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# CHAPTER 10

## IMPOSING AN INTERNATIONAL ENVIRONMENTAL JURISDICTION: HOW DEVELOPMENTS ON MARINE PROTECTED AREAS ARE FOSTERING A NEW LEGAL ORDER FOR THE CONSERVATION OF AREAS BEYOND NATIONAL JURISDICTION

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**RÉSUMÉ:** *Les avancées sur les aires marines protégées dans les zones situées au-delà de la juridiction nationale ont un impact sur la manière dont les océans et les mers sont gouvernés. Ces développements se déroulent parallèlement à l'évolution de la compréhension des dispositions de la Convention par le biais d'une mise en garde environnementale prudente quant à l'obligation de protéger la biodiversité marine. Le document examine comment le cadre de la Convention des Nations Unies sur le droit de la mer s'articule avec les traités internationaux relatifs à l'environnement, les lois non contraignantes, les décisions de tribunaux internationaux (en particulier, les arbitrages sur la zone de protection marine de Chagos et la mer de Chine méridionale) et les pratiques des États en matière de MPA dans l'ABNJ (sous OSPAR, CCAMLR, Autorité Internationale des Fonds Marins —AIFM-ISA—, la Convention de Barcelone et la Commission de la mer des Sargasses) pour favoriser collectivement un nouvel ordre juridique environnemental pour les océans et les mers. Il conclut que ces développements aident les États à réorienter l'équilibre entre les obligations de la communauté internationale en matière de conservation et ses droits et libertés au sein de l'ABNJ.*

**Mots-clés:** aires marines protégées (AMP-MPA); espaces au-delà des juridictions nationales (EAJN-ABNJ); Convention des Nations Unies sur le droit de la mer (CNUDM-UNCLOS).

**ABSTRACT:** *Advances on marine protected areas (MPA) in areas beyond national jurisdiction (ABNJ) are impacting how the oceans and seas are ruled. These developments are taking place in parallel with evolution of the understanding of UNCLOS's provisions through a precautionary, environmental emphasis on the obligation to protect marine biodiversity. The paper discusses how the interaction of the UNCLOS framework with international environmental treaties, soft law, decisions of international tribunals (in particular, the Chagos Marine Protected Area and South China Sea arbitrations) and States' practices on MPA in ABNJ (under OSPAR, CCAMLR, International Seabed Authority (ISA), the Barcelona Convention and the Sargasso Sea Commission) are collectively fostering a new environmental legal order for the oceans and seas. It concludes that these developments are helping States reorient the balance between the international community's conservation obligations and its ABNJ rights and freedoms.*

**Keywords:** *marine protected areas (MPA); areas beyond national jurisdiction (ABNJ); united nations convention on the law of the sea (UNCLOS).*

## 1. INTRODUCTION

This paper addresses the question of whether current developments around international law and marine protected areas in areas beyond national jurisdiction are changing the balance of rights and obligations of States under the law of the sea, and if so how.

The overarching framework for international environmental law of the sea is UNCLOS<sup>1</sup>, under which the areas beyond national jurisdiction (ABNJ) are the high seas<sup>2</sup> and the Area<sup>3</sup>. All measures taken under any other legal instruments need to be consistent with UNCLOS. Thus, the rights and obligations of States at issue are those under UNCLOS. As well as giving States certain freedoms in ABNJ, UNCLOS establishes general obligations to protect the marine environment and take the necessary measures for this aim as discussed below<sup>4</sup>. As formally stated UNCLOS provisions cannot change, however their meaning can be «clarified», made concrete or interpreted<sup>5</sup>. In particular, a family of other treaties and prac-

<sup>1</sup> 1982 United Nations Convention on the Law of the Sea (UNCLOS). Adopted on 10 December 1982, UNTS 1833, in force on 16 November 1994, UNCLOS has widespread support, with 168 Parties.

<sup>2</sup> UNCLOS, Art. 86: The high seas are «all parts of the sea that are not included in the EEZ, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State». See Part VII.

<sup>3</sup> UNCLOS, Art. 1(1)(1): «Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction». See Part XI.

<sup>4</sup> See § Treaty Law and «Soft» Law.

<sup>5</sup> Vienna Convention on the Law of Treaties, Art. 31(3)(c).

tices<sup>6</sup> inform and flesh out UNCLOS in dynamic, evolutionary, arguably emergent<sup>7</sup>, ways<sup>8</sup>.

Amongst the latter are current developments, often manifestations of environmental and precautionary turns, around ABNJ marine protected areas in States' individual and collective practice, decisions of tribunals, UNGA calls and CBD<sup>9</sup> COP targets. In short, the paper outlines how through these developments more weight is being given to the obligation to protect the marine environment and its biodiversity, markedly changing the balance of States' rights and obligations.

