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Note on the establishment of Marine Protected Areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean Sea

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1. Terms of Reference and Scheme of the Report

Under the terms of reference the legal consultant is requested to examine the legal implications of the establishment and the management of marine protected areas (MPAs) and in particular Specially Protected Areas of Mediterranean Importance (SPAMIs)[1] beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, bearing in mind the relevant international framework. In particular, the legal consultant is expected to examine:

- the different ways to award a legal status to the concerned area that guarantees its effective long-term protection, in accordance with the provisions set by the criteria for inclusion in the SPAMI List;

- the legal implications for the regulation of shipping activities in the SPAMIs;

- the legal implications for the regulation of the exploitation of the seabed in the SPAMIs;

- the legal implications for the regulation of exploitation of living resources, including fishing activities in the SPAMIs;

- the legal implications for the set-up of the management body shared by the neighbouring countries;

- the legal implications for the surveillance and the management evaluation, including procedures for compliance checking, of the SPAMIs.

As regards the establishment of marine protected areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, this report will consider both the world and the Mediterranean frameworks, as they result from customary international law and treaties in force[2].

[1] On them see *infra*, para. 8.A.

[2] This report will not consider MPAs established for archaeological, historical or cultural purposes. However, as the underwater cultural heritage of the Mediterranean is particularly rich, attention should be devoted also to MPAs to be established for these purposes, also considering that areas of cultural value can be designated as SPAMIs and that several Mediterranean States are parties to the Convention on the Protection of the Underwater Cultural Heritage (Paris, 2001).

PART I
THE MEANING OF "BEYOND NATIONAL JURISDICTION"

2. The Meaning of "Beyond National Jurisdiction" in International Law of the Sea:

2.A. The Waters

The terms "open seas" and "deep sea", which are frequently used in natural sciences, have no precise meaning in international law. Under both customary international law and the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS) the nature and extent of the marine spaces within or beyond the limits of national jurisdiction, and the relevant terminology, are the following, moving from the coast seaward.

a) The marine **internal waters** are the waters located on the landward side of the baselines from which the territorial sea is measured. These baselines correspond, depending on the geographical characteristics of the coastline, to the low-water line or, in particular cases, one or more straight baselines[3]. The internal waters are subject to the sovereignty of the coastal State.

b) The breadth of the **territorial sea** cannot exceed 12 nautical miles from the baseline (Art. 3 UNCLOS). The territorial sea does not depend on any express proclamation by the coastal States concerned, but exists *ipso iure*. It is subject to the sovereignty of the coastal State with the exception of the right of innocent passage for the ships of third States[4].

c) The breadth of the **exclusive economic zone** cannot exceed 200 nautical miles from the baselines (Art. 57 UNCLOS). The exclusive economic zone depends on an express proclamation by the coastal State concerned. In such a zone the coastal State enjoys "sovereign rights" for the purpose of exploitation of the natural resources, whether living or non-living, and production of energy from the water, currents and winds, as well as "jurisdiction" with regard to artificial islands, installations and structures, marine scientific research and protection and preservation of the marine environment[5]. The other States enjoy the freedoms of navigation, overflight and laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms[6].

d) The **high seas** is defined as "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State" (Art. 86 UNCLOS). The high seas is subject to a regime of freedom that encompasses different activities:

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[3] Under the UNCLOS, straight baselines can be drawn the cases of deeply indented coastlines or fringes of islands (Art. 7), mouths of rivers (Art. 9), bays (Art. 10) or archipelagic States (Art. 47).

[4] In straits used for international navigation the regime of transit passage is applicable (Part III UNCLOS).

[5] See for more details Art. 56 UNCLOS. Nobody knows what is the difference between "sovereign rights" and "jurisdiction".

[6] See for more details Art. 58 UNCLOS.

"1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, inter alia, both for coastal and land-locked States:

(a) freedom of navigation;

(b) freedom of overflight;

(c) freedom to lay submarine cables and pipelines, subject to Part VI [= Continental Shelf];

(d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;

(e) freedom of fishing, subject to the conditions laid down in section 2 [= Conservation and Management of the Living Resources of the High Seas];

(f) freedom of scientific research, subject to Parts VI and XIII [= Marine Scientific Research].

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas (…)" (Art. 87 UNCLOS).

2.B. The Seabed

a) As far as the seabed is concerned, the national jurisdiction includes the bed and the subsoil of the marine internal waters and of the territorial sea, as well as the **continental shelf**. The latter is defined as

"the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance" (Art. 76, para. 1, UNCLOS).

The continental shelf does not depend on any express proclamation by the coastal State concerned, but exists *ipso iure* (Art. 77, para. 3, UNCLOS).

In the continental shelf the coastal State exercises sovereign rights for the purpose of exploring it and exploiting its natural resources (Art. 77, para. 1, UNCLOS). These resources "consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil" (Art. 77, para. 2, UNCLOS).

b) The seabed located beyond the limits of the continental shelf is called the **Area** and is subject to the special regime of the common heritage of mankind (Part XI UNCLOS).

3. The Meaning of "Beyond National Jurisdiction" in the Case of the Mediterranean Sea

The general rules of international law on the regime and extent of marine spaces within and beyond national jurisdiction apply also to the Mediterranean Sea. However, in this semi-enclosed sea[7] surrounded by twenty-one coastal States[8] a number of peculiarities must be taken into account that make the present jurisdictional picture particularly complex.

Not all the coastal States have so far decided to establish an exclusive economic zone.

Some coastal States have established beyond the territorial sea *sui generis* zones, such as a **fishing zone**[9] or an **ecological protection zone**[10][11]. While neither of them is mentioned in the UNCLOS, they are not prohibited either. They include some of the rights that can be exercised within the exclusive economic zone. This sort of fragmentation of rights is compatible with international law, for the simple reason that the right to do less can be considered as implied in the right to do more (*in maiore stat minus*).

Since for geographical reasons no point in the Mediterranean is located at a distance of more than 200 n.m. from the closest land or island, any waters beyond the limits of national jurisdiction (high seas) would disappear if all the coastal States decided to establish their own exclusive economic zones (or fishing zones or ecological protection zones);

For the same geographical reasons recalled above, all Mediterranean seabed already falls under national jurisdiction, belonging to the continental shelf of one or another coastal State, and no seabed having the legal condition of the Area does exist in the Mediterranean.

Only a part of all existing maritime boundaries have so far been agreed upon by the opposite or adjacent Mediterranean States concerned[12].

The peculiarities referred above make the Mediterranean a special case. It can be considered a sea in transition towards an exclusive economic zone regime.

For practical purposes, given the peculiarities mentioned above and the transitional phase of many Mediterranean coastal waters and the number of unsettled maritime boundaries, the present

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[7] The Mediterranean is a semi-enclosed sea under the definition provided by Art. 122 UNCLOS: "For the purposes of this Convention, 'enclosed or semi-enclosed sea' means a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States".

[8] Spain, France, Monaco, Italy, Malta, Slovenia, Croatia, Bosnia and Herzegovina, Montenegro, Albania, Greece, Cyprus, Turkey, Syria, Lebanon, Israel, Egypt, Libya, Tunisia, Algeria, Morocco. The United Kingdom (as far as the sovereign base areas of Akrotiri and Dhekelia are concerned) would add up a 22nd coastal State. This paper does not consider the Black Sea, a semi-enclosed sea connected to the Mediterranean by the straits of Dardanelles and Bosphorus.

[9] Zones were the coastal States exercise jurisdiction over the conservation and exploitation of living resources.

[10] Zones were the coastal States exercise jurisdiction over the preservation and protection of the marine environment.

[11] *Infra*, para. 3.A.

[12] *Infra*, para. 3.B.

report will understand the expression “MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined” in a particular meaning adapted to the Mediterranean, as referred to those MPAs that are totally or partially located beyond the limits of the territorial seas of the relevant coastal States. Such MPAs could include not only areas of high seas, in those waters where no coastal zones beyond the territorial sea have been declared, but also areas that are subject to different sorts of national jurisdiction, falling, as the case may be, under the regime of the continental shelf, the exclusive economic zone, the fishing zone or the ecological protection zone. The existence of areas of national jurisdiction or that in the near future can be proclaimed as falling under national jurisdiction should always be taken into account when envisaging the rules applying to the MPAs in question.

3.A. The Coastal Zones Established by the Mediterranean States

The Mediterranean coastal States have so far established a variety of national coastal zones beyond the territorial sea. While some States have refrained from exercising the right granted by the UNCLOS to proclaim an exclusive economic zone, others have created such a zone. Others again have chosen to claim only certain rights comprised in the exclusive economic zone regime, such as those relating to fisheries or to the protection of the marine environment. The current picture of national coastal zones is summarized hereunder.

(a) As regards internal waters, several Mediterranean States (Albania, Algeria, Croatia, Cyprus, Egypt, France, Italy, Libya, Malta, Morocco, Montenegro, Spain, Tunisia and Turkey) apply legislation measuring the breadth of the territorial sea from straight baselines joining specific points located on the mainland or islands. Historical bays are claimed by Italy (Gulf of Taranto) and Libya (Gulf of Sidra).

(b) Most Mediterranean States have established a 12-mile territorial sea. The exceptions are the United Kingdom (3 n.m. claimed for the Sovereign Base Areas of Akrotiri and Dhekelia on the island of Cyprus), Greece (6 n.m.) and Turkey (6 n.m. in the Aegean Sea, but 12 n.m. elsewhere).

(c) A number of Mediterranean States, such as Algeria, Cyprus, France, Italy and Tunisia, claim to exercise rights in the field of archaeological and historical objects found at sea within the 24-mile limit from the baselines of the territorial sea (so-called archaeological contiguous zone; Art. 303, para. 2, UNCLOS).

(d) Five States have declared a fishing zone beyond the limit of the territorial sea.

Based on legislation dating back to 1951 (Decree of the Bey of 26 July 1951) which was subsequently confirmed (Laws No. 63-49 of 30 December 1963 and No. 73-49 of 2 August 1973), Tunisia has established along its southern coastline (from Ras Kapoudia to the frontier with Libya) a fishing zone delimited according to the criterion of the 50-meter isobath[13].

[13] The recent 2005 legislation on the Tunisian exclusive economic zone does not affect the fishing zone. The area where the Tunisian fishing zone is located is considered by Italy as a high seas zone of biological protection where fishing by Italian vessels or nationals is prohibited (Decree of 25 September 1979).

In 1978, Malta established a 25-mile exclusive fishing zone (Territorial Waters and Contiguous Zone Amendment Act of 18 July 1978). Legislative Act No. X of 26 July 2005 provides that fishing waters may be designated beyond the limits laid down in the 1978 Act and that jurisdiction in these waters may also be extended to artificial islands, marine scientific research and the protection and preservation of the marine environment.

In 1994, Algeria created a fishing zone whose extent is 32 n.m. from the maritime frontier with Morocco to Ras Ténés and 52 n.m. from Ras Ténés to the maritime frontier with Tunisia (Legislative Decree No. 94-13 of 28 May 1994).

In 1997, Spain established a fishing protection zone in the Mediterranean (Royal Decree 1315/1997 of 1 August 1997, modified by Royal Decree 431/2000 of 31 March 2000). The zone is delimited according to the line which is equidistant between Spain and the opposite or adjacent coasts of Algeria, Italy and France[14].

In 2005 Libya established a fisheries protection zone whose limits extend seaward for a distance of 62 n.m. from the external limit of the territorial sea (General People's Committee Decision No. 37 of 24 February 2005), according to the geographical co-ordinates set forth in General People's Committee Decision No. 105 of 21 June 2005.

(e) Three States have adopted legislation for the establishment of an ecological protection zone.

In 2003, France adopted Law No. 2003-346 of 15 April 2003 which provides that an ecological protection zone may be created. In this zone France exercises only some of the powers granted to the coastal State under the exclusive economic zone regime, namely the powers relating to the protection and preservation of the marine environment, marine scientific research and the establishment and use of artificial islands, installations and structures. A zone of this kind was established along the French Mediterranean coast by Decree No. 2004-33 of 8 January 2004 which specifies the co-ordinates to define the external limit of the zone. The French zone partially overlaps with the Spanish fishing zone.

In 2005, Slovenia provided for the establishment of an ecological protection zone (Law of 4 October 2005)[15].

In 2006, Italy adopted legislation for ecological protection zones (Law No. 61 of 8 February 2006) to be established by decrees. No such decrees have been adopted so far. Within the ecological zones, Italy will exercise powers which are not limited to the prevention and control of pollution, but extend also to the protection of marine mammals, biodiversity and the archaeological and historical heritage.

f) One Mediterranean State has established a zone for both fishing and ecological purposes.

On 3 October 2003, the Croatian Parliament adopted a "decision on the extension of the jurisdiction of the Republic of Croatia in the Adriatic Sea" and proclaimed "the content of the exclusive economic zone related to the sovereign rights for the purpose of exploring and exploiting,

[14] No fishing zone was established as regards the Spanish Mediterranean coast facing Morocco.

[15] Croatia has objected to the right of Slovenia to establish national coastal zones beyond the territorial sea.

conserving and managing the living resources beyond the outer limits of the territorial sea, as well as the jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment, whereby the ecological and fisheries protection zone of the Republic of Croatia is established as of today" (Art. 1). However, on 3 June 2004, the Parliament amended the 2003 decision in order to postpone implementation of the ecological and fishing zone with regard to Member States of the European Union.

(g) Seven States have established, or officially announced the establishment of, an exclusive economic zone.

In 1981, Morocco created a 200-mile exclusive economic zone (Dahir No. 1-81-179 of 8 April 1981), without making any distinction between the Atlantic and the Mediterranean coasts.

Upon ratifying the UNCLOS on 26 August 1983, Egypt declared that it "will exercise as from this day the rights attributed to it by the provisions of parts V and VI of the (...) Convention (...) in the exclusive economic zone situated beyond and adjacent to its territorial sea in the Mediterranean Sea and in the Red Sea".

By Law No. 28 of 19 November 2003 Syria provided for the establishment of an exclusive economic zone.

Cyprus proclaimed an exclusive economic zone under the Exclusive Economic Zone Law adopted on 2 April 2004[16].

Tunisia established an exclusive economic zone under Law No. 2005-60 of 27 June 2005. The modalities for the implementation of the law will be determined by decree.

Under a declaration of 27 May 2009 and a decision of 31 May 2009, No. 260, Libya proclaimed an exclusive economic zone. The external limit of the zone will be determined by agreements with the neighbouring States concerned.

By a note of 14 July 2010 Lebanon deposited with the Secretary-General of the United Nations the charts and lists of geographical coordinates of points defining the southern limit of its exclusive economic zone.

3.B. Maritime Boundaries

So far only a limited number of the required delimitation treaties have been concluded by adjacent or opposite Mediterranean States and not all of these instruments have entered into force[17]. Several instances of maritime boundaries are still unsettled in the Mediterranean, including some that are quite complex to handle due to the peculiar geographical configuration of the coastlines of the States concerned (concave or convex coastlines, islands located on the so-called wrong side of the median line, coastal enclaves, etc.). In certain cases, where the interested States have agreed on a boundary relating to their continental shelves, the question is still open on

[16] The law was given a retroactive application, entering into force on 21 March 2003.

[17] See Scovazzi, *Maritime Delimitations in the Mediterranean Sea*, in *Cursos Euromediterraneos Bancaja de Derecho Internacional*, 2004-2005, p. 349.

whether the same boundary should apply to the superjacent waters. In chronological order the boundaries agreed upon are the following.

On 8 January 1968 Italy and Yugoslavia signed in Rome an Agreement concerning the delimitation of the continental shelf[18]. Croatia and Montenegro have succeeded to the former Yugoslavia in the agreement.

On 20 August 1971 Italy and Tunisia signed in Tunis an Agreement relating to the delimitation of the continental shelf[19].

On 19 February 1974 Italy and Spain signed in Madrid an Agreement relating to the delimitation of the continental shelf[20].

