshop to facilitate the description of EBSAs in the Southern Indian Ocean was held from 31 July to 3 August 2012 in Flic en Flac, Mauritius. This workshop was convened by the Secretariat of the CBD in collaboration with the FAO and the Secretariat of the Nairobi Convention for the Protection, Management and

and Western Mid-Atlantic Regional Workshop to facilitate the description of ecologically or biologically significant marine areas.

Development of the Marine and Coastal Environment of the Eastern African Region. It reviewed marine waters within the national jurisdiction of Comoros, Kenya, Madagascar, Mauritius, Mozambique, Seychelles, Somalia, South Africa (Agulhas current eco-region only) and Tanzania, as well as Indonesia (for the Indian Ocean only), Maldives, Sri Lanka and the overseas territories of France and marine areas beyond national jurisdiction. It led to the description of 40 areas meeting the EBSA criteria, but further noted that “*limited information on areas beyond national jurisdiction in areas off Eastern Africa (between the mainland and Seychelles Islands) prevented any description of areas for EBSA criteria in this area*”.⁴⁴

3.5. The Eastern Tropical and Temperate Pacific regional workshop

A regional workshop to facilitate the description of EBSAs in the Eastern Tropical and Temperate Pacific region took place from 28 to 31 August 2012 in the Galapagos, Ecuador. The workshop was convened by the Secretariat of the CBD in collaboration with the Permanent Commission on South Pacific. It reviewed the marine areas under the national jurisdiction of Chile, Colombia, Costa Rica, Ecuador, El Salvador, France, Guatemala, Honduras, Mexico, Nicaragua, Panama, and Peru as well as marine areas beyond national jurisdiction and led to the description of 21 areas meeting the EBSA criteria. A summary report of this work was considered by the 11th Conference of the Parties to the CBD. It was decided that it will be included in the repository and transmitted to the UNGA and its BBNJ Working Group.

As these two last workshops (Southern Indian Ocean and Eastern Tropical and Temperate Pacific) were organised after the last meeting of SBSTTA, they have not been reviewed yet and were therefore not considered by the 11th Conference of the Parties to the CBD—This will be done in 2014.

3.6. Other initiatives and future workshops

In 2012, Contracting Parties to the Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean requested the Secretariat of the Convention to contact the Secretariat of the CBD in order to present the work carried out

in the Mediterranean Sea for the identification of EBSAs.⁴⁵ In this region, **Contracting Parties have applied the criteria for the identification of Specially Protected Areas of Mediterranean Importance (SPAMIs)⁴⁶ and consider that these criteria complement the EBSA criteria.** A synthesis report on this work was presented as an information document to the last SBSTTA meeting and contains information about ten areas which may meet both the EBSA and SPAMI criteria.⁴⁷ A summary report of this work was considered by the 11th Conference of the Parties to the CBD. It was decided that it will be included in the repository and transmitted to the UNGA and its BBNJ Working Group.

The last SBSTTA meeting was also the occasion to note that **workshops have not yet been held in all the regions of the world.** In this respect, the SBSTTA recommended to the Conference of the Parties to the CBD that it request the CBD Executive Secretary to accord high priority to the organisation of additional regional workshops. In their final decision on EBSAs, Contracting parties to the CBD took note of a tentative schedule proposed by the Secretariat⁴⁸. It includes the organisation, before March 2014, of regional workshops in the Southeast Atlantic, the North Pacific, the Arctic, the North West Atlantic, the Northern Indian Ocean, Red Sea and Gulf of Aden and ROPME Sea area, the East Asian Seas, and the Peri-Antarctic Circumpolar region. The objective is to achieve a near-global coverage by the end of 2014.

There have also been other initiatives under the auspices of various non-intergovernmental organisations. In 2010, the International Union for Conservation of Nature (IUCN) and the Natural Resources Defence Council (NRDC) held a workshop to identify areas of ecological and biological significance or vulnerability in the Arctic marine environment. The workshop, used the seven criteria developed by the CBD to identify EBSAs, and finally came up with descriptions of seventy-seven areas meeting these criteria.⁴⁹

45. Decision IG.20/7 on the conservation of sites of particular interest in the Mediterranean.

46. See the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean, adopted in Barcelona in 1995.

47. See document UNEP/CBD/SBSTTA/16/INF/8, *Synthesis report on the work carried out regarding description of EBSAs in the Mediterranean*.