What of «marine protected areas» (MPA)? The concept is an archetypal illustration of Wittgenstein's idea of family resemblance. There are many recognizable examples<sup>10</sup>, going under a plethora of names<sup>11</sup>, with a «complicated network of similarities overlapping and criss-crossing»<sup>12</sup>, and a slew of related concepts<sup>13</sup>, yet there is no single commonality or definition. Hence, one should not to get bogged down by attempts at all encompassing definitions.

Moreover, there is no single legal definition of «marine protected area»<sup>14</sup>. Neither UNCLOS nor CBD, the main international treaty regulating the conservation of biodiversity, uses the term, and neither makes explicit use of the concept<sup>15</sup>. Whilst some regional instruments<sup>16</sup> do give definitions of MPA, other instruments<sup>17</sup> prefer not to. Consequently, answers to the paper's fundamental question cannot be artificially limited to, *e. g.*, developments around treaty mentions of MPA.

<sup>6</sup> See § States' Practices.

<sup>7</sup> GOLDSTEIN, J. (1999), «Emergence as a Construct: History and Issues», *Emergence*, 1(1), 49-72.

<sup>8</sup> See BOYLE, A. (2005), «Further Development of The Law of The Sea Convention: Mechanisms For Change», *International and Comparative Law Quarterly*, 54(3), 563-584.

<sup>9</sup> The Convention on Biological Diversity (CBD), 1760 UNTS 79 (1992).

<sup>10</sup> Examples include Ramsar sites, International Seabed Authority (ISA) APEI, Marine World Heritage sites, Specially Protected Areas of Mediterranean Importance and Whale Sanctuaries.

<sup>11</sup> Agardy et al list twenty nine variations. AGARDY, T. *et al.* (2003), «Dangerous targets? Unresolved issues and ideological clashes around marine protected areas». *Aquatic Conservation: Marine and Freshwater Ecosystems*, 13(4), 353-367.

<sup>12</sup> WITTGENSTEIN, L. (2001) [1953], *Philosophical Investigations*, § 66.

<sup>13</sup> Examples include MARPOL Special Areas, PSSA and RFMO fisheries closures.

<sup>14</sup> BIRNIE, P.; BOYLE, A., and REDGWELL, C. (to appear), *International Law and the Environment*, Draft Fourth Edition, OUP, Ch. 12, 71.

<sup>15</sup> CBD, Art. 2 does define «protected area» and Art. 8(a) mandates its Parties to establish a system of protected areas, «as far as possible and as appropriate». However, CBD COPs, from COP 2 onwards, have been happy to agree Decisions about MPA without a formal definition of the notion. While in the lead up to CBD COP 7 the CBD Ad-Hoc Technical Experts Group did formulate a definition of MPA, COP 7 did *not* agree to adopt this definition and later COP and AHTEG have not revisited the issue.

<sup>16</sup> *E. g.*, the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), 2354 UNTS 67(1993); Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) 1329 UNTS 48 (1980).

<sup>17</sup> *E. g.*, ISA.

## 2. TREATY LAW AND «SOFT» LAW

Notwithstanding its dearth of references to MPA, UNCLOS does impose general protection and preserve obligations directly relevant to them on its parties<sup>18</sup>. These include obligations applicable in all maritime zones to «protect and preserve the marine environment» unconditionally (Art. 192), «take necessary measures to protect and preserve rare or fragile ecosystems, habitat of depleted, threatened or endangered species and other forms of marine life» (Art. 194 [5]), and «cooperate on a global and on a regional basis [...] for the protection and preservation of the marine environment» (Art. 197).

Under UNCLOS, the areas beyond national jurisdiction, on which this paper focuses, are comprised of two maritime zones, the high seas<sup>19</sup> and the Area<sup>20</sup>. Neither is coincident with ecosystem boundaries, and each has a distinct regime allowing States considerable freedoms which, perceived in isolation, also present obstacles to the designation and effective management of MPA. In the high seas, freedoms, including of fishing, navigation, laying submarine cables, apply to all States (Art. 87). Under the Area regime mineral resources fall under the ambit of ISA<sup>21</sup> (Art. 133), but marine living resources do not and their exploitation is again a freedom. Further, States are banned from appropriating or having sovereign rights over any parts of ABNJ, blocking one avenue to unilateral MPA designation.

