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GOVERNANCE OF HIGH SEA MEDITERRANEAN MARINE PROTECTED AREAS FROM A MALTESE PERSPECTIVE

by

CHRISTOPHER COUSIN

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Author's Signed Declaration

At no time during the registration for the degree of Doctor of Philosophy has the author been registered for any other University award without prior agreement of the Doctoral College Quality Sub-Committee.

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Signed: [Signature]

Date: 18 April 2021
The conservation of marine resources is gaining importance as more research is carried out leading to an increase in public awareness through campaigns and news. One conservation tool that is attracting more attention is commonly referred to as marine protected area (MPA). This tool has been used over many years but its use is increasing. There are various legal instruments that either obligate or encourage the use of MPAs. MPAs can be applied in all areas irrespective of the jurisdiction. However, jurisdiction of the area where a MPA is to be designated, influences the nature of regulations with which the MPA is governed and also the complexity of the process to establish the protected area. The High Seas, in which no State can exercise any form of jurisdiction, is presenting legal and practical challenges in the setting up of MPAs. To date a number of High Seas MPAs (HSMPAs) have been designated in various parts of the globe. In the Mediterranean Sea, only one HSMPA has been set even though a relevant regional legal instrument, in the form of a Protocol, is in place since 1995. This instrument calls for and incorporates an administrative process how HSMPAs can be set. It is evident that after twenty years of the Protocol’s existence and the number of HSMPAs in this regional sea, that some factors may be holding its Parties back. Such factors need to be singled out and analysed. These factors are not just of legal nature but also of political,
scientific, social and financial nature, among others. This research endeavoured to analyse the existing situation by an empirical review looking at the nature and need of MPAs and then delving into existing laws that factor MPAs in their provisions. The empirical aspect was considered since law evolves to meet the needs and expectations of humankind, which also include the protection of the environment. There are a multitude of provisions that can allow States to at least seek a way forward to establish HSMPAs but yet progress is limited. So much so that now work is on-going on an agreement under the auspices of the United Nations to possibly facilitate HSMPAs. The status quo of the Mediterranean situation was also sought through questionnaires being sent to Parties of the Protocol, analysis of documents from conferences of the Parties and also by interviews with various academics. It is evident that while HSMPAs in other parts of the globe present various challenges, the situation in the Mediterranean may be even more complex owing to the political situation and the differences in the level of development between various States. The factors that are withholding the States to set HSMPA need to be addressed to ensure the successful implementation of the Protocol’s relevant provisions. Failure to do so might not imply that Mediterranean HSMPAs would not be created but they can simply remain paper MPAs. Such a situation might lead to a discontent in the public attitude toward this tool due to poor tangible results. This research attempts to identify various factors and also puts forward some recommendations for possible way forward.
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<tr>
<td>CBD</td>
<td>Convention on Biological Diversity</td>
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<td>CCAMLR</td>
<td>Convention on the Conservation of Antarctic Marine Living Resources</td>
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<td>CCRF</td>
<td>Food and Agriculture Organisation of the United Nations Code of Conduct for Responsible Fisheries</td>
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<td>CJEU</td>
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<td>Convention on Migratory Species</td>
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<td>COP</td>
<td>Conference of Parties</td>
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<td>Continental Shelf</td>
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<td>Development and Planning Act</td>
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<td>Ecologically and Biologically Significant Area</td>
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<td>Environment and Development Planning Act</td>
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<td>Good Environmental Status</td>
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<td>IMO</td>
<td>International Maritime Organisation</td>
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<td>ISA</td>
<td>International Seabed Authority</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<td>ITLOS</td>
<td>International Tribunal for the Law of the Sea</td>
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<td>International Union for Conservation of Nature</td>
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<td>Illegal, Unreported and Unregulated fishing</td>
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<td>International Whaling Commission</td>
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<td>International Convention for the Prevention of Pollution from Ships 1973, as modified by the Protocol of 1978</td>
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<td>Monitoring, Control and Surveillance</td>
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<td>MedPAN</td>
<td>Network of Marine Protected Areas Managers in the Mediterranean</td>
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<td>Malta Environment and Planning Authority</td>
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<td>MOP</td>
<td>Meeting of the Parties</td>
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<td>North East Atlantic Fisheries Commission</td>
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<td>Non-Governmental Organisation</td>
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<td>PSSA</td>
<td>Particularly Sensitive Sea Area</td>
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<tr>
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<td>Regional Fisheries Management Organisation</td>
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<td>SBSTTA</td>
<td>Subsidiary Body on Scientific, Technical and Technological Advice</td>
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<td>Total Allowable Catch</td>
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<td>VME</td>
<td>Vulnerable Marine Ecosystem</td>
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<td>Worldwide Fund for Nature</td>
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Introduction

The sea has been at the service of humankind for thousands of years. It is used for consumptive and non-consumptive needs, from fishing to navigation. It serves the needs of not just the people living on the coastline, but also of those living in distant areas. As with the ‘Tragedy of the Commons’, the non-responsible use and unsustainable harvesting of resources for short-term benefit can fundamentally impact the marine environment.¹ However, there is evidence of an increasing drive toward the protection and conservation of our seas and their associated resources, stemming from numerous negative impact events, including continued diminishing catches of living resources and wide-scale pollution, coupled with increasing pressure from environmental groups.

As a result, marine conservation measures have been adopted at local, national and regional levels. Historically, these measures were based not on scientific grounds, but either in response to an emerging situation or user observations. Some of these still practised today, but most conservation measures are grounded in scientific evidence. One conservation measure practised for a number of years, and the focus of this research, is the protection of resources and geophysical features through the designation of marine areas that are then subject to tailor-made regulation. Such areas are popularly known as marine

---

protected areas (MPAs).\(^2\) The International Union for the Conservation of Nature (IUCN) defines a protected area as:

“…a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.”\(^3\)

While this definition is frequently used, there are other definitions which will be explored under the respective legal instrument. Today, there exist a number of national, regional and international legal texts that call for, and provide direction on, the selection and governance of such areas.

Unlike on land, the marine environment presents a number of challenges in respect of State jurisdiction as a result of the limits or exclusion of ‘ownership’. The literature review analyses the States’ rights over the marine environment, In fact, through the United Nations Convention on the Law of the Sea (UNCLOS), to be discussed in detail in the following chapters, the oceans are divided into a number of areas in which a State’s jurisdictional rights vary. This impinges significantly on the governance of MPAs most notably because a State has limited jurisdiction which varies according to areas as indicated in UNCLOS. As a general simple rule, over specific areas, the ‘ownership’ rights decrease as the distance from the coast increases. An analysis of such rights is provided in section 2.1. Nevertheless, they have been designated within numerous marine


\(^3\) IUCN. “When is a Marine Protected Area really a Marine Protected Area.” *IUCN*, September 8, 2012. [https://www.iucn.org/content/when-marine-protected-area-really-marine-protected-area](https://www.iucn.org/content/when-marine-protected-area-really-marine-protected-area) (accessed June 1, 2018).
areas, including in the Mediterranean Sea, which is the focus of this study. The thesis, among others, analyses how a State’s ‘ownership’ or different jurisdictional rights in different marine zones affect the designation and governance of MPAs. More details of this are provided in the chapter on Legal Review. Moreover, modern practice in the designation of MPAs has evolved from an approach that selected isolated areas, in favour of one focused on developing more coherent networks of protection. However, there remains the need for the regulation of conservation and the sustainable use of biodiversity to be more effectively coordinated and continually updated.4

The conservation of living resources in the Mediterranean Sea faces various challenges. Some of these may be attributable to the geo-political situation of this region. The Mediterranean Sea still incorporates significant areas of High Seas, since the majority of States have not yet laid claim to their full potential entitlement to an Exclusive Economic Zone (EEZ), while others have not even claimed the full extent of Territorial Sea to which they are entitled. The overlapping of Continental Shelf borders is evident, bringing with it significant implications should States claim a full EEZ. The difference in the political stability and the economic development between the States on the northern and the southern perimeter of the Mediterranean is, possibly, also a contributing factor to the lack of High Seas MPAs (HSMPAs). One consequence of this situation is an increase in pressure upon the marine environment. These additional pressures are, for example, manifested in phenomena such as illegal

4 Sylvia Earle, “Forward: high time for High Seas marine protected areas,” Parks 15, no. 3 (2005): 4
unreported and unregulated (IUU) fishing, by vessels operating under the flags of both Mediterranean and non-Mediterranean States. Military exercises, sonic disruption, extraction of non-living resources and underwater research are further contributing pressures, although this list is non-exhaustive.

Malta is an island State, lying approximately in the middle of the Mediterranean basin. Its marine environment and resources, including straddling stocks, may be affected by activities occurring on both the High Seas and in the territory of other States. Malta has designated a number of MPAs in areas under its jurisdiction but has proposed none on the High Seas. However, mere designation of marine protected areas alone, is not the ultimate goal: MPAs have to be properly managed through binding rules, adequate monitoring and appropriate and proportionate enforcement measures. If they are not, they run the risk of being perceived as merely paper MPAs, which in turn may undermine the credibility of MPAs as an effective conservation tool. In the case of Malta, whilst designation of Territorial Sea MPAs occurred a number of years ago, the management plans have not been finalised although the process to do so is ongoing. Even though existing, regional legal provisions allow for the designation of HSMPAs, only one such area has ever been proposed, and Malta has proposed none. Ultimately, the central question then becomes whether failure to make effective use of the available legal regime in respect of HSMPAs undermines the enhancement of marine conservation.

Over the recent years it has been noted that there seems to be a lack of steady progress towards the designation of HSMPAs in the Mediterranean Sea. While
it is noted that a legal instrument (The Specially Protected Areas and Biological Diversity (SPA/BD) Protocol, refer to Section 3.5.1) is in place to allow for HSMPAs, there seems to be a lack of coherence among its Parties on its application to designate HSMPAs. There seems to be a perceived inertia of some Mediterranean States to act in furtherance of the legal opportunities available to designate HSMPAs, and to respond to pressure from various expert bodies. Noting the seemingly lack of agreement among the Parties on the application of this Protocol and the affirmation of the Protocol’s Secretariat’s that this legal instrument does provide for HSMPAs led the author to raise various questions and most of all to the need to seek to acquire in-depth knowledge about this issue so as to be able to take an affirmative position in argumentation on the topic of HSMPAs in the Mediterranean Sea particularly when carrying out tasks related to MPAs. This knowledge was considered to be particularly useful noting that the author did participate in various regional meetings representing his country.

Consequently, this study focuses on legal aspects related to the designation and regulation of Mediterranean HSMPAs, presenting the Republic of Malta as a detailed case study.

The main objectives of this research are to:

- Identify and analyse existing legal instruments that can be used to establish Mediterranean HSMPAs;
- Suggest some possible solutions for any identified burdens that may be hindering the progress of Mediterranean HSMPAs.
In order to attain the overall objectives, the following interim objectives need to be attained:

1. To seek knowledge on the need for HSMPAs taking into consideration social and ecological aspects;
2. To explore and analyse legal instruments that are being applied in other parts of the world to create HSMPAs;
3. To analyse in-depth existing legal instruments, especially with regards to their provisions to allow the designation of Mediterranean HSMPAs;
4. To provide information on the status of the situation in the Mediterranean Sea with emphasis on the progress made by the Parties as compared to their commitments at various regional meetings.

In order to meet the objectives of this research, the thesis is structured as described below.

The first chapter provides a comprehensive review of the literature on the subject of MPAs. It considers a variety of perspectives, including those related to social, economic, legal, scientific and political discourses. Although the principal focus of this study is framed upon the legal regime to designate and enforce MPAs on the High Seas, it is important to provide analysis of this range of perspectives to offer a more complete picture. In most situations, law is reactive: driven by a variety of socio-economic needs. This literature review therefore incorporates various sources, ranging from printed material to electronically available sources. It includes books and refereed, academic
articles, official sources, and grey literature including periodicals and newspapers, as well as stakeholders’ views and third parties’ websites.

Chapter 2 offers an in-depth analysis of a number of directly relevant instruments of Public International Law. It identifies a number of lacunae that are present in these measures and considers their potential impact on the governance of MPAs. In addition to the detailed analysis of the law, this chapter recognises the significance of the political context in which these laws operate. It also considers how the development of MPAs as a conservation mechanism has necessitated an evolution of the legal instruments in order to support their designation and governance, as well as to manage various situations and the needs of different stakeholders. The chapter starts with an analysis of the different marine zones established by UNCLOS.

The third chapter examines the applicable regional Conventions, relevant measures of European Union (EU) law and Maltese law. In the Mediterranean context, the regional Conventions have driven EU and national law imperatives. In fact, the Conventions that are relevant to Malta, are reflected in national legal measures. This chapter seeks to bring the reader closer to the Mediterranean Sea, and to Malta. The measures under consideration in this chapter are once again set within the geo-political context of the Mediterranean Sea. Necessarily, there are links to the discussion in the previous chapter due to the fact that there is significant reference to the UNCLOS established marine zones.
Chapter 4 offers an exploration of the methodology adopted. In order to provide a factual picture of the existing situation, as well as likely scenarios for the future, the methodology not only incorporates an empirical literature and legal review but also explains the acquisition of the views, perspectives and official positions of various stakeholders. Since the focus of the study is the Mediterranean Sea, the position and opinion of authorities of the various coastal States bordering the Mediterranean Sea, and that of relevant third parties, was initially considered important and of value in gathering. In addition, the perspective of two other groups of States was also considered relevant: first, those States that in some way or another make use of the Mediterranean Sea, such as by having registered vessels navigating or fishing therein: and, second, those landlocked States, which although not being on the coastline still may have a role in the governance of the High Seas due to their UNCLOS rights, including to use the ports of coastal States. Within the Mediterranean context, the views of third parties include those of environmental non-governmental organisations (eNGOs).

Chapter 5 presents the findings of empirical data collection, including that from third parties and institutional stakeholders. The data collection process sought primarily to acquire information on the approaches adopted by the various Mediterranean States in respect of the designation of HSMPAs. Descriptive text provides an analysis of the findings and is augmented by a number of diagrammatic representations to facilitate explanation. In addition, chapter five provides a textual analysis of the principal decisions and measures adopted by the Secretariats to the governing Conventions and States party to them. Hence,
this is a chapter that provides an analysis of the *status quo* of the situation in the Mediterranean Sea and the Republic of Malta, as well as the views of organisational groups.

Finally, Chapter 6 provides a summary of what is explored and analysed in this study, followed by the main findings and general recommendations. A table is used to assist in bringing together the various main factors and articulate an effective response to the central focus of the thesis. It explores potential recommendations to resolve any identified problems.

The complexity of the existing situation, especially on the High Seas, naturally means that this is not a study that can provide the key to resolving all problems or issues associated with MPAs. To this end, the need for, and basis of, further complementary research is needed.
1 Literature Review

This literature review provides an investigation into the use of marine protected areas and considers a number of different issues in respect to their establishment, their management and their perception as a means to deliver conservation imperatives. A detailed examination of the principal legal mechanisms necessary to create MPAs is offered in the following chapter.

The information provided in this chapter will assist in the considerations related to legal issues. The information provided in this chapter, among others, relates to current problems and also good governance aspects of MPAs. In fact, later on, in this study, these factors are brought up again when analysing the current situation and also when presenting recommendations.

This chapter addresses the first sub-objective, refer to page 24, by providing empirical evidence of the issues around MPAs. It starts by providing historical information on how the use and concept of MPAs developed over time. It delves into aspects related to nomenclature noting that while the term MPA is commonly used, there are other terms employed by different legal instruments that imply the use of MPAs. In other words, the term MPA and other different nomenclatures are used interchangeably. The rest of the chapter deals with aspects related to issues with MPAs including the evolution of legal instruments; the various uses of MPAs; and information about the various issues regarding MPAs.
1.1 The Changing Oceans: an Historical Perspective of Protected Areas

Unlike protected areas in the terrestrial environment, the designation of MPAs has two added complexities: differing jurisdictional issues; and, sometimes related, a different regime of property rights. Allied to these issues, has been a long-held public perception that the use of the sea, for various extractive reasons, including for example for food, energy and mineral resources, is limitless.\(^5\) The sea has been traditionally considered as a public domain, a concept dating back to Roman times.\(^6\) This view of access to the oceans was further strengthened in the 17\(^{th}\) century, when Hugo Grotius claimed that the sea should be accessible to all and marine areas should be used without restriction, because in his opinion the seas could not be harmed by human activities and thus needed no protection.\(^7\) Over the centuries this perception has evolved to bring us to what is commonly referred to as the ‘tragedy of the commons’. Hardin’s seminal work identified that where a resource was open to all, an individual will seek maximum gain through the exploitation of that resource, ignoring the long-term effects, since the individual has no guarantee that others will not do the same.\(^8\)

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Today, Grotius’s vision still influences ocean policy.\textsuperscript{9} By way of example, the negative impacts of over-exploitation of fish stocks in open access fisheries,\textsuperscript{10} and in the case of the High Seas, illegal fishing.\textsuperscript{11} In principle, this is caused by the failure of fisheries management.\textsuperscript{12} This situation is compounded by ineffective conservation measures in areas beyond national jurisdiction (ABNJ).\textsuperscript{13} A further complicating factor, can be seen in an increase in negative anthropogenic influences\textsuperscript{14} that have led, for example, to the loss of biodiversity, habitat depletion, over-exploitation and pollution\textsuperscript{15}, which has caused irreversible damage to the marine environment.\textsuperscript{16} Other examples of negative effects result from shipping and tourism:\textsuperscript{17} the negative effects of navigation include oil spills, operational discharges and waste dumping.\textsuperscript{18} Evidence shows that damage has been caused to habitats in vast marine areas, ranging from

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the shore to ABNJ. This situation also pertains to European waters, including those of the Mediterranean, which have been host to one of the longest historical and uninterrupted uses by mankind.