48. See document UNEP/CBD/COP/11/22, *Progress report on describing areas that meet the criteria for ecologically or biologically significant marine areas*, Annex 1 for the tentative schedule and document UNEP/CBD/COP/11/L.29, §13 for the decision reached at the COP.

49. See Speer L., Laughlin T.L., (2011), “IUCN/NRDC

44. See document UNEP/CBD/COP/11/22, *Progress report on describing areas that meet the criteria for ecologically or biologically significant marine areas*, p.5.

An international scientific partnership facilitated by IUCN, aimed at helping countries as well as regional and global organisations to use and develop data, tools and methodologies to identify EBSAs in ABNJ has also been developed under the name “Global Ocean Biodiversity Initiative” or GOBI.⁵⁰

4. WHAT'S NEXT? DEFINING A FUTURE FOR EBSAS

It has been repeatedly stated that the application of the EBSA criteria is a scientific and technical exercise that does not prejudice the establishment of conservation and management measures in the areas identified by States and competent inter-governmental organisations. Nevertheless, this process is particularly relevant when it comes to highlighting the importance and value of areas located in ABNJ. This, in turn, can stimulate action to protect these areas in parts of the world where regional governance mechanisms (regional seas conventions for example) exist or initiate discussions or initiatives to expand the mandate of existing regional organisations to ABNJ. Such actions would be legitimated by the global recognition accorded to EBSAs identified by the regional workshops, once the summary reports are endorsed by the Conference of the Parties to the CBD. Yet, one outstanding issue remains: the role of the UNGA in regard to EBSAs.

The question of the respective roles of the CBD and the UNGA in regard to the protection of marine biodiversity in ABNJ is a complex one. As UNCLOS is considered as the overarching legal framework “under which all activities in the oceans and seas must be carried out”,⁵¹ the role of the CBD has voluntarily been limited to providing the scientific and technical expertise on these subjects. For this reason, within the EBSA process, the Conference of the Parties to the CBD only has the competence to submit the summary reports of the regional workshops included in the repository “to the United Nations General Assembly and particularly to its Ad Hoc Open-ended Informal Working Group, as well as relevant international organizations, Parties and other Governments”.⁵² **The prob-**

lem is that the UNGA has not so far anticipated its role with respect to EBSAs. For example, the 2011 annual Resolution on Oceans and the Law of the Sea merely “[r]ecalls that the Conference of the Parties to the Convention on Biological Diversity, at its ninth meeting, adopted ‘Scientific criteria for identifying ecologically or biologically significant marine areas in need of protection in open ocean waters and deep-sea habitats’ and ‘Scientific guidance for selecting areas to establish a representative network of marine protected areas, including in open-ocean waters and deep-sea habitats’”.⁵³ The EBSA issue is not even discussed as such within the BBNJ Working Group, where the Secretariat of the CBD has simply made general statements describing its work in relation to this process. There is thus a need to think about how the EBSA process should fit into the UNGA processes.

As has been noted earlier, **only summary reports of the regional workshops included in the repository will be sent to the UNGA and in particular to the BBNJ Working Group.** Areas described as meeting the EBSA criteria in these reports may be located either within or outside national jurisdiction. The North-East Atlantic regional workshop has excluded areas within national jurisdiction from its scope whereas the South West Pacific and the Wider Caribbean and Western Mid-Atlantic workshops have not. But it is clear that the BBNJ Working Group will only have the mandate to consider areas located strictly beyond national jurisdiction.

Within the Working Group, an agreement was reached in 2011 whereby the issues of marine genetic resources would be addressed as a package, including questions on the sharing of benefits, area-based management tools such as MPAs, environmental impact assessments, capacity-building and the transfer of marine technology. The idea is to address them together as a whole, and a number of countries will be reluctant to consider any further action on EBSAs at the UNGA (or even at the CBD) without concurrent action on marine genetic resources. Therefore, in order to progress on these issues, **it would be crucial for States supporting the EBSA process to also indicate their willingness to advance on the marine genetic resources issue.** This could include in the short-term the development of initiatives such as research cruises involving scientists from developed and developing countries or the establishment of trust funds and scholarships.