Nevertheless, in the high seas States «have a duty to take, or to cooperate with other States in taking [...] measures for their respective nationals as may be necessary for the conservation of the living resources» (Art. 117) and «are to cooperate with each other in the conservation and management of living resources» (Art. 118). It is untested whether Art. 117 should be read as imposing a duty to take measures at a time in the future from the signing of the treaty that turn out then to be necessary, or whether it imposes a precautionary duty: to take measures whose necessity is uncertain but possible at the time of their adoption. In either case, MPA in many cases constitute measures necessary for the conservation of the high seas and should be subjects of cooperation. Similarly, there is an element of precautionarity in Art. 145's instruction that ISA shall take «Necessary measures [...] to ensure effective protection for the marine environment from harmful effects which may arise from activities» in the Area, whilst MPA are amongst the «appropriate rules, regulations and procedures for [...] the prevention, reduction and control of [...] other hazards to the marine environment [...] and of interference with the ecological balance of the marine environment [...] [and] the protection

<sup>18</sup> There are currently 167 Parties. However, there are 29 non-Parties, including a number of States with substantial seaboard or maritime activity.

<sup>19</sup> *Supra* n. 2.

<sup>20</sup> *Supra* n. 3.

<sup>21</sup> The International Seabed Authority (ISA) is an autonomous international organization, created by UNCLOS and the 1994 Agreement relating to the implementation of Part XI of UNCLOS, acting on behalf of «mankind as a whole», UNCLOS Art. 137(2).

and conservation of the natural (non-living) resources [...] and the prevention of damage to the flora and fauna for the marine environment» that ISA must adopt<sup>22</sup>.

These obligations may appear vague and they do not explicitly mention MPA. However, the understanding of UNCLOS's provisions evolves dynamically in interaction with Implementing Agreements, other international treaties, soft law - providing a normative input for MPA in ABNJ, tribunal decisions and States' practices<sup>23</sup>.

Other international treaties provide detailed, specific biodiversity concepts which elucidate these UNCLOS obligations to protect marine environment and its living resources and their relationship with ABNJ MPA. Amongst the most important are CITES<sup>24</sup>, CMS<sup>25</sup> and CBD. CITES appendices list endangered species and those whose trade requires control, informing the notion of «depleted, threatened or endangered» species. CMS introduces the concept of Range States<sup>26</sup> and the need for international cooperation for the protection of migratory corridors, including in ABNJ. The CBD concepts of biodiversity, ecosystem conservation in *situ* through protected areas, and sustainable use are also influencing the implementation of UNCLOS protect and preserve obligations through the designation of MPA<sup>28</sup>.

Moreover, Conference of Parties (COP) decisions on MPA and marine conservation play a normative role<sup>29</sup>. CBD COP 2 (1995) set out a marine biodiversity action plan (the «Jakarta Mandate»)<sup>30</sup> under which marine and coastal protected areas were one of the five thematic areas, with the protection of ecosystem functioning emphasised as an important criterion for their selection<sup>31</sup>. Its implementation is to rely on international organisations and regional conventions. Cooperation for the protection and conservation of the marine environment between regional fisheries bodies and regional organizations is specifically encouraged<sup>32</sup>. Later COP reinforced the Jakarta Mandate. In particular, COP 7 (2004) stressed MPA as a tool

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<sup>22</sup> See HARRISON, J. (2017), *Saving the Oceans Through Law: The International Legal Framework for the Protection of the Marine Environment*, OUP, 239.

<sup>23</sup> *Supra*, n. 8.

<sup>24</sup> Convention on International Trade in Endangered Species of Wide Fauna and Flora (CITES), 993 UNTS 243 (1973).

<sup>25</sup> Convention on Migratory Species of Wild Animals (CMS), 1651 UNTS 333 (1979).

<sup>26</sup> CMS, Art. 19(f): «Range means all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time on its normal migration route».

<sup>27</sup> CMS, Art. 2(1): «The Parties acknowledge the importance of migratory species being conserved and of Range States agreeing to take action to this end whenever possible and appropriate, paying special attention to migratory species the conservation status of which is unfavourable, and taking individually or in cooperation appropriate and necessary steps to conserve such species and their habitat».

<sup>28</sup> See § Tribunal Decisions.

<sup>29</sup> See BRUNNÉE, J. (2002), «COPing with Consent: Law-Making Under Multilateral Environmental Agreements», *Leiden Journal of International Law*, 15 (1), 1-52, for discussion of the soft law nature of COP decisions and their impact notwithstanding.

<sup>30</sup> UNEP/CBD/COP/Dec/II/10.

<sup>31</sup> *Ibid.*, Annex I(iv).