In response to these aggregated threats, commentators, such as Gjerde, have suggested that a precautionary and integrated management approach is required to eliminate, or at least minimise, the resulting impact. Rayfuse, in the context of fisheries, claims that freedom of access to and use of the oceans actually no longer exists, partially as a result of industrialised nations exerting their freedoms irresponsibly. This irresponsible use can be witnessed in, for example, larger and well equipped fishing vessels being able to out-compete those that are less equipped, and hence acquire a larger portion of the catch, which has impacts on artisanal or subsistence coastal communities; and pollution of the marine environment, which may limit the availability of productive areas. Finally, the development of international legal mechanisms, such as the Agreement on Highly Migratory Fish Stocks also indicate a weakening of the principle of the freedom of the sea.

These problems require mitigation: the restoration of various habitats across the world is needed, according to Barbier et al.\textsuperscript{26} in O'Leary's view, the impetus for the mitigation of problems and a move towards a more holistic protection of the oceans, has stemmed from various States' initiatives and has been sustained through the global community's drive to designate and create MPAs.\textsuperscript{27} Marine protected areas serve a variety of purposes to facilitate the achievement of a disparate range of valued characteristics. Vallega, for example, contends that post-modern society looks at the oceans from a cultural and/or heritage perspective and not solely as a means to work towards ecological balance.\textsuperscript{28} In this context, MPAs are being widely used not just to protect biodiversity but also to protect cultural heritage,\textsuperscript{29} leading to the promulgation of a number of legal instruments for enhanced and bespoke MPA governance. These measures provide the legal basis upon which such areas can be designated; still others create obligations to identify prospective MPAs on the grounds of specific characteristics. There are, however, various legal and technical issues involved with the design, management, governance and enforcement of MPAs, which will be the continuing focus of this thesis.

An action to counteract the possible lack of due protection of areas that do not appertain to any jurisdiction and therefore safeguard such areas against problems similar in nature as that described by Hardin as the Tragedy of the


\textsuperscript{27} O’Leary et al., “The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next,” 603.


\textsuperscript{29} See The Specially Protected Areas and Biological Diversity Protocol, section 3.5.1 and the UNESCO World Heritage Convention, section 2.13.
Commons, was published by Van Dyke, who noted that Stone has advocated the creation of an Ocean Guardian. The creation of such a role would necessitate certain powers. It was offered that the Guardian would need to be authorised to: “…monitor ocean conditions;… appear before the legislatures and administrative agencies of States considering ocean-impacting actions to counsel moderation on behalf of their ‘client’;… appear as a special intervener-counsel for the unrepresented ‘victim’ in a variety of bilateral and multilateral disputes; and… to initiate legal and diplomatic action on behalf of the commons in appropriate situations.” In some respects this aligns with contemporary measures in granting rights to natural features, in line with Stone’s seminal work *Should Trees Have Standing?*

### 1.2 Historical Development in the use of Protected Areas

While the overriding sense of attitudes to the marine environment has, and still reflects Grotius’ view of the freedom of the seas, an exploration of the literature identifies a history and progressive use of measures designed to protect certain marine areas. Hence, as identified by Jones-Walters and Civic, the management of natural resources, particularly at a local level by local

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communities, has in fact been in practice for hundreds of years.\textsuperscript{33} Such areas now range from flexibly managed resource protected areas to strictly controlled and managed nature reserves.\textsuperscript{34} Scott notes protected areas and access to the resources therein, also form part of marine spatial planning (MSP), which is a device used in seeking to balance all legitimate marine uses sustainably.\textsuperscript{35} Both MSP and MPAs are thus capable of being potentially important tools for the protection of our seas.\textsuperscript{36} This is because they allow better and more systematic management of human activities, balanced with conservation of the environment.\textsuperscript{37} As Gjerde and Rulsk-Domin state, MSP can lead to the development of coordination and the proper spatial location of human uses, without creating a negative impact on the environment.\textsuperscript{38} Different stakeholders use the marine environment to accommodate their needs in an effective and efficient manner while their impact on the natural environment might be of least concern; also noting that the degree of sensitivity of marine natural areas varies from one area to another MSP is a right tool to ensure as much as possible that activities occurring in an area do not cause unwanted impacts on the

\textsuperscript{36} Salomon and Dross, “Challenges in Cross-Sectoral Marine Protection in Europe,” 142.
environment. MSP can therefore serve a dual role of minimising impact on the natural environment and decrease conflicts among stakeholders.

Most of the benefits originally expected from MPAs, focused primarily on fisheries resources, as opposed to being a means of offering protection for the entire ecosystem. MPAs were therefore used to manage and protect coastal zones and marine areas closer to shore. In Polynesia, for example, closed areas and limited fishing seasons have been used for hundreds of years. More recently, within the last century, one can find the development of examples of the regulation of certain activities in the Mediterranean Sea, the focus of this study. An example can be found in Maltese law, dating back to 1934, which prohibited the use of specific fishing gear in certain areas during specific times of the year. Although such areas were not formally designated or commonly recognised as MPAs, they provided a function analogous to one. When extractive activity ceases or is limited in specific areas there is an expectation that the areas will see a corresponding recovery in condition. Thus, when there was a decrease in fishing effort during World Wars I and II, most marine areas became a de facto MPA. The resulting net positive effect on fish stocks, supported the idea of deploying closed areas for the benefit more

41 Fishery Regulations, Subsidiary Legislation 425.01.
generally of such stocks. More recently, in 2005, the General Fisheries Commission for the Mediterranean (GFCM) called for a ban of bottom-trawling at depths beyond 1000 meters throughout the Mediterranean Sea. The same argument in fact can be used for areas within EEZs whereby such zones, assuming that they are governed through a management plan, could be defined as MPAs (even though the marine conservation value is sometimes debatable).

In 1970, Canada established the first, formally declared, marine environmental protection zone, and followed this with several other initiatives. Gradually, over the following years, more MPAs were designated by a number of other countries across the globe. This also included the Mediterranean Sea, where Juanes observes an increase in the formal establishment of MPAs. The lack of compliance with, and success of, conventional fisheries management measures may have led to the increased use of MPAs. In fact, “reserves may be the only way to protect the most vulnerable species in these complexes or stocks that have been overfished in the past.”

In 1987, Malta established a specific coastal area in which most fishing operations and other activities, even including swimming, were prohibited.49 In 2001, France, Italy and Monaco declared an area that spreads outwards from their Territorial Seas as the Pelagos Sanctuary for Marine Mammals.50 Part of this Sanctuary comprises the first, and only, HSMPA in the Mediterranean Sea. However, Fenberg notes that this Sanctuary is “only designed to ensure protection for marine mammals and is basically a ‘paper park’ with little to no enforcement.”51

The first Maltese coastal MPA was established in 200552 under the auspices of the EU Habitats Directive.53 Other protected areas were later designated and are officially known as Special Areas of Conservation of International Importance. In 2006, the Convention for the Protection of the Marine Environment of the North East Atlantic (OSPAR) acknowledged the first national MPA proposal on the High Seas of the North Atlantic – however, the Commission on the Limits of the Continental Shelf later confirmed that some areas were in fact under Portuguese jurisdiction.54 During the first part of the

52 Government Notice 1138 of 2005. The MPA is: The Marine Area between Rdum Majjiesa and Ras ir-Raheb.
21st Century, the accelerated designation of coastal MPAs was complemented, although to a lesser degree, by the designation of a number of HSMPAs.

According to Marinesque et al, the likely impetus behind this increased designation of MPAs, is the need for States to achieve agreed international targets. This may imply that their designation, which can be divided into three policy network theories, is not always backed by scientific data. These theories are identified as the epistemic community theory, the advocacy coalition theory, and the discourse coalition theory. In an analysis by Caveen et al of these theories, it is noted that the epistemic community theory is not always the most successful approach. This is because the coordination of States' responses to a collective problem requiring action that has arisen at the regional or global level is rarely straightforward. Caveen et al describe the second network theory, advocacy coalitions, as including ‘knowledge experts’, academics, elected officials and civil servants, non-governmental organisations (NGOs), think tanks, journalists and members of civil society. This approach is thus more likely to be limited to expert, scientific participation. Finally, the authors argue that the

discourse coalition theory is the only policy network approach of the three to recognise both the difficulties of separating science from values, and the fact that many environmental issues are incomprehensibly complex allowing a number of different plausible perspectives to exist on the potential solution to a problem.\textsuperscript{61}

The lack of science-backed MPAs may give rise to concerns. While there are claims that many scientists recognise the MPAs’ potential as tools for fisheries management,\textsuperscript{62} there are others that recall the Scientific Consensus Statement on Marine Reserves and Marine Protected Areas of 17 February 2001, whereby many marine scientists became high profile enthusiasts for MPAs, which might have led to their irrational use.\textsuperscript{63}

MPAs have to be designated using existing legal frameworks, which would include particular selection criteria. This template should also apply to the designation of HSMPAs, which should respect the legal status of the area and the stakeholders, ranging from international organisation to coastal States, interests and competencies.\textsuperscript{64}

1.3 The Development of the Legal Regime

As noted, gradually, governments and the global community, and particularly industrialised States, began to realise that humankind cannot afford to keep using the sea as it did in the past: extracting resources without consideration of their use in the future and dumping any kind of waste without any concern on the repercussions on the environment. In the 1950s there were sporadic attempts to protect certain elements of the marine environment by treaty-based regulatory mechanisms. In 1958, following a series of conferences convened by international organisations, four Conventions were adopted which were the Convention on the Territorial Sea and the Contiguous Zone; the Convention on the High Seas; the Convention on Fishing and Conservation of the Living Resources of the High Seas; and the Convention on the Continental Shelf. These established an international framework for the protection of living marine resources. The first to specifically call for the protection of habitats, was the Convention on Wetlands of International Importance especially as Waterfowl Habitat, discussed more fully in Section 2.7. This focus on habitat may be considered to be in the vanguard of mechanisms specifically created to protect an area. Applying such a device in a marine setting, thereby provides the basis for the creation of MPAs.

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Under the auspices of the United Nations, in 1972, the Convention Concerning the Protection of the World Cultural and Natural Heritage sought to protect marine areas of global importance. The sites protected under this Convention must satisfy one of the ten criteria. For the marine environment, one of the most applicable criteria being:

“to be outstanding examples representing significant on-going ecological and biological processes in the evolution and development of terrestrial, fresh water, coastal and marine ecosystems and communities of plants and animals.”

In the same year, the United Nations Environment Programme (UNEP) was established, with a mission to manage the environment by engaging neighbouring countries in mutually beneficial, environmental management.

Also in 1972, the UN held the Stockholm Conference from which two non-legally binding instruments, the Stockholm Declaration and the Action Plan, emerged.

Following Stockholm, measures reflecting concerns related to human impact on the marine environment gathered pace. In 1973, the primary treaty governing the prevention of pollution of the marine environment by shipping, the International Convention for the Prevention of Pollution from Ships (MARPOL),
was adopted. It governs basic shipping operations, as well as the implications of accidents, and consolidated laws relating to marine pollution from ships, including incorporation of the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL) 1954, as amended. Measures concerning shipping were not the sole focus of the international community. In 1975, the International Union for the Conservation of Nature (IUCN) conference was held in Tokyo. An outcome was the production of a guide for planners on marine protected areas, which amongst other things proposed the formulation of appropriate conservation policies to assist in designating MPAs. By 1975 the Mediterranean Action Plan (MAP) had also been adopted. This paved the way for the Convention for the Protection of the Mediterranean Sea against Pollution, agreed in 1976 and more commonly referred to as the Barcelona Convention. Discussed more fully in chapter three, the Specially Protected Areas and Biological Diversity (SPA/BD) Protocol to the Convention contains, inter alia, measures related to the designation of protected areas, including those beyond national jurisdiction. This extra-territorial capacity generated some controversy between certain States: on face value this was

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resolved, according to Scovazzi, in a similar manner to that in the Antarctic Ocean,\textsuperscript{78} which whilst seemingly sharing no obvious common features with the Mediterranean, actually shares two characteristics, namely, competing and unsettled claims of sovereignty in coastal areas and extensive tracts High Seas. Information on the Antarctic Treaty is available in Section 2.14.

In 1982, United Nations Convention on the Law of the Sea (UNCLOS) was agreed, although it did not enter into force until 1994.\textsuperscript{79} This was the first attempt by the international community to provide for the regulation of various sectoral activities occurring at sea in one, all-encompassing Treaty.\textsuperscript{80} UNCLOS is considered as a cornerstone measure, as it establishes the basic rights and obligations of States as they relate to different activities in the marine environment. UNCLOS is also a framework Convention, and thus many other measures that apply to the marine environment refer to its provisions.

Complementary to the issue-specific regulation of the marine environment as outlined above, international law also developed to extend protection to species and their habitat. This included: the Convention on the Conservation of European Wildlife and Natural Habitats, adopted in 1982;\textsuperscript{81} the Convention on the

Conservation of Migratory Species of Wild Animals, adopted in 1983;\textsuperscript{82} and the Convention on Biological Diversity (CBD), adopted in 1992.\textsuperscript{83} These are discussed in greater detail later in this thesis.

The United Nations Conference on Environment and Development, convened in 1992 in Rio de Janeiro, produced the non-legally binding Agenda 21\textsuperscript{84} and was the vehicle for the adoption of the above mentioned CBD.\textsuperscript{85} The themes from the Rio Conference were re-visited at the Johannesburg World Summit on Sustainable Development in 2002, at which States committed to create networks of MPAs by 2012.\textsuperscript{86} Other conferences followed, but as Beyerlin and Marauhn note, these have not led to significant progress of any hard legal instrument with respect to international environmental law.\textsuperscript{87}

In 2004, the CBD’s conference of the parties (COP) proposed that a representative, global network of MPAs be established.\textsuperscript{88} Two years later, the IUCN noted that to reduce biodiversity loss by 2010, the original target, the relevant CBD provisions needed to be globally implemented in all marine areas.\textsuperscript{89} This was followed by a proposal, again from the CBD’s COP, that between 20

\textsuperscript{82} Convention on the Conservation of Migratory Species of Wild Animals 1651 UNTS 333.
\textsuperscript{83} Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 (1992)
\textsuperscript{84} Beyerlin and Marauhn, \textit{International Environmental Law}, 14.
\textsuperscript{85} Invild Ulrikke Jakobsen, \textit{Marine Protected Areas in International Law: An Arctic Perspective}, (Leiden: Brill Nijhoff, 2016), 84
\textsuperscript{87} Beyerlin and Marauhn, \textit{International Environmental Law}, 23, 27.
\textsuperscript{89} Calado et al., “Introducing a Legal Management Instrument for Offshore Marine Protected Areas in the Azores - The Azores Marine Park,” 1180.
and 30 per cent of each marine habitat be protected by 2012 and that not less than ten per cent of the world’s eco-regions are conserved by 2010 through designation of an appropriate global network of MPAs. The same COP, according to Calado et al, proposed the elaboration of enforcement instruments to be applied to all MPAs.

In 2010, the Aichi targets were adopted: Aichi Target 11 seeks establishment by 2020 of a system of managed and connected MPAs to conserve biodiversity. In 2012, at the Rio+20 UN Conference on Sustainable Development, a document entitled, ‘The Future We Want’, was agreed. A component of that agreement, as observed by Gjerde, was that States committed to develop a legal instrument under UNCLOS to further these aims before the end of 2014. The recognition of continuing pressures impacting on marine biodiversity augmented demands for the designation of MPAs on the High Seas, as part of a managed and connected MPA network reflecting the Aichi Targets. This was manifested in calls

95 Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 841.
for an implementing agreement to UNCLOS providing for the protection of marine biodiversity in ABNJ. By 2014, UNCLOS parties were working on an implementing agreement at the suggestion of a number of States, with the main objectives to include the establishment of such marine protected areas — at the time of writing this work remains on-going.

### 1.4 Types and Nomenclature of MPAs

Since protected areas have been created for different objectives and designated under different legal instruments, it is not surprising to find different titles or descriptors for MPAs. Some typical examples are protected areas under the CBD, Special Areas of Conservation and Special Protection Areas under the EU Habitats Directive and the EU Birds Directive, respectively, and specially protected areas under the SPA/BD Protocol. One description, interesting from an environmental perspective, according to Maes, is an ‘area to be avoided’. This device was created pursuant to MARPOL to complement a specific area with a special status where ships in excess of 500 tonnes are not allowed in order to improve the safety of navigation. Another type of shipping-related protected area is known as a Particularly Sensitive Sea Area (PSSA), which are

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described by Blanco-Bazfin as “… marine protected areas *sui generis* with an extended protective mechanism.”

One final example in this connection, is seen in the Preservation Reference Zone (PRZ) designation. PRZs apply to the seabed under the High Sea water column and are designated by the International Seabed Authority.  

The first formal MPA description in fisheries management was provided by Beverton and Holt in 1957. The various definitions and different sectors involved are probably significant in what is the lack of a single system for MPAs. For example, in Australia, the terms MPA and sanctuary zone are interchangeable and have led to a partial overstatement of the value of so-called protected areas, according to Kearney *et al.* Their reasoning considers that a sanctuary refers to an area with stricter regulations than those in a MPA. Hence, reference to a MPA as a sanctuary, is expected to lead to better results from a conservation point of view. One solution, as proposed by Gillespie, to reduce the complexity stemming from a plethora of different definitions is to have an international classification scheme encompassing all MPAs.