On 10 November 1975 Italy and Yugoslavia signed in Osimo a Treaty which settled the problem of the land boundary between the two countries after World War II and completed the maritime boundary, providing for the delimitation of their territorial seas (Annex V)[21]. Slovenia and Croatia have succeeded to the former Yugoslavia in the treaty.

On 24 May 1977 Greece and Italy signed in Athens an agreement on the delimitation of the zones of the continental shelf[22].

On 16 February 1984 France and Monaco signed in Paris an Agreement on maritime delimitation[23] that sets forth the boundary of the territorial seas and the other maritime spaces of the two adjacent countries, one of which is totally enclosed by the other.

On 10 November 1986 Libya and Malta signed in Valletta an Agreement[24] for the implementation of the judgment rendered by the International Court of Justice on 3 June 1985 in the case between them on the *Continental Shelf*.

On 28 November 1986 France and Italy signed in Paris a Convention relating to the delimitation of the territorial seas in the area of the Mouths of Bonifacio[25].

On 8 August 1988 Libya and Tunisia signed in Benghazi an Agreement[26] to implement the judgment rendered by the International Court of Justice on 24 February 1982 in the case between them on the *Continental Shelf*.

On 18 December 1992 Albania and Italy signed in Tirana an Agreement for the delimitation of the continental shelf of each of the two countries[27].

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[18] It entered into force on 21 January 1970.
[19] It entered into force on 6 December 1978.
[20] It entered into force on 16 November 1978.
[21] It entered in force on 3 April 1977.
[22] It entered into force on 12 November 1980.
[23] It entered into force on 22 August 1985.
[24] It entered into force on 11 December 1987.
[25] It entered into force on 15 May 1989.
[26] It entered into force on 11 April 1989.

On 30 July 1999 Bosnia-Herzegovina and Croatia signed in Sarajevo a treaty on the State border between the two countries[28]. It also provides for the delimitation between the internal waters of Croatia and the territorial sea of Bosnia-Herzegovina that, due to the coastal configuration, is enclosed within the Croatian internal waters.

On 11 February 2002 Algeria and Tunisia signed in Algiers an Agreement on the provisional understanding on the delimitation of maritime boundaries between the two States, pending the conclusion of a final agreement.

On 17 February 2003 Cyprus and Egypt signed in Cairo an Agreement on the Delimitation of the Exclusive Economic Zone[29].

On 17 January 2007 Cyprus and Lebanon signed in Beirut an Agreement on the delimitation of their exclusive economic zone[30].

On 27 April 2009 Albania and Greece signed in Tirana an Agreement on the delimitation of their respective continental shelf areas and other maritime zones to which they are entitled under international law[31].

On 4 November 2009 Croatia and Slovenia concluded an arbitration agreement, asking the arbitral tribunal to determine the course of the maritime and land boundary between them, the Slovenia's junction to the high seas and the regime for the use of the relevant maritime areas[32].

On 17 December 2010 Cyprus and Israel signed in Nicosia an Agreement on the Delimitation of their exclusive economic zones[33].

Despite the many unsettled boundaries, there is no doubt that Mediterranean States are entitled to establish exclusive economic zones whenever they wish to do so[34]. International law does not prevent States bordering seas of limited dimensions from proclaiming their own exclusive economic zones, provided that maritime boundaries are not unilaterally imposed by one State on its adjacent or opposite neighbours[35].

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[27] It entered into force on 26 February 1999.

[28] It does not seem to have entered into force.

[29] It entered into force on 7 April 2004.

[30] It does not seem to have entered into force.

[31] It is not likely to enter into force. On 15 April 2010 the Constitutional Court of Albania found that the Agreement is incompatible with the Albanian Constitution.

[32] It does not seem to have entered into force.

[33] It does not seem to have entered into force.

[34] In fact, exclusive economic zones have been proclaimed in other enclosed or semi-enclosed seas, such as the Baltic, the Caribbean and the Black Sea.

[35] As remarked by the International Court of Justice in the judgment of 18 December 1951 on the *Fisheries* case (United Kingdom v. Norway), "the delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal State as expressed in its municipal law. Although it is true that the act of delimitation is necessariliy a unilateral act, because only the coastal State is comptent to undertake it, the validity of the delimitation with regard to other States depends upon international law" International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders,* 1951, p. 20).

PART II
MARINE PROTECTED AREAS AT THE WORLD AND REGIONAL LEVEL

4. The Notion of Marine Protected Area

Vulnerable or rare marine ecosystems present various characteristics and are found in areas which have different legal conditions. While wetlands, lagoons or estuaries are located along the coastal belt, other kinds of ecosystems, such as seamounts, hydrothermal vents or submarine canyons are also found at a certain distance from the coast, in areas located beyond the limit of the territorial sea or the exclusive economic zone.

For the purposes of this report, an MPA can generally be understood as an area of marine waters or seabed that is delimited within precise boundaries (including, if appropriate, buffer zones) and that is granted a special protection regime because of its significance for a number of reasons (ecological, biological, scientific, cultural, educational, recreational, etc.)[36].

This broad notion of MPA does not substantially depart from the definition of "protected area" given by the Art. 2 of the Convention on Biological Diversity ("a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives") and from the definition of "marine and coastal protected areas" that has been proposed by the Ad Hoc Technical Group on Marine and Coastal Protected Areas, established within the framework of the same convention:

> "'Marine and coastal protected areas' means any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of protection than its surroundings".

The World Conservation Union (IUCN) has defined a protected area as "an area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources and managed through legal or other effective means". It has developed a number of protected area management categories, all applicable to the marine environment (Strict Nature Reserve: protected area managed mainly for science; Wilderness Area: protected area managed mainly for wilderness protection; National Park: protected area managed mainly for ecosystem protection and recreation; Natural Monument: protected area managed mainly for conservation of specific natural features; Natural Monument: protected area managed mainly for conservation of specific natural features; Protected Landscape/Seascape: protected area managed mainly for landscape/seascape conservation and recreation; Managed Resource Protected Area: protected area managed mainly for the sustainable use of natural ecosystems).

MPAs, often included in the category of area-based management tools, are a rather flexible instrument that can be limited to those protection measures which are necessary to ensure the

[36] This definition is recalled in note 11 of Decision VII/5 (2004) on Marine and Coastal Biological Diversity adopted by the Conference of the Parties to the Convention.

prescribed objectives, without unnecessarily burdening maritime activities that can be carried out in an environmentally sustainable way[37].

5. Marine Protected Areas in Some Policy Instruments

The establishment of MPAs as a key element of marine environmental protection is linked to the most advanced concepts of environmental policy, such as sustainable development, precautionary approach, integrated coastal zone management, marine spatial planning[38], ecosystem approach and transboundary cooperation. A number of policy instruments call for action towards the establishment of such areas.

According to Agenda 21, the action programme adopted in Rio de Janeiro by the 1992 United Nations Conference on Environment and Development, States, acting individually, bilaterally, regionally or multilaterally and within the framework of the International Maritime Organization (IMO) and other relevant international organizations, should assess the need for additional measures to address degradation of the marine environment. Agenda 21 stresses the importance of protecting and restoring endangered marine species, as well as preserving habitats and other ecologically sensitive areas, both on the high seas and in the zones under national jurisdiction[39]. In particular:

> "States commit themselves to the conservation and the sustainable use of marine living resources on the high seas. To this end, it is necessary to: (...)
>
> e) Protect and restore marine species;
>
> f) Preserve habitats and other ecologically sensitive areas" (para. 17.46).
>
> "States should identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and provide necessary limitations on use in these areas, through, inter alia, designation of protected areas" (para. 17.86).

The Plan of Implementation of the World Summit on Sustainable Development (Johannesburg, 2002) confirms the need to promote the conservation and management of the ocean and "maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, including in areas within and beyond national jurisdiction" (para. 32, a). To achieve this aim, the Plan puts

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[37] For a list of measures that can be adopted in an MPA see Art. 6 of the SPA Protocol, reproduced *infra*, para. 9.C.

[38] Under the Communication by the Commission of the European Union *Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU*, doc. COM(2008) 791 final of 25 November 2008, "MSP [= Maritime Spatial Planning] is a tool for improved decision-making. It provides a framework for arbitrating between competing human activities and managing their impact on the marine environment. Its objective is to balance sectoral interests and achieve sustainable use of marine resources in line with the EU Sustainable Development Strategy. MSP should be based on the specificities of individual marine regions or sub-regions. It is a process that consists of data collection, stakeholder consultation and the participatory development of a plan, the subsequent stages of implementation, enforcement, evaluation and revision" (para. 2.1).

[39] See para. 17.75, *e*, *f*. Agenda 21 includes the exclusive economic zone among the "coastal areas" (para. 17.1).

forward the concept of a representative network of MPAs and the deadline of 2012 for its achievement. States are invited to

> "develop and facilitate the use of diverse approaches and tools, including (...) the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods (...)" (para. 32, c).

An in-depth discussion on the issue of "area-based management tools, in particular marine protected areas" took place during the 2010 session of the Ad Hoc Open-Ended Informal Working Group to Study Issues Relating to Conservation and Sustainable Use of Marine Biological Diversity beyond Areas of National Jurisdiction, established by the United Nations General Assembly. Attention was drawn to the lack of progress in meeting the commitment in the Johannesburg Plan of Implementation with respect to areas beyond national jurisdiction[40]. Several delegations noted the fundamental role of area-based management tools, including marine protected areas, in the conservation and sustainable use of marine biodiversity and in ensuring the resilience of marine ecosystems. They highlighted the importance of these tools, as part of a range of management options, in implementing precautionary and ecosystem approaches to the management of human activities and in integrating scientific advice on cross-sectoral and cumulative impacts[41]. In particular,

> "it was underlined that management arrangements should be based on science, including considerations of threats and ecological values. Several delegations emphasized the need for flexibility in the selection of area-based management tools, and the need to avoid a 'one-size-fits-all' approach, recognizing regional and local characteristics. In this regard, some delegations noted that the designation of marine protected areas did not require closing those areas to all activities, or particular activities, but rather managing those areas to ensure that ecological values were maintained. A suggestion was made that fisheries management measures, such as the protection of spawning stocks and the establishment of catch or fishing limits for specific areas could be considered a form of marine protected area.
>
> (…) The view was expressed that marine protected areas needed to have: clearly delineated boundaries; a strong causal link between the harm being addressed and management measures, which should be flexible and adaptive; and implementation, compliance and enforcement measures consistent with international law, as reflected in the Convention [= the UNCLOS] (…)[42]".

The Working Group recommended to the United Nations General Assembly to recognize the work of competent international organizations related to the use of area-based management tools and the importance of establishing MPAs, as well as to call upon States to work through such organizations towards the development of a common methodology for the identification and selection of marine areas that may benefit from protection[43].

The General Assembly, by Resolution 65/37 on "Oceans and the Law of the Sea", adopted on 7 December 2010, reaffirmed

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[40] U.N. doc. A/65/8 of 17 March 2010, para. 60.
[41] *Ibidem*, para. 58.
[42] *Ibidem*, paras. 66 and 67.
[43] *Ibidem*, paras. 17 and 18.

> "the need for States to continue and intensify their efforts, directly or through competent international organizations, to develop and facilitate the use of diverse approaches and tools for conserving and managing vulnerable marine ecosystems, including the establishment of marine protected areas, consistent with international law, as reflected in the Convention [= the UNCLOS], and based on the best scientific information available, and the development of representative networks of any such marine protected areas by 2012" (para. 177)[44].

Recent studies and discussions emphasize that a number of management and policy options can be used for the governance of marine areas beyond national jurisdiction, such as area-based management tools, marine spatial planning, the selection of pilot sites for the development of management plans based on the ecosystem approach, assessment processes for cumulative impacts of human activities with a potential for significant adverse impacts on the marine environment[45], implementation of the precautionary approach by placing the burden of proof on those who propose a specific activity to show that it will not cause significant adverse impacts and that measures are in place to prevent such impacts[46].

In Resolution 65/37 the United Nations General Assembly also noted

> "the work of States, relevant intergovernmental organizations and bodies (…) in the assessment of scientific information on, and compilation of ecological criteria for the identification of, marine areas that require protection (…)" (para. 178).

Yet in some frameworks, the process for the identification on the basis of appropriate criteria of a network of marine areas that require protection beyond national jurisdiction is in a quite advanced phase[47]. One MPA is obviously better than nothing but ideally MPAs should not be established in a vacuum and in isolation. The fluid nature of the marine environment makes it particularly important to integrate MPAs within a comprehensive long-term approach to planning and management of activities that affect fragile coastal and marine ecosystems. MPAs should be selected and established within a logical and integrated network, in which the various components aim at protecting different portions of biological diversity. Protected area systems or networks offer advantages in comparison to individual MPAs because they can encompass representative examples of regional biodiversity as well as an appropriate number and spread of critical habitats. This is especially useful for migratory species and for straddling stocks moving between waters subject to the jurisdiction of neighbouring countries.

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[44] Probably in view of the fact that the target is far from being achieved, the General Assembly also encouraged "States to further progress towards the 2012 target for the establishment of marine protected areas, including representative networks" and called "upon States to further consider options to identify and protect ecologically or biologically significant areas, consistent with international law and on the basis of the best available scientific information" (para. 179).

[45] See the *Report of the Expert Workshop on Scientific and Technical Aspects Relevant to Environmental Impact assessment in Marine Areas beyond National Jurisdiction*, doc. UNEP/CBD/EW-EIAMA/2 of 25 January 2010.

[46] See *Workshop on Governance of Marine Areas beyond National Jurisdiction: Management Issues and Policy Options – Executive Summary*, Singapore, 2008.

[47] For what has been done in this regard within the framework of the Convention on Biological Diversity, the Food and Agriculture Organization, the North-East Atlantic and the Mediterranean see *infra*, respectively paras. 6.B, 6.A., 6.D and 8.A.

6. The Legal Basis for Marine Protected Areas

The policy instruments that call for the establishment of marine protected areas beyond the limits of national jurisdiction have not been adopted in a legal vacuum. Such an action is already required by a number of obligations that are today already binding according to both customary international law and treaties in force for many States[48], as well as, for its Member States, to the legislation adopted within the European Union.

6.A. Customary International Law

It would be a mistake to think that customary international law and the traditional principle of freedom of the sea, which is applicable on the high seas and, for some of its aspects, within the exclusive economic zones, become insurmountable obstacles against the establishment and management of MPAs beyond the limit of the territorial sea[49]. The freedom of the high seas is not unlimited and, according to Art. 87, para. 1, UNCLOS, "is exercised under the conditions laid down by this Convention and by other rules of international law".

All States are under a general obligation, arising from customary international law and restated in Art. 192 UNCLOS, "to protect and preserve the marine environment". This obligation applies everywhere in the sea, including the high seas. Accordingly, under Art. 194, para. 5, UNCLOS, the measures taken to protect and preserve the marine environment

> "shall include those 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".

Also this obligation has a general scope of application. It covers any kind of vulnerable marine ecosystems and species, wherever they are located. It goes without saying that a typical measure to protect such ecosystems and species is the establishment of an MPA.

According to another general obligation, arising from customary international law and reflected in Art. 197 UNCLOS,

> "States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features".

The concept of an obligation to cooperate is not devoid of legal meaning. It implies a duty to act in good faith in taking into account the positions of other interested States and in entering into negotiations with them with a view to arriving at an agreement. As remarked by the International Court of Justice in the judgement of 20 February 1969 on the *North Sea Continental Shelf* cases,

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[48] See, in general, Secretariat of the Convention on Biological Diversity, CBD Technical Series No. 19, *The International Legal Regime of the High Seas and the Seabed beyond the Limits of National Jurisdiction and Options for Cooperation for the Establishment of Marine Protected Areas (MPAs) in Marine Areas beyond the Limits of National Jurisdiction*, Study prepared by L. Kimball, November 2005.

[49] See Scovazzi, *Marine Protected Areas on the High Seas: Some Legal and Policy Considerations*, in *International Journal of Marine and Coastal Law*, 2004, p. 1; Molenaar, *Managing Biodiversity in Areas beyond National Jurisdiction*, in *International Journal of Marine and Coastal Law*, 2007, p. 89.