<sup>32</sup> *Ibid.*, Annex I(viii).

for achieving the conservation and sustainable use of biological diversity, COP 9 (2008) initiated description by Parties of Ecologically Biologically Significant Marine Areas (EBSA), giving information on marine areas in need of protection both within NJ and in ABNJ<sup>33</sup>, and COP 10 (2010) set Aichi Target 11 [reiterated in UN SDG 14 (2015)]<sup>34</sup> for ecologically representative and well-connected systems of MPA, covering 10% of the oceans, by 2020.

Over time these calls and similar CBD COP decisions have notably evolved, changing in focus from individual MPA to networks of MPA and to a global network of MPA, with increased size and representativeness (covering ecosystems of all maritime zones), and implementing an approach protecting whole ecosystems or ecosystem functional units.

In parallel, the CMS COP fifth meeting (1997) decided on the objective for its parties that they should designate protected areas, in close cooperation with other Range States, so that a network of critical sites is established throughout the migration route of species listed under CMS Appendix I as in danger of extinction<sup>35</sup>. Twenty-seven such species have ABNJ as part of their range.

Returning to hard law instruments, two *Implementing Agreements*, the Agreement Relating to the Implementation of Part XI (1994) and UNFSA (1995)<sup>36</sup>, purposefully modify<sup>37</sup> UNCLOS's provisions<sup>38</sup>.

The IA for Part XI, *inter alia*, reinforces the mandate of the International Seabed Authority (ISA) under UNCLOS Arts.136 and 145 to take measures to ensure effective protection of the marine environment in the course of managing the mineral resources of the seabed beyond national jurisdiction as part of the «common heritage of mankind».

Under UNFSA, States should «adopt measures to ensure long-term sustainability» [Art. 5(a)], «agree on conservation and management measures» (Art. 10), and fulfil their «obligation to protect biodiversity» [Art. 5(g)]. Moreover, measures for the high seas should not «undermine the effectiveness» of measures adopted by coastal States (Art. 7). The ITLOS Fisheries Advisory Opinion (2015) underlined the links amongst these obligations and general UNCLOS protect and preserve obligations when commenting on UNCLOS Art. 192 that «the conservation of the living resources of the sea is an element in the protection and preservation of the

<sup>33</sup> E. g., in the Clarion-Clipperton Zone. See ISA APEI, § States' Practices.

<sup>34</sup> UNGA (2015), «Transforming our world: the 2030 Agenda for Sustainable Development», A/RES/70/1.

<sup>35</sup> UNEP/CMS/COP/Dec/5, Resolution 5.4.

<sup>36</sup> United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS 88 (1995).

<sup>37</sup> VCLT, *supra* n. 5, Art. 31(3)(a).

<sup>38</sup> A possible international legally binding instrument for the conservation and sustainable use of biodiversity in ABNJ - with MPA as one of four areas of explicit focus, currently being discussed under the auspices of the UNGA, may ultimately also prove to be important. However, for the present this remains highly speculative.

marine environment»<sup>39</sup>. Arguably, unprotected ABNJ could potentially undermine living resource conservation MPA measures adopted by coastal States within national jurisdiction, *contra* UNFSA Art. 7, and fall foul of States' obligations under UNCLOS Art. 192.

States should also, under UNFSA, apply «the precautionary approach [...] to protect the living marine resources and preserve the marine environment» (Art. 6). This has been particularly influential amongst RFMO<sup>40</sup>, facilitating their cooperation over MPA designated by other regional organizations.

The precautionary use of and cooperation with MPA has also been promoted by normatively influential, international consensus calls. Agenda 21 advocates «a precautionary approach for oceans and seas»<sup>41</sup>, UNGA Res. 59/24 (2003) application of a precautionary principle «beyond national jurisdictions» and UNGA Res. 61/105 (2006) and 64/72 (2009) protection of vulnerable marine ecosystem (VME), hydrothermal vents, seamounts and cold water corals from fishing.

### 3. TRIBUNAL DECISIONS

Tribunal interpretation, in recent decisions, of the interplay between MPA, international treaties and UNCLOS preservation and protection obligations<sup>42</sup> (and concomitant dispute resolution obligations)<sup>43</sup> plays a further important role for understanding the evolution of the balance of States' rights and obligations.

The tribunal in *Chagos MPA Arbitration (Mauritius v. United Kingdom, 2015)* held that the measures «necessary to protect and preserve rare or fragile ecosystems» referred to in UNCLOS Art. 194(5) are not limited to those aimed strictly at marine pollution<sup>44</sup>; they extend to measures necessary to protect marine biodiversity at all levels: species, habitats and ecosystems. As MPA can be Art. 194(5) «necessary measures» this expanded substance of Art. 194(5) provides strong support for ABNJ MPA<sup>45</sup>. Arguably, Art. 145's insistence that ISA adopt rules, regulations and procedures to prevent, reduce and control «interference with the ecological balance of the marine environment» should be interpreted as mandating

<sup>39</sup> ITLOS (2015), *Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, ITLOS Reports, §120.