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105 Gillespie, “Defining Internationally Protected Areas,” 231.
The strictest forms of MPA are referred to as reserves, closed areas or no-take areas. These devices are claimed by some of the most respected commentators, such as Laffoley, to be amongst the best tools for the recovery of our ocean areas. In common with other types of MPAs, their actual effectiveness is influenced by both natural and governance factors. At the other end of the spectrum, are MPAs lacking any specific regulation or effective enforcement, commonly referred to as ‘paper MPAs’. MPAs may also be for a temporary period, for example being located where specific seasonal oceanographic conditions are met. The ability to declare such MPAs may be controversial, depending on its territorial extent and real purpose, such as, for example, the USA declaration of a five-mile zone around its warships in the Persian Gulf, where any party prior to entering this zone is required to declare their identity.

In summary, at present there are numerous definitions for MPAs and no agreed scheme for the definition and nomenclature of them. The CBD’s Ad-Hoc Technical Expert Group defines marine protected areas as:

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110 Gillespie, “Defining Internationally Protected Areas.” 229.
“…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.”

However, the lack of definitional clarity remains. This is corroborated by Malta’s Declaration, presented at ‘OUR OCEAN 2017’ on October 6, 2017, which notes:

“…the term ‘MPA’ is now being used so loosely that it no longer connotes meaningful protection. As currently used, the term is a catchall bucket that contains everything from fully protected marine reserves to an area in which only one species is protected or one activity is disallowed. Even fishery management areas are counted as ‘protected’ by some countries.”

From the above, the best we can conclude is that MPAs are areas designated with the aim of enhancing the management of living and non-living resources by regulating human activities more stringently than elsewhere. In turn, a MPA network can be described as:

“…a collection of individual marine protected areas operating cooperatively and synergistically, at various spatial scales, and with a range of protection levels, in order to fulfil ecological aims more effectively and comprehensively than individual sites could alone.”

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112 Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 29.  
1.5 Uses and benefits

One of the common uses of MPAs is for the protection of fish stocks, and an ancillary benefit may be that they prove useful in managing shared stocks. Sumaila and Huang consider this specifically in a Mediterranean context in respect of tuna, a highly mobile species.\textsuperscript{115} In particular, MPAs can provide a substitute for conventional fisheries management when this is otherwise not possible.\textsuperscript{116} For example, Roberts \textit{et al} note that the positive effects MPAs may have on fisheries has been experienced in St. Lucia.\textsuperscript{117} Hilborn \textit{et al} have noted that even in the absence of empirical evidence, MPAs are perceived as an effective tool to protect fish stocks.\textsuperscript{118} In some circumstances, marine reserves have been designated in locations and in situations where reliable stock assessments were not possible, or where fish stock protection was an absolute priority.\textsuperscript{119} However, MPAs cannot be used for the protection or enhancement of all fish stocks, especially when the stock consists of, as with the tuna example above, highly mobile single species and where there is little or no by-catch.\textsuperscript{120} Further benefits from MPAs may be appreciated in spill-over effects into contiguous areas, whereby fish stocks outside of them increase as a result of

\begin{itemize}
\item \textsuperscript{115} Ussif Rashid Sumaila and Ling Huang, “Managing Bluefin Tuna in the Mediterranean Sea,” \textit{Marine Policy} 36 2012 509.
\item \textsuperscript{116} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., \textit{Marine Protected Areas}. 40.
\item \textsuperscript{117} Callum M. Roberts, James A. Bohnsack, Fiona Gell, Julie P. Hawkins and Renata Goodbridge, “Effects of Marine Reserves on Adjacent Fisheries,” \textit{Science} 294, no.30 (2005): 1921.
\item \textsuperscript{119} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., \textit{Marine Protected Areas}. 40.
\item \textsuperscript{120} Hilborn et al., “When Can Marine Reserves Improve Fisheries Management?,” 198.
\end{itemize}
fish migrating from within the MPA. There are also reports of increases in the abundance and size of commercial and non-commercial fish species: research comparing marine reserves with areas outside of them not subject to protection, has shown that the impact of the former leads to an increase in various biological factors, including those identified by Claudet et al such as biomass and species richness. Reserves have been employed to target the recovery of depleted stocks, since in certain cases this may be the only practical way to do so. However, marine reserves are not a panacea and some express doubts about their performance. This is possibly because while there are undoubted successful instances of MPA designation, there are also reported failures. Where there is an unsuccessful MPA, the potential exists for stakeholders to lose trust in the system.

Despite the above focus on fisheries, MPAs are obviously more than just a tool to protect fish stock. Their use in conservation, the provision of ecosystem services and the sustainable use of biodiversity is increasing. In the Mediterranean, for example, they have been used to protect important areas for

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124 Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 35.
125 ibid. 23.
126 ibid. 41.
127 See Alex Caveen et al., The Controversy over Marine Protected Areas, Chapter 4, (The Netherlands: Springer, 2015).
the conservation of marine turtles, monk seals, red coral and birds.\textsuperscript{129} To strengthen the protection of specific biodiversity reserves the Dinard Guidelines, proposed for chemosynthetic ecological reserves, can be applied.\textsuperscript{130} These guidelines include criteria for the identification of chemosynthetic ecological reserves in line with the requirements of the Convention on Biological Diversity or because of their importance from a natural, cultural or historical importance. The guidelines also include aspects related to the management of identified sites.\textsuperscript{131} In some cases, marine reserves offer a means to protect undisturbed sites, which may then be used to establish baseline standards to evaluate human-induced impacts.\textsuperscript{132} In addition, they may also assist in the preservation of diverse ecosystems, with the accompanying genetic diversity promoting resilience. In some situations, such reserves can provide the guaranteed preservation of specific natural features,\textsuperscript{133} by prohibiting the taking of wildlife and natural structures.\textsuperscript{134} However, appropriate design, management, and enforcement are a requirement for their success.\textsuperscript{135}

\begin{itemize}
\item \textsuperscript{132} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 27.
\item \textsuperscript{133} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 23.
\item \textsuperscript{135} Fenberg et al., “The Science of European Marine Reserves: Status, Efficacy, and Future Needs,” 1012.
\end{itemize}
In turn, success also depends on selecting the right locations and the taking into consideration of activities in nearby areas. For example, a study has shown that trawling in the Mediterranean, albeit banned in deep areas, still has a negative effect on areas located in deeper water than fishing grounds.\textsuperscript{136} For effective MPAs on the High Seas, Grant has noted that surrounding marine areas should also enjoy a number of protection measures.\textsuperscript{137} This could be due to the fact that excessive fishing may occur right at the perimeter of the MPA threatening any fish migrating to and from the MPA, as well as potential effects from any trans-boundary pollution.

In addition to the protection of resources, MPAs may be used to ensure the future of habitats in many stressed marine ecosystems.\textsuperscript{138} Although this may appear at first glance a wholly bio-centric approach, in reality it may bring benefits to humans as a result of the numerous ecosystem services provided by the oceans. Such services would include the removal of carbon dioxide from the atmosphere, the production of oxygen and the moderation of coastal temperatures;\textsuperscript{139} and otherwise can offer socio-economic benefits such as fishing and tourism.\textsuperscript{140}

\begin{thebibliography}{99}

\bibitem{137} Susie M. Grant, “Challenges of Marine Protected Area Development in Antarctica” \textit{Parks} 15, no. 3 (2005): 47.
\bibitem{138} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 32.
\end{thebibliography}
The number of benefits attributed to MPAs can be ascertained from the significant amount of published material. Over 200 peer reviewed examples have been published demonstrating the various benefits that MPAs provide. However, this does not imply that MPAs should be assumed as providing the sole solution to global marine problems. According to Kearney et al, the significantly positive claims attributed to MPA designation fuel a bias against fishing in certain areas: this may in fact be a result of misinterpretation of data from other areas in which MPAs have been designated and claimed a success. In fact, Kaiser argues that MPAs should not be applied in a blanket fashion and notes both positive and negative components in respect of their effectiveness. In this vein, Laffoley argues that MPAs should be employed as a periodically reviewed tool to protect marine biodiversity.

1.6 Issues

MPAs are surrounded by a number of controversies, especially when marine reserves are proposed and elicit different perspectives from different

141 Laffoley, “‘Future Ocean’ – Communicating and Conserving the Blue Heart of the Planet,” 259.
142 R. Kearney et al., “Australia’s No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?,” 1066.
144 Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 11.
stakeholders. Among such controversies, apart from the potential benefits claimed to be obtained from MPAs which were dealt with in the previous section, are issues related to their governance; political discourses; the fragmentation of laws and policies; and stakeholder perceptions and attitudes.

1.6.1 The Governance of MPAs

Good governance is important since the designation of MPAs alone would not guarantee their success. It is evident that both theoretically and practically, the success of a MPA is much more likely to be achieved if the management system incorporates monitoring, control and surveillance schemes to ensure compliance, and effective enforcement where that does not occur. Compliance may be enhanced by a range of incentives. These incentives are relational to where the MPA is located (and the protected features), because the sea has been divided into jurisdictional areas, and the incentives are offered through public institutions.

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147 Laffoley, “'Future Ocean' – Communicating and Conserving the Blue Heart of the Planet,” 259.
Over the years it has been observed that where MPAs have failed, in contrast to those that have been successful,\textsuperscript{154} it has been a result of a combination of poor operation,\textsuperscript{155} inappropriate design\textsuperscript{156} and/ or ineffective enforcement.\textsuperscript{157} If a specific MPA is not successful in its stated purpose, the potential exists for their more general use to be called into question.\textsuperscript{158} Davies \textit{et al} writing in the context of off-shore conservation observes that “[c]urrent protection, although improving, still needs to become more efficient with comprehensive legalisation and enforcement that can cover multi-jurisdictional areas such as the High Seas.”\textsuperscript{159} As stated, conservation measures must be monitored, and if necessary enforced, to maintain their integrity. Of course, there is an obvious tension in balancing conservation with economic interests.\textsuperscript{160} Anecdotally, economic factors tend to be prioritised. However, effective management cannot be considered in isolation from economic drivers. In 2000, the recurrent annual expenditure on selected MPAs ranged from zero to over US$ 28 million per square kilometer with an average of US$775.\textsuperscript{161} In 2003, more than US$ 25 billion were required by the IUCN World Parks Congress to maintain MPAs.\textsuperscript{162}

\textsuperscript{154} Laffoley, “Future Ocean - Communicating and Conserving the Blue Heart of the Planet,” 259.
\textsuperscript{160} Calado et al., “Introducing a Legal Management Instrument for Offshore Marine Protected Areas in the Azores - The Azores Marine Park,” 1185.
These figures could be suggestive of the fact that value must be extracted, if necessary by effective enforcement, from MPA designations to justify the cost of their provision.

In contrast, there is evidence of the designation of MPAs as a means of making financial savings. For example, in Australia, Kearney et al claim that marine reserves were selected over traditional fisheries management as a more cost-effective governance option. The use of MPAs in this way may have an influence on stakeholders’ perceptions. This, and the accompanying financial considerations, may in turn influence the designation of new areas and the implementation of existing laws. Thurstan et al reflect this tension in their proposition that activities must be permitted and managed, since merely prohibiting extractive or depositional activities alone may not suffice to achieve conservation goals.

The justification to designate MPAs has evolved beyond considerations of fish stock protection: the imperative for MPA designation continues alongside, as opposed to instead of, the emergence of positive results from fisheries management and the associated increase in various fish stocks. In addition, the steady global increase in MPA designation appears to be leading to larger areas under some form of protection, although this does not necessarily

165 Kearney et al., “Australia’s No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?,” 1068.
translate into an effective network. MPA networks, according to Marinesque et al., may not be adequate if they are implemented through blanket policies which do not take account of specific local characteristics, especially any biodiversity considered unique. In this connection, Kearney, notes that “Australia appears to have allowed misinterpretation of the Precautionary Principle to support the call for more ‘no-take’ MPAs” despite the lack of evidence of threats and impacts from fisheries and a paucity of scientific assessment. The precautionary principle is open to interpretation…. This leads to the questioning of the adoption of the precautionary approach. It is not intended to indicate that a proper application of the precautionary principle should not be practiced since “conceptually, [MPAs] correspond with the precautionary principle when faced with unknown consequences, which is largely the case with complex marine ecosystems” In some situations especially the “limited data available for marine species and ecosystems within

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166 Marinesque et al., “Global Implementation of Marine Protected Areas: Is the Developing World Being Left Behind?,” 734.
167 ibid. 736.
168 World Commission on the Ethics of Scientific Knowledge and Technology, The Precautionary Principle, (UNESCO, 2005). UNESCO Digital Library https://unesdoc.unesco.org/ark:/48223/pf0000139578 (accessed May 20, 2015), 14: “When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish that harm. Morally unacceptable harm refers to harm to humans or the environment that is threatening to human life or health, or serious and effectively irreversible, or inequitable to present or future generations, or imposed without adequate consideration of the human rights of those affected. The judgement of plausibility should be grounded in scientific analysis. Analysis should be ongoing so that chosen actions are subject to review. Uncertainty may apply to, but need not be limited to, causality or the bounds of the possible harm. Actions are interventions that are undertaken before harm occurs that seek to avoid or diminish the harm. Actions should be chosen that are proportional to the seriousness of the potential harm, with consideration of their positive and negative consequences, and with an assessment of the moral implications of both action and inaction. The choice of action should be the result of a participatory process.”
169 Kearney et al., “Questionable Interpretation of the Precautionary Principle in Australia’s Implementation of ‘No-Take’ Marine Protected Areas,” 596.
the High Seas the precautionary principle has to be embraced in order to protect biodiversity.”\textsuperscript{171} This may contrast when it is considered that “several initiatives to establish PSSA have not progressed as expected due to the difficulties in producing the thorough factual assessment needed to justify such a special legal status.”\textsuperscript{172} Therefore, the intent for the creation of MPAs and supporting data should be clearly set from the start and consulted with stakeholders who in turn may also share their knowledge and possibly be more cooperative if a MPA is eventually set.

Issues of legal effectiveness and governance of MPAs also stem from ‘border setting’. For example, while sessile organisms, defined as species that do not move or have limited locomotion, may be protected from fishing by their location in a MPA with a restriction on bottom-trawling, it would be more difficult to protect mobile species trans-locating across the jurisdictional borders of MPAs.\textsuperscript{173} A further complicating factor with regard to legal and geo-political boundaries, stems from the different legal rights to protect the environment that a coastal State has in different marine zones. It could be observed that this fails to take into consideration the fact that biodiversity needs to be managed and protected as a whole, which may not be entirely possible within what are man-made boundaries.\textsuperscript{174} One additional point that may be overlooked, is that MPAs will likely be adjacent to unprotected areas. All of these factors may negatively

\textsuperscript{172} Blanco-Bazfin, “The IMO Guidelines on Particular Sensitive Sea Areas (PSSAs),” 347.
\textsuperscript{173} Kearney et al., “Australia’s No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?,” 1066.
impact upon the potential success of a designated MPA. For example, fish stocks may be affected by unregulated fishing close to a MPA border; and pollutants discharged outside of a MPA may affect species or habitats within it. Thus, as Fenberg et al identify, the success of a MPA does not depend solely on its internal management but also on that practiced in areas adjacent to it. However, as a result of the arrangement of jurisdictional boundaries in UNCLOS (as explained in Chapter 3), there is no guarantee that whole ecosystems straddling national boundaries, and/ or ABNJ, are offered effective protection. In addition, differing levels of commitment by neighbouring States is also likely to undermine effectiveness.

There are a number of issues related to enforcement. For example, while a coastal State is legally empowered within its jurisdictional reach to take enforcement measures such as boarding, inspection, arrest and judicial proceedings, in practice enforcement off-shore remains difficult. To compound this difficulty, should a coastal State wish to ensure conservation for those fish stocks that straddle its EEZ and the High Seas, it must agree measures with all States targeting such stocks.

For enforcement of marine environmental laws on the High Seas, UNCLOS relies primarily on the flag State (as defined and further elaborated on in Chapter 3). This may lead to inadequate enforcement for a number of reasons, including the flag State's limited physical, maritime resources. The International Maritime Organisation (IMO) operates a mandatory flag State audit scheme to counteract this issue but this does not apply to High Seas fishing, dumping, or other activities. In common with other multi-lateral environmental agreements, Tladi has identified an additional problem in that States have not adequately implemented those provisions of UNCLOS applying to the High Seas with regard to the protection of the marine environment.  

Regional agreements are not *erga omnes* but *inter partes*, consequently, they cannot be enforced on third country vessels unless they give effect to the generally accepted international rules and standards. Under MARPOL, outlined in 2.3 above, Special Areas fall into the latter category. This means that cooperation between States and clear enforcement policies are central to ensuring appropriate protection. For example, difficulties in maintaining successful legal actions against large numbers of ships illegally discharging oil was noted during the designation process of the Baltic Sea PSSA.