States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[50]. According to the order rendered on 3 December 2001 by the International Tribunal for the Law of the Sea in the *MOX Plant* case, "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"[51]. *Mutatis mutandis*, it can be concluded that all States are bound to act in good faith in discussions and negotiations in order to address the threats and risks to vulnerable marine ecosystems, to preserve marine biodiversity and to adopt effective measures to achieve the required results.

Any principle, including the principle of freedom of the sea, is to be understood in relation to the evolution of legal rules and in the light of the peculiar circumstances under which it should apply. This principle was developed by the Dutch scholar Hugo Grotius at the beginning of the 17th century[52]. At that time, the stake was the right of the European powers to occupy the newly discovered territories in Asia and the Americas. When they engaged in their learned elaborations, neither Grotius and his followers nor their opponents who pleaded for the sovereignty of the sea could have in mind the questions posed by supertankers, ships carrying hazardous substances, off-shore drilling, mining for polymetallic nodules, fishing with driftnets and many other activities and means which can today harm the marine environment. This obvious remark leads to an equally obvious consequence. We cannot today use the same concepts that Grotius used four centuries ago and give them the same intellectual and legal strength that Grotius gave them.

Today also the concept of freedom of the sea is to be understood in the context of the present range of marine activities and in relation to all the potentially conflicting uses and interests taking place in marine spaces. The needs of navigation and the other internationally lawful uses of the sea are still important elements to be taken into consideration. But they have to be balanced with other interests, in particular those which have a collective character, as they belong to the international community as a whole, such as the protection of the marine environment and the sustainable exploitation of marine living resources. Today it cannot be held that a State has a right to engage into a specific marine activity simply because it enjoys freedom of the sea, without being ready to consider the different views, if any, of the other interested States and to enter into negotiations to settle the conflicting interests.

The trend towards the weakening of the traditional principle of freedom of the sea in order to duly take into account also other interests and concerns, is supported by several instances in the present evolutionary stage of international law of the sea. The case of fisheries is particularly significant in this regard. Arts. 117 (Duty of States to adopt with respect to their nationals measures for the conservation of the living resources of the high seas) and 118 (Cooperation of States in the conservation and management of living resources) UNCLOS, which correspond to customary

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[50] International Court of Justice, *Reports of Judgments, Advisory Opinions and Orders*, 1969, para. 85 of the judgment.

[51] Para. 82 of the order. Part XII of UNCLOS deals with "protection and preservation of the marine environment".

[52] Anonymous (but Grotius), Mare liberum sive de jure, quod Batavis competit ad Indicana commercia dissertatio, 1609.

international law[53], set forth an obligation to cooperate through the adoption of appropriate measures to prevent the depletion of living marine resources of the high seas:

> "All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas".
>
> "States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end".

The obligation to act for the conservation of living resources and to "take measures which are designed, on the best scientific evidence available to the States concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield" (Art. 119, para. 1, UNCLOS), does limit the traditional freedom of fishing on the high seas. But this was felt as necessary to achieve a general objective pertaining to the international community as a whole. The measures of restraint to be adopted in this regard have a technical character and different forms, such as closed areas, closed seasons, quotas, minimum size of nets, etc., and are mostly needed in case of vulnerable marine ecosystems. In particular, the designation of an area where fishing activities are prohibited or restricted can be considered as an area-based management tool. This kind of measures belongs to the same category of measures that includes also MPAs.

In 2008 the Food and Agriculture Organization (FAO) developed the International Guidelines for the Management of Deep-Sea Fisheries in the High Seas in order to assist States and regional fisheries management organizations (RMFOs) and arrangements in sustainably managing fisheries that occur in areas beyond national jurisdiction[54]. The Guidelines also include standards and criteria for identifying vulnerable marine ecosystems in areas beyond national jurisdiction and identify the potential impacts of fishing activities on such ecosystems, in order to facilitate the adoption and the implementation of conservation and management measures by RMFOs and flag States. According to the Guidelines, States and RFMOs should, based on the results of assessments, adopt conservation and management measures to achieve long-term conservation and sustainable use of deep-sea fish stocks, ensure adequate protection and prevent significant adverse impacts on vulnerable marine ecosystems (para. 70)[55]. Such measures include, *inter alia*, temporal and spatial restrictions or closures (para. 71).

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[53] An obligation to ensure the conservation of the resources on the high seas was already provided for in the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958).

[54] The Guidelines have been developed "for fisheries that occur in areas beyond national jurisdiction and have the following characteristics: i. the total catch (everything brought up by the gear) includes species that can only sustain low exploitation rates; and ii. the fishing gear is likely to contact the seafloor during the normal course of fishing operations" (para. 8).

[55] "When determining the scale and significance of an impact, the following six factors should be considered: i. the intensity or severity of the impact at the specific site being affected; ii. the spatial extent of the impact relative to the availability of the habitat type affected; iii. The sensitivity/vulnerability of the ecosystem to the impact; iv. the ability of an ecosystem to recover from harm, and the rate of such recovery; v. the extent to which ecosystem functions may be altered by the impact; and vi. the timing and duration of the impact relative to the period in which a species needs the habitat during one or more of its life-history stages" (para. 18).

The close link between protection of the marine environment and sustainable management of marine living resources is confirmed by decision X/31 (protected areas), adopted in 2010 by the Conference of the Parties to the Convention on Biological Diversity that encourages Parties to establish marine protected areas for conservation and management of biodiversity as the main objective and, when in accordance with management objectives of protected areas, as fisheries management tools.

6.B. Treaty Law: The World Level

The importance of MPAs, as a means for the protection of the marine environment, is strengthened by the multilateral treaties which, besides the already mentioned UNCLOS[56], encourage the parties to create such zones. These treaties have either a global or a regional sphere of application. Only some examples are hereunder given.

a) Under the Convention for the Regulation of Whaling (Washington, 1946), the International Whaling Commission (IWC) may adopt regulations with respect to the conservation and utilization of whale resources, fixing, *inter alia*, "open and closed waters, including the designation of sanctuary areas" (Art. V, para. 1). Sanctuaries where commercial whaling is prohibited were established by the IWC in the Indian Ocean (1979) and the Southern Ocean (1994). They comprise extremely large extents of high seas waters, where whaling for commercial purposes is prohibited[57].

b) The International Convention for the Prevention of Pollution from Ships, called MARPOL (London, 1973, amended in 1978) provides for the establishment of special areas where particularly strict standards are applied to discharges from ships. Special areas provisions are contained in Annexes I (Regulations for the Prevention of Pollution by Oil), II (Regulations for the Control of Pollution by Noxious Substances in Bulk) and V (Regulations for the Prevention of Pollution by Garbage from Ships) to the MARPOL[58]. Special areas, which are listed in the relevant annexes, may include also the high seas. The whole Mediterranean Sea area is a special area for the purposes of Annexes I and V.

A set of Guidelines for the Identification of Particularly Sensitive Sea Areas (PSSAs) were adopted on 6 November 1991 by the Assembly of the International Maritime Organization (IMO) under Resolution A.720(17), revised by Resolutions A.927(22) of 29 November 2001 and A.982(24) of 1 December 2005. Procedures for the identification of PSSAs and the adoption of associated protective measures were set forth under IMO Assembly Resolution A.885(21) of 25 November 1999[59]. A PSSA is defined "as an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons

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[56] *Supra*, para. 6.A.

[57] It is regrettable that the prohibition does not cover whaling for scientific purposes.

[58] For example, under Regulation 1, para. 10, of Annex I, "special area means a sea area where for recognized technical reasons in relation to its oceanographical and ecological condition and to the particular character of its traffic the adoption of special mandatory methods for the prevention of sea pollution by oil is required".

[59] The new procedures supersede those contained in the annex to Resolution A.720(17).

and which may be vulnerable to damage by international maritime activities". It is intended to function as "(…) a comprehensive management tool at the international level that provides a mechanism for reviewing an area that is vulnerable to damage by international shipping and determining the most appropriate way to address that vulnerability"[60].

To be identified as a PSSA, an area should meet at least one of eleven ecological criteria (uniqueness or rarity; critical habitat; dependency; representativity; diversity; productivity; spawning or breeding grounds; naturalness; integrity; vulnerability; bio-geographic importance), three social, cultural and economic criteria (economic benefit; recreation; human dependency) or three scientific and educational criteria (research; baseline and monitoring studies; education). In addition, the area should be at risk from international shipping activities, taking into consideration vessel traffic (operational factors; vessel types; traffic characteristics; harmful substances carried) and natural factors of hydrographical, meteorological and oceanographic character. The 2005 revised PSSAs guidelines specify that at least one of the relevant criteria should be present in the entire proposed PSSA, though this does not have to be the same criterion throughout the area. Cultural heritage has been reinstated as a criterion under the category of "social, cultural and economic criteria".

PSSAs may be located in or beyond the limits of the territorial sea. They are identified by the Marine Environment Protection Committee of IMO on proposal by one or more member States and under a procedure which takes place at the multilateral level. PSSA proposals should be accompanied by proposals for associated protective measures, identifying the legal basis for each measure. Associated protective measures that may be taken in PSSAs include those available under IMO instruments and cannot be extended to fields different from shipping. They encompass the following options: designation of an area as a Special Area under MARPOL Annexes I, II, V and VI; adoption of ships' routeing systems under the 1974 International Convention for the Safety of Life at Sea, including areas to be avoided, that is areas within defined limits in which either navigation is particularly hazardous or it is exceptionally important to avoid casualties and which should be avoided by all ships, or by certain classes of ships; reporting systems near or in the area; other measures, such as compulsory pilotage schemes or vessel traffic management systems.

No PSSAs have so far been established in the Mediterranean.

c) The United Nations Convention on Biological Diversity (Rio de Janeiro, 1992) sets out a series of measures for *in-situ* conservation. Parties are required, as far as possible and as appropriate, to "establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity" (Art. 8, *a*), to "develop, where necessary, guidelines for the selection, establishment and management of protected areas where special measures need to be taken to conserve biological diversity" (Art. 8, *b*), and to "regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use" (Art. 8, *c*).

As to its territorial scope, the convention applies, in relation to each Party,

[60] Guidance Document for Submitting PSSA Proposals to IMO (MEPC Cir/398).

(a) in the case of components of biological diversity, in areas within the limits of its national jurisdiction; and

(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 its national jurisdiction or beyond the limits of national jurisdiction"[61].

Within the framework of the convention, a Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya, 2010) was recently adopted. Under the protocol,

"benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention. Such sharing shall be upon mutually agreed terms" (Art. 5, para. 1).

For the time being it is not clear whether and, if so, to what extent the protocol can apply to future activities of exploitation of the genetic resources found beyond national jurisdiction[62].

Several decisions adopted by the parties to the convention underline the importance of marine protected areas as one of the essential tools and approaches in the conservation and sustainable use of biodiversity, including marine genetic resources, and provide detailed guidance to the States concerned.

In 1995, the Parties agreed on a programme of action to implement the convention in marine and coastal ecosystems, called Jakarta Mandate on Marine and Coastal Biological Diversity**.** It was reviewed and updated in 2004 (Decision VII/5 on Marine and Coastal Biological Diversity). It provides guidance on integrated marine and coastal area management, the sustainable use of living resources and marine and coastal protected areas. Annex II (Guidance for the Development of a National Marine and Coastal Biodiversity Management Framework) to Decision VII/5 recommends that the legal or customary frameworks of marine and coastal protected areas clearly identify prohibited activities contrary to the objectives of such areas, as well as activities that are allowed, with clear restrictions or conditions to ensure that they will not be contrary to the MPA's objectives and a decision-making process for all other activities (para. 6). Under Appendix 3 (Elements of a Marine and Coastal Biodiversity Management Framework) to the same decision, integrated networks of marine and coastal protected areas should consist of marine and coastal protected areas, where threats are managed for the purpose of biodiversity conservation or sustainable use and where extractive uses may be allowed, as well as of representative marine

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[61] Under Art. 22, para. 2, "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea".

[62] These activities seem quite promising where certain particular marine ecosystems occur. The remote environment of the deep seabed supports biological communities that present unique genetic characteristics. Some animal communities live in the complete absence of sunlight in the seabed where warm water springs from tectonically active areas (so called hydrothermal vents). Several species of microorganisms, fish, crustaceans, polychaetes, echinoderms, coelenterates and molluscs have been found in hydrothermal vent areas. These communities, which do not depend on plant photosynthesis for their survival, rely on specially adapted micro-organisms able to synthesize organic compounds from the hydrothermal fluid of the vents (chemosyntesis). The ability of some deep seabed organisms to survive extreme temperatures (thermophiles and hyperthermofiles) and other extreme conditions (extremophiles) makes their genes of great interest to science and industry.

and coastal protected areas where extractive uses are excluded and other significant human pressures are removed or minimized, to enable the integrity, structure and functioning of ecosystems to be maintained or recovered (para. 5).

In 2006 the Conference of the Parties (Decision VIII/24 on protected areas) recognized that

> "marine protected areas are one of the essential tools to help achieve conservation and sustainable use of biodiversity in marine areas beyond the limits of national jurisdiction, and that they should be considered as part of a wider management framework consisting of a range of appropriate tools, consistent with international law and in the context of best available scientific information, the precautionary approach and ecosystem approach; and that application of tools beyond and within national jurisdiction need to be coherent, compatible and complementary and without prejudice to the rights and obligations of coastal States under international law" (para. 38).

In 2008 the Conference of the Parties (Decision IX/20 on marine and coastal biodiversity) adopted a set of "Scientific criteria for identifying ecologically or biologically significant marine areas in need of protection in open waters and deep-sea habitats" (Annex I; so-called CBD EBSA criteria), namely "uniqueness or rarity"[63], "special importance for lifehistory stages of species"[64], "importance for threatened, endangered or declining species and/or habitats"[65], "vulnerability, fragility, sensitivity, or slow recovery"[66], "biological productivity"[67], "biological diversity"[68] and "naturalness"[69]. The Conference also adopted the "Scientific guidance for selecting areas to establish a representative network of marine protected areas, including in open-ocean waters and deep-sea habitats" (Annex II) that lists the required network properties and components, namely "ecologically and biologically significant areas", "representativity", "connectivity", "replicated ecological features" and "adequate and viable sites". The Conference proposed "Four initial steps to be considered in the development of representative networks of marine protected areas" (Annex III), namely "scientific identification of an initial set of ecologically or biologically significant areas", "develop/chose a biogeographic habitat and/or community classification scheme", "drawing upon steps 1 and 2 above, iteratively use qualitative and/or quantitative techniques to identify sites to include in a network" and "assess the adequacy and viability of the selected sites"[70].

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[63] "Area contains either (i) unique ('the only one of its kind'), rare (occurs only in few locations) or endemic species, populations or communities, and/or (ii) unique, rare or distinct habitats or ecosystems, and/or (iii) unique or unusual geomorphological or oceanographic features".

[64] "Areas that are required for a population to survive and thrive".

[65] "Area containing habitat for the survival of and recovery of endangered, threatened, declining species or area with significant assemblages of such species".

[66] "Areas that contain a relatively high proportion of sensitive habitats, biotopes or species that are functionally fragile (highly susceptible to degradation or depletion by human activity or by natural events) or with slow recovery".

[67] "Area containing species, populations or communities with comparatively higher natural biological productivity".

[68] "Area contains comparatively higher diversity of ecosystems, habitats, communities, or species, or has higher genetic diversity".

[69] "Area with a comparatively higher degree of naturalness as a result of the lack of or low level of human-induced disturbance or degradation".

[70] An Expert workshop on scientific and technical guidance on the use of biogeographic classification systems and identification of marine areas beyond national jurisdiction in need of protection was held in 2009 in Ottawa. The report of the workshop (doc. UNEP/CBD/EW-BCS&IMA/1/2 of 22 December 2009) includes

The last Conference of the Parties, held in Nagoya 2010, noted with concern (Decision X/29 on marine and coastal biodiversity)

> "the slow progress towards achieving the 2012 target of establishment of marine protected areas, consistent with international law and based on the best scientific information available, including representative networks, and that despite efforts in the last few years, just over 1 per cent of the ocean surface is designated as protected areas, compared to nearly 15 per cent of protected-area coverage on land" (para. 4).