<sup>40</sup> *E. g.*, NAFO, NEAFC, SEAFO, ICCAT, CCAMLR, WCPFC, IATTC and CRFM have each incorporated precautionarity. See HAUGHTON, M. (2011), «The Precautionary Principle in Fisheries Management in CARICOM States».

<sup>41</sup> UNGA (1992), 46th Sess., Agenda Item 21: *Programme of Action for Sustainable Development*, UN Doc A/Conf.151/26. See Chapter 17.

<sup>42</sup> UNCLOS, Part XII.

<sup>43</sup> UNCLOS, Part XV.

<sup>44</sup> The chapeau of Art. 194 is «Measures to prevent, reduce and control pollution of the marine environment». However, the chapeau of Part XII's first article, Art. 192, is «General obligation» and the article reads, «States have the obligation to protect and preserve the marine environment».

<sup>45</sup> Whilst the tribunal did not rule on the legality of the whole EEZ MPA in question, it did not rule against it and nor did Mauritius ask it to do so.



a similar ecosystem approach, incorporating MPA, for the protection of the Area environment by ISA.

In *South China Sea Arbitration (Philippines v. China, 2016)* the tribunal both borrowed the definition of «ecosystem» from CBD Art. 2 and used CITES's Appendices to inform interpretation of the UNCLOS Art. 194(5) obligation on States to prevent damage to the «habitat of depleted, threatened or endangered species» and to «rare or fragile ecosystems», in this case through direct harvesting of species (such as sea turtles, listed in CITES Appendix I) internationally recognized as threatened with extinction. These obligations apply both inside national jurisdiction and in ABNJ. Moreover, unsustainable exercise of high seas freedoms is subject to dispute settlement (Arts. 286, 288). Hence, in exercising high seas freedoms, Flag State activities should not undermine conservation measures in ABNJ. This again provides strong support for enforcement of MPA in ABNJ by all UNCLOS Parties.

#### 4. STATES' PRACTICES

The collection of ABNJ MPA (the Pelagos Sanctuary and Sargasso Sea)<sup>46</sup> and MPA networks (OSPAR and CCAMLR MPA and ISA's Clarion-Clipperton Areas of Particular Environmental Interest (APEI) networks)<sup>47</sup>, is limited and, albeit that others are on the horizon<sup>48</sup>, it is their role within UNCLOS-framed international law that is focused on here. These ABNJ MPA are being underpinned by the development of webs of cooperation with other organizations with legal mandates in ABNJ. Much of this work has gone on after the initial MPA designations: it is seemingly impractical to expect otherwise. Amongst salient strands in such webs, discussed below, are those of regional sea organizations (RSO) cooperating with organisations such as the International Maritime Organization (IMO) and regional fisheries management organizations (RFMO), coastal States cooperating on area based planning<sup>49</sup>, and the CBD COP 9 initiated description of EBSA in ABNJ<sup>50</sup>. Analysis of these frameworks and cooperative arrangements is important in demonstrating that States are achieving through ABNJ MPA a more environmental balance of rights and obligations under the law of the sea.

Before examining these MPA and networks individually it is worthwhile noting that CCAMLR (which predates CBD) and the Sargasso Sea Commission have had broad mandates to adopt biodiversity protection goals, approaches and instru-

<sup>46</sup> The *Pelagos Sanctuary for the Protection of Marine Mammals in the Mediterranean Sea* is a 96,000 km<sup>2</sup> marine area adopted in 1999.

<sup>47</sup> The *Sargasso Sea Commission Area of Collaboration* is a 4,000,000 km<sup>2</sup> marine area in the North Atlantic sub-tropical gyre, bounded by four surrounding ocean currents that retain the floating Sargassum ecosystem.

<sup>48</sup> Concretely under CCAMLR and OSPAR, more diffusely under other RSO. See below.

<sup>49</sup> E. g., The 2012 Mauritius and Seychelles Treaty Concerning the Joint Management of the Continental Shelf in the Mascarene Plateau Region.

<sup>50</sup> E. g., The Clarion-Clipperton zone and Sargasso Sea EBSA. See UNEP/CBD/COP/DEC/XI/17, respectively §§ 13, 19.

ments since their inception, while other actors, such as OSPAR<sup>51</sup>, the Barcelona<sup>52</sup>, Nairobi and Abidjan Conventions<sup>53</sup>, have developed or extended their original mandates.