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181 Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 446.  
Regional Fisheries Management Organisations (RFMOs) are capable of managing large areas of High Sea. Such RFMOs include the Northwest Atlantic Fisheries Organisation (NAFO), and the South East Atlantic Fisheries Organisation (SEAFO).\textsuperscript{183} These have all taken steps to contribute to MPAs on the High Seas.\textsuperscript{184} In the Mediterranean context, relevant RFMOs include the General Fisheries Commission for the Mediterranean (GFCM), the International Commission for the Conservation of Atlantic Tuna (ICCAT) and the International Whaling Commission (IWC) – detail on which is provided in Chapter 3.\textsuperscript{185} According to Cullis-Suzuki and Pauly, the success of the various RFMOs is open to question given the decline in many global fish stocks. They offer that this may be due to organisational problems and ill-defined duties.\textsuperscript{186} Furthermore, RFMOs are challenged by the fact that countries which are not registered with them cannot be held legally responsible for a fishing activity inside that regional fisheries management area. This significantly undermines the enforcement of closed areas in international waters.\textsuperscript{187} In 2004, the FAO

\textsuperscript{183} Miller et al., “Monitoring, Control and Surveillance of Protected Areas and Specially Managed Areas in the Marine Domain,” 64.
\textsuperscript{184} Gail L. Lugten, A Review OF Measures Taken by Regional Marine Fishery Bodies to Address Contemporary Fishery Issues (Rome: FAO, 1999), Food and Agricultural Organization of the United Nations, http://www.fao.org/docrep/X1051E/x1051E00.htm (accessed October 2, 2015): 97, FAO defines RFMO as “a mechanism through which three or more States or international organizations that are parties to any international fishery agreement or arrangement collaboratively engage each other in multilateral management of fisheries affairs related to transboundary, straddling and highly migratory fish stocks, through the collection and provision of scientific information and data, serving as a technical and policy forum, or taking decisions pertaining to the development and conservation, management and responsible utilization of the resources… in other words is the instrument for fishery governance at the regional level.”
\textsuperscript{186} ibid. 1036.
observed that this situation could be a consequence of the lack of incentives for States to limit fishing on the High Seas.\textsuperscript{188}

Regional fisheries management is additionally impacted on by use of flags of convenience, which makes it possible for vessels to avoid regulation.\textsuperscript{189} This occurs despite the fact that UNCLOS demands at Article 91 that flag States are to exercise effective control over their fleet by maintaining a genuine link.\textsuperscript{190} The 1995 Straddling Fish Stocks Agreement requires commercial fishing fleets to abide by RFMO regulations in order to be able fish in the RFMO’s areas.\textsuperscript{191} However, RFMOs cannot prohibit or prosecute fishing in RFMO-controlled waters by vessels flying the flag of non-member States, even if nationals of Member States are involved.\textsuperscript{192} It has been suggested by Cullis-Suzuki and Pauly that more could be achieved from RFMO managed High Sea areas.\textsuperscript{193} However, according to Fidelman \textit{et al} RFMOs face considerable challenges in the governance of extensive marine areas about which there is little information and a lack of experience in implementation.\textsuperscript{194}

\begin{itemize}
\item\textsuperscript{190} Elizabeth Foster et al., “Improved Oceans Governance to Conserve High Seas Biodiversity,” 15, No. 3 \textit{Parks} (2005): 19.
\item\textsuperscript{191} Cullis-Suzuki and Pauly, “Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations,” 1036.
\item\textsuperscript{192} Foster et al., “Improved Oceans Governance to Conserve High Seas Biodiversity,” 22.
\item\textsuperscript{193} Cullis-Suzuki and Pauly, “Failing the High Seas: A Global Evaluation of Regional Fisheries Management Organizations,” 1041.
\item\textsuperscript{194} Pedro Fidelman et al., “Governing Large-Scale Marine Commons: Contextual Challenges in the Coral Triangle,” 36 \textit{Marine Policy} (2012): 42–53. 42.
\end{itemize}
1.6.2 Political Issues

National and inter-State politics may influence the designation and management of MPAs and therefore impact upon their overall success. Identification and design of areas suitable to be designated as a MPA, is dependent upon appropriate research. Such research, for example, in respect of straddling stocks between EEZs, and other trans-boundary effects, requires cooperation between neighbouring States. A lack of cooperation on the part of one State may have a negative impact on the quality of the research necessary to collate information about the area, which may lead to inadequate designation.\(^{195}\) As noted above, ecosystems exist across political boundaries and consequently protection of the marine environment would benefit if their evaluation was not limited by differing political imperatives.\(^{196}\) In the Mediterranean context, this essential international cooperation between neighbouring States is yet to be achieved,\(^{197}\) and as a consequence there has been significant depletion of a number of fish stocks.\(^{198}\) It would be beneficial if research was therefore conducted through international and/ or regional fora, rather than upon a single State’s initiative.

A further consideration related to the political dimension inherent in the designation of MPAs, militates against decisions based on pure scientific

\(^{196}\) Toropova et al., (eds.). *Global Ocean Protection: Present Status and Future Possibilities*, 10.
\(^{197}\) Kearney et al., “Australia’s No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?,” 1068.

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justifications. Here, focus is placed on pressure created by eNGOs, scientists, other States and the implementation of a neo-Seldenan agenda – which would place greater rights and obligations on the coastal State - as opposed to the freedoms put forward by Grotius. The result, according to Sand, may contribute to undermine consensus by stakeholders.\(^{199}\) The justifications behind such designations invoke the spectre of creeping jurisdiction, as observed by Oxman.\(^{200}\) A further example of this ‘creep’ is evident, according to Van Dyke, in the contemporary practice of coastal States regulating navigation in their EEZs dependent upon the nature of the ship and its cargo.\(^{201}\) Whilst this may have an important role in the management of MPAs, more work is needed to address the full range of aspects related to the regulation of the passage of vessels within an EEZ.\(^{202}\) In summary, these trends may indicate a change in public values, which are more supportive of conservation measures.\(^{203}\) In addition, when State authorities establish a MPA, as well as increasing public awareness of the area’s importance, it may also satisfy the public that the State is taking action to adequately protect the marine environment.\(^{204}\) Scientific evidence, as well as political will, are equally important factors despite the fact that some uncertainty as to purpose and potential effectiveness may persist.\(^{205}\) It is

\(^{201}\) Van Dyke, “The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone,” 121.  
\(^{202}\) Laffoley, “Protecting Earth’s Last Frontier: Why We Need a Global System of High Seas Marine Protected Area Networks, 9.  
\(^{203}\) Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 44.  
\(^{204}\) Kearney et al., “Australia’s No-Take Marine Protected Areas: Appropriate Conservation or Inappropriate Management of Fishing?,” 1067.  
therefore important that MPAs are routed in sound science so that the designation of MPAs does not lose credibility with stakeholders.

Certain States, for example Australia, have been prominent in leading the global political agenda to establish more MPAs. Australia’s justification for this has been suggested by Kearney et al to be a consequence of its interpretation of the precautionary approach. The fact that this principle is an important component of various MEAs offers a justification for its use. As explained above, in essence it relates to gaps in scientific knowledge concerning specific harms balanced against the costs of not taking action. Furthermore, Decision IX/20 of the CBD COP-9 recommended that governments should urgently apply a set of criteria to identify Ecologically and Biologically Significant Areas (EBSAs) and MPAs. However, despite this imperative, Wood et al, offer the view that MPAs are being designated at a slow rate.

In Europe, conservation of the marine environment is all too often a compromise between socio-economic factors, political issues and the protection of the environment. This is perhaps not surprising given that the governance of MPAs is a decision-making process that has to balance all these factors and

206 Kearney et al., “Questionable Interpretation of the Precautionary Principle in Australia’s Implementation of ‘No-Take’ Marine Protected Areas,” 592.


be adopted at a political level. At this level there is stakeholder pressure from both sides: from those in favour of MPAs; and from those who are sceptical, especially those who might be negatively affected. In addition, is the fact that there are limitations in the extent of our knowledge about the marine environment.\textsuperscript{211} Thus, socio-economic pressures and a knowledge gap combine to potentially hamper informed political decision-making.

An added complexity is seen in the process adopted for identification of specific areas by States, including differing interpretations on the binding nature of MEAs. The Western European PSSA has been particularly controversial, a result of how the criteria to identify this PSSA were interpreted, noting that it does not host a single coherent ecosystem and the degree of vulnerability of the marine environment in the area is open to question.\textsuperscript{212}

Other issues cluster around political inter-State relationships. For example, in the Mediterranean context, States face issues including jurisdictional delimitation, significant differences in political systems, and in levels of economic development.\textsuperscript{213} These factors taken together may hinder the development of MPAs regardless of whether they are located within one State’s territory, on the High Seas or contiguous to another State’s territory. Noting the transitory nature of marine biodiversity and the fact that the sea connects one

\textsuperscript{212} Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 450.
part to another and substances can be transported from one area to another, the efforts of one State can be jeopardised by the lack of effort and/or cooperation of another State. With regard to the designation of HSMPAs, consensus is critical, since without it they are likely to remain ineffective ‘paper MPAs’. Of significance in the context of this thesis, is that the Mediterranean Sea Regional Advisory Council (RAC), required under the legal framework for MSP, has not yet been established. The RAC, when established, may act as an influential coordinator among States and facilitate political mediation between them.

### 1.6.3 Fragmented and Conflicting Policies

Policies and regulations relevant to MPAs generally reflect the various laws regulating different sectors. Although inter-sector consultation may occur, the final output often results in policies that do not tackle issues related to MPAs in a coordinated manner. The fragmentation of regulations, both at national and international levels, which at times may appear contradictory, is not effective to protect marine biodiversity. The diversity of institutions making policies may also lead to confusion or conflicts between the rules. Additionally there are

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situations where different rules apply for the water column and the seabed beneath it. For example, such a situation was faced when HSMPAs were designated under OSPAR above the extended Continental Shelf. In this case, both international and national law were applicable to the water column and seafloor, respectively. 217 A similar situation is likely to develop in the Mediterranean Sea if HSMPAs are designated since the Continental Shelf beneath the water column belongs to the coastal States. A common methodology to classify, by importance, the conservation objectives particularly for trans-boundary protected areas, may help minimise conflicting situations 218 arising from States having different rules for contiguous areas. Possible areas of conflict include the trend to increase navigational speed for more efficient shipping, which conflicts with the need to reduce speed to decrease the risk of collision with whales. 219 Navigation represents another significant area of potential conflict. It contributes to marine pollution, 220 although States are powerless to impose restrictions to address this beyond universally accepted international rules, although this situation may be partially mitigated if a PSSA is established. 221 Alternatively, emerging norms permitting States to impose certain regulations on navigation in its EEZ as noted above may either address this issue, or indeed generate further political conflict. 222

Regardless of the considerations around shipping and freedom of navigation, it remains the case that international law obligates all parties to protect the marine environment.\textsuperscript{223}

Thurstan \textit{et al} are amongst commentators advocating a cross-sectoral approach to avoid regulatory conflict.\textsuperscript{224} A successful example of this can be seen in the designation of new MPAs under OSPAR, for which working relationships between key competent authorities, such as the IMO and International Seabed Authority (ISA), were formalised.\textsuperscript{225} As noted above, regulatory conflict is seen in the fisheries sector: different fishing operations and practices have disproportionate impacts on fish stocks, which may be observed most keenly when comparing artisanal fishers vis-a-vis trawlers. In the context of regulatory conflict it must also be noted that a coastal State has no unilateral ability to implement plans affecting freedom of navigation in the EEZ.\textsuperscript{226} Norms affecting fishing in the EEZ, particularly in the EU given the influence of the Common Fisheries Policy (CFP), cannot be modified by an individual State, thus restricting a State’s potential to regulate such activities in MPAs.\textsuperscript{227} This leads to the difficult position whereby international agreement necessarily involves a longer and more involved process than a coastal State acting unilaterally in order to protect biodiversity. Notwithstanding that the coastal

\begin{flushleft}
\textsuperscript{224} Thurstan \textit{et al}., “Are Marine Reserves and Non-Consumptive Activities Compatible? A Global Analysis of Marine Reserve Regulations,” 1102.
\textsuperscript{225} O’Leary \textit{et al}., “The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next,” 600.
\textsuperscript{226} Maes, “The International Legal Framework for Marine Spatial Planning,” 809.
\textsuperscript{227} Salomon and Dross, “Challenges in Cross-Sectoral Marine Protection in Europe,” 143.
\end{flushleft}
State might identify a set of regulatory measures affecting fishing and navigation that are potentially needed to improve the conservation status of an area in its EEZ, it has to rely on other States to agree to such measures. Despite the fact that a State acting unilaterally may achieve positive results more quickly, they only apply to that State’s imperatives. Managing a shared resource, such as the marine environment, therefore is best achieved through an agreed multi-party, cross-sectoral approach. Fidelman et al argue that since fisheries generate food resources, international conservation objectives should not overshadow food security and poverty alleviation.\(^{228}\) More generally, although MPAs may be used to positive effect, Hilborn et al note that their effect on adjacent outside areas is frequently not analysed.\(^{229}\)

The framework nature of UNCLOS arguably does not provide sufficient detail for the holistic management of MPAs. Therefore, the development of clear measures permitting a common interpretation would reduce conflict and enable more coherent policy developments. Existing policies have developed piecemeal,\(^{230}\) over a considerable period of time, and have been subject to political influence.\(^{231}\) This lack of coordination has produced the overlap of legal instruments;\(^{232}\) lacunae,\(^{233}\) and a complex volume of regulations and policies

\(^{228}\) Fidelman et al., “Governing Large-Scale Marine Commons: Contextual Challenges in the Coral Triangle,” 51.
\(^{229}\) Hilborn et al., “When Can Marine Reserves Improve Fisheries Management?,” 201.
\(^{231}\) Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 47.
applying to the marine environment.\textsuperscript{234} It is also noticeable that existing laws may face increased pressure from the growing demand in the use of marine space and the fast progress in discoveries of new marine habitats and species. Scott contends that various legal instruments and complex jurisdictional arrangements governing activities in ABNJ and notably the distinction between rights in relation to the water column and rights over the seabed and its resources are challenges that are yet to be overcome.\textsuperscript{235}

Interpretation is key when there is a backdrop of fragmented and conflicting policies and laws relating to MPAs. For example, and in the context of this thesis, Scott argues that there is no explicit rule to allow the designation of MPAs in ABNJ, such as the High Seas, and thus no multilateral basis to enable their effective management.\textsuperscript{236} This may be true on a global scale, but is less clear in the Mediterranean context. A close reading of the Protocol to the Barcelona Convention,\textsuperscript{237} discussed in Chapter 3, can be interpreted as providing the legal basis to the creation of MPAs in ABNJ, and the process to be followed to establish management measures.

\textsuperscript{234} Salomon and Dross, “Challenges in Cross-Sectoral Marine Protection in Europe,” 142.
\textsuperscript{235} Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 856.
\textsuperscript{236} Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 854.
\textsuperscript{237} Refer to Section 3.17
1.6.4 Stakeholders’ Perception and Attitude

As discussed, the governance of MPAs always tends to have a socio-political dimension as it deals with different stakeholders and the distribution of benefits amongst them.\textsuperscript{238} According to Chuenpagdee \textit{et al}, MPAs may not just be considered technical tools but also socio-political enterprises.\textsuperscript{239} The stakeholders’ desire to maintain access rights, perceived benefits and potential dislocation of fishing effort to other areas, are important factors that can influence the political support for MPAs.\textsuperscript{240} This is no surprise, since they may cause hardship to fishing communities, for example as a result of shorter fishing seasons, and/or the need for longer trips to new fishing grounds, which may also cause an increase in risks, particularly to smaller vessels.\textsuperscript{241} The international NGOs' perspective is often in conflict with local and national objectives\textsuperscript{242} because they can tend to neglect the needs and culture of the local stakeholder. Furthermore, it is important to note that environmental management measures may create inequality, such that transnational conservation organisations and government agencies may benefit at the expense of local communities, particularly if conservation is focussed on a large eco-regional scale.\textsuperscript{243} An example can be seen in the management of the EU

\textsuperscript{238} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 45.
\textsuperscript{239} Chuenpagdee et al., “Marine Protected Areas: Re-Thinking Their Inception,” 234.
\textsuperscript{240} Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 42.
\textsuperscript{241} Hilborn et al., “When Can Marine Reserves Improve Fisheries management?,” 202.

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Natura 2000 Network, which demands the identification of areas solely on scientific criteria, only afterwards, when elaborating the management measures, are social and other aspects taken into consideration. This may lead to conflicts between stakeholders and a detriment to some. The governance of MPAs from before their identification to their management involves various decisions that may be difficult to both take and/or to implement.

Noting the drive that there is to apply an ecosystems approach to MPA management, stakeholders’ views are important not only for such management but also possibly in the identification of MPAs. The tendency of top-down implementation without any stakeholder participation may undermine the achievability of expected outcomes from MPAs, especially since conflict of use in MPAs is not uncommon. Regulations imposed without any stakeholder participation in their creation, may lead to opposition from those who will be affected and from those who sympathise with affected groups or individuals. This in turn, may lead to regulations being ignored, increased costs in enforcement and possibly even formal protests and vandalism within the MPA.

In particular, the top-down approach, especially for international conservation initiatives, may not consider the needs of local stakeholders. Different users

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may provide useful information not just on the features of the MPA but also on patterns and intensity of use of different locations within it. They can also expose conflicts that may exist, prior to the actual designation of the MPA or its management, and hence the planner has the opportunity to attempt to resolve such conflicts by creating a win-win situation in which conservation aspects are included. This apart, at the national level MPA users may interpret variations in the rights of use allocated to different users as unfair and inequitable. In contrast, the diligent management of a MPA may lead to improved productivity from which all users may benefit and thus overcome any possible losses that may be incurred until conservation targets are achieved. MPA development is somewhat controversial, because based on past experiences there is a general assumption that public areas will be closed to all activities. To overcome this perception, it is important to identify an appropriate process to set objectives and manage the area. It may indeed be better if hard decisions are adopted at the beginning of the process.