The Conference invited the Parties to make

> "further efforts on improving the coverage, representativity and other network properties, as identified in annex II to decision IX/20, of the global system of marine and coastal protected areas, in particular identifying ways to accelerate progress in establishing ecologically representative and effectively managed marine and coastal protected areas under national jurisdiction or in areas subject to international regimes competent for the adoption of such measures, and achieving the commonly agreed 2012 target of establishing marine and coastal protected areas, in accordance with international law, including the United Nations Convention on the Law of the Sea, and based on the best scientific information available, including representative networks" (para. 13, *a*).

6.C. Treaty law: the regional level

The obligation to co-operate applies also at the regional basis and covers a number of relevant subjects, such as protection of the marine environment, fisheries and scientific research.

Art. 123 UNCLOS confirms that international co-operation in several fields is particularly appropriate in the case of countries surrounding the same enclosed or semi-enclosed sea[71]:

> "States bordering an enclosed or semi-enclosed sea should co-operate with each other in the exercise of their rights and in the performance of their duties under this Convention. To this end they shall endeavour, directly or through an appropriate regional organization:
>
> (a) to co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea;
>
> (b) to co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;
>
> (c) to co-ordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
>
> (d) to invite, as appropriate, other interested States or international organizations to co-operate with them in the furtherance of the provisions of this article".

(Annex IV) a "scientific guidance on the identification of marine areas beyond national jurisdiction, which meet the scientific criteria in annex I to decision IX/20)".

[71] For the definition of enclosed or semi-enclosed sea see *supra*, note 7. The Mediterranean Sea fully complies with this definition.

In the specific case of MPAs, in 2010 the Conference of the Parties to the Convention on Biological Diversity by the already mentioned Decision X/29 took note

> "of the importance of collaboration and working jointly with relevant regional initiatives, organizations, and agreements in identifying ecologically or biologically significant marine areas (EBSAs), in accordance with international law, including the United Nations Convention on the Law of the Sea, in particular, in enclosed or semi-enclosed seas, among riparian countries, such as the Caspian and Black Seas, the Regional Organization for the Protection of the Marine Environment (ROPME) region, Baltic Sea, Wider Caribbean Region, Mediterranean Sea, and other similar sea areas and to promote conservation and sustainable use of biodiversity in those areas" (para. 11).

A number of treaties deal with to the establishment of MPAs in certain regional seas[72]. Some of these regional instruments apply within the areas falling under the national jurisdiction of the parties. This is, for instance, the case of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (Nairobi, 1985)[73], the Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific (Paipa, 1989)[74], the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region (Kingston, 1990)[75], the Black Sea Biodiversity and Landscape Protection Protocol (Sofia, 2002)[76].

Other regional treaties allow also the creation of MPAs on the high seas, such as in Antarctica within the framework of the Convention on Conservation of Antarctic Marine Living Resources (Canberra, 1980; CCAMLR) or of Annex V (Area protection and management) to the Protocol on Environmental Protection (Madrid, 1991) to the Antarctic Treaty. The first high seas MPA in the Antarctic region was established in November 2009 (CCAMLR Conservation Measure 91-03 on protection of the South Orkney Islands southern shelf)[77]. For the recent and very significant achievements in the establishment of MPAs beyond national jurisdiction, action taken under the OSPAR Convention deserves being particularly recalled.

6.D. The North-East Atlantic (OSPAR Convention)

The maritime areas falling under the scope of the Convention for the Protection of the Marine Environment of the North East Atlantic (Paris, 1992; OSPAR Convention)[78], which are defined as

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[72] For the Mediterranean see *infra*, para. 8.A.

[73] The Protocol was concluded within the framework of the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (Nairobi, 1985).

[74] The Protocol was concluded within the framework of the Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific (Lima, 1981).

[75] The Protocol was concluded within the framework of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (Cartagena de Indias, 1983).

[76] The Protocol was concluded within the framework of the Convention on the Protection of the Black Sea against Pollution (Bucharest, 1992).

[77] Four MPAs (West Oceania Marine Reserve, Greater Oceania Marine Reserve, Moana Marine Reserve and Western Pacific Marine Reserve) have been suggested for high seas enclaves in the Pacific Islands region. See *High Seas Pacific Marine Reserves: A Case Study for the High Seas Enclaves*, Report for Greenpeace International by E. Partridge, August 2009.

[78] The Parties to the OSPAR Convention are Belgium, Denmark, the European Union, Finland, France, Germany, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland.

those parts of the Atlantic Ocean which lie north of the 36° north latitude and between 42° west longitude and 51° east longitude (from the Strait of Gibraltar in the south, to the North Pole in the north, to Greenland in the west), include also the high seas and its seabed beyond the 200-mile limit. In 1998 Annex V concerning the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area was added to the OSPAR Convention.

The Parties to Annex V commit themselves to take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area and to restore, when practicable, marine areas which have been adversely affected. Art. 3, para. 1, *b*, ii, makes it a duty of the OSPAR Commission "to develop means, consistent with international law, for instituting protective, conservation, restorative or precautionary measures related to specific areas or sites or related to specific species or habitats".

In 2003 the Parties to the OSPAR Convention adopted Recommendation 2003/3 on a network of marine protected areas[79]. Its purpose is

> "to establish the OSPAR Network of marine Protected Areas and to ensure that by 2010 it is an ecologically coherent network of well-managed marine protected areas which will:
>
> a) protect, conserve and restore species, habitats and ecological processes which have been adversely affected by human activities;
>
> b) prevent degradation of, and damage to, species, habitats and ecological processes, following the precautionary principle;
>
> c) protect and conserve areas that best represent the range of species, habitats and ecological processes in the maritime area".

In 2010 Recommendation 2003/3 was amended by Recommendation 2010/2, based on the purpose to make further efforts "to ensure the ecological coherence of the network of marine protected areas in the North-East Atlantic, in particular through inclusion of areas in deeper water". Under the amended recommendation, Parties should

> "(…) c) contribute, as practicable, to assessments of areas beyond national jurisdiction in the North-East Atlantic which may justify selection as an OSPAR Marine Protected Area under the criteria set out in the identification and selection guidelines; and
>
> d) propose to the OSPAR Commission the areas beyond national jurisdiction that should be selected by the OSPAR Commission as components of the OSPAR Network of Marine Protected Areas" (para. 3.1).

This enabled the Parties to establish in 2010 six MPAs that regard waters or seabed located beyond national jurisdiction, namely Milne Seamount Complex Marine Protected Area, that is an area of seamounts of about 21,000 km² situated to the west of the Mid-Atlantic Ridge (Decision 2010/1), Charlie-Gibbs South Marine Protected Area, that is a fracture zone of 145,420 km² that divides the Mid-Atlantic Ridge into two sections (Decision 2010/2), Altair Seamount High Seas Marine Protected Area, that is an area of about 4,409 km² of high seas (Decision 2010/3), Antialtair

[79] During the same 2003 meeting the OSPAR Commission adopted the Guidelines of the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area and the Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area.

Seamount High Seas Marine Protected Area, that is an area of about 2,208 km² of high seas (Decision 2010/4), Josephine Seamount High Seas Marine Protected Area, that is an area of about 19,370 km² of high seas (Decision 2010/5) and MAR North of the Azores High Seas Marine Protected Area, that is an area of about 93,568 km² of high seas (Decision 2010/6). The OSPAR Parties have adopted recommendations on the management of each of the six MPAs (Recommendations from 2010/12 to 2010/17), providing that the management of human activities in the MPA should be guided by the general obligations set forth in Art. 2 of the OSPAR Convention, the ecosystem approach and the "Conservation Vision and Objectives" indicated in an annex to each recommendation[80]. The programmes and measures envisaged for the MPAs relate to the fields of awareness raising, information building, marine science, human activities that may be potentially conflicting with the conservation objectives and likely to cause a significant impact to the ecosystems. These activities are subject to environmental impact assessment or strategic environmental assessment and the relevant stakeholders are involved in the planning of new activities.

The OSPAR decisions and recommendations on MPAs are notable for the spirit of co-operation that inspires them. While two MPAs include both the high seas waters and the seabed, the other four are limited to the high seas waters superjacent to the seabed beyond 200 n.m. claimed by Portugal as being within its continental margin[81]. In this case, the goal of protecting and conserving the biodiversity and ecosystems of the waters is to be achieved in coordination with, and complementary to, protective measures taken by Portugal for the seabed. Furthermore, the OSPAR Parties should engage with third parties and relevant international organizations with a view to promoting the delivery of the conservation objectives that the OSPAR Commission has set for the MPAs and to encourage the application of the relevant programmes and measures. The decisions and recommendations on the MPAs recognize that a range of human activities occurring, or potentially occurring, in them "are regulated in the respective frameworks of other competent authorities", such as the North-East Atlantic Fisheries Commission (NEAFC), the International Commission for the Conservation of Atlantic Tunas (ICCAT), the North Atlantic Salmon Conservation Organization (NASCO), the North Atlantic Marine Mammal Commission (NAMMCO) and the International Whaling Commission (IWC), in the case of fishing; IMO, in the case of shipping; the International Seabed Authority (ISA), in the case of extraction of mineral resources (the latter organization only for the two MPAs that include the seabed). Memoranda of understanding have already been concluded in 2008 between the OSPAR Commission and NEAFC in order to promote mutual cooperation towards the conservation and sustainable use of marine biological diversity, including protection of marine ecosystems, in the North-East Atlantic[82], and in 2010 between the OSPAR Commission and the ISA, to consult on matters of mutual interest

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[80] It includes a "conservation vision" and a number of "general conservation objectives" and "specific conservation objectives". For example, in the case of Milne Seamount the latter related to the water column, the benthopelagic layer, the benthos and habitats and species of specific concern.

[81] See the UNCLOS definition of continental shelf, *supra*, para. 2.B.

[82] In the statement adopted in Bergen at their 2010 meeting, the Parties to the OSPAR Convention "welcome the decision by the North East Atlantic Fisheries Commission to close until 31 December 2015 an area almost identical to Charlie-Gibbs Fracture Zone, as well as areas coinciding with the Mid-Atlantic Ridge North of the Azores, Altair Seamount and Antialtair Seamount and other areas beyond national jurisdiction of the North-East Atlantic, to bottom fisheries in order to protect the vulnerable marine ecosystems in these areas from significant adverse impacts" (para. 30).

with a view to promoting or enhancing a better understanding and coordination of their respective activities.

A collective arrangement between competent authorities on the management of MPAs in areas beyond national jurisdiction in the OSPAR maritime area is being developed for consideration by the 2011 Meeting of OSPAR Parties.

6.E. The European Union Legislation

The European Union (EU; previously the European Community) is an international organization to which twenty-seven European States are Members. It has, *inter alia*, exclusive competence for fisheries management and conservation within EU waters and shared competence with Member States in the field of environmental protection, including the marine environment.

Directive 92/43 of 21 May 1992 on the conservation of natural habitats of wild fauna and flora (so-called Habitat Directive) is the main European Union instrument laying down biodiversity related obligations[83]. It provides for the establishment of a coherent ecological network, known as Natura 2000, which comprises “special areas of conservation” (SACs) designated by Member States in accordance with the provisions of the directive and “special protection areas” designated pursuant to Directive 79/409 of 2 April 1979 on the conservation of wild birds. Network-related measures are complemented by species-based and general conservation provisions. The Habitats Directive sets out detailed rules on SAC selection, conservation, management planning and impact assessment. One criterion for site selection relates to sites that represent outstanding examples of typical characteristics of specific biogeographical regions, including the Mediterranean. Habitats and species to be conserved through the designation of SACs are listed in Annexes I (Natural habitat types of Community interest) and II (Animal and plant species of Community interest). The latter includes several Mediterranean marine animal species, such as seals, cetaceans and the two species of marine turtle known to nest on the beaches of EU Member States and to reproduce in EU waters (*Caretta caretta* and *Chelonia mydas*). The Habitat Directive specifies that, for aquatic species that range over wide areas, SACs should be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction (Art 4, para.1).

According to preambular para. 6 of Directive 2008/56/EC of 17 June 2008, establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), the establishment of marine protected areas, including areas already designated under the Habitat Directive and under agreements to which the European Union or Member States concerned are parties, is an important contribution to the achievement of good environmental status. Art. 13, para. 4, provides that programmes of measures established pursuant to the directive “shall include spatial protection measures, contributing to coherent and representative networks of marine protected areas”.

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[83] In 2004, a special regime (Directive 2004/35 of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage) was established for compensation of environmental damage, whether direct or indirect, to species and natural habitats protected under the Habitats Directive.

The Mediterranean Sea is one of the four marine regions identified by Art. 4, para. 1, of the Marine Strategy Framework Directive. It is divided into the subregions "Western Mediterranean Sea", "Adriatic Sea", "Ionian Sea and Central Mediterranean Sea" and "Aegean-Levantine Sea". To achieve the coordination needed for the development of marine strategies, European Union Member States "shall, where practical and appropriate, use existing regional institutional cooperation structures, including those under Regional Sea Conventions, covering that marine region or subregion" (Art. 6, para. 1)[84].

7. The Question of Third States

The problem of third States is often raised as an obstacle to the implementation of measures intended to be applied in marine areas beyond the limits of national jurisdiction. In these areas, where no territorial sovereignty exists, jurisdiction is exercised according to criterion of the nationality of the ship concerned, that is by the State that has granted its flag to a certain ship. No State can impose its own legislation on the others. No State can, consequently, unilaterally establish an MPA on the high seas and claim that ships flying a foreign flag abide by the relevant provisions.

Under customary international law, as confirmed by Art. 34 of the Convention on the Law of Treaties (Vienna, 1969), "a treaty does not create either obligations or rights for a third State without its consent". This clearly means that, if the flag State of a ship is not a party to a treaty covering a marine area beyond national jurisdiction, the provisions of such a treaty do not apply to the State in question and to ships flying its flag.

In fact, the problem of third States does exist. But it is far from being an insurmountable obstacle towards the establishment of marine protected areas and, more generally, of area-based management tools beyond national jurisdiction.

A first important remark in this regard is that every State, even though it is not a party to a certain treaty, is bound by obligations arising from customary international law. As provided by Art. 38 of the above mentioned Convention on the Law of Treaties, nothing "precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such". As already recalled[85], there already are in place rules of customary international that apply to the high seas and bind any State, irrespective of its participation to the relevant treaties, to a number of general commitments, such as the protection of the marine environment, the preservation of rare or fragile ecosystems as well habitats of threatened species

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[84] For the policy aspects of the European Union action see, in general, European Commission, *Progress Report on the EU's Integrated Maritime Policy*, doc. SEC(2009) 1343 of 2010, and, as regards the Mediterranean, the Communication from the European Commission to the Council and the European Parliament *Towards an Integrated Maritime Policy for better Governance in the Mediterranean*, doc. COM(2009) 466 final of 11 September 2009. For some general considerations on international cooperation for the Mediterranean, see European Commission – EuropeAid Cooperation Office, *Study on the Current Status of Ratification, Implementation and Compliance with Maritime Treaties Applicable to the Mediterranean Sea Basin*, Part 2, December 2009, para. 10; IUCN, *Towards a better Governance of the Mediterranean*, Gland, 2010.

[85] *Supra*, para. 6.A.

or the conservation of living resources. For example, every State, even though it is not a party to any treaty prohibiting the dumping of hazardous substances into the high seas, is prevented from taking such an action as a consequence of the application of the customary international rule on the protection and preservation of the marine environment.