Another point that might complicate discussions on the subject is the fact that several States do fear that EBSAs are the basis for future MPAs.

Workshop to Identify Areas of Ecological and Biological Significance or Vulnerability in the Arctic Marine Environment”, 40p.

50. See the website of the partnership at: <http://www.gobi.org/>.

51. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, § 22.

52. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §42.

53. Resolution 66/231, §179.

However, the EBSA criteria are scientific criteria and do not ascertain the level of human threats in the areas concerned or prejudge the future management measures that might be adopted. As several of the decisions of the Conference of the Parties to the CBD highlight, “*areas found to meet the criteria may require enhanced conservation and management measures and (...) this can be achieved through a variety of means, including marine protected areas and impact assessments.*”⁵⁴ In addition, according to Annex II of Decision IX/20, the EBSA criteria are not the only scientific aspect to take into consideration when selecting areas to establish a representative network of MPAs. The conclusion is that, in the future, there could be a policy decision to designate certain EBSAs as MPAs (or even to designate parts of some EBSAs as MPAs), but that not all of them automatically qualify as such. They rather constitute a scientific knowledge base that would inform the decision process when such networks and other management tools, such as fisheries closures or environmental impact assessments, are being established. A policy decision to designate an EBSA as MPA could be based, for example, on three criteria: the area designated (i) will benefit from more proactive and comprehensive management; (ii) will provide important components for a representative network of MPAs; and (iii) is identified as being subject to higher levels of human pressures and related threats.⁵⁵

One possible option for moving ahead could be that, after the Conference of the Parties to the CBD which was held in October 2012, governments turn to the UNGA and, during the negotiations of the annual Resolution on Oceans and the Law of the Sea, request that a specific paragraph be included giving the BBNJ Working Group the mandate to provide advice to the UNGA on which actions might be undertaken with respect to the summary reports forwarded by the CBD. Such actions should make sure that the need for further policy decisions is adequately evaluated. Moreover, this Resolution could add that States and all competent intergovernmental organisations need to support and contribute, as appropriate, to this ongoing process in order to ensure that it is as

comprehensive as possible.⁵⁶ **If the UNGA agrees to consider the EBSA process, several actions might be possible.**

In the short term, the UNGA could take into consideration the whole EBSA process by adopting a **resolution in which it calls upon States and competent intergovernmental organisations to grant additional protection to EBSAs through the creation of MPAs or the application of other protection tools, taking into account the ecosystem and precautionary approaches.** This resolution could be similar to the ones already developed for VMEs, providing only general inputs and direction, and would be completed by further work and guidelines adopted by the CBD.

In the meantime, the BBNJ Working Group would pursue its process related to the conservation and sustainable use of marine biodiversity in ABNJ. One of the interests of this process could be **to develop a global mechanism to recognise the importance of EBSAs and to prevent significant adverse impacts in these areas.** For example, a possible future implementing agreement to UNCLOS on marine biodiversity in ABNJ could state that EBSAs submitted by the Conference of the Parties to the CBD to the UNGA and further evaluated within the BBNJ Working Group are of global significance and that competent intergovernmental organisations (the International Maritime Organisation, the International Seabed Authority, the regional seas conventions, the regional fisheries management organisations...) together with States need to take action to prevent significant adverse impacts due to human activities in these areas. A list of EBSAs could be annexed to the implementing agreement and reviewed at the meeting of the Conference of the Parties to this agreement or it could be defined by the BBNJ Working Group. The progress here would be to have a list of significant areas based on internationally agreed scientific criteria that all competent sectoral organisations could use. In the meantime, the implementing agreement could also recognise that MPAs in ABNJ could be established or recognised at the global level using well-documented EBSAs as a scientific basis.