Regulatory agencies have the difficult but important task of balancing current users’ needs with those of future users and the interests of the general public. Even at an institutional level, one may find disagreement as regards protective measures. Such a situation is not assisted by UNCLOS provisions

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251 Chuenpagdee et al., “Marine Protected Areas: Re-Thinking their Inception,” 239.
252 Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 3.
since it does not integrate provisions regulating different sectors, regions and areas of the sea such as the seabed and the High Seas water column above it.\textsuperscript{253} If States are also considered stakeholders of MPAs located across more than one jurisdiction, which is likely in the case of most large marine ecosystems, cooperation between them becomes significantly important.\textsuperscript{254} Therefore, the management of the High Seas cannot be achieved if there is lack of cooperation between States, which in turn requires the hard work of policy makers.\textsuperscript{255}

### 1.6.5 Conclusion

The use of MPAs as a tool to conserve biodiversity is ever increasing. Yet, there is no guarantee that this tool would lead to the desired outcomes. Various scientific literature has been published to assess the efficacy of MPAs. However, more studies may be needed to elaborate on the legal aspects regarding their governance, both at national and regional levels. Noting the fragmentation that exists among the various legal instruments that promote the use of MPAs and/or those that govern activities at sea, research to seek to improve coordination among legal instruments would benefit MPAs’ governance and possibly also the stakeholders’ perspective on MPAs. The streamlining or

\begin{flushright}
\textsuperscript{253} Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 844.
\textsuperscript{254} Maes, “The International Legal Framework for Marine Spatial Planning,” 798.
\end{flushright}
agglomeration of laws that call for the use of MPAs may be a topic that can be further researched. In addition, studies that focus on social aspects would complement the research. These may include aspects related to the effect of MPAs on the primary users of the MPAs and also how various stakeholders’ activities can be regulated and coordinated. The elaboration of laws and research results are not enough. Above all, the political commitment to use MPAs in an appropriate manner and to create a collaborative relationship among neighbouring States is needed.

The following chapter will consider the international legal regime that is currently available to create and manage MPAs, and which should operate to address the multitude of interests that are reflected in their establishment.
Building upon the discussion in the previous chapter, the establishment and successful governance of MPAs, including those on the High Seas, requires appropriate legal instruments, which in turn necessitates multilateral cooperation between States. In this chapter, relevant legal instruments will be considered, and their provisions that are identified as having significance to MPAs will be described and analysed, with consideration of the historical context. These instruments include: multilateral agreements governing sectors such as the environment, fisheries and shipping; and customary international law. While the latter is not a formally agreed Convention it is still binding on all States. A number of multilateral agreements provide for the use of MPAs as a conservation tool. This analysis will also compare and contrast certain provisions from different legal instruments. It is recognised that this approach presents its own complexities, which this thesis aims to tackle. In order to be able adopt this approach a number of legal instruments will be analysed. Comparison between the relevant legal provisions from different instruments that relate to various aspects of MPAs such as for example designation, will be made. This allowed to identify common aspects in different instruments. At the same time while certain instruments seek the same results, such as for example the designation of MPAs, the process that would lead to

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results may be somewhat different. The same can be said with regards to, but not limited to, reporting obligations. This allowed to attain the second and part of the fourth sub-objective, respectively, refer to page 24.

Multilateral agreements bind their parties only. As a consequence their success is dependent on the number of States that accede to them, as well as the activities of non-parties, which may contradict or undermine the obligations set out in the agreement. To establish MPAs naturally requires a legal framework, but ultimately their success depends on the willingness of States to become party to relevant multilateral agreements, and remain in compliance with their provisions. Such agreements have to cover a wide range of activities. As noted in the previous chapter, there are a number of regulations governing individual activities in the marine environment, and there has been a gradual development of the concept and use of MPAs as a conservation measure. However, there is often little overt linkage between these sectors and how their regulation has developed. As already identified, this sort of fragmentation may present challenges for the optimal governance of MPAs.

On this basis, it is clear that cooperation is the key component to success. This important principle applies regardless of where a MPA is located, but becomes particularly significant if the MPA is located in ABNJ. Such cooperation

mitigates the potential for conflict between States and sectors, such as, for example, fisheries and deep-sea cable laying, and may also help to overcome governance issues through the provision of an efficient enforcement scheme.

Since the legal framework applied to the oceans refers to what could be termed geo-political delimitations of the sea as provided for in UNCLOS, the first part of this chapter will provide an overview of these zones. This is considered to be important because in each zone, a State, in particular the coastal State, has different rights and responsibilities, which may consequently affect the extent to which it can effectively regulate, through law, to protect the environment. The remainder of this chapter provides an analysis of a number of more specific measures as they relate to the protection of the marine environment, and provide for the legal establishment and/or regulation of MPAs, including those in the Mediterranean and on the High Seas.

2.1 The United Nations Convention on the Law of the Sea (UNCLOS)

UNCLOS was signed on 10 December 1982 and came in force on 16 November 1994. It provides for the governance of activities occurring at sea and also for the protection of the marine environment. It also includes provisions

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about the use of airspace. A total of 182 States have ratified this Convention.\textsuperscript{263} UNCLOS defines a series of spatial limits for specific marine zones (see Figure 1) and in doing so identifies States’ respective jurisdictional limits.\textsuperscript{264}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{marine_delimitations.png}
\caption{Marine delimitations\textsuperscript{265}}
\end{figure}

These zones are significant because they may be areas where devices such as MSP, and analogous regulatory mechanisms, may be applied.\textsuperscript{266} These include internal waters, archipelagic waters, the Territorial Sea (TS), the Contiguous Zone (CZ), the Continental Shelf (CS), the Exclusive Economic Zone (EEZ) and Exclusive Fisheries Zones. The latter is considered as a derivative of the EEZ. While coastal States enjoy varying degrees of jurisdiction in the TS, CS, exclusive fisheries zone and the EEZ,\textsuperscript{267} the High Seas and the Area, both defined in UNCLOS, as discussed below, have their own legal status

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\textsuperscript{265} (Source: author)
\textsuperscript{266} Maes, “The International Legal Framework for Marine Spatial Planning,” 799.
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and lie beyond the zones under the jurisdiction of coastal States.\textsuperscript{268} The Mediterranean Sea includes all of these UNCLOS defined zones, including the High Sea.

\subsection{The Territorial Sea (TS)}

The Territorial Sea is the only UNCLOS defined marine zone in which a State can exert absolute sovereignty. A State has the right to extend its TS up to 12 nautical miles (NM) from the baseline (which is defined in the Treaty).\textsuperscript{269} Given that the State has such absolute sovereignty, it may establish MPAs within its TS by enacting national law. However, any such national law has to comply with the international legal obligations to which the State is party. Navigation offers a relevant example: Article 17 UNCLOS, states that “...ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.”\textsuperscript{270} The Convention, however, allows a coastal State to establish certain rules in respect of the regulation of marine traffic on the basis of safety.\textsuperscript{271} Notably, Article 21 UNCLOS allows the coastal State to adopt laws restricting innocent passage in respect of, \textit{inter alia}, “the conservation of the living resources of the sea.”\textsuperscript{272} Navigation and innocent passage are both factors relevant to the integrity of a MPA. The nature of the cargo carried by

\footnotesize
\begin{itemize}
\item\textsuperscript{269} UNCLOS Article 3.
\item\textsuperscript{270} “Innocent passage” is defined in UNCLOS Article 19.
\item\textsuperscript{271} See UNCLOS Articles 20 to 25.
\item\textsuperscript{272} See UNCLOS Article 21(1)(d).
\end{itemize}
ships traversing the TS may be potentially hazardous and specifically damaging to the features of a MPA, therefore justifying a coastal State’s imposition of a restriction.273

2.1.2 The Contiguous Zone (CZ)

A Contiguous Zone may be claimed beyond the TS.274 It may extend to 24 NM from the baseline.275 The CZ has independent legal status until the point an EEZ is claimed, thus negating the need for the CZ.276 If claimed, coastal States have enforcement powers within the CZ with regard to customs, fiscal, sanitary and immigration laws.277 In addition, the State has power to protect historical and archaeological objects.278 However, as Maes observes, coastal States do not have the right to use devices such as MSP within the CZ as a means to promote environmental protection, or indeed to minimise possible conflict between different users of identified marine spaces.279

273 Jakobsen, Marine Protected Areas in International Law: An Arctic Perspective, 27.
274 See R. R. Churchill and A. V. Lowe, The Law of the Sea, 3 ed. (Glasgow: Bell and Bain, 2010), 136: “This zone has to be claimed by the concerned State in order to be effective.”
275 UNCLOS Article 33(2) “The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.”
277 UNCLOS Article 33(1) “In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea...”
278 UNCLOS Article 303(2) “In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that Article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Article.”
2.1.3 Straits

The rights and obligations of States in regard to Straits, are contained in a number of provisions in UNCLOS. Strait-bordering States are allowed to regulate transit passage to protect the marine environment from pollution and to impose a number of conditions on this passage. However, it is clearly set out in UNCLOS that navigation through straits has to be continuous and expeditious.

2.1.4 Archipelagic waters

In some geographical situations, archipelagic States, defined in Article 46 UNCLOS, can extend sovereign rights to their archipelagic waters. Noting that the State has sovereign rights, then the setting up of MPAs should be along the same lines as those with the Territorial Sea. While Malta's terrestrial territory comprises three main islands and a number of smaller ones, Malta does not have any archipelagic waters. In order to establish such waters the State needs

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280 UNCLOS Part 3, section 1 Articles 34-45.
281 UNCLOS Article 39(2) "Ships in transit passage shall: (a) comply with generally accepted international regulations, procedures and practices for safety at sea, including the International Regulations for Preventing Collisions at Sea; (b) comply with generally accepted international regulations, procedures and practices for the prevention, reduction and control of pollution from ships."
282 UNCLOS Article 41(1) "States bordering straits may designate sea lanes and prescribe traffic separation schemes for navigation in straits where necessary to promote the safe passage of ships."
283 UNCLOS Article 38 "...in straits... all ships and aircraft enjoy the right of transit passage, which shall not be impeded..."
284 UNCLOS Article 49.
to satisfy a criterion set in UNCLOS Article 47(1) which denotes that a ratio of water to land area between one to one and nine to one is to result when straight baselines are drawn joining the outermost points of the outermost islands.

2.1.5 The Exclusive Economic Zone (EEZ)

The EEZ lies beyond the TS and may extend out to 200 NM from the baseline.\(^{285}\) The EEZ has to be claimed by the coastal State for it to be effective in international law.\(^{286}\) Once claimed, under Article 62 a State is obligated to take an active approach with regard to the management of living resources.\(^{287}\) The EEZ, unlike other zones set out in UNLCOS, did not derive from customary international law, and thus could not originally be said to be supported by the entire international community. However, as noted by Stokke, the EEZ concept now forms part of customary international law, and therefore binds those that are not party to UNCLOS.\(^{288}\)

The sovereign rights, jurisdiction and duties of coastal States in the EEZ include the management and exploitation of natural resources; production of energy from renewable resources; installation of structures; research; and the

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\(^{285}\) UNCLOS Article 57 “The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.”


protection and preservation of the marine environment. Gavounelli has observed that these rights are not equivalent to sovereignty of the zone, and exist for the water column, the seabed and the subsoil. Therefore, in contrast to the TS and the CZ, the EEZ only provides for rights to resources and permits an enforcement capacity to protect those rights. Regardless, the coastal State does not have the right to prohibit or limit freedom of navigation or overflight. In Article 56(1)(b), it is observed that environmental protection is listed as a jurisdictional right rather than making an obligation on the coastal State to establish protection measures. Such text may lead to weaken the responsibility that the coastal State has to protect the environment.

In the EEZ, a coastal State has the ability to adopt regulations which conform to generally accepted international rules and standards. If these measures are proven inadequate States may then enact anti-pollution measures in specific circumstances subject to certain limitations. Such special rules must, however, be first approved through the procedure set out in UNCLOS Article 210(5), and thus must be approved by the International Maritime Organisation (IMO). By way of example, the USA’s proposal to establish a mandatory ship reporting system off the northeast and southeast coasts of the United States in order to protect a species of whale from collisions with vessels, required IMO

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289 UNCLOS Article 56(1).
291 UNCLOS Article 58(1).
approval, which was granted in 1998.\textsuperscript{294} While governance within the EEZ may appear straightforward, competing uses may create issues according to Van Dyke.\textsuperscript{295}

In the context of designating MPAs, the coastal State’s right to do so in its EEZ appears to have evolved, from a start-point where there was no consensus, possibly a result of the fact that the EEZ was not a concept recognised in customary international law prior to UNCLOS. Czybulka and Bosecka, in their consideration of MPAs located in EEZs, offer that there appears to now be consensus that coastal States do have such a right.\textsuperscript{296} It could be argued since MPAs represent a conservation tool, they therefore provide a means to achieve the obligations of the coastal State within the context of a number of MEAs. It is noted that States are under the general obligations to protect the marine environment in any part of the ocean, therefore including the EEZ, and that the States can employ any measure consistent with UNCLOS to reach this aim (refer also to section 2.3). UNCLOS does not articulate the designation of MPAs within the EEZ and consequently customary international law gains importance.\textsuperscript{297} Therefore, it is argued that the increase in the use of MPAs as a

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\textsuperscript{294} Van Dyke, “The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone,” 110.
\textsuperscript{295} ibid. 108.
\end{flushright}
measure to reach the aim of the obligation to protect the oceans now forms part of customary international law.

Coastal States may enact specific provisions presenting certain difficulties. One of these difficulties may be that the measure is claimed ultra vires in respect of the rights enjoyed by third States. Against this there is the freedom of navigation in the EEZ. However, other States must have due regard to the rights and laws of the coastal State. An illustrative example is the Monte Confurco case. In this case a vessel travelling through the EEZ of a coastal State with its cargo hold full of fish was held to be legitimate only if the coastal State was advised of its passage in advance. Adopting such an approach may reduce the risk of a foreign vessel being suspected of fishing without authorisation in a coastal State’s EEZ.

Based on UNCLOS, the coastal State sovereign rights to fishing within its EEZ are based on the concept that such fishing is to achieve the optimum utilisation of living resources. This implies that overfishing is to be avoided by assessing the allowable catch that can be targeted without compromising the population of the targeted resource. In order to be able to ensure this practice the State is to set the maximum sustainable yield (MSY). Therefore, the sovereign rights do not allow indiscriminate fishing. Furthermore, to ensure optimum utilisation, the

coastal State is to share such resources with other States if the maximum sustainable yield (MSY)\textsuperscript{301} has not been caught by the coastal State. This is a contentious issue because there are controversial issues regarding fishing mortality at MSY with many claiming that this threshold should not be aimed for.\textsuperscript{302}

Other important activities in the EEZ are the laying of pipelines and cables. Although at first instance these do not seem relevant to MPAs, in reality they may, directly or indirectly, influence MPA management and designation. Based on Articles 1, 208 and 79(2) UNCLOS, in the EEZ and beyond, a coastal State cannot dictate the delineation of a cable route nor impose any environmental measures on cable operations, except to prevent pollution. In addition, whilst Article 113 requires States to create offences in respect to damage caused to cables and/ or submarine pipelines in the EEZ and High Seas,\textsuperscript{303} Davenport identifies that under international case law, making reference to the Arbitral Tribunal in Guyana v. Suriname Arbitration, there is an obligation on coastal States and cable companies to cooperate to minimise conflicts.\textsuperscript{304}

\footnotesize{\textsuperscript{301}See UNCLOS Articles 61(3) and 62(2).}
\footnotesize{\textsuperscript{302}Committee on the Evaluation, Design, and Monitoring of Marine Reserves and Protected Areas in the United States et al., Marine Protected Areas. 33.}
\footnotesize{\textsuperscript{303}Davenport, “Submarine Communications Cables and Law of the Sea: Problems in Law and Practice,” 219.}
\footnotesize{\textsuperscript{304}ibid. 215.}
2.1.6 High Sea (HS)

According to Article 86 UNCLOS, the High Sea is a zone that lies beyond the EEZ, or TS if no EEZ has been claimed.\textsuperscript{305} It includes the water column, but not the seabed.\textsuperscript{306} In this area, no State may claim sovereign rights\textsuperscript{307} and therefore jurisdiction to impose devices, such as MSP, which may promote the designation of MPAs, is not possible.\textsuperscript{308} In turn, it appears unlikely that any State has a right to unilaterally designate a MPA.\textsuperscript{309} However, Jakobson, writing in the context of the Arctic, states that possibilities remain to do so on the basis that MPA designation in the HSs does not amount to a territorial claim.\textsuperscript{310} Thus, MPAs on the HS could be considered to be areas where regulations apply to protect particular features. It could not be a territorial claim because if a State identifies such an area, the imposition of regulations apply only to its nationals, and/or vessels flying the flag of that State. Nevertheless, other States may well be inclined to abide by those regulations. A number of MEAs and UNCLOS itself would appear to encourage such an approach, and the reality of good geopolitical relations may promote such reciprocity. In time, therefore, such areas may become unofficially designated, but \textit{de facto}, MPAs. This reality may provide an incentive for non-cooperating States to align their practices accordingly. This is supported by the fact that whilst the High Sea is an area

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\textsuperscript{305} UNCLOS Article 86 “The provisions of this Part [High Seas] apply to 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.”


\textsuperscript{307} UNCLOS Article 89 “Invalidity of claims of sovereignty over the high seas No State may validly purport to subject any part of the high seas to its sovereignty.”


\textsuperscript{309} Jakobsen, \textit{Marine Protected Areas in International Law: An Arctic Perspective}, 52.

\textsuperscript{310} \textit{ibid}. 38.
where all States enjoy freedoms, they must according to UNCLOS be enjoyed with due regard to the interests of other States.