A second important remark is that international law allows for countermeasures in certain circumstances and under certain conditions. According to Arts. 48 and 54 of the Draft Articles on the International Responsibility of States, adopted by the International Law Commission in 2001, if the obligation breached is owed to the international community as a whole, any State is entitled to take lawful measures against the State responsible for an internationally wrongful act, to ensure the cessation of the breach and reparation in the interest of the beneficiaries of the obligation breached. Such measures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question (Art. 51). To interfere on the high seas on board of a ship flying the flag of another State is a violation of the obligations arising from the principle of freedom of the high seas. But, in certain cases, such an interference could be justified as a lawful countermeasure against one or more wrongful acts committed by the flag State, such as, referring to the same example proposed above, the persistent dumping of hazardous substances into the high seas. In other words, the breach of the principle of freedom of the sea should be balanced with previous breaches of other obligations having an equivalent, or even more, gravity. Countermeasures different from interferences on foreign flag vessels on the high seas, such as trade sanctions, can also be envisaged.

In international fisheries law there are many instances of treaties applying to the high seas and providing for measures of self-restraint agreed upon by the parties (interdiction to use certain fishing methods or to fish certain species or stocks, introduction of quotas, minimum size of nets, closed seasons, closed areas, etc.) in order to avoid the depletion of living resources due to overfishing[86]. Some crucial questions that are typical of high seas fisheries may be asked in this respect. How is it possible to apply a conservation scheme agreed under a multilateral treaty to fishing vessels flying the flag of non-party States (for example, a flag of convenience)[87]? What are the means for preventing the conservation measures accepted by most interested States from being frustrated by a few countries (so-called free-rider States) which enjoy the benefits of such measures without burdening themselves with the corresponding duties?

An appropriate way to address the problem of free-rider States is to put emphasis on the customary obligations that their behaviour is likely to breach; for example, in the case of high seas fisheries, to address the question whether the general obligation of conservation of living resources of the high seas has been undermined by a certain free-rider State. If this is the case, lawful countermeasures could be adopted. Three instances, among others, are notable in this respect.

The Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of

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[86] It is well known that where the fishing effort exceeds the rate of natural reproduction of the resources, the yield of the fishery decreases. Conservation measures need often to be adopted to achieve the objective of reaching an intensity of fishing which approaches as closely as possible the optimum sustainable yield from a determined fishery.

[87] This is the case where a State does not exercise an effective control on activities carried out by ships flying its flag.

Straddling Fish Stocks and Highly Migratory Fish Stocks, opened for signature in New York on 4 December 1995, confirms the customary rule that coastal States and States fishing on the high seas are under a duty to cooperate to conserve and manage straddling and highly migratory fish stocks (Art. 5). But it also contains provisions that derogate from the traditional principle of freedom of fishing on the high seas. On the one hand, all States having a real interest in the fisheries concerned have the right to become members of a subregional or regional fisheries management organization or participants in such an arrangement (Art. 8, para. 3). On the other, only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such an organization or arrangement, have access to the fishery resources to which those measures apply (Art. 8, para. 4).

Already in 1996 ICCAT, under Recommendation 96-11, asked Parties to take appropriate measures to the effect that the import of Atlantic bluefin tuna and its products in any form from two non-Party States (Belize and Honduras) be prohibited. This was done

> "considering the sighting of vessels of Belize and Honduras in the Mediterranean Sea during the closed season when the bluefin tuna are spawning; (…)
>
> expressing concern with regard to the over-fished status of bluefin tuna in the Atlantic Ocean; (…)
>
> recognizing that effective management of bluefin tuna stocks cannot be achieved by Contracting Parties of ICCAT whose fishermen are forced to reduce their catches of Atlantic bluefin tuna unless all non-Contracting Parties cooperate with ICCAT in connection with its conservation and management measures;
>
> calling attention to the 1995 decision by the Commission identifying Belize and Honduras as countries whose vessels have been fishing for Atlantic bluefin tuna in a manner which diminishes the effectiveness of the ICCAT bluefin tuna conservation measures, and recognizing that the decision was based on catch, trade and vessel sightings data;
>
> carefully reviewing information regarding the efforts by the Commission to get the collaboration of Belize and Honduras over the past year, including recognition of the fact that there has been no response from Belize to the ICCAT requests, and limited response, but no action, from Honduras".

In 2006 ICCAT adopted a general instrument concerning trade measures (Recommendation 06-13), noting that "trade restrictive measures should be implemented only as a last resort, where other measures have proven unsuccessful to prevent, deter and eliminate any act or omission that diminishes the effectiveness of ICCAT conservation and management measures".

Art. VII, para. 1, v, of the Convention for the Strengthening of the Inter-American Tropical Tuna Commission (Washington, 2003; known as the Antigua Convention) provides that the Commission established by the Convention shall perform, inter alia, the function to

> "adopt any other measure or recommendation, based on relevant information, including the best scientific information available, as may be necessary to achieve the objective of this Convention, including non-discriminatory and transparent measures consistent with international law, to prevent, deter and eliminate activities that undermine the effectiveness of the conservation and management measures adopted by the Commission".

Both exploitation of marine living resources and protection of the marine environment are key components of the concept of sustainable development as applied to the high seas. From a logical and legal point of view treaties that aim at establishing MPAs beyond national jurisdiction are very close to treaties that aim at regulating fishing on the high seas. Both types of treaties make use of area-based management tools and may be affected by activities carried out by non-parties. Parties to both types of treaties may, *mutatis mutandis*, rely on similar means, that is resort to customary rules of international law and adoption, where no other option is left, of countermeasures to deter activities by third parties that undermine the conservation and management measures agreed upon[88].

[88] In this regard see Art. 28, para. 2, of the SPA Protocol (*infra*, para. 8.A).

PART III
MARINE PROTECTED AREAS IN THE MEDITERRANEAN CONTEXT

8. The Relevant Mediterranean Instruments

Several policy and legal instruments adopted at the Mediterranean level confirm the trend towards the establishment of MPAs in this regional sea.

8.A. The Barcelona System and the SPA Protocol

The Barcelona system is a notable instance of fulfilment of the obligation to co-operate for the protection of a semi-enclosed sea[89].

On 4 February 1975 a policy instrument, the Mediterranean Action Plan (MAP), was adopted by an intergovernmental meeting convened in Barcelona by the United Nations Environment Programme (UNEP). One of the main objectives of the MAP was to promote the conclusion of a framework convention, together with related protocols and technical annexes, for the protection of the Mediterranean environment. This was done on 16 February 1976 when the Convention on the Protection of the Mediterranean Sea against Pollution and two protocols were opened to signature in Barcelona. The Convention, which entered into force on 12 February 1978, is chronologically the first of the so-called regional seas agreements concluded under the auspices of UNEP.

In the years following the Rio Conference on Environment and Development (1992), several components of the Barcelona system underwent important changes. In 1995, the MAP was replaced by the "Action Plan for the Protection of the Marine Environment and the Sustainable Development of the Coastal Areas of the Mediterranean (MAP Phase II)". Some of the legal instruments were amended. New protocols were adopted either to replace the protocols which had not been amended or to cover new subjects of cooperation. The present Barcelona legal system includes a framework convention, that has to be implemented through specific protocols, and seven protocols, namely:

a) the Convention on the Protection of the Mediterranean Sea against Pollution which, as amended in Barcelona on 10 June 1995, changes its name into Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (the amendments entered into force on 9 July 2004);

b) the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (Barcelona, 16 February 1976; in force from 12 February 1978), which, as amended in Barcelona on 10 June 1995, changes its name into Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea (the amendments are not yet in force);

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[89] On the Barcelona system see Raftopoulos, *Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime*, Athens, 1997; Juste Ruiz, *Regional Approaches to the Protection of the Marine Environment*, in *Thesaurus Acroasium*, 2002, p. 402; Raftopoulos & McConnell (eds.), *Contributions to International Environmental Negotiation in the Mediterranean Context*, Athens, 2004; Scovazzi, *The Developments within the "Barcelona System" for the Protection of the Mediterranean Sea against Pollution*, in *Annuaire de Droit Maritime et Océanique*, 2008, p. 201.

c) the Protocol Concerning Co-operation in Combating Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency (Barcelona, 16 February 1976; in force from 12 February 1978), which has been replaced by the Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea (Valletta, 25 January 2002; in force from 17 March 2004);

d) the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources (Athens, 17 May 1980; in force from 17 June 1983), which, as amended in Syracuse on 7 March 1996, changes its name into Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities (in force from 11May 2008);

e) the Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 1 April 1982; in force from 23 March 1986), which has been replaced by the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (Barcelona, 10 June 1995; in force from 12 December 1999: hereinafter SPA Protocol);

f) the Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil (Madrid, 14 October 1994; in force from 24 March 2011);

g) the Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal (Izmir on 1 October 1996; in force from 18 December 2007);

h) the Protocol on Integrated Coastal Zone Management in the Mediterranean (Madrid, 21 January 2008; in force from 24 March 2011).

The updating and the additions to the Barcelona legal system show that the parties consider it as a dynamic body capable of being subject to re-examination and improvement, whenever appropriate. Each of the new instruments contains important innovations The protocols even display a certain degree of legal imagination in finding constructive ways to address complex environmental problems. Particularly relevant for the purpose of this report is the SPA Protocol[90].

While the sphere of application of the previous 1982 Protocol did not cover the high seas, the SPA Protocol applies to all the maritime waters of the Mediterranean, irrespective of their legal condition, to the seabed and its subsoil and to the terrestrial coastal areas designated by each of the Parties. The extension of the application of the Protocol to the high seas areas was seen by the Parties necessary to protect those highly migratory marine species (such as marine mammals) which, because of their natural behaviour, do not respect the artificial boundaries drawn by man on the sea.

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[90] See Bou Franch & Badenes Casino, *La protección internacional de zonas y especies en la región mediterránea*, in *Anuario de Derecho Internacional*, 1997, p. 33; Scovazzi (ed.), *Marine Specially Protected Areas - The General Aspects and the Mediterranean Regional System*, The Hague, 1999. Provisions on MPAs can be found also in the Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil (see, *infra*, para. 9.F) and in the Protocol on Integrated Coastal Zone Management in the Mediterranean, whose geographical coverage is, however, limited to the territorial sea.

To overcome the difficulties arising from the fact that different kinds of national coastal zones have been proclaimed and that several maritime boundaries have yet to be agreed upon by the Mediterranean States concerned, the Protocol includes two very elaborate disclaimer provisions:

> "Nothing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any State relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between States with opposite or adjacent coasts, freedom of navigation on the high seas, the right and the modalities of passage through straits used for international navigation and the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of the coastal State, the flag State and the port State.
>
> No act or activity undertaken on the basis of this Protocol shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction" (Art. 2, paras. 2 and 3)[91].

The idea behind such a display of juridical devices is simple. On the one hand, the establishment of intergovernmental cooperation in the field of the marine environment shall not prejudice all the different questions which have a legal or political nature; but, on the other hand, the very existence of such questions, whose settlement is not likely to be achieved in the short term, should neither prevent nor delay the adoption of measures necessary for the protection of the marine environment in the Mediterranean.

The Protocol provides for the establishment of a List of Specially Protected Areas of Mediterranean Importance (SPAMI List)[92]. The SPAMI List may include sites which "are of importance for conserving the components of biological diversity in the Mediterranean; contain ecosystems specific to the Mediterranean area or the habitats of endangered species; are of special interest at the scientific, aesthetic, cultural or educational levels" (Art. 8, para. 2). The existence of the SPAMI List does not exclude the right of each Party to create and manage protected areas which are not intended to be listed as SPAMIs, but deserve to be protected under its domestic legislation.

The procedures for the listing of SPAMIs are specified in detail in the Protocol:

> "Proposals for inclusion in the List may be submitted:
>
> (a) by the Party concerned, if the area is situated in a zone already delimited, over which it exercises sovereignty or jurisdiction;
>
> (b) by two or more neighbouring Parties concerned if the area is situated, partly or wholly, on the high sea;
>
> (c) by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined" (Art. 9, para. 2).

Yet the submission of a joint proposal may become a way to promote new forms of co-operation between the States concerned, irrespective of the fact that their maritime boundaries have not yet been defined.

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[91] The model of the disclaimer provision was, *mutatis mutandis*, Art. IV of the Convention on the Conservation of Antarctic Marine Living Resources (Canberra, 1980).

[92] The idea of a "list of landscapes and habitats of Black Sea importance" has been retained in Art. 4, para. 5, of the Black Sea Biodiversity and Landscape Protection Protocol.

In proposing a SPAMI, the Party or Parties concerned shall indicate the relevant protection and management measures, as well as the means for their implementation (Art. 9, para. 3). As paper areas would not comply with the SPA Protocol, protection, planning and management measures "must be adequate for the achievement of the conservation and management objectives set for the site in the short and long term, and take in particular into account the threats upon it" (Annex 1, para. D, 2).

Once the areas are included in the SPAMI List, all the parties agree "to recognize the particular importance of these areas for the Mediterranean", as well as "to comply with the measures applicable to the SPAMIs and not to authorize nor undertake any activities that might be contrary to the objectives for which the SPAMIs were established" (Art. 8, para. 3). This gives to the SPAMIs and to the measures adopted for their protection an *erga omnes partes* effect, that is an effect with respect to all the Parties to the SPA Protocol.

As to the relationship with third countries, the Parties shall "invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation" of the SPA Protocol (Art. 28, para. 1). They also "undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles and purposes" of the Protocol (Art. 28, para. 2)[93]. This provision aims at facing the potential problems arising from the fact that treaties, including the SPA Protocol itself, can produce rights and obligations only among parties[94].

The SPA Protocol is completed by three annexes, which were adopted in 1996 in Monaco, namely the Common Criteria for the Choice of Protected Marine and Coastal Areas that Could be Included in the SPAMI List (Annex I)[95], the List of Endangered or Threatened Species (Annex II), the List of Species Whose Exploitation is Regulated (Annex III)[96]. Under Annex I, the sites included in the SPAMI List must be "provided with adequate legal status, protection measures and management methods and means" (para. A, *e*) and must fulfil at least one of six general criteria ("uniqueness", "natural representativeness", "diversity", "naturalness", "presence of habitats that are critical to endangered, threatened or endemic species", "cultural representativeness"). The SPAMIs must be awarded a legal status guaranteeing their effective long term, protection (para. C.1) and must have a management body, a management plan and a monitoring programme (paras. from D.6 to D.8). Moreover,

> "in the case of areas situated, partly or wholly, on the high sea or in a zone where the limits of national sovereignty or jurisdiction have not yet been defined, the legal status, the management plan,

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[93] Also this provision is shaped on a precedent taken from the Antarctic Treaty System: "Each of the Contracting Parties undertake to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty" (Art. X of the 1959 Antarctic Treaty).

[94] See *supra*, para. 7.

[95] It has been remarked that "the CBD EBSA criteria provide a helpful supplement to the older SPAMI criteria in that they provide more specific operational guidance" (doc. UNEP/CBD/EW-BCS&IMA/1/2 of 22 December 2009, Annex IV, para. 1, *a*).

[96] Important tasks for the implementation of the Protocol, such as assisting the Parties in establishing and managing specially protected areas, conducting programmes of technical and scientific research, preparing management plans for protected areas and species, formulating recommendations and guidelines and common criteria, are entrusted with the MAP RAC/SPA.

> the applicable measures and the other elements provided for in Article 9, paragraph 3, of the Protocol will be provided by the neighbouring Parties concerned in the proposal for inclusion in the SPAMI List" (para. C.3)[97].

At the Meeting of the Contracting Parties held in 2001 the first twelve SPAMIs were inscribed in the list, namely the island of Alborán (Spain), the sea bottom of the Levante de Almería (Spain), Cape Gata-Nijar (Spain), Mar Menor and the East coast of Murcia (Spain), Cape Creus (Spain), Medas Islands (Spain), Columbretes Islands (Spain), Port-Cros (France), the Kneiss Islands (Tunisia), La Galite, Zembra and Zembretta (Tunisia) and the French-Italian-Monegasque sanctuary for marine mammals (so-called Pelagos sanctuary, jointly proposed by the three States concerned)[98]. Other SPAMIs have subsequently been added, namely the Cabrera Archipelago (Spain) and Maro-Cerro Gordo (Spain) in 2003, Kabyles Bank (Algeria), Habibas Islands (Algeria) and Portofino (Italy) in 2005, Miramare (Italy), Plemmirio (Italy), Tavolara – Punta Coda Cavallo (Italy) and Torre Guaceto (Italy) in 2008, Bonifacio Mouths (France), Capo Caccia – Isola Piana (Italy), Punta Campanella (Italy) and Al-Hoceima (Morocco) in 2009. With the exception of the Pelagos sanctuary, all the present SPAMIs are limited to coastal waters.