Moving away from the UNGA processes, it has also been said that **EBSAs, which will form a common scientific understanding, could be the basis for cooperative marine spatial planning.** In a recent article published in the journal *Nature*, Weaver and Johnson suggested “*that a marine spatial plan be drawn up for each EBSA and regularly*

54. CBD COP 10, Decision X/29 on Marine and Coastal Biodiversity, §26.

55. See Druel E., Billé R., Treyer S., (2011), “A legal scenario analysis for marine protected areas in areas beyond national jurisdiction. Report from the Boulogne-sur-Mer seminar, 19-21 September”, Studies No.06/11, *IDDRI – IUCN – Agence des Aires Marines Protégées*, Paris, France, p. 12.

56. These recommendations were provided by WWF International in a briefing note for UN Missions in May 2012.

updated. This will articulate a vision, show what activity is taking place in the region (from commercial fishing to tourism) and study the impacts of those activities.”⁵⁷ From the management perspective, the authors further propose that “areas that historically have been heavily fished and are now degraded remain unprotected; areas with light historical fishing are given full protection; and moderately fished areas are subject to further scrutiny. Marine protected areas could sit comfortably within EBSAs, giving protection to the most critical ecosystems. The main benefit of this system is that it appeals to many different stakeholders: for example, it legitimises existing fishing activities while preventing them from spreading to vulnerable ecosystems in future.”

5. CONCLUSION: MOVING AHEAD FROM COMPETITION - THE COMPLEMENTARY ROLES OF THE CBD AND OF THE UNGA TO PROTECT MARINE BIODIVERSITY IN ABNJ

What appears from the state of play provided in this report is that the EBSA process is currently well engaged, both at the CBD and regional levels. There will be no step back. There is thus a need, while pursuing the scientific exercise, to move ahead and try to define the future of this identification process. In this respect, EBSAs are as much an opportunity as a challenge.

The EBSA process provides a common set of scientific criteria applicable across all regions, regardless of whether these regions benefit from a strong governance framework that may adopt specific conservation and management measures. The process helps to develop a common understanding and, if current political issues are solved, to define an internationally agreed list of areas in need of protection. As more and more States are engaging in the identification and designation process for EBSAs, it will also hopefully convince them of the need to protect these areas and thus move towards the adoption of an implementing agreement to UNCLOS on marine biodiversity in ABNJ. At the regional level, intergovernmental organisations and States may also use the results of the regional workshops to engage in more proactive protection and to discuss the

need to expand the mandate of some organisations so that they can take into account the designated EBSAs.

But EBSAs are also a challenge, in particular with respect to their future policy implications. They are, for the moment, limited to a scientific exercise and there is currently no mechanism in place to call on the relevant intergovernmental organisations to take action to prevent significant adverse impacts resulting from human activities in these areas. The Conference of the Parties to the CBD has decided that this should be the role of the UNGA, and in particular of the BBNJ Working Group, to discuss this matter. The distribution of the roles is therefore relatively clear, but might be complicated by various political aspects.

Indeed, there has always been some reluctance within the UNGA and the BBNJ Working Group to consider and discuss initiatives undertaken by the CBD. As has been said, some States negotiating in the BBNJ Working Group want to consider all ABNJ issues as a package and avoid making headway in one matter while others remain blocked (hence the need to negotiate everything in the same arena). There is also a more diffuse feeling that the CBD and UNGA processes might sometimes compete with each other and, within the UNGA, an understanding that UNCLOS prevails over the CBD. From time to time, negotiators attending the CBD meetings and BBNJ Working Group meetings adopt strong positions on the respective mandates of these institutions, ranging from the total absence of competence of the CBD on marine biodiversity in ABNJ to the idea that negotiations on this issue should only take place within this Convention and not at the UNGA. What is true is that States have not always acted rationally in these different arenas, advocating for example for progress at the CBD and then trying to minimise such progress at the UNGA.

The EBSA process offers an opportunity to move away from this situation and to highlight the complementary roles of the CBD and the UNGA in protecting marine biodiversity in ABNJ. For its part, the CBD provides a sound scientific basis to inform the decisions of the UNGA and the BBNJ Working Group, while the latter use this information to make the relevant decisions. Their work, as well as the work of intergovernmental organisations and States at the regional level, is interconnected and these three levels must work hand in hand towards common goals. ■

57. See Weaver P., Johnson D., (2012), “Biodiversity: Think Big for Marine Conservation”, *Nature* 483, p.399.

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