Article 87(1)(a) and (e) UNCLOS provide States with freedoms of fishing and of navigation on the High Sea and these are those freedoms most likely to have an impact on the governance of HSMPAs. The open-access to fisheries is a source of vulnerability, according to Davies et al. However, Borg notes such rights are qualified, since Article 87(2), in dealing with freedom of the High Sea, states that “…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, and also with due regard for the rights under this Convention with respect to activities in the Area.” Regulating fisheries on the High Sea presents a challenge since it is likely that fisheries may be the largest threat to, or have the most impact on, marine biodiversity in ABNJ, and therefore might be one of the most important human activities to be regulated within HSMPAs. In this

311 UNCLOS Article 87(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; (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; (f) freedom of scientific research, subject to Parts VI and XIII. 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, and also with due regard for the rights under this Convention with respect to activities in the Area.”


313 Refer to footnote 326.


315 Marine environment law expert, personal communication, April 17, 2019.

respect, Maes argues that fisheries cannot be unilaterally regulated: the existence of RFMOs would seem to support that view. Overcapacity in fishing effort, combined with a lack of effective enforcement, has prompted the application of regulatory devices such as trade sanctions, port measures and blacklisting to support regulations of High Seas fisheries.

The freedom of navigation on the HS may also have impacts on the marine environment. Whilst restriction as to cargo may be imposed, as discussed above, such navigation may produce notable impacts, including via collisions, with the attendant risk of pollution, and noise, which may impact negatively on, for example, biodiversity.

2.1.7 Continental Shelf (CS)

The Continental Shelf (CS) is comprised of the seabed and subsoil and may extend to 200 NM from the baseline, but there may be situations where it can be extended to 350 NM. The water column above the CS is governed by

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320 UNCLOS Article76(1) “The continental shelf of a coastal State comprises 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. 2. The continental shelf of a coastal State shall not extend beyond the limits provided for in paragraphs 4 to 6.
different provisions under UNCLOS. Provisions applying to research in the EEZ also apply to the CS. The rights of a coastal State include certain property rights, although according to Penick, these should not be strictly interpreted. The coastal State has sovereign rights in respect of sedentary living resources and abiotic resources, even if these are unclaimed. UNCLOS describes sedentary species by reference to their locomotive characteristics at the time when they can be harvested. Article 77(4) provides that:

“The natural 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.”

3. The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.
4. (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured...
5. The fixed points comprising the line of the outer limits of the continental shelf on the seabed, drawn in accordance with paragraph 4 (a)(i) and (ii), either shall not exceed 350 nautical miles from the baselines...
10. The provisions of this Article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts.”

324 UNCLOS Article 77 “Rights of the coastal State over the continental shelf
1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources.
2. The rights referred to in paragraph 1 are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.
3. The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.
Examples of sedentary species include oysters, clams and abalone. Of particular interest in the Maltese context, is red coral, which has been subject to damage and unsustainable harvest on the Maltese CS.

Scientifically, there is a spectrum identified between purely sedentary and purely sessile species. According to Rettig, Nagasaki and Chikuni, prawns and gurnards respectively are categorised as sedentary species. The apparent mismatch of the legal and scientific interpretations of the language of UNCLOS, may create confusion and therefore promote controversy.

Considering the rights and obligations considered above, an anomalous situation may arise if a third State seeks to assert its right to, for example, dredge, or lay cable, on the Continental Shelf of another State known to host such species.

A further dimension when considering Article 77, relates to bycatch. For example, in the case of clams, some species may move without being in constant contact with the seabed in their juvenile state. Thus, if a fisher targets such juvenile clams it brings the coastal State’s sovereignty into question. This is because the clams will, at that stage, arguably be in the water column above the coastal State’s CS but outside its EEZ. This has been tested through the courts and an illustrative Canadian case concluded that a US licensed vessel

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327 Fukuzō Nagasaki and S. Chikuni, Management of Multispecies Resources and Multi-gear Fisheries, Google Books ebook. (Rome: FAO, 1989), 33. “...various sedentary species, e.g. flounders, soles, rockfish, croakers, largehead hairtail, lizardfish...gurnards...”
was guilty of harvesting sedentary species beyond the Canadian EEZ even though the outer-limit of the CS had not yet been defined.\textsuperscript{328} This decision is consistent with the fact that, although there is no direct reference obliging States to protect such resources, a State is under an obligation to take action necessary to prevent damage by other States.\textsuperscript{329}

To conclude this part, on the CS a coastal State is allowed to regulate certain activities. However, if the water column above the CS comprises part of the High Sea, there is a difficulty in effectively regulating that water column as a fully-fledged High Sea zone.\textsuperscript{330} This is because there may be situations where a coastal State wishes to protect sedentary species, which may conflict with other States’ freedom of the HS.\textsuperscript{331} Of course this does not imply that there are no limitations because in so doing a coastal State has to ensure that measures do not cause unjustifiable interference with navigation and other rights.\textsuperscript{332} However, in turn other States have to honour provisions which have a positive influence\textsuperscript{333} on the protection of sedentary species.\textsuperscript{334}

\textsuperscript{328} This was a Provincial Court case and is cited as personal communication in Lee A. Kimball, “Deep-Sea Fisheries of the High Seas: The Management Impasse,” \textit{The International Journal of Marine and Coastal Law} 19, No. 3 (2004): 277.
\textsuperscript{330} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 92.
\textsuperscript{331} Mossop, “Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles,” 289.
\textsuperscript{332} UNCLOS Article 78(2).
\textsuperscript{333} UNCLOS Articles 63(2), 64 to 67 and 119(a).
2.1.8 The Area

The Area is defined as the seabed that lies beyond the CS. The mineral resources in the Area are considered to be the common heritage of mankind according to Armars-Pfirter, this concept cannot be amended. In fact, UNCLOS Article 311(6) boldly states that:

“States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in Article 136 and that they shall not be party to any agreement in derogation thereof.”

Part XI of UNCLOS includes provisions for the Area. The International Seabed Authority (ISA) was created under the provisions of UNCLOS as an autonomous body with competencies listed in Part XI, which include environmental protection and marine scientific research. States are required to confirm to ISA regulations, including those which aim to protect the environment, when carrying out their rights in the Area. Although ISA has no formal mandate to designate MPAs, in 2012 it adopted a plan providing for the provisional designation of nine MPAs, justifying this action as an exercise of the general obligation to protect the marine environment. Through Article 145(b) of UNCLOS, which states that:

“Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which

335 UNCLOS Article 1(1) 1. For the purposes of this Convention: “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
336 UNCLOS Article 136 “The Area and its resources are the common heritage of mankind.”
338 UNCLOS Part XI, notably Articles 143 and 145.
339 UNCLOS Article 143.
may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia: the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.”

Scott has suggested there is an argument that MPAs in the Area can be designated, within which mining and related activities may be prohibited.341

2.1.9 Semi-Enclosed Sea

The Mediterranean Sea according to UNCLOS342 and confirmed by the International Court of Justice (ICJ)343 is a semi-enclosed sea and therefore particular provisions of UNCLOS are applicable. The Mediterranean is surrounded by 22 States, see Figure 2 below.344 Since many of these have not yet claimed the full extent limits of the EEZ and a few have not claimed any EEZ, the Mediterranean Sea comprises significant expanses of High Sea. In contrast to the position related to the water column, the Mediterranean Sea has no Area since all the seabed forms part of the CS of the coastal States, illustrated in Figure 3, below.

342 UNCLOS Article 122 “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.”
344 These coastal Mediterranean States are Spain, France, Italy, Slovenia, Greece, Malta, Cyprus which are EU member States, Monaco, Croatia, Bosnia and Herzegovina, Montenegro, Albania, Turkey, Syria, Lebanon, Israel, Palestine, Morocco, Algeria, Tunisia, Libya, Egypt.
Figure 2 - Political Map of the Mediterranean Sea\textsuperscript{345}

Figure 3 – Continental shelf delimitations\textsuperscript{346}

\textsuperscript{345} Source: Google maps, available at https://www.google.com/maps/@39.5815611,16.121102,5.31z
\textsuperscript{346} Source: Marineregions.org, available at http://www.marineregions.org/eezmapper.php
Malta has claimed a TS, CZ, CS and a fisheries management zone (FMZ), which has been given a special status by the EU. The FMZ, which in respect of its subject-matter can be considered as an analogous to an EEZ, extends out 25NM from the baseline, while Malta’s CS is significantly larger than this. A decision in 1985 saw the ICJ determine a dispute on the extent of the CS between Malta and Libya. Although UNCLOS provides the necessary provisions, the Court took other issues into consideration. Among these were the natural prolongation of the continental shelf and the length of the coastlines of both States. It was also noted that the “application of the equidistance method is not obligatory, and its application in the particular circumstances of this case would not lead to an equitable result.”

It is not unusual for semi-enclosed seas to contain Straits (as explained in 3.1.3, above). The Mediterranean Sea, for example, has eight Straits. Shipping traffic volume, navigating through these Straits is high, especially the Strait of Gibraltar. As well as shipping, this area of sea is particularly important for migratory species, specifically those migrating to and from the Atlantic, an obvious example being tuna. Given its significance, this Strait may therefore possess characteristics justifying its designation as a MPA. The implications of such a designation would necessitate sophisticated governance due to the need for the regulation of numerous activities.

347 Territorial Waters and Contiguous Zone Act (10 December, 1971).
Vallega notes that in a few enclosed and semi-enclosed seas some coastal States have established EEZs that allow them to manage the ecosystem as a whole,\textsuperscript{350} for example the Baltic Sea. MPAs in the EEZ have proved to be successful, which is clearly positive.\textsuperscript{351} However, these areas remain within coastal State jurisdiction. As noted, the Mediterranean Sea has significant areas of High Sea, as demonstrated in Figure 4.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure4.png}
\caption{Maritime delimitations in the Mediterranean Sea\textsuperscript{352}}
\end{figure}

\textsuperscript{352} J. L. Suárez de Vivero, Alba I. Martínez, Jiménez J.M., Martín and Sánchez C. Jiménez, Jurisdictional waters in the Mediterranean and black seas. (Brussels: Directorate general for internal policies, 2010).
Scovazzi notes that in the past there was a contention that an initiative by one Mediterranean coastal State to claim an EEZ could drive other States to do the same, with the potential danger of political and legal disputes. This in fact occurred and these disputes continue. Some notable cases have included those between Italy and Croatia; and Slovenia and Croatia, both of which were resolved. In both cases Croatia made a unilateral move to declare an ‘ecological and fisheries protection zone.’ This zone affected both Italy and Slovenia and consequently was criticised by both Italy and Slovenia. At the time Croatia was seeking membership in the EU. A number of meetings were held with the involvement of the European Commission. Eventually, the borders of the zone declared by Croatia were agreed. To date, few Mediterranean States have proclaimed an EEZ although there are a significant number that have proclaimed a form of protection or fisheries zone. For example, France and Italy have declared an Ecological Protection Zone; Croatia an Ecological and Fisheries Protection Zone; and Slovenia an Ecological and Continental Shelf Protection Zone.

Further issues are related to CS delimitation. A particular example can be seen in Croatia’s decision on its claim to the extent of its CS, which was met

with objections from neighbouring Adriatic Sea countries. The basis to their objections, was that this was a unilateral measure, albeit that such a claim cannot be expected to be anything other than unilateral.\textsuperscript{359} UNCLOS Article 83(3), with regard to the delimitation of the CS, states that:

“Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardise or hamper the reaching of the final agreement. Such arrangements shall be without prejudice to the final delimitation.”

The Maltese academic law expert noted that this Article may be useful employed when there is lack of agreement on CS delimitations so that the process of creating HSMPAs can be facilitated since this Article allows for provisional arrangements of a practical nature and during this transitional period do not jeopardise the final delimitation.\textsuperscript{360}

\textbf{2.1.10 Land-locked and Geographically Disadvantaged States}

At first sight, it may seem that the sea concerns only coastal States but, as de Vivero and Mateos observe, UNCLOS also contains provisions relating to land-locked and geographically disadvantaged States.\textsuperscript{361} The former are States that do not have a coastline, such as, for example, Switzerland; and the latter are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{359} Vidas, “The UN Convention on the Law of the Sea, the European Union and the Rule of Law: What is going on in the Adriatic Sea?,” 15.
\item \textsuperscript{360} Maltese academic law expert, personal communication, May 24, 2019.
\item \textsuperscript{361} Suarez de Vivero and Rodriguez Mateos, “The Mediterranean and Black Sea: Regional Integration and Maritime Nationalism,” 390.
\end{itemize}
\end{footnotesize}
those which have a very small coastline when compared to their terrestrial
territory. UNCLOS contains a number of provisions extending rights to both.

The rights of land-locked States include that ships flying their flag have the right
of innocent passage; they enjoy all rights on the High Seas; the right of access
to and from the sea; and freedom of transit.\textsuperscript{362} In UNCLOS there are also
provisions that refer to the sharing of the surplus living resources of the coastal
State’s EEZ with a land-locked State,\textsuperscript{363} thereby giving land-locked States the
right to exploit that surplus.\textsuperscript{364} This was applied, for example, in 1992, when
Bolivia and Peru agreed on the possibility that the former could engage in
fishing activities in the Peruvian EEZ.\textsuperscript{365} In addition, exercising these rights
brings an obligation to protect the marine environment: as discussed below,
UNCLOS Article 193 requires all States to do so. Land-locked and
geographically disadvantaged States also have a seat on the IMO, and are thus
theoretically able to propose or have a role in the creation of HSMPAs.\textsuperscript{366}

\textsuperscript{362} UNCLOS Article 87(1) “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…”, see also Stephen

\textsuperscript{363} Cheryl Thompson-Barrow, “Land-locked and Coastal States under the UN Convention on the

\textsuperscript{364} UNCLOS Article 69(1) “Land-locked States shall have the right to participate, on an equitable
basis, in the exploitation of an appropriate part of the surplus of the living resources of the
exclusive economic zones of coastal States of the same subregion or region…”


\textsuperscript{366} Maltese maritime law expert, personal communication, May 31, 2019.
2.2 The Development of Contemporary International Environmental Law

Aside from the general provisions of UNCLOS in respect of marine jurisdiction, contemporary environmental law has developed to provide a context for the more specific environmentally protective parts of UNCLOS (as will be discussed in section 3.3). Although the Stockholm Conference of 1972 is considered to be the start-point of modern international environmental law, it predates UNCLOS and so focus, for the purpose of this thesis, is placed upon more contemporary measures. The 1992 UN Conference on Environment and Development, otherwise known as the Earth Summit, in Rio de Janeiro, attended by 172 States, produced two important, soft law measures: the Rio Declaration on Environment and Development (Rio Declaration) and Agenda 21. These measures include provisions requiring States to avoid trans-boundary environmental harm; and that a State should consult with any State likely to be affected by such trans-boundary impacts. Agenda 21 calls for the holistic management of the oceans. This includes the preservation, protection, restoration of habitats and endangered marine species; the establishment of

MPAs in any marine zone;\textsuperscript{371} and the adoption of the precautionary approach.\textsuperscript{372} This principle is now widely included in various laws that, as well as providing for protection in seas under coastal State jurisdiction, aim to manage biodiversity in ABNJ.\textsuperscript{373} This represents a step-change, since previously, according to Dzidzornu, principles of pollution prevention were inadequate and not respected.\textsuperscript{374} Taken together, in a contemporary setting the precautionary approach and the polluter pays principle, which seeks to impose the costs of the remedying of pollution on its creator in the first instance, help pave the way for the designation of MPAs, including on the High Seas.\textsuperscript{375} A limitation of the precautionary principle, however, can be seen in how it is interpreted. Factors which influence this interpretation include issues of subjectivity and the arguments that science and precaution have different attributes and cannot be intermingled.\textsuperscript{376}

\textsuperscript{371} See United Nations Sustainable Development, Agenda 21, Chapter 15, para. 15.6 & Chapter 17, para. 17.6(h) https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf (accessed August 15, 2019); see also Scovazzi, “Marine Protected Areas on the High Seas: Some Legal and Policy Considerations,” 2.


\textsuperscript{373} Rayfuse, “Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction,” 774.


\textsuperscript{375} Morling, “The economic rationale for marine protected areas in the high seas,” 31.

Ten years later, the World Summit on Sustainable Development (WSSD), in 2002, produced an additional soft law measure, known as the Plan of Implementation. This sought the achievement of various targets by 2010. These include the establishment of MPAs and a representative network of MPAs. This achievement left its mark in MPA progress. States party to the CBD endorsed the year 2012 for the establishment of the network.

The UN Conference on Sustainable Development 2012 (Rio+20) followed. An outcome from this conference was a commitment by States to protect and restore marine ecosystems and to apply international law when undertaking activities in the marine environment. One dimension of this protection, observed by Miller et al, was the re-statement of the importance of area-based conservation measures (which would include MPAs). Combining these drivers with the general and specific provisions contained within UNCLOS offers

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379 Plan of Implementation of the World Summit on Sustainable Development, 20 “Develop and facilitate the use of diverse approaches and tools, including the ecosystem approach, the elimination of destructive fishing practices, 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, proper coastal land use and watershed planning and the integration of marine and coastal areas management into key sectors”
382 Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 841.
383 Miller et al., “Monitoring, Control and Surveillance of Protected Areas and Specially Managed Areas in the Marine Domain,” 64.
a potential framework for such area-based designation. The specific opportunities are set out in the following section.