Also to ensure a more representative network of SPAMIs, the Parties to the Convention reaffirmed in the Declaration adopted on 4 November 2009 in Marrakesh

> "the necessity, at the Mediterranean level, of pursuing efforts to identify varied methods and tools for the conservation and management of ecosystems, including the establishment of marine protected areas and the creation of networks representing such areas in accordance with the relevant objectives for 2012 of the World Summit on Sustainable Development (…)".

The Meeting of the Parties also adopted Decision IG.19/13, regarding a regional working programme for the coastal and marine protected areas in the Mediterranean. A project on the identification of areas of conservation interest, with a view to promoting the establishment of a representative ecological network of protected areas in the Mediterranean, is being implemented by the UNEP – Mediterranean Action Plan, Regional Activity Centre for Specially Protected Areas (RAC/SPA), with funding by the European Union. The first phase of the project was implemented in 2008 and 2009 in order to collect the available scientific data for identifying priority conservation areas. An extraordinary Meeting of the MAP Focal Points for Specially Protected Areas was held in Istanbul in June 2010[99]. A number of "operational criteria for identifying SPAMIs in areas of open seas, including the deep sea" have been identified[100]. A list of thirteen "priority conservation areas

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[97] Under Art. 9, para. 3, of the SPA Protocol, "Parties making proposals for inclusion in the SPAMI List shall provide the Centre with an introductory report containing information on the area's geographical location, its physical and ecological characteristics, its legal status, its management plans and the means for their implementation, as well as a statement justifying its Mediterranean importance; (a) where a proposal is formulated under subparagraphs 2 (b) and 2 (c) of this Article, the neighbouring Parties concerned shall consult each other with a view to ensuring the consistency of the proposed protection and management measures, as well as the means for their implementation; (b) proposals made under paragraph 2 of this Article shall indicate the protection and management measures applicable to the area as well as the means of their implementation".

[98] See *infra*, para. 8.B.

[99] For the legal aspect see *International Legal Instruments Applied to the Conservation of Marine Biodiversity in the Mediterranean Region and Actors Responsible for the Implementation and Enforcement*, doc. UNEP(DEPI)/MED WG.348/Inf.7 of 14 May 2010.

[100] See Annex 1 to doc. UNEP(DEPI)/MED WG.348/3 of 28 May 2010.

lying in the open seas, including the deep sea, likely to contain sites that could be candidates for the SPAMI List" has been drafted[101]. The second phase, to be implemented from 2010 to 2011, will be devoted to the drafting of presentation reports for the areas identified as candidates for inclusion in the SPAMI List. The areas involved are likely to be the Gulf of Lions[102], the Alboran Sea[103] and perhaps others[104].

8.B. The Pelagos Sanctuary

One of the present SPAMIs is the Pelagos sanctuary for marine mammals, established under an Agreement signed in Rome in 1999 by France, Italy and Monaco[105]. This is the first treaty ever concluded with the specific objective to establish a sanctuary for marine mammals. It entered into force on 21 February 2002.

The sanctuary extends for about 96,000 km² of waters located between the continental coasts of the three countries and the islands of Corsica (France) and Sardinia (Italy). It encompasses waters having the different legal condition of maritime internal waters, territorial sea, ecological protection zone and high seas. They are inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (*Balaenoptera physalus*), the sperm whale (*Physeter catodon*), Cuvier's beaked whale (*Ziphius cavirostris*), the long-finned pilot whale (*Globicephala melas*), the striped dolphin (*Stenella coeruleoalba*), the common dolphin (*Delphinus delphis*), the bottlenose dolphin (*Tursiops truncatus*) and Risso's dolphin (*Grampus griseus*). In this area, the water currents create conditions favouring phytoplankton growth and abundance of krill (*Meganyctiphanes norvegica*), a small shrimp that is preyed upon by pelagic vertebrates.

The parties to the Agreement undertake to adopt measures to ensure a favourable state of conservation for every species of marine mammal and to protect them and their habitat from negative impacts, both direct and indirect (Art. 4). They prohibit in the sanctuary any deliberate "taking" (defined as "hunting, catching, killing or harassing of marine mammals, as well as the attempting of such actions") or disturbance of mammals. Non-lethal catches may be authorized in urgent situations or for *in-situ* scientific research purposes (Art. 7, *a*).

As regards the crucial question of driftnet fishing, the parties undertake to comply with the relevant international and European Community regimes (Art. 7, *b*). This is an implicit reference to European Council Regulation No. 1239/98 of 8 June 1998 which prohibited as from 1st January

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[101] See Annex 2 to doc. UNEP(DEPI)/MED WG.348/3 of 28 May 2010.

[102] "The representatives of France and Spain informed the meeting of their countries' intention to pursue their cooperation with regard to the Gulf of Lions and to consider the possibility of preparing a proposal for the declaration of a SPAMI in this open-sea, which included deep waters" (see the *Report of the Extraordinary Meeting of the Focal Points for SPAs*, doc. UNEP(DEPI)/MED WG.348/5 of 4 June 2010, para. 50).

[103] "The representative of Spain also referred to the wish of his country to pursue the process of cooperation with Morocco and Algeria concerning the Alboran Sea" (*ibidem*, para. 51).

[104] A workshop "Towards a Representative Network of Marine Protected Areas in the Adriatic" was held in Piran in October 2010 to discuss MPAs in this sub-regional sea.

[105] See LEHARDY, *La protection des mammifères marins en Méditerranée – L'accord créant le sanctuaire corso-liguro-provençal*, in *Revue de Droit Monégasque*, No. 3, 2000, p. 95; SCOVAZZI, *The Mediterranean Marine Mammals Sanctuary*, in *International Journal of Marine and Coastal Law*, 2001, p. 132.

2002 the keeping on board, or the use for fishing, of one or more driftnets used for the catching of the species listed in an annex. The parties to the Agreement undertake to exchange their views, if appropriate, in order to promote, in the competent fora and after scientific evaluation, the adoption of regulations concerning the use of new fishing methods that could involve the incidental catch of marine mammals or endanger their food resources, taking into account the risk of loss or discard of fishing instruments at sea (Art. 7, *c*).

The parties undertake to exchange their views with the objective to regulate and, if appropriate, prohibit high-speed offshore races in the sanctuary (Art. 9). They also undertake to regulate whale watching activities for purposes of tourism (Art. 8)[106].

The parties are bound to hold regular meetings to ensure the application of and follow up of the Agreement (Art. 12, para. 1). In this framework they are required to encourage national and international research programmes, as well as public awareness campaigns directed at professional and other users of the sea and non-governmental organisations, relating *inter alia* to the prevention of collisions between vessels and marine mammals and the communication to the competent authorities of the presence of dead or distressed marine mammals (Art. 12, para. 2).

From the legal point of view, the most critical aspect of the Agreement is the provision on the enforcement on the high seas of the measures agreed upon by the parties. Art. 14 provides as follows:

> "1. Dans la partie du sanctuaire située dans les eaux placées sous sa souveraineté ou juridiction, chacun des Etats Parties au présent accord est compétent pour assurer l'application des dispositions y prévues.
>
> 2. Dans les autres parties du sanctuaire, chacun des Etats Parties est compétent pour assurer l'application des dispositions du présent accord à l'égard des navires battant son pavillon, ainsi que, dans les limites prévues par les règles de droit international, à l'égard des navires battant le pavillon d'Etats tiers"[107].

In the present legal condition of Mediterranean waters[108], Art. 14, para. 2, of the Agreement gives the parties the right to enforce on the high seas its provisions with respect to ships flying the flag of third States "within the limits established by the rules of international law". This wording brings an element of ambiguity into the picture, as it can be interpreted in two different ways. Under the first interpretation, the parties cannot enforce the provisions of the Agreement in respect of foreign ships, as such an action would be an encroachment upon the freedom of the high seas. The second interpretation is based on the fact that all the waters included in the sanctuary would fall within the exclusive economic zones of one or another of the three parties if they decided to

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[106] Whale watching for commercial purposes is already carried out in the sanctuary by a certain number of vessels. There are promising prospects for the development in the sanctuary of this kind of activities, which are a benign way of exploiting marine mammals.

[107] "1. In the part of the sanctuary located in the waters subject to its sovereignty or jurisdiction, any of the States Parties to the present agreement is entitled to ensure the enforcement of the provisions set forth by it. 2. In the other parts of the sanctuary, any of the States Parties is entitled to ensure the enforcement of the provisions of the present agreement with respect to ships flying its flag, as well as, within the limits established by the rules of international law, with respect to ships flying the flag of third States" (unofficial translation).

[108] See *supra*, paras. 3.A. and 3.B.

establish such zones. With the creation of the sanctuary the parties have limited themselves to the exercise of only one of the rights which are included in the broad concept of the exclusive economic zone. This seems sufficient to reach the conclusion that the parties are already entitled to enforce the rules applying in the sanctuary also in respect of foreign ships which are found within its boundaries.

Criticism has recently been addressed towards the lack of a proper management body of the Pelagos sanctuary[109].

8.C. ACCOBAMS

The main obligations of the Parties to the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; ACCOBAMS[110]) are to "take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans" and to "prohibit and take all necessary measures to eliminate, where this is not already done, any deliberate taking of cetaceans" (Art. II, para. 1)[111]. ACCOBAMS provides, *inter alia*, that the Parties shall endeavour to establish and manage specially protected areas for cetaceans corresponding to the areas which serve as their habitats or provide important food resources for them (Annex 2, Art. 3).

In 2007 the Meeting of the parties to ACCOBAMS adopted Resolution 3.22, which recommends to the parties to give full consideration to the creation of eighteen marine protected areas for cetaceans (for example, in the Alboran Sea, in the North-East Adriatic, in the Strait of Sicily, in the Eastern Ionian Sea and the Gulf of Corinth, in the Northern Sporades, in the Northern Aegean Sea, in the Dodekanese). This approach was confirmed in Resolution 4-15 (Marine Protected Areas of Importance for Cetacean Conservation), whereby the Meeting of the Parties held in 2010

> "encourages the States concerned to promote the institution of the areas of special importance for cetaceans in the ACCOBAMS area, as listed in the Annex to this Resolution and to ensure their effective management" (para. 5).

8.D. The General Fisheries Commission for the Mediterranean

The General Fisheries Council for the Mediterranean (GFCM) was established in 1949 as an institution under the auspices of the FAO to co-ordinate activities related to fishery management, regulation and research in the Mediterranean and Black Seas and connecting waters. In 1998, the institution was reformed and renamed the General Fisheries Commission for the Mediterranean. It

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[109] Notarbartolo di Sciara, *The Pelagos Sanctuary for the Conservation of Mediterranean Marine Mammals: An Iconic High Sea MPA in Dire Straits*, Paper presented at the 2nd International Conference on Progress in Marine Conservation in Europe (Stralsund, 2009). See also *infra*, para. 9.G.

[110] ACCOBAMS entered into force on 1 June 2001. It has been concluded within the framework of the Convention on the Conservation of Migratory Species of Wild Animals (Bonn, 1979; CMS).

[111] Under Art. I, para. 3, ACCOBAMS, the term "taking" is to be intended in the very broad meaning as it is defined in Art. I, para. 1, *i*, CMS, that is: "(…) taking, hunting, fishing, capturing, harassing, deliberate killing, or attempting to engage in any such conduct".

now has twenty-four members, including one non-Mediterranean State (Japan) and the European Union. The area covered by the GFCM Agreement includes both the high seas and marine areas under national sovereignty or jurisdiction.

The GFCM has the purpose of promoting the development, conservation, rational management and best utilization of all marine living resources, as well as the sustainable development of aquaculture in the area falling under its competence. Particularly notable are the measures on the establishment of fisheries restricted areas in order to protect the deep sea sensitive habitats, namely Recommendation 30/2006/3, adopted in 2006, which prohibits fishing with towed dredges and bottom trawl nets within “Lophelia reef off Capo Santa Maria di Leuca”, “The Nile delta area cold hydrocarbon seeps” and “The Eratosthenes Seamount”, and recommendation 33/2009/1, adopted in 2009, on the fisheries restricted area in the Gulf of Lions. Among the other measures adopted within the GFCM framework, Recommendation 2005/1 on the management of certain fisheries exploiting demersal and deepwater species can be recalled, insofar as it prohibits the use of towed dredges and trawl nets fisheries at depths beyond 1000 m. Under Recommendation 31/2007/2, the GFCM Secretariat is requested to cooperate with the Pelagos Sanctuary Secretariat on the exchange of data.

8.E. Other Calls for the Establishment of MPAs

Calls for the establishment of MPAs covering areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean have been recently made by a number of other governmental and non-governmental organizations.

The workshop of the International Commission for the Scientific Exploration of the Mediterranean Sea (CIESM), held in Siracusa in 2010, discussed eight “coast-to-coast international marine parks”, to be established under a “marine peace park paradigm”. They are considered as essential to the proper functioning of large Mediterranean ecosystems.

The meeting of the IUCN Group of Experts for the Improvement of the Governance of the Mediterranean Sea, held in Procida in 2010, stressed the importance, as future MPAs, of three canyon systems located in the Gulf of Lions, the Adriatic Sea and the Aegean-Levantine Sea.

In 2009 Greenpeace International proposed a network of marine reserves covering about 40% of the Mediterranean high seas and including areas around the Balearic Islands and in the Sicilian Channel[112].

[112] Greenpeace, *Mediterranean Marine Governance*, 2009, p. 9.

9. Future Steps towards a Network of Marine Protected Areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined

Three basic conditions are needed to achieve the objective of establishing a network of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, namely, scientific foundations, a legal framework and political goodwill.

The analysis made above shows that in the Mediterranean convincing scientific foundations exist towards such an objective and that certain priority areas have been identified on the basis of relevant criteria. Suffice it to mention the documents prepared for, and the discussion held, at the 2010 Istanbul Extraordinary Meeting of the MAP Focal Points for Specially Protected Areas, as well as the studies and documents elaborated in other fora, both intergovernmental and non-governmental, that all concur to similar conclusions.

More open to discussion is the existence of general political goodwill. In this regard, the report of the Istanbul Meeting contains a worrying paragraph:

> "The representative of the European Commission expressed his disappointment regarding the low commitments by the Parties for further action to protect the areas identified through the first phase of the project"[113].

Yet, the Mediterranean States, or some of them, might still not depart from the trend, which occurs in other seas and oceans as well, to remain reluctant to accept stringent measures to protect the marine environment beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined[114].

Rather than on the scientific foundations, that seem hardly questionable, and rather than on the political goodwill, which can only be assumed under an optimistic perspective, the purpose of this paper is to focus on the legal framework. Some considerations will hereunder be developed on pending legal questions and steps that could in the future be taken towards the establishment of a network of MPAs in the Mediterranean.

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[113] Doc. UNEP(DEPI)/MED WG.348/5 of 4 June 2010, para. 61.

[114] It has rightly be remarked that "on the one hand, it is clear from discussions at the UNGA [= United Nations General Assembly] and the CBD [= Convention on Biological Diversity] that States accept and support the need for greater protection for high seas biodiversity. On the other hand, experience has shown through the IMO that many flag States remain reluctant to endorse the adoption of stringent mandatory protective measures. Despite the obligation to protect the marine environment, and the numerous commitments made to protect high seas biodiversity, until recently there has been a great reluctance by some States to adopt internationally binding measures that may have an impact on high seas freedoms. While there is no suggestion that States should forgo these freedoms, their exercise and maintenance should not occur at the expense of the fundamental duty of States to protect and preserve the marine environment" (Roberts, Chircop & Prior, *Area-Based Management on the High Seas: Possible Application of the IMO's Particularly Sea Area Concept*, in *International Journal of Marine and Coastal Law*, 2010, p. 521).