The OSPAR Convention<sup>54</sup> currently has ten ABNJ MPA (as well as many NJ sites), with varying, sometimes hybrid, designations and protection. Annex V of the Convention mandated parties to take necessary measures to protect and conserve OSPAR ecosystems and biological diversity and to cooperate in adopting programmes and measures. In 2003, the OSPAR Commission recommended setting up an ecologically coherent network of MPA by 2012 to «protect and conserve areas that best represent the range of species, habitats and ecological processes in the maritime area»<sup>55</sup>. Although «the maritime area» includes extensive ABNJ, parties were only asked to select areas within their jurisdiction as components of the OSPAR MPA network. However, in 2010, the Commission amended this recommendation, with effect that the network should explicitly include «sites representative of all biogeographic regions in the OSPAR maritime area» including ABNJ, and «consistent with the CBD target [CBD Aichi Target 11] for effectively conserved marine and coastal ecological regions»<sup>56</sup>. The parties are also to contribute to assessments of ABNJ in the North-East Atlantic which may justify their selection as an OSPAR MPA and propose ABNJ that should be selected by the OSPAR Commission as a component of the MPA network<sup>57</sup>.

OSPAR has no competence to regulate fisheries, maritime transport or mining. However, it has established cooperation with the North-East Atlantic Fisheries Commission (NEAFC), ISA<sup>58</sup> and the IMO<sup>59</sup> in order to conserve and protect biodiversity within the ABNJ MPA from impacts caused by activities they respectively regulate. For instance, NEAFC established fisheries closures overlapping ABNJ MPA for the protection of vulnerable habitats. These meet the formulation

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<sup>51</sup> See OSPAR's Annex V on the *Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area*, adopted in 1998 to extend the cooperation of its parties to cover all human activities that might adversely affect the marine environment of the North-East Atlantic.

<sup>52</sup> The Convention for the Protection of the Mediterranean Sea against Pollution, 1102 UNTS 27 (1976) was amended in 1995 and renamed The Convention for the Protection of the Mediterranean Marine and Coastal Environment. Its Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean was adopted in 1995.

<sup>53</sup> See 2050 African Integrated Maritime Strategy, §§ 39, 41.

<sup>54</sup> OSPAR, *supra* n. 16.

<sup>55</sup> OSPAR, Rec. 2003/3 on a Network of Marine Protected Areas, § 2.1(c).

<sup>56</sup> OSPAR, Rec. 2010/2.

<sup>57</sup> *Id.*, § 2.5(c);(d).

<sup>58</sup> In consonance with UNCLOS, Art. 169: «The [ISA] Secretary-General shall, on matters within the competence of the Authority, make suitable arrangements [...] for consultation and cooperation with international and non-governmental organizations».

<sup>59</sup> See UNCLOS, Art. 211(1). The IMO has adopted treaties and recommendations important for marine areas that might be vulnerable to shipping activities. See IMO, Res. A.982(24)/2006. *Revised guidelines for the identification and designation of Particularly Sensitive Sea Areas (PSSA) and Special Areas under the International Convention for the Prevention of Pollution from Ships (MARPOL) 340 UNTS 184 (1973)*. While the Mediterranean Sea and the Antarctic Areas are covered by MARPOL Annexes, ABNJ MPA have not yet been subject of any PSSA.

of UNGA Res. 61/105 (2006) and 64/72 (2009) on protection of deep sea ecosystems which call for a precautionary approach to bottom fisheries, including through the adoption of fisheries closures<sup>60</sup>. OSPAR and ISA have signed a MoU with the purpose of conciliating the development of mineral resources with comprehensive protection of the marine environment<sup>61</sup>. Both cooperations are part of the development of a stronger environmental balance between rights and obligations in ABNJ.

The OSPAR Commission is currently assessing information, gathered through public consultation, to decide whether a proposal to designate a *North Atlantic Current and Evlanov Seamount Marine Protected Area* meets OSPAR MPA criteria. If designated, this area, important for foraging for many species of seabirds, will be the first large-scale OSPAR ABNJ MPA.

In 2012, ISA, as part of a continuing development of regulations for the exploitation of mineral resources in the Area in response to its UNCLOS Art. 145 obligations<sup>62</sup>, precautionarily designated a network of nine APEI in the Clarion-Clipperton Zone in the Eastern Central Pacific. The aim is to protect endemic biodiversity before seabed mining starts. Mining and scientific research in the Area must be «carried out with reasonable regard for other activities», including MPA designation and management, «in the marine environment»<sup>63</sup>. UNGA Res. 68/70 (2013) subsequently encouraged ISA to extend such designations to other regions, stressing ISA's environmental mandate.