2.3 UNCLOS and Protection of the Marine Environment

UNCLOS confirmed States awareness not only of the importance of the oceans and its resources, but also of the connections and impacts that exist between different uses of the sea, which requires the adoption of integrated marine policies.\(^{384}\) So as to make such policies effective, Miles argues that Grotius’s philosophy required reconsideration: in other words, the impact of UNCLOS, particularly the control of natural resources in areas under national jurisdiction beyond the TS, required dilution of the principle of freedom on the High Seas.\(^{385}\) This, however, is not to imply that conservation was a priority. As noted by Larson and Roth, the superpowers’ first priorities were the rights of unhindered transit passage through international straits, and freedom of navigation on the High Seas.\(^{386}\) In terms of the latter, emphasis was placed more on the control, rather than the sustainable use, of natural resources. This, in turn, has possibly given way to certain lacunae on how such control is to be achieved and


practised. Tladi reflects on how socio-political aspects influenced various provisions of UNCLOS, and that it is important to consider the Convention in its historical context. In fact, on the 30th anniversary of the opening for signature of UNCLOS, it was claimed that “it is time to confront the fact that the ocean has changed from what it was just a few decades ago.” The result is that UNCLOS contains gaps in its provisions for effective enforcement, as well as in respect of genetic resources, species and ecosystems, prompting Long to characterise measures for the protection of the marine environment, including the protection of biodiversity in ABNJ, as particularly weak measures. Notwithstanding these claimed deficiencies, UNCLOS acts as the principal legal basis regulating marine resources and imposing a duty to protect the marine environment. In achieving these twin aims, its provisions include navigation, exploitation of resources, marine scientific research and the protection of the marine environment. In the context of this thesis and its focus on the High Seas, Rayfuse observes that all High Seas freedoms are subject to the duty to protect and preserve the marine environment.

388 Tladi, Ocean governance - a fragmented regulatory framework, 99.
However, as Scott notes, the concept of MPAs is not explicitly referred to in UNCLOS.\textsuperscript{395} Thus, UNCLOS contains no specific provisions on the designation of MPAs,\textsuperscript{396} and so offers no mandate to designate MPAs in ABNJ or provisions for sustainable use of marine resources through the regulation of activities.\textsuperscript{397} Others claim that the designation of MPAs can be considered an obligation arising under UNCLOS;\textsuperscript{398} Kimball argues in the context of deep-sea fisheries that this extends to their establishment in ABNJ, when based on scientific information.\textsuperscript{399} In parallel, Gjerde and Rulska-Domino point to UNCLOS providing a strong legal basis to establish MSP measures:\textsuperscript{400} again, not something explicitly contemplated in UNCLOS. This could suggest that coastal States and States with adjacent TSs could adopt joint MSP initiatives, with a MPA component to include management of marine living resources, implementation of rights and duties with respect to the protection of the marine environment, and scientific research policies.\textsuperscript{401}

The applicable measures contained in UNCLOS focussed on the protection of the marine environment, particularly those relevant to MPAs, will now be discussed.

\begin{footnotes}
\footnote{Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 851.}
\footnote{Ardron, et al., “Marine Spatial Planning in the High Seas,” 832}
\footnote{Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 106.}
\footnote{Scovazzi, “Marine Protected Areas on the High Seas: Some Legal and Policy Considerations,” 4.}
\footnote{Kimball, “Deep-Sea Fisheries of the High Seas: The Management Impasse,” 266.}
\footnote{Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 356.}
\footnote{Maes, “The International Legal Framework for Marine Spatial Planning,” 809.}
\end{footnotes}
UNCLOS seeks the protection of the marine environment through general obligations and asks all States to cooperate in this achievement.\textsuperscript{402} It hosts a whole part about the protection and preservation of the marine environment.\textsuperscript{403} The general conservation duties vary among the different marine zones, for example, while there is an explicit duty to conserve and manage natural resources,\textsuperscript{404} but provisions related to the Continental Shelf do not explicitly state so. The obligation on all States does neither explicitly indicate if they are coastal or not, nor does it include elaborate content on the duty to protect and preserve the marine environment in all marine zones.\textsuperscript{405} With regard to the High Seas and the Area commentators such as Gjerde note that there are strengths, weaknesses and gaps.\textsuperscript{406}

UNCLOS uses the terms both ‘preserve’ and ‘conserve’ in its measures, such as, for example, Article 192 where the general obligation is expressed that “States have the obligation to protect and preserve the marine environment; and Article 120 on marine mammals which provides that “Article 65 also applies to the conservation and management of marine mammals in the high seas.” Preservation generally implies the leaving intact of the subject. This may be achieved if there is significant impact to the environment by humans. One tool

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\begin{itemize}
\item \textsuperscript{402} Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 450.
\item \textsuperscript{403} UNCLOS Part XII – Protection and preservation of the marine environment.
\item \textsuperscript{405} UNCLOS Article 192 “States have the obligation to protect and preserve the marine environment.”
\item \textsuperscript{406} Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 844.
\end{itemize}
likely to lead to preservation is the establishment of a MPA, which might, however, conflict with general freedoms including use of the sea for navigation and fishing. For example, measures to protect certain pelagic species such as cetaceans by regulating craft speed, or exclusion from certain areas may impact on the right of innocent passage. The issue to be determined is where the balance is to be most effectively found.

In seeking to find this balance, agreement between smaller numbers of States, as opposed to the entire international community, as to where it lies might be a potentially useful, and easier to achieve. In this respect, the environmental protection duties, particularly in respect of conservation and cooperation, contained in UNCLOS have been incorporated into a number of regional seas Conventions. Such measures, have provided for the incorporation of provisions on the establishment of MPAs in a number of instruments referred to in sections 2.6, 2.5 and 3.5.1 below. 407

UNCLOS Article 193 states that “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.” It is clear, at least in this case, that States do not enjoy an unfettered right to exploit their natural resources, given the requirement to protect the environment, thus rendering it a qualified right. As such, Article 193 may have an important and positive impact in MPA governance and spatial management. However,

407 See also Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 356.
legitimate use of Article 193 is undermined if a State designates a MPA to protect certain areas while ignoring other marine habitats where resource exploitation occurs. Article 193 also refers only to where States have the right to exploit natural resources. It can, therefore, not apply on the High Sea because here States do not have sovereign rights. It is noticeable that while States do have the right to fish on the High Sea this does not constitute a sovereign right. The main difference between such rights is that a sovereign right excludes other States from having the right to fish and also allows the State to establish associated laws to regulate the use a resource, in this case, fisheries. Therefore, it is clear that since all States have the right to fish on the High Sea, and since no State can exclude any other State from fishing in such areas, this right is not equivalent to a sovereign right.

Under Article 194(2): “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment…” Pollution is a threat to biodiversity and thus provisions protecting against its threats, some of which apply to all areas may be of significance in the proper management of MPAs. Activities occurring under the jurisdiction or control of a State include those of any vessel on the High Sea, which is subject to the control of its flag State. Furthermore, Article 194(5) requires that “The measures taken in accordance with this Part shall include those necessary to protect and preserve

408 UNCLOS Article 195 “In taking measures to prevent, reduce and control pollution of the marine environment, States shall act so as not to transfer, directly or indirectly, damage or hazards from one area to another or transform one type of pollution into another.”
rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” This is a clear obligation to protect marine biodiversity, and an indication of transboundary impact – irrespective of resource conservation.

Article 211(1) contemplates pollution from vessels. It provides that “States, acting through the competent international organisation or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimise the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States…” It may be argued that re-routeing can lead to the indirect benefits which may fall short of establishment of a MPA but still provide a benefit. In this situation an example might be the avoidance of collisions with cetaceans in their migratory corridors. UNCLOS allows the coastal State to seek the implementation of specific regulations for areas of ecological importance which may be at risk from pollution caused by navigation. 409

Also of significance in protection of the marine environment is Article 197, which requires States to: “…cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organisations, in

409 UNCLOS Article 211(6)(a).
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.” This call for cooperation between States on a global and regional basis for the protection of the marine environment through, *inter alia*, the elaboration of rules and practices, lends useful support to the designation of MPAs. It is of particular significance when considering the High Sea, which, as Gjerde and Kelleher note, by its nature requires global cooperation between nations and international organisations across differing sectors coupled with global enforcement protocols.  

On the High Sea, States have the right to fish but it does not mean that this is unregulated since various duties, including biodiversity protection, have to be observed and the rights of other States have to be respected. Such rights should also be exercised to facilitate cooperation between the fishing States. High Seas stocks do not exclude those that are either dependant on sedentary species or other biodiversity associated with the continental shelf. This though affects the management of certain straddling stocks, which cannot be adequately protected if the biodiversity upon which they depend is not protected. Therefore, in cases where the High Sea lies on the continental shelf of another State, cooperation should ensure that biodiversity within the water

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411 UNCLOS Article 116 “All States have the right for their nationals to engage in fishing on the high seas subject to...(b) the rights and duties as well as the interests of coastal States provided for, *inter alia*, in Article 63, paragraph 2, and articles 64 to 67; and..."
column, as well as sedentary resources upon which the stocks may depend, are properly conserved.

Articles 117 to 119 contain relevant provisions that focus on sustainable fishing. They focus on living resources and to a certain extent it may be argued that these articles may also be applied to other biodiversity that may not be targeted for fishing but upon which harvested species depend. The reasons could be that a State cannot effectively conserve living resources if it does not conserve the ecosystem upon which they depend. If this is so, then all States have the duty to cooperate to protect the environment (physical and biological factors) on the High Seas.

Article 117 concerns the duty of states to regulate the activities of their nationals with respect to the conservation of the living resources of the High Seas. It provides that: “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.” This implies that UNCLOS expects that the High Sea resources are exploited subject to a system of State imposed. Given that MPAs are management tools, it might be argued that MPAs can also be designated on the High Sea, at least with respect to the nationals and flagged vessels of one State. That State might

\[412\] Article 119(1) “In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall… (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened…”

\[413\] Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 356.
impose a restriction of certain activities in a given area, which its nationals and flagged vessels would be bound to observe. Perhaps then other States might be encouraged to adopt similar measures for its nationals or flagged vessels as a result of the inter-State cooperation contemplated in Article 118. This provides that:

“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” (emphasis added).

Taken together, these two Articles arguably provide an initial foothold for the creation of HSMPAs.

UNLCOS Article 119 contains the provisions to ensure that fishing on the High Seas is not conducted in such a manner so as to be detrimental to fish stocks. The approach to be adopted by the States is also enshrined in this Article which provides for sustainable fishing on the High Seas. In fact, this Article sets fishing on the High Seas as a qualified right.

414 UNCLOS Article 119 “Article 119 Conservation of the living resources of the high seas 1. In determining the allowable catch and establishing other conservation measures for the living resources in the high seas, States shall: (a) 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, as qualified by relevant environmental and economic factors, including the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global; (b) take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened. 415 See also Simone Borg, “The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction,”
Away from the High Sea, but in areas which would affect it, such as the EEZ, where the State, according to Article 56(1), has “sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living.” The State has jurisdiction, but that is referential to the duty, to protect and preserve the environment.\(^{416}\) It is noticeable that the word preservation is being used, similar to the previous observation made above. This has to be linked to the obligation contained in other parts and hence protection of the environment becomes an obligation for a State.\(^ {417}\) Yet, the link, as has been noted by Ringbom, most notably in this case, that between the Part referring to EEZ and that to environment protection, is not straightforward.\(^ {418}\)

Article 58 reflects another aspect of this lack of clarity in the EEZ. It provides that all States have freedom of “navigation…of the laying of submarine cables and pipelines…” within EEZs. However, when exercising these rights, Article 58(3) places a qualification in that there must be “due regard to the rights and duties of the coastal State” and compliance “with the laws and regulations adopted by the coastal State in accordance with the provisions of this

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\(^{416}\) UNCLOS Article 56(1) “In the exclusive economic zone, the coastal State has: (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living… (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to… (iii) the protection and preservation of the marine environment; (c) other rights and duties provided for in this Convention. 2. In exercising its rights and performing its duties… the coastal State shall have due regard to the rights and duties of other States.”

\(^{417}\) UNCLOS Article 192, Articles 56(1)(c) and 56(2)

Convention and other rules of international law *in so far as they are not incompatible* (emphasis added).419 Freedoms must therefore, in Scholz’s view, be exercised with due consideration paid to the freedom of others.420 For example, in carrying out an UNCLOS permitted activity in an EEZ, it is not acceptable for a third State to damage the protected sedentary species of a coastal State – say, for example in respect of deep-sea coral affected by a pipeline. This according to Molenaar reflects a contemporary and growing acceptance of the superiority of conservation over utilisation.421

More specifically in respect of protection of the environment, the coastal state is obligated under Article 61(2) to “ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation.”422 This can be achieved if the coastal State ensures to establish measures for the conservation of harvestable species and other species dependent on these.423 However, it could be argued that the emphasis is on living resources that are of use to humankind rather than all biodiversity for its intrinsic value, and that the provision is clearly anthropocentric. This argument may be counteracted if all

419 UNCLOS Article 58(1).
422 UNCLOS Article 61 “2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end. (4) In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.”
biodiversity is considered as having the potential to be harvested, making it relevant whether at the time of drafting the Convention something was or was not considered to be a living resource. In contrast to other provisions relating to the protection of the environment, Article 61 uses the term conservation rather than preservation. This possibly is acknowledging that the harvesting of living resources may not allow the preservation of the environment and consequently conservation should be aimed for. This provision may sustain the argument that, preservation in other articles is the intention to leave intact.

There are a number of specific measures, related to fishing, including the State’s right to elaborate enforcement procedures.\textsuperscript{424} for stocks occurring in the EEZ, flag States targeting a stock that occurs in more than one EEZ or in ABNJ, have to apply measures to ensure the conservation of that stock. This was considered by the International Tribunal of the Law of the Sea (ITLOS) in 1995, and confirmed, amongst other things, including ITLOS’ jurisdiction, this relationship in respect of illegal, unreported and unregulated fishing in an EEZ.\textsuperscript{425} Thus, in circumstances where measures are applied assuming that stocks occupy specific areas, it may lead to the formation of an unofficially established MPA – and/or become the basis for RFMO rules.\textsuperscript{426} A direct

\textsuperscript{424} UNCLOS Article 62 “1. The coastal State shall promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to Article 61. 4(k). Nationals of other States fishing in the exclusive economic zone shall comply… with… the laws and regulations of the coastal State. These laws… may relate to… enforcement procedures.”

\textsuperscript{425} See here, \textit{Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, Advisory Opinion}, 2 April 2015, ITLOS Reports 2015, p. 4

\textsuperscript{426} UNCLOS Article 63 “Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it.
measure akin to a MPA is the establishment of closed areas, which could be imposed, for example, on a seasonal basis. In ABNJ, cooperation by all States seeking to utilise the resources of an area could pave the way for the identification and governance of HSMPAs. The importance of highly migratory species is recognised and certain species are listed in an Annex to UNCLOS. Effort in respect of those species is subject to more specific measures than the general fisheries provisions.⁴²⁷

Aside from a specific fisheries focus, UNCLOS calls upon all States to cooperate and to apply measures that may be needed for the conservation of marine mammals, wherever such species occur.⁴²⁸ The conservation of cetaceans, however, may come into conflict with the freedom of navigation, noted above, since there might be instances where navigation may be a factor causing a negative impact on cetacean conservation, for example due to noise

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek… to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.
2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek… to agree upon the measures necessary for the conservation of these stocks in the adjacent area.”

⁴²⁷ UNCLOS Article 64(1) “The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organisation exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work. 2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.”

⁴²⁸ UNCLOS Article 65 “Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.”
pollution or collisions. An initial means of dealing with this might be through applying devices such as MSP, with special measures applicable in areas which are of importance to marine mammals. Eventually such areas could be considered MPAs without ever being designated as such. Since by definition there is no coastal State on the High Sea[^429] and, Article 65 does not distinguish between coastal and other State, this cooperation is sought from all States. This may however potentially lead to States with little or no direct interest in the marine sector being in favour of applying restrictive measures to protect marine mammals even though such measures may not be seen as a necessity by those that do have a direct interest. This may be as a result that States with no direct interest will not impact their citizen stakeholders with the restrictive measures. This, among others, will avoid political pressure exerted by nationals that can be directly affected. Furthermore, such States may not even be economically or otherwise impacted. On the other hand, such States can be seen as supporting the protection of the environment in contrast to directly interested States which may be taking into consideration of wider number of factors prior to concluding on restrictive measures. Consequently, such a provision may backfire and lead discussions on the application of specific measures to a standstill. Another issue is how to distinguish between a State that is not cooperating and a State simply not agreeing but able to justify its position.

The same applies to pelagic migratory species; anadromous and catadromous species, respectively. With regard to the latter two species, in some cases, protection may demand the designation of MPAs in the High Seas. The measures applied here may disturb the freedoms enjoyed by States through UNCLOS. However, there is a limitation of the freedom of fishing on the High Sea because it is prohibited to take catadromous species.

For closed and semi-enclosed seas, bordering States are called upon to coordinate the conservation of living resources, which in a way is a similar provision mentioned earlier that is this should somehow incorporate the environment. States are to coordinate the implementation of their rights and

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430 Anadromous species are those that translocate from marine areas into the rivers to spawn, whereas catadromous species are those that migrate from rivers into the open sea to reproduce.

431 UNCLOS Article 66 "1. States in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks.
2. The State of origin of anadromous stocks shall ensure their conservation by the establishment of appropriate regulatory measures for fishing in all waters landward of the outer limits of its exclusive economic zone and for fishing provided for in paragraph 3(b). The State of origin may, after consultations with the other States referred to in paragraphs 3 and 4 fishing these stocks, establish total allowable catches for stocks originating in its rivers.
3. (a) Fisheries for anadromous stocks shall be conducted only in waters landward of the outer limits of exclusive economic zones, except in cases where this provision would result in economic dislocation for a State other than the State of origin. With respect to such fishing beyond the outer limits of the exclusive economic zone, States concerned shall maintain consultations with a view to achieving agreement on terms and conditions of such fishing giving due regard to the conservation requirements and the needs of the State of origin in respect of these stocks...""