9.A. A Fully Adequate Legal Framework

The present legal framework for the establishment of a network of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean is fully adequate to achieve this objective.

Not only the establishment of networks of MPAs is required by a number of legal and policy instruments applying at the world level[115], but also a very good treaty is already in place to achieve this objective at the Mediterranean regional level, that is the SPA Protocol. From the legal point of view this instrument is sophisticated and flexible enough to meet all the peculiarities of the present and future condition of Mediterranean waters and seabed. It uses the expression “area situated in a zone already delimited, over which a Party exercises sovereignty or jurisdiction” to refer to areas undoubtedly falling under the authority of a coastal State in maritime internal waters, territorial sea, continental shelf, exclusive economic zone, fishing zone or ecological protection zone; it uses the expression “areas where the limits of national jurisdiction have not yet been defined by the neighbouring Parties concerned” to refer to areas of any kind where questions of maritime boundaries between adjacent or opposite States are still pending; it uses the expression “high sea” to refer to waters that still have the legal condition of high seas, but may in the future lose it, when all the Mediterranean States will create their exclusive economic zone. The SPA Protocol is in itself an invitation to co-operate for the establishment of MPAs everywhere in the Mediterranean it would be appropriate to do so, irrespective of, and without prejudice to, pending political and legal questions that have little to do with the need to protect the marine environment.

9.B. The Legal Instrument Needed for the Establishment of MPAs

Once the area has been identified and delimited on the basis of the relevant scientific criteria, the way to establish an MPA beyond national jurisdiction or in waters where the maritime boundaries between the States concerned have not yet been delimited is to do so under a treaty. Resort to unilateral legislation by one State is not likely to be a means acceptable for other States. The Pelagos sanctuary was established under a treaty between the three States concerned and was almost contextually inscribed on the SPAMI List to give to the measures applying in it an *erga omnes partes*[116] effect.

It would be impossible to draft a uniform model of treaty covering all kinds of MPAs that in the future could be established in the Mediterranean waters beyond the limits of the territorial seas of the State concerned. The relevant biological, ecological, geological and other scientific conditions that support the establishment of such a MSPA vary greatly from case to case. The legal questions to be addressed vary as well. It would be advisable in this regard to include in the treaties a carefully worded disclaimer clause following the example of Art. 2, paras. 2 and 3, of the SPA Protocol[117].

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[115] *Supra*, paras. 5 and 6.

[116] An obligation towards all parties.

[117] *Supra*, para. 8.A.

The fact that a treaty is needed does not mean that the States directly concerned must necessarily sign and ratify a specific treaty for the establishment of any future MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean and wait for its entry into force after having exchanged or deposited their ratifications. If the States concerned prefer to do so, they can proceed in an informal and flexible way. In fact a treaty framework, that is the SPA Protocol itself, already exists for that purpose. It provides for a special procedure of making proposals for inscription in the SPAMI List by two or more "neighbouring Parties concerned". The joint proposal, which is inevitably discussed, agreed and signed by the competent authorities of the States concerned and must indicate the protection and management measures applicable to the envisaged MPA, can be considered as an agreement concluded in a simplified form subject to the condition of subsequent approval by the Meeting of the Parties to the SPA Protocol. There is no need to conclude, ratify and wait the entry into force of any specific treaty before making a joint proposal, as the SPA Protocol itself has already been concluded, ratified by the "neighbouring Parties concerned" and has already entered into force for them. This does not prevent the States concerned, if they want to do so, to conclude a treaty after the inscription of the area on the SPAMI list in order to regulate in detail the management of the SPAMI.

The only cases where a specific treaty is needed would be where the Parties concerned by the future MPA include a State which is not a party to the SPA Protocol[118] or where the States concerned do not intend to have the MPA inscribed on the SPAMI List (but this second case seems unlikely for MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined).

What is mostly important, due to the present transitional and unsettled condition of several areas in the Mediterranean, is to properly identify how many and which are the "neighbouring Parties concerned". The utmost care should be exercised in this initial step that, if wrongly made, would jeopardise for evident political reasons the outcome of the whole process. It would not be legally admissible to establish a SPAMI without the participation and, even worse, against the will of one of the "neighbouring Parties concerned", considering that the SPAMI in question is likely to be totally or partially located in waters that can be claimed by the objecting State.

The first step towards the establishment of SPAMIs in areas where maritime boundaries have not yet been defined or in the high seas is to identify and delimit the proposed SPAMI according to the relevant scientific criteria. If it is situated in an area where the limits of national sovereignty or jurisdiction have not yet been defined, that is in an area where no agreement has been concluded by the States concerned as regards the boundary of territorial seas[119], continental shelves, as well as, if already established, exclusive economic zones, fishing zones or ecological protection zones, it should not be difficult to identify the States that have a claim over the waters where the area is located. They qualify as the "neighbouring Parties concerned".

If the area is situated, partly or wholly, on the high seas, the notion of "neighbouring Parties concerned" acquires a more elastic character and is not devoid of a certain margin of constructive ambiguity. It needs to be determined on a case by case basis, taking into account the relevant

[118] Bosnia and Herzegovina, Greece, Israel, Libya and the United Kingdom are not parties to it.

[119] In certain circumstances also delimitations of maritime internal waters may be envisaged.

circumstances. The notion of neighbourhood should be understood in the sense of vicinity and not necessarily of contiguity. Even though there is a high seas space between a high seas SPAMI and the territorial sea of a given State, this State can be considered as neighbour to the SPAMI, if it is sufficiently proximate to it[120]. The "neighbouring Parties concerned" might even be only one State, if the area of high seas is surrounded by the territorial sea that State solely[121]. In most cases the "neighbouring Parties concerned" are more than one State and they should be identified taking into consideration the potential claims that they may put forward as regards future exclusive economic zones and the possibility of overlapping claims. In areas where there are potential overlapping claims by two or more States, all the claimant States shall jointly formulate the proposal. It should also be taken into account of instances where overlappings of areas of different nature occur[122], of cases where a treaty has been concluded for the delimitation of the seabed without it been automatically applicable to the superjacent waters[123], of cases where disagreement on the legality of straight baselines has an influence also on the external limit of coastal zones that should be measured from such baselines.

If it is true that overlapping claims are likely to occur in the Mediterranean, a sea where complex issues of delimitation are still open, the contrary may also happen. If a potential MPA is situated in a zone already delimited where a Party exercises sovereignty or jurisdiction, no other State should be involved in the formulation of the proposal[124].

9.C. The Protection and Management Measures Applicable in the MPA

The Strategic Action Programme for the Conservation of Biological Diversity in the Mediterranean Region (SAP BIO) identified a series of constraints to effective implementation of the SPA Protocol[125]. Almost all these constraints are potentially relevant for MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined and include insufficient legal regime, lack of effective conservation measures to protect particular species (monk seal, sea turtles, cetaceans, etc.) or plant communities (e.g. seagrass),

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[120] It would be more difficult to consider a State as a "neighbouring Party concerned", if the territorial sea of another State were located between the territorial sea of that State and the proposed high seas SPAMI.

[121] The example may be given of a hypothetical high seas SPAMI in an area of central Tyrrhenian Sea totally surrounded by the coasts of Italy (Sardinia, Sicily and continental Italy).

[122] For example, the French ecological protection zone partially overlaps with the Spanish fishing zone.

[123] For example, Italy and Tunisia take opposite position on whether the delimitation line already agreed upon for their continental shelves should apply also to delimit the superjacent waters.

[124] At the above mentioned 2010 Istanbul Meeting, the representative of Cyprus "emphasized that the Eratosthenes area fell entirely within the exclusive economic zone of Cyprus and was therefore an area under its exclusive jurisdiction, within which Cyprus was exercising sovereignty rights in accordance with the relevant UNCLOS provisions. She stressed that according to the SPA Protocol it was the concerned Party, and in the present case Cyprus, that should be proposing the area for inclusion in the SPAMI List. Cyprus accordingly wished for the Eratosthenes Seamount to be removed from the group of potential SPAMIs proposed by RAC/SPA for the open seas" (Doc. UNEP(DEPI)/MED WG.348/5 of 4 June 2010, para. 41).

[125] See UNEP-MAP, Second Meeting of the Advisory Committee of the Strategic Action Programme for the Conservation of Biological Diversity (SAP BIO) in the Mediterranean Region, *Mediterranean Countries' Needs for Legal, Policy and Institutional Reforms to Strengthen the Management of Existing Marine Protected Areas*, Report prepared by C. Shine & T. Scovazzi, doc. UNEP(DEPI)/MED WG.309/Inf.5 rev. 1 of 27 March 2007, Part 3.

confusion of competences and fragmentation or overlapping of responsibilities between different authorities, low or non-existent stakeholder participation in the decision-making process, poor efforts to improve public awareness on marine conservation issues, lack of effective scientific monitoring or enforcement measures, lack of sufficient economic resources to achieve the protection measures, limited experience of the people administrating the MPAs.

Whatever the enabling legislation, scientific information is needed to determine the size, shape, conservation objectives and management prescriptions for each area. The legal instrument for establishment of an MPAs must clearly define the conservation and management objectives of the area concerned and delimit its boundaries, together with a zoning system and buffer zones where appropriate. Relevant legislation and regulations for management of marine areas and natural resources should be consistent with the precautionary and ecosystem approaches enshrined in international law.

A wide range of protection measures can be agreed upon for application within an MPA. For example, the Parties to the SPA Protocol, “in conformity with international law and taking into account the characteristics of each specially protected area”, may adopt:

> “(a) the strengthening of the application of the other Protocols to the Convention and of other relevant treaties to which they are Parties;
>
> (b) the prohibition of the dumping or discharge of wastes and other substances likely directly or indirectly to impair the integrity of the specially protected area;
>
> (c) the regulation of the passage of ships and any stopping or anchoring;
>
> (d) the regulation of the introduction of any species not indigenous to the specially protected area in question, or of genetically modified species, as well as the introduction or reintroduction of species which are or have been present in the specially protected area;
>
> (e) the regulation or prohibition of any activity involving the exploration or modification of the soil or the exploitation of the subsoil of the land part, the seabed or its subsoil;
>
> (f) the regulation of any scientific research activity;
>
> (g) the regulation or prohibition of fishing, hunting, taking of animals and harvesting of plants or their destruction, as well as trade in animals, parts of animals, plants, parts of plants, which originate in specially protected areas;
>
> (h) the regulation and if necessary the prohibition of any other activity or act likely to harm or disturb the species or that might endanger the state of conservation of the ecosystems or species or might impair the natural or cultural characteristics of the specially protected area;
>
> (i) any other measure aimed at safeguarding ecological and biological processes and the landscape” (Art. 6).

Other programmes and measures could be added, especially where new activities are feasible, such as carbon capture and storage via injection in the deep seabed, off-shore wind energy installations, bioprospecting for genetic resources, or where military exercises that involve the use of weapons or sonars are carried out.

It is very unlikely that all the above listed measures will be adopted at the same time for the same MPA established beyond national jurisdiction or in areas where the limits of national

sovereignty or jurisdiction have not yet been defined, also considering the rights that other States enjoy, in particular the traditional freedoms of the sea[126]. Depending on the specific circumstances, it could be advisable to take a prudent approach also in the Mediterranean, at it was done under the OSPAR Convention[127], by envisaging, at least as a first step, measures that have a more procedural nature and do not interfere too much with rights that could be claimed by third States, such as measures in the fields of awareness raising, information building, marine science, capacity building and transfer of technology. All the relevant stakeholders should be involved in the planning of new activities and all the human activities that may be potentially conflicting with the conservation objectives and are likely to cause a significant impact to the ecosystems should be identified, in order to be subject to environmental impact assessment or strategic environmental assessment.

Under Art. 7, para. 1, of the SPA Protocol, the Parties must, in accordance with international law, adopt planning, management, supervision and monitoring measures for the specially protected areas. Such measures are specified in Art. 7, para. 2, and are of particular importance for any kind of MPA, either within or beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined.

Each MPA should be covered by a specific and sufficiently detailed management plan. Planning and management measures must also be based on an adequate knowledge of the elements of the natural environment and of socio-economic and cultural factors that characterize the area. Management plans should prescribe appropriate regulatory and management measures for different zones within the MPA. They should also include contingency measures to respond to incidents. An ecosystem-based management approach should be envisaged, which includes regulation of activities, control of sources of pollution, integrated planning and an adaptive mechanism that could promptly deal with changing patterns.

As part of MPA establishment and planning, all efforts should be made to evaluate the significance of benefits that, while not directly quantifiable in precise monetary terms, can be achieved through MPA creation, such as the preservation of endangered species or the promotion of aesthetic and spiritual values. States should recognise the positive contribution that non-governmental organizations active in the field of the environment can make through their educational, campaigning and monitoring activities[128].

The financial constraints which affect effective full operation of MPAs should, wherever possible, be addressed by the States concerned. Consequences of inadequate or insecure funding include delay in the recruitment of sufficient staff, in the purchase of equipment for performing basic tasks (which can be particularly costly in the case of marine areas) and in the promotion of research. Appropriate funding should be granted, wherever possible, by the States or the public institutions involved. Fundraising mechanisms involving visitors or the private sector may also be put into effect as an alternative source of financing, provided that they do not conflict with the basic objectives of the protected area.

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[126] See however *supra*, para. 6.A.

[127] *Supra*, para. 6.D.

[128] See *Mediterranean Countries' Needs* etc (quoted *supra*, note 126), para. 3.G.

If two or more States are involved in an MPA, as it frequently happens in cases of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, the treaty establishing the MPA or the joint proposal in the case of SPAMIs should clearly define what are the procedures according to which new protection measures, as well as the management plan and the subsequent modifications, are to be agreed and adopted by the States concerned. A general political commitment is not sufficient for this purpose.

It should also be recalled that a number of measures and programmes that can be adopted for Mediterranean MPAs already fall within the specific scope of treaties different from the SPA Protocol or institutions different from UNEP-MAP. For instance, ACCOBAMS can be considered as the specific forum for the protection of cetaceans, CIESM for the carrying out of fundamental scientific research, GFCM for fisheries, IMO for shipping. Full coordination and consistency are highly desirable among all the legal instruments and entities operating at the Mediterranean level. However, the SPAMI Protocol does not prevent the Parties concerned to propose, and the Meeting of the Parties to adopt, protection and management measures applicable to a SPAMI that are stricter than those adopted within other relevant fora. This may occur where there is a need to take into account the cumulative impacts of different threats to marine biodiversity within a SPAMI, including those due to climate change. However, measures applicable in a SPAMI must be compatible with the obligations arising from general international law and other treaties in force for the Parties to the SPA Protocol.

9.D. The Regulation of Shipping Activities

The Mediterranean is characterized by several routes heavily used for international navigation, including the route crossing it via the Strait of Gibraltar and the Suez Canal to link the Atlantic and the Indian Oceans[129]. Measures relating to shipping are highly delicate[130], considering that freedom of navigation on the high seas and within the exclusive economic zone is the key component of the traditional concept of freedom of the sea[131] and is regulated by several UNCLOS provisions. In particular Art. 211, para. 5, subjects the adoption of laws and regulations for the prevention, reduction and control of pollution from vessels in the exclusive economic zone to “generally accepted international rules and standards established through the competent international organization or general diplomatic conference”.

It would be practically impossible to get general acceptance of any measure affecting shipping in an MPA beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined without previous endorsement at the world level within IMO in any of the forms provided under the relevant IMO instruments (establishment of a PSSA, ship

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[129] See IUCN, *Maritime Traffic Effects on Biodiversity in the Mediterranean Sea*, Malaga, 2008: vol. I, Abdulla & Linden (eds.), *Review of Impacts, Priority Areas and Mitigation Measures*; vol. II, Oral & Simard (eds.), *Legal Mechanisms to Address Maritime Impacts on Mediterranean Biodiversity*, in particular the papers by Verlaan, Roberts & Pullen, Roberts, Sivitos; IUCN, *Risks from Maritime Traffic to Biodiversity in the Mediterranean Sea*, Malaga, 2009.