The entire, wholly within ABNJ<sup>64</sup>, Antarctic marine ecosystem is covered by the CAMLR Convention. CCAMLR Conservation Measure<sup>65</sup> 91-04 (2011)<sup>66</sup>, exemplifying an ecosystem approach, provides a Framework for CCAMLR MPA Network<sup>67</sup>. It aims to sustain the ecosystem, including in areas outside MPA, enable scientific reference areas for monitoring, adapt to climate change, reduce alien species and, meeting Art. 2 of the CAMLR Convention goals, conserve Antarctic marine living resources.

Two large-scale ABNJ sites have been designated part of the CCAMLR MPA Network, the 2009 South Orkney Islands Southern Shelf MPA and the 2016 Ross

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<sup>60</sup> Nevertheless, the OSPAR Commission (2017), «2016 Status Report on the OSPAR Network of Marine Protected Areas», 43, found further work is required to prevent damage from seabed mining, cable laying, shipping and military activities.

<sup>61</sup> See *Memorandum of understanding between the OSPAR Commission and the International Seabed Authority* (2010).

<sup>62</sup> *Supra* § Treaty Law and «Soft» Law.

<sup>63</sup> UNCLOS, Art. 147.

<sup>64</sup> Under the Antarctic Treaty, UNTS 71 (1980).

<sup>65</sup> Under Art. IX.2(f) and 2(g) of the CCAMLR, Conservation Measures, which are binding decisions, formulated on the basis of the best scientific evidence available, may designate the opening and closing of areas, regions or sub-regions for the purposes of scientific study or conservation.

<sup>66</sup> CCAMLR, CM 91-04 (2011) on the General Framework for the Establishment of CCAMLR Marine Protected Areas.

<sup>67</sup> «[I]ndividual MPAs alone will not be able to achieve all of the desired objectives for MPAs in the CCAMLR Area, but that together they should be able to do so». CCAMLR, CM 91-04 (2011), Preamble.

Sea MPA<sup>68</sup>. Moreover, the development of a representative system of CCAMLR MPA continues. Proposals for MPA in East Antarctica, the Weddell Sea and the Western Antarctic Peninsula are under consideration at CCAMLR's 37<sup>th</sup> annual meeting in late 2018<sup>69</sup>. Some caution is in order, however; previous similar proposals have foundered through lack of unanimity, and that the Ross Sea Region MPA was designated for a 35 year period only<sup>70</sup> is a further indicator of the difficulties in negotiating MPA that conflict with commercial fishing interests.

Both existing MPA cover submarine shelf areas and seamounts, important habitat for Antarctic krill<sup>71</sup>. Unlike most regional sea organisations, CCAMLR has competence to regulate fishing activities in its jurisdiction. To this end<sup>72</sup>, Flag States must notify CCAMLR prior to entry of their fishing vessels into the Ross Sea Region MPA<sup>73</sup>. Vessels fishing or conducting scientific research on Antarctic marine living resources are also to avoid dumping or discharging wastes or other matter within the MPA<sup>74</sup>.

Nevertheless, the Commission is to identify other organisations to support the specific objectives of the MPA whenever a CCAMLR MPA is designated<sup>75</sup>. CCAMLR cooperation arrangements with the IWC<sup>76</sup> resulted in joint workshops helping develop scientific models of Antarctic marine ecosystems and on identifying VME. CCAMLR also has a variety of MoU and other arrangements with neighbouring RFMO<sup>77</sup>.

The Pelagos Sanctuary<sup>78</sup>, 1999, originally the result of an agreement between Italy, Monaco and France, was the first large-scale ABNJ MPA. It is partly in territorial seas, partly in the adjacent high sea: many Mediterranean States have not claimed an EEZ, so large parts of the water column remain high seas areas overlying the continental shelf. It was then adopted by the Barcelona Commission under its 1995 Protocol on «Specially Protected Areas of Mediterranean Importance» (SPAMI)<sup>79</sup>. Under the Protocol the parties «may invite any other interested State or international organization to accede»<sup>80</sup>. Further, cooperation, *e. g.*, with

<sup>68</sup> The CAMLR Convention Area also contains large MPA within national jurisdiction.

<sup>69</sup> 21/10-2/11/2018.

<sup>70</sup> CCAMLR, CM 91-05, Art. 20. Its designation can be renewed if the specific objectives of the MPA are still relevant. *Ibid.*, Art. 21.

<sup>71</sup> Krill is one of the main species harvested in the Antarctic.

<sup>72</sup> CM 91-05(2016), Art. 7.

<sup>73</sup> *Ibid.*, Art. 24.

<sup>74</sup> *Ibid.*, Art. 10.

<sup>75</sup> CM 91-04/2011, Art. 10.

<sup>76</sup> The International Whaling Commission is empowered to designate sanctuary areas, fix the limits of open and closed waters, prescribe seasons, catch and size limits for each species of whale as well as prohibit types and methods of fishing. See International Convention for the Regulation of Whaling, 161 UNTS 72 (1946), Art. 5.

<sup>77</sup> *E. g.*, CCSBT, WCPFC, SPRFMO, SIOFA, SEAFO. See CCAMLR (2017), *Report of the Thirty-Sixth Meeting of the Commission*.

<sup>78</sup> *Supra* n. 46.

<sup>79</sup> In practice, neighbouring coastal States' interests may be crucial for designating further high seas MPA: despite sixteen Mediterranean EBSA having been described to date, no other ABNJ SPAMI have been proposed.

<sup>80</sup> SPAMI Protocol, Art. 20.

the IMO, is important for effective protection of the Pelagos given that SPAMI regulations apply to third States only «within the limits of international law»<sup>81</sup>.

The Sargasso Sea Collaborative Area<sup>82</sup>, 2014, covers a large area of the High Seas and the Area in the North Atlantic. As the marine area is not under the ambit of any RSO and only small fragments lie in the scope of RFMO, the Hamilton Declaration<sup>83</sup> in setting up the Sargasso Sea Commission encouraged «relevant regional and international organisations [...] who wish to contribute to efforts to conserve the Sargasso Sea ecosystem [...] to participate as Collaborating Partners»<sup>84</sup>. Given its lack of jurisdiction, a crucial part of the Commission's work is in developing proposals for regional and international cooperation on preservation of the ecosystem with other organisations. Progress in this regard can be seen in the North-West Atlantic Fisheries Organisation ban on mid-water trawling gear and its adopting other precautionary measures to protect shallow seamounts<sup>85</sup>.

The 2012 Mauritius and Seychelles «Treaty Concerning the Joint Management of the Continental Shelf in the Mascarene Plateau Region»<sup>86</sup> attempts to limit environmentally harmful activities in the ABNJ water column superjacent to their joint extended continental shelf. Measures should be taken precautionarily «concerning fishing activity» in those waters having direct impact on, or posing a significant risk to, «the natural resources of the seabed and subsoil in the JMA» [Art. 12(b)].

## 5. CONCLUSION

Precautionary innovations in international environmental law treaties, concepts and the practices of States on ABNJ MPA designation, and the *Chagos* and *South China Sea* tribunal decisions, have helped change understanding of the scope of UNCLOS provisions, particularly Arts. 192 and 194(5) and Arts. 117, 118 and 145, supporting the development of regional frameworks for MPA in ABNJ as an important tool to implement international law obligations to conserve marine biodiversity, and making clear the unsustainable exercise of high seas freedoms violates protection and preservation of the marine environment and is subject to dispute settlement. Looking to the future, as well as the new CCAMLR and OSPAR ABNJ MPA proposals, other RSO, such as the Abidjan<sup>87</sup> and Nairobi<sup>88</sup> Conventions are also starting to develop frameworks for protection of ABNJ marine ecosystems through MPA. Moreover, while regional organisations can only

<sup>81</sup> The MPA regulations apply to third States «within the limits of international law». *Ibid.*, Art. 14(2).

<sup>82</sup> *Supra* n. 47.

<sup>83</sup> Original signatories: the Azores, Bermuda, Monaco, UK and USA.

<sup>84</sup> Hamilton Declaration, § 11.

<sup>85</sup> NAFO (2013), *Report of the Scientific Council*, 6-7.

<sup>86</sup> *Supra* n. 49. The Treaty's principle concern is regulating and protecting the environment of the joint extended continental shelf.

<sup>87</sup> Abidjan Convention COP Decision 11/10 (2014).

<sup>88</sup> Nairobi Convention COP Decisions 8/5 (2015) and 9/6 (2018).

bind their own parties and cannot regulate all human activities in ABNJ, there has been clear progress on their capability to enforce MPA with respect to third parties. MPA designation and post-designation underpinning is showing that different organisations can contribute to managing human activities in a way that supports ecosystems. These emerging cooperations supporting ecosystem protection through ABNJ MPA are, gradually, visibly reorienting the balance between the international community's conservation obligations and its ABNJ freedoms.