[130] Highly delicate as well is any measure that could affect the right of innocent passage in the territorial sea or the right of transit passage through straits used for international navigation.

[131] Measures affecting the laying of cables and pipelines could be delicate as well.

routeing systems, including areas to be avoided, compulsory pilotage schemes, vessel traffic management systems)[132].

To get more political strength, the proposal should be jointly submitted to IMO by the Mediterranean States concerned with the MPA and, whenever possible, by all the Parties to the SPA Protocol. The 2002 Protocol Concerning Cooperation in Preventing Pollution from Ships and, in Cases of Emergency, Combating Pollution of the Mediterranean Sea already contains a provision that should encourage Mediterranean States to take such an action. Under Art. 15 (Environmental risks of maritime traffic),

> "in conformity with generally accepted international rules and standards and the global mandate of the International Maritime Organization, the Parties shall individually, bilaterally or multilaterally take the necessary steps to assess the environmental risks of the recognized routes used in maritime traffic and shall take the appropriate measures aimed at reducing the risks of accidents or the environmental consequences thereof".

9.E. The Regulation of Fishing Activities

In view of the close link between protection of the marine environment and the sustainable exploitation of marine living resources, it is likely that measures relating to fishing activities would apply in MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean. In this field, proposals to establish MPAs should include a reference to the measured adopted or to be adopted in the future by GFCM, also considering that this institution has already made use of area-based management tools by establishing fisheries restricted areas in order to protect the deep sea sensitive habitats[133].

A good basis of coordination already exists, as in 2008 a memorandum was concluded between FAO, on behalf on GFCM, and MAP RAC/SPA on co-operation on fisheries and biodiversity preservation in the Mediterranean region, whereby the two institutions agree to co-operate in the following areas:

> "1. Development and participation in the implementation of the Ecosystem Approach to Fisheries in the Mediterranean region;
>
> 2. Identification of marine sensitive habitat of ecosystems, either coastal sea, pelagic, benthic or of the deep sea;
>
> 3. Formulation of sustainable development frameworks and guidelines for coastal areas management;
>
> 4. Strengthening of scientific evidence on issues of common interest and jointly develop, as appropriate new fields of investigations applied to marine conservation, especially in relation to the protection of emblematic species;
>
> 5. Development and reinforcement of communication partnership and links between the marine environment and fisheries in the Mediterranean".

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[132] See *supra*, para. 6.B.

[133] See *supra*, para. 8.D.

An informal *modus vivendi* has taken place between GFCM and ICCAT, that is competent for fisheries of tuna and tuna-like fishes. GFCM "adopts" the ICCAT decisions relating to tuna and tuna quotas. In this way there are no contradictions between the GFCM and the ICCAT action.

9.F. The Regulation of Seabed Exploitation Activities

Activities for the exploration and exploitation of mineral resources of the seabed already fall within the national jurisdiction of one Mediterranean State as they are necessarily conducted on a continental shelf (in the legal sense[134]), irrespective of the depth of the superjacent waters. The proposal for the inclusion of an MPA on the SPAMI List, with the relevant protection and management measures, must consequently by submitted by the concerned State or the concerned States, if the area is situated in a zone of seabed that has not yet been delimitated or if it straddles on the continental shelves of two or more States.

The activities in question can have a particularly significant impact on the environment, due to the noise that seabed exploration techniques generate and due to the catastrophic effects that an oil spill can determine in the surrounding marine environment. In this field there is no international organization exercising specific competences. This explains why, although it has not yet entered into force, proposals for the establishment of MPAs on the Mediterranean continental shelf should take into consideration Art. 21 (specially protected areas) of the 1994 Protocol Concerning Pollution Resulting from Exploration and Exploitation of the Continental Shelf, the Seabed and its Subsoil:

> "For the protection of the areas defined in the Protocol concerning Mediterranean Specially Protected Areas and any other area established by a Party and in furtherance of the goals stated therein, the Parties shall take special measures in conformity with international law, either individually or through multilateral or bilateral cooperation, to prevent, abate, combat and control pollution arising from activities in these areas.
>
> In addition to the measures referred to in the Protocol concerning Mediterranean Specially Protected Areas for the granting of authorization, such measures may include, *inter alia*:
>
> (a) Special restrictions or conditions when granting authorizations for such areas:
>
> (i) The preparation and evaluation of environmental impact assessments;
>
> (ii) The elaboration of special provisions in such areas concerning monitoring, removal of installations and prohibition of any discharge.
>
> (b) Intensified exchange of information among operators, the competent authorities, Parties and the Organization regarding matters which may affect such areas"[135].

In the MPA full consistency should be ensured between the measures applying to the seabed and those applying to the superjacent waters, considering also that sedentary living species fall under the seabed regime.

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[134] See the UNCLOS definition of continental shelf (*supra*, para. 2.B).

[135] The "Organization" is UNEP.

9.G. The Management Body

Due to the importance of the management plan, if two or more States are involved in an MPA, as it frequently happens in cases of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined, the treaty establishing the MPA or the joint proposal in the case of SPAMIs should provide for a strong management body, having a clear mandate and the necessary human and financial resources. As it has been critically remarked, the effort to create a network of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean

> "begs the question of how do the Parties to the Barcelona Convention envisage managing such high seas protected areas, or whether it is conceivable to establish MPAs without providing for a solid and effective management mechanism. This, in turn, raises the further question of whether a management mechanism appropriate for MPAs in the Mediterranean ABNJ [= areas beyond national jurisdiction] can be envisaged within the existing legislative framework, or there is a need for more advanced juridical creativity which will account for the likely multi-national nature of such protected areas"[136].

In fact, the call for "juridical creativity" could be partially countered by the remark that Part D of Annex I to the SPAMI Protocol already requires that proposals for SPAMIs ensure clear conservation and management objectives and clearly define "the competence and responsibility with regard to administration and implementation of conservation measures" (para. 4). In any case, the basic prerequisite of having an adequately strong management body in place should never be neglected in examining proposals for the future network of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean and legal devices could be studied to ensure it. Proposals should make a distinction between the roles respectively granted to the meetings of the Parties concerned, to the agreement secretariat, if any, and to the management body, entrusting the latter with a set of clearly defined competences. The composition of the management body could also include representatives of stakeholders different from States to ensure the participation of all the interests involved. The Meeting of the Parties to the SPA Protocol could elaborate a model management body scheme for MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined that could provide a non-binding guidance to the Parties concerned.

9.H. Compliance

Once established, MPAs require continuous monitoring of ecological processes, habitats, population dynamics and the impact of human activities. This information is essential for periodic updating of applicable regulations and management plans. Wherever possible, incentives and non-regulatory approaches should be considered to encourage voluntary compliance and a culture of

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[136] Notarbartolo di Sciara, *The Pelagos Sanctuary* cit. (*supra*, note 110), p. 2. The criticism is based on the experience of the Pelagos sanctuary: "The parties' assumption that the Agreement Secretariat – which is undermanned and devoid of sufficient powers as well as means and human resources to prevent or control activities that contrast with the aims of the protected area – should act as a surrogate management body of the Pelagos SPAMI has been a crippling misunderstanding, resulting in severely deficient management action in the area" (*ibidem*).

self-enforcement of rules by user groups. This is particularly important at sea where monitoring and detection are often harder than on land. Such approaches are likely to work best within a context that encourages informed public participation, education and awareness-building.

Constructive working relationships with fisheries and tourism operators, local authorities, communities, scientists, nature conservation interests and other interested parties can facilitate MPA establishment, planning and operation. They are conducive to better-informed adoption of collective goals and more efficient and clear decision-making and may reduce instances of non-compliance. Creating public awareness and fostering public participation will probably involve extra time and effort before decisions can be taken. However, the alternative – perceived lack of transparency and accountability, loss of confidence by local people in management decisions and the regulatory process – can create serious impediments to the long-term acceptability and effectiveness of MPAs. Relevant stakeholders should thus be identified and efforts made, preferably through the adoption of specific regulations, to encourage public participation in MPA procedures[137].

The MPA management body must have authority to enforce, through the competent State authorities, the rules and regulations applying within the MPA. Relevant legislation should therefore provide adequate powers to take enforcement action, backed by meaningful penalties. Under appropriate circumstances, coastal or marine conservation officers should have the authority to impose on-the-spot fines for minor resource and environmental offences. For more serious violations, their authority should extend to the gathering of evidence, impounding and confiscation of equipment, imposing a court summons and, when appropriate, arrest and detention powers.

The fact that some portions of MPAs can totally or partially cover high seas waters should not be seen as a major obstacle against the enforcement of the relevant provisions. The same legal scheme already followed in Art. 14 of the Agreement establishing the Pelagos sanctuary could be repeated. In the part of the MPA located in the waters subject to its sovereignty or jurisdiction, any of the States concerned is entitled to ensure the enforcement of the applicable provisions. In the other parts of the MPA, any of the States concerned is entitled to ensure the enforcement of the applicable provisions with respect to ships flying its flag, as well as, within the limits established by the rules of international law, with respect to ships flying the flag of third States.

As regards possible cases of non-compliance by States Parties, a provision on reporting (Art. 23) is already included in the SPA Protocol. Moreover the Procedures and Mechanisms on Compliance under the Barcelona Convention and its Protocols, adopted in 2008 by the Meeting of the Parties to the Barcelona Convention[138], are also applicable. Their objective is “to facilitate and promote compliance with the obligations under the Barcelona Convention and its Protocols, taking into account the specific situation of each Contracting Party, in particular those which are developing countries”.

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[137] Ecological measures are often perceived to be in competition with economic activities, even though economic development opportunities may actually depend upon the conservation of the environment, as is the case of tourism.

[138] See Papanicolopulu, *Procedures and Mechanism on Compliance under the 1976/1995 Barcelona Convention on the Protection of the Mediterranean Sea and its Protocols*, in Treves, Pineschi, Tanzi, Pitea, Ragni & Romanin Jacur (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, The Hague, 2009, p. 155.

10. Summary and Conclusions

The Mediterranean is a special sea, as far as its legal condition is concerned. Not all its coastal States have established an exclusive economic zone. Some of them have proclaimed a fishing zone or an ecological protection zone. Since for geographical reasons no point in this semi-enclosed sea is located at a distance of more than 200 n.m. from the closest land or island, any waters beyond the limits of national jurisdiction (high seas) would disappear if in the future all the coastal States decided to establish their own exclusive economic zones (or fishing zones or ecological protection zones). The entire Mediterranean seabed already falls under the national jurisdiction of coastal States (continental shelf in legal sense).

For practical purposes, this report understands the expression “MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined” in a particular meaning adapted to the Mediterranean, as referred to those MPAs that are totally or partially located beyond the limits of the territorial seas of the relevant coastal States. Such MPAs could include not only areas of high seas, in those waters where no coastal zones beyond the territorial sea have been declared, but also areas that are subject to different sorts of national jurisdiction, falling, as the case may be, under the regime of the continental shelf, the exclusive economic zone, the fishing zone or the ecological protection zone.

A MPA can generally be understood as an area of marine waters or seabed that is delimited within precise boundaries (including, if appropriate, buffer zones) and that is granted a special protection regime because of its significance for a number of reasons (ecological, biological, scientific, cultural, educational, recreational, etc.). MPAs should have clearly delineated boundaries and a strong causal link between the harm being addressed and the management measures, which should be flexible and adaptive. They should include implementation, compliance and enforcement measures consistent with international law, as reflected in the UNCLOS.

The establishment of MPAs as a key element of marine environmental protection is linked to the most advanced concepts of environmental policy, such as sustainable development, precautionary approach, integrated coastal zone management, marine spatial planning, ecosystem approach and transboundary cooperation. Several policy instruments call for action towards the establishment of such areas. Yet such an action is already required by a number of obligations that are today binding according to both customary international law and treaties in force for many States at the world and the regional level. It would be a mistake to think that customary international law and the traditional principle of freedom of the sea, which is applicable on the high seas and, for some of its aspects, within the exclusive economic zone, become insurmountable obstacles against the establishment and management of MPAs beyond the limit of the territorial sea. As to the question of States that are not parties to the relevant treaties, it should be recalled that in any case every State is bound by obligations arising from customary international law, such as those relating to the protection of the marine environment, and that international law allows for countermeasures, such as trade sanctions, in certain circumstances and under certain conditions. For the recent and very significant establishment of six MPAs beyond national jurisdiction, the action taken in the North-East Atlantic by the Parties to the OSPAR Convention deserves being particularly recalled.

Several policy and legal instruments adopted at the Mediterranean level confirm the trend towards the establishment of MPAs in this regional sea. While the political goodwill of some Mediterranean States could still seem dubious, the scientific foundations for such an action are

hardly questionable and a fully adequate legal instrument, that is the SPA Protocol, is already in place. This instrument is sophisticated and flexible enough to meet all the peculiarities of the present and future condition of Mediterranean waters and seabed. While they need to be carefully addressed, legal aspects do not constitute a problem for the establishment of MPAs beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean.

The way to establish an MPA beyond national jurisdiction or in waters where the maritime boundaries between the States concerned have not yet been delimited is to do so under a treaty. However, in the case of Parties to the SPA Protocol, the joint proposal, can take the place of the needed treaty. If the States concerned prefer to do so, they can proceed in an informal and flexible way. The proposal is agreed by the competent authorities of the States concerned and must indicate the protection and management measures applicable to the envisaged MPA. It can be considered as an agreement concluded in a simplified form subject to the condition of subsequent approval by the Meeting of the Parties to the SPA Protocol. This does not prevent the States concerned, if they want to do so, to conclude a treaty after the inscription of the area on the SPAMI list in order to regulate in detail the management of the SPAMI. What is mostly important, due to the present transitional and unsettled condition of several areas in the Mediterranean, is to properly identify how many and which are the “neighbouring Parties concerned”.

A wide range of protection measures can be agreed upon for application within an MPA, in conformity with international law and taking into account the characteristics of each MPA. The States concerned must envisage planning, management, supervision and monitoring measures. If two or more States are involved in an MPA, the treaty establishing it or the joint proposal in the case of SPAMIs should clearly define what are the procedures according to which new protection measures, as well as the management plan and the subsequent modifications, are to be agreed and adopted by the States concerned. A general political commitment is not sufficient for this purpose.

It would be practically impossible to get general acceptance of any measure affecting shipping in an MPA beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined without previous endorsement at the world level within IMO in any of the forms provided under the relevant IMO instruments (establishment of a PSSA, ship routeing systems, including areas to be avoided, compulsory pilotage schemes, vessel traffic management systems). The same can be said, in the field of fisheries, as regards the measures adopted by GFCM, considering that this institution has already made use of area-based management tools by establishing fisheries restricted areas in order to protect the deep sea sensitive habitats. Close co-operation is equally needed with other legal frameworks that carry out activities in the Mediterranean, such as the ACCOBAMS Secretariat, as regards the protection of cetaceans, and CIESM, as regards fundamental scientific research. Activities of exploration and exploitation of the mineral resources of the seabed can have a particularly significant impact on the environment, due to the noise that seabed exploration techniques generate and due to the catastrophic effects that an oil spill can determine in the surrounding marine environment. In this field no specific institution exercises competences.

Due to the importance of the management plan, if two or more States are involved in an MPA, the treaty establishing the MPA or the joint proposal in the case of SPAMIs should provide for a strong management body, having a clear mandate and the necessary human and financial

resources. The MPA management should have authority to enforce, through the competent State authorities, the rules and regulations applying within the MPA. The fact that, some portions of MPAs can totally or partially cover high seas waters should not be seen as a major obstacle against the enforcement of the relevant provisions. In the part of the MPA located in the waters subject to its sovereignty or jurisdiction, any of the States concerned is entitled to ensure the enforcement of the applicable provisions. In the other parts of the MPA, any of the States concerned is entitled to ensure the enforcement of the applicable provisions with respect to ships flying its flag, as well as, within the limits established by the rules of international law, with respect to ships flying the flag of third States.