432 UNCLOS Article 67. "1. A coastal State in whose waters catadromous species spend the greater part of their life cycle shall have responsibility for the management of these species and shall ensure the ingress and egress of migrating fish.
2. Harvesting of catadromous species shall be conducted only in waters landward of the outer limits of exclusive economic zones..."

433 UNCLOS Article 123 “States bordering an enclosed or semi-enclosed sea should cooperate 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 coordinate the management, conservation, exploration and exploitation of the living resources of the sea;
(b) to coordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment;"
duties with respect to the protection of the marine environment. While it is noted that States not bordering this sea are not called to be involved in this coordination, it is offered that this Article is highly relevant for the establishment of MPAs beyond the Territorial sea and their subsequent management. It may be argued that this Article is applicable to the EEZ rather than to the High Sea noting that according to UNLCOS Article 122 a semi-enclosed sea is to be at least almost completely entirely made of EEZ.\footnote{UNCLOS Article 122 Article 122 “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.”}

On the continental shelf, a State, in exercising its sovereign rights should not cause unjustifiable interference to other States.\footnote{UNCLOS Article 78 “1. The rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters. (2). The exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention.”} If MPAs were to be designated on the continental shelf where no EEZ has been claimed it would imply that the overlying water column forms part of the High Sea. While it is recognised that measures in such MPAs should be associated with sedentary biodiversity, it is also likely that such measures may affect the freedoms enjoyed by other States on the High Sea. But if such measures are justifiable then they should be fed into the designated process of competent international organisations for their adoption. However, the coastal State’s sovereign rights

\begin{itemize}
\item[(c)] to coordinate their scientific research policies and undertake where appropriate joint programmes of scientific research in the area;
\item[(d)] to invite, as appropriate, other interested States or international organisations to cooperate with them in furtherance of the provisions of this Article."
\end{itemize}
need also to be brought into discussion. The reason is that the Article 77\textsuperscript{436} gives rights for exploration and exploitation, although not for protection. Therefore, whether or not a State can unilaterally designate protected areas on its continental shelf and expect that protective measures are respected by other States may be questionable.

In the Area, States are to ensure that activities carried out do not negatively affect the marine environment.\textsuperscript{437} However, there are no specific provisions to protect biodiversity for its intrinsic value in the Area and hence no direct justification under UNCLOS for the designation of MPAs. However, indirectly, the provisions can be tools for spatial management and for the identification of areas that host rare or sensitive biodiversity, with the result that these areas may eventually become protected areas. The ISA, as noted above, is empowered to take measures necessary to ensure effective protection of the marine environment, including its biodiversity and ecological balance, from the

\textsuperscript{436} UNCLOS Article 77 “1. The coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources… (4) The natural resources referred to in this Part 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.”

\textsuperscript{437} UNCLOS Article 145 “Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia: (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities; (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.”
harmful effects of seabed mining activities but it has no regulatory capacity as regards other activities. Whilst it has no explicit mandate for the creation of MPAs, in 2012 it adopted a plan providing for the provisional designation of nine MPAs, justifying this action as an exercise of the general plenary to protect the marine environment.

2.3.1 Selected factors from UNCLOS of relevance to the governance of MPAs

In some parts of the Convention there are provisions direct to a number of activities including the laying of pipelines and submarine cables, installation of structures, fishing, warships and research. The rights and duties complementing these activities may influence the management and efficacy MPAs.

Navigation is one factor that may affect conservation. Provisions within UNCLOS control some of these threats through regulation. In the Territorial Sea, the establishment of a routeing system is allowed for safety reasons, including the protection of the environment. Within the provisions of Article

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440 Ibid. 366.
441 Rayfuse, “Precaution and the Protection of Marine Biodiversity in Areas beyond National Jurisdiction,” 780.
211(1),\textsuperscript{443} for areas beyond the Territorial Sea, it is possible that States apply the same principle to facilitate the management of MPAs. Provisions to regulate navigation do not apply to warships and State-owned ships,\textsuperscript{444} though they are expected, as far as reasonable, to observe such provisions. It is expected that warships also respect the rules of MPAs, since it is frequently by the means of warships that laws at sea are enforced and it would be paradoxical to have a warship enforcing a law which it itself is not abiding with.

Pipelines and submarine cables may have a direct or an indirect influence when it comes to MPA management because they may obliterate habitats and/or sessile species. While all States have the right to lay such utilities on the continental shelf of the coastal State,\textsuperscript{445} the latter, may demand changes in routeing because of mineral exploitation activities but not for environmental protection.

\textsuperscript{443} UNCLOS Article 211(1) “States, acting through the competent international organization… shall establish… international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment…”

\textsuperscript{444} UNCLOS Article 236 “The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessels or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.”

\textsuperscript{445} UNCLOS Article 79(1) “All States are entitled to lay submarine cables and pipelines on the continental shelf, in accordance with the provisions of this Article. 2. Subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines, the coastal State may not impede the laying or maintenance of such cables or pipelines. 3. The delineation of the course for the laying of such pipelines on the continental shelf is subject to the consent of the coastal State. 4. Nothing in this Part affects the right of the coastal State to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources or the operations of artificial islands, installations and structures under its jurisdiction. 5. When laying submarine cables or pipelines, States shall have due regard to cables or pipelines already in position. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.”
protection issues.\textsuperscript{446} However, when pipelines or cables may affect the environment, it is expected that States would seek to minimise conflicts\textsuperscript{447} as is also evident from the \textit{MOX Plant Case} in which ITLOS reitered the obligation for coastal States to cooperate.\textsuperscript{448} In the \textit{MOX Plant Case}, the Tribunal also noted that the State performing the activity should have assessed any environmental impacts and informed the coastal State upon whose Continental Shelf the operations were occurring. With regard to ABNJ, while States enjoy the freedom to lay cables and pipelines, in Article 87, without any reference to ensure the consideration of the impact on the marine environment, Article 145 allows the ISA to enact regulation for the protection of the environment from the installation of pipelines and cables. If States are committed to observe certain limitations in the routeing of cables and pipelines, then it could follow that they could also be willing to discuss an agreement to take into consideration important biological features when routeing cables and pipelines in any marine area. On its CS Malta demands a geotechnical survey to ensure safety.\textsuperscript{449} Aside from cable and pipeline considerations, the installation of structures in the EEZ is mainly addressed through Article 60, which makes provision for artificial islands, installations and structures. The coastal State is to have due regard for

\textsuperscript{448} Ireland v United Kingdom, MOX Plant Case, Order, Request for Provisional Measures, 3rd December 2001, International Tribunal for the Law of the Sea (ITLOS) \texttt{https://www.itlos.org/cases/list-of-cases/case-no-10/} (accessed April 24, 2015), 110, para. 84.
\textsuperscript{449} Maltese continental shelf expert, personal communication, April 30, 2019.
the protection of the marine environment when dismantling structures.\(^{450}\) This is, however, not mirrored in site selection and when installing structures. This may be so as not to cause interference with the economic interests requiring the installation of such structures. In contrast, structures may not be established where interference to recognised sea lanes essential to international navigation is caused. This seems to give more weight to protect other State’s rights than to the protection of the environment. Another provision is the establishment of a safety distance, which cannot exceed 500 metres around such structures. This is to be respected by all ships and must comply with generally accepted international standards regarding navigation in the vicinity of artificial islands, installations, structures and safety zones. This in a way potentially enables another means to establish a form of MPA. Thus there is the theoretical scenario of a State installing a significant number of artificial structures in a single area, resulting in a huge area being protected from certain activities particularly navigation and fishing – however, as has been confirmed by the Permanent Court of Arbitration in the *South China Sea Arbitration* decision, artificial structures or islands do not confer the right to claim an EEZ.\(^{451}\) The point is that these safety zones further impinge on the freedoms of the sea but with regard to MPAs there are no clear similar provisions. Furthermore, a single structure may be dismantled in one area and installed in another and this is

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\(^{450}\) UNCLOS Article 60(3) “…[s]uch removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed”.

somewhat similar to a dynamic MPA since the 500 metre safety zone would shift with the structure.

Provisions for structures on the continental shelf are also included hence the same discussion applies but with a difference. The installation of a structure on the continental shelf, in cases where the coastal State has not claimed an EEZ, would rest within or float on the water column in the High Sea, resulting in a negative effect on the freedoms enjoyed by other States. Therefore, once again the point is whether or not States are willing to accept the same restrictions but for the different objective of protecting biodiversity through MPAs.

Marine scientific research (MSR) is governed by provisions contained in UNCLOS Part XIII. The coastal State has the right to enact rules regarding MSR and the right to withhold consent in certain cases. MSR may influence the management of MPAs. First, because it may have a negative impact on certain MPA features and second, because through MSR important areas that require protection may be identified by the entity conducting the research which may not be acting on behalf of the coastal State.

Enforcement has always been an important yet sensitive issue. For example, in a Convention dating back to 1882, there were detailed enforcement

452 UNCLOS Article 246.
453 Convention Between Her Majesty, The German Emperor, King of Prussia, The King of The Belgians, The King of Denmark, The President of The French Republic, and the King of The Netherlands, for Regulating the Police of the North Sea Fisheries of 1882. University of Oregon https://iea.uoregon.edu/treaty-text/1882-policenorthseafisheryentxt
provisions that allowed the State Parties to inspect each other’s vessels; to order a vessel to return to a port of her flag State; and to permit the enforcing State to keep the crew until they are handed over to their flag State.

UNCLOS contains lengthy provisions with regard to the enforcement duties of States\textsuperscript{454} that can be taken to protect the marine environment.\textsuperscript{455} However, such provisions for certain practical situations seem to be too bare. For example, UNCLOS seems to take it for granted that self-compliance by vessels, including enforcement cooperation, will be practiced and does not provide any detail on the measures that a warship can take in confronting a non-compliant vessel.\textsuperscript{456}

Within its EEZ, with respect to living resources, Article 73(1) permits a coastal State to board, inspect and also arrest the vessel of another State.\textsuperscript{457} In cases of infringements occurring in areas under a State’s jurisdiction, the coastal State may pursue the vessel even on the High Sea and subsequently arrest it.\textsuperscript{458} However, the level of force that can be used requires an examination of customary international law.\textsuperscript{459} This is of importance since MPAs on the High Sea

\textsuperscript{454} Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 843.
\textsuperscript{455} Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 445.
\textsuperscript{457} UNCLOS Article 73(1) “The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention…”
\textsuperscript{458} UNCLOS Article 111 Right of hot pursuit.
\textsuperscript{459} Letts, “The Use of Force in Patrolling Australia’s Fishing Zones,” 154.
Sea need to be properly enforced in order for them to be effective and such provisions could be one step towards more effective enforcement measures. In case of a lack of compliance with applicable international rules and coastal State’s laws that are in conformity with international law, UNCLOS gives the coastal State the right to arrest the contravening vessel and apply a set of general conditions, for example the release of the vessel once a guarantee has been paid. Yet, there are claims that in cases of negligence by other States that UNCLOS is not clear on the coastal State’s right to arrest the contravening vessel. According to Van Dyke, the most effective UNCLOS provision, in favour of the coastal State is Article 220(5), under which a coastal State has authority to obtain the identification of, and conduct a search of, a commercial cargo vessel in the EEZ suspected of violating pollution regulations. Van Dyke also contends that recent State practice restricting navigational freedoms shows that vessels, including military ones which are immune from seizure, must respect the rules to protect the marine environment and the security of coastal

460 UNCLOS Article 73(2) “Arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security”
Article 220 “6. Where there is clear objective evidence that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone, that State may, subject to section 7, provided that the evidence so warrants, institute proceedings, including detention of the vessel, in accordance with its laws.”

463 UNCLOS Article 220(6) “Where there are clear grounds for believing that a vessel navigating in the exclusive economic zone or the territorial sea of a State has, in the exclusive economic zone, committed a violation referred to in paragraph 3 resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection.”
populations. However, in contrast, Beckman notes that States have generally opposed a right to board without the flag State’s consent even for the suppression of serious crimes.

Any ecological benefits expected from the establishment of MPAs would be undermined in the absence of an agreed management framework and effective and enforceable conservation measures. Effective enforcement is obviously crucial on the High Seas. However, provisions for the protection of the biodiversity in ABNJ do not provide adequate and practical tools to implement conservation measures that include MPAs. As a result, Gjerde claims that some States are relying on an implementing agreement under UNCLOS focussed on conservation in ABNJ which is discussed further below. The implementing agreement can facilitate the implementation of relevant UNCLOS provisions that apply to biodiversity in ABNJ. For example, detailed measures about the application of the EIA process, management of MSR, better governance of fisheries and protection of specific areas, in ABNJ can be included. A similar implementing agreement is the FSA, refer to section 2.8. This is expected to be considered as a landmark with regards to regulating vessels on the High Sea.

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466 Foster et al., “Improved Oceans Governance to Conserve High Seas Biodiversity,” 19.
468 Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 841.
469 Maltese academic law expert, personal communication, May 24, 2019.
2.4 Potential Implementing Agreement

A High Sea implementing agreement, negotiated under an existing treaty, was proposed, by the European Union,\textsuperscript{470} to be the instrument through which MPAs in ABNJ can be designated and governed.\textsuperscript{471} However, such an agreement may take significant time to conclude, if it could be concluded at all, so therefore existing tools should be used to ensure conservation until then.\textsuperscript{472} In 2008 a statement made by the Slovenian Minister on behalf of the European Union noted that:

> “the EU remains of the view that ultimately an Implementation Agreement under UNCLOS would be the most effective option in order to provide such an integrated regime and address in a comprehensive manner the multiplicity of challenges facing the protection and sustainable use of marine biodiversity in ABNJ.”\textsuperscript{473}

The implementing agreement could include a mandate for a global body, such as COFI, the UNGA or the UN Trusteeship Council, to assess the impact of certain fishing practices, for example.\textsuperscript{474} Some States suggested the elaboration of an implementing agreement under UNCLOS focussing on conservation in ABNJ because provisions for the protection of the marine biodiversity in ABNJ

\begin{itemize}
\item \textsuperscript{470} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 98.
\item \textsuperscript{471} Scovazzi, “Marine Protected Areas on the High Seas: Some Legal and Policy Considerations,” 17.
\item \textsuperscript{472} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 373.
\item \textsuperscript{474} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 104.
\end{itemize}
may not be adequate.\textsuperscript{475} The EU backed such an approach to resolve the establishment of High Seas MPAs.\textsuperscript{476} However, there are also other States which are doubtful on the effectiveness of such an agreement.\textsuperscript{477} In 2011, UNGA and the UN ABNJ Working Group\textsuperscript{478} were given the task to start the process that would lead to a set of provisions applicable to ABNJ.\textsuperscript{479} The binding nature of such an agreement can be considered as a top priority otherwise it would not address certain weaknesses of UNCLOS.\textsuperscript{480} It is expected that MPA governance is to be made more effective by including monitoring and enforcement measures in respect of the coastal State’s environmental laws as well as how to deal with non-signatories States, and application of customary international law of the sea\textsuperscript{481} will be addressed. Such an agreement may include a mandate, \textit{inter alia}, for appropriate governance taking into consideration various principles and tackling known issues.\textsuperscript{482} The proposal for this agreement perhaps suggests that the existing legal

\textsuperscript{475} Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,” 841.
\textsuperscript{476} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 98.
\textsuperscript{479} Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 855.
\textsuperscript{480} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 370.
\textsuperscript{481} Van Dyke, “The Disappearing Right to Navigational Freedom in the Exclusive Economic Zone,” 107–121.
\textsuperscript{482} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 372.
instruments that call upon Parties to establish MPAs in ABNJ may not be sufficiently robust to allow these designations.

2.5  Convention on the Conservation of Migratory Species of Wild Animals (CMS)

The CMS\textsuperscript{483} calls for the conservation and sustainable use of migratory animals and their habitats.\textsuperscript{484} The Parties to CMS are illustrated in Figure 5 below. It neither calls for the designation of MPAs in any area, nor contains any specific provision that would allow the designation of MPAs in ABNJ. However, as discussed below, certain provisions may, by inference, direct efforts towards the designation of MPAs. A number of agreements which have been adopted as a result of the framework of this Convention are more specific about MPAs, such as ACCOBAMS, which is discussed in more detail in Section 3.6.1 below.

One term that is commonly used in the CMS is ‘Range States.’ The Convention defines Range State in Article I(1)(h):

"Range State" in relation to a particular migratory species means any State (and where appropriate any other Party referred to under subparagraph (k) of this paragraph) that exercises jurisdiction over any part of the range of that migratory species, or a State, flag vessels of which are engaged outside national jurisdictional limits in taking that migratory species."

\textsuperscript{483} The CMS was signed in 1979 and entered into force in 1983.
These States are called upon to seek means to conserve and restore, as appropriate, habitats for particular species listed in Appendix I. States are required, where considered appropriate, to reach agreements for the conservation and restoration of habitats and the maintenance of a network consisting of such habitats that are important for migratory species. Among the migratory species that are listed under in this Convention are a number of cetaceans. By inference, in order to protect such species, it might be argued, as has been by Rabaut et al, that one tool that might be used to achieve this objective is to establish MPAs in the location where important habitats are found.

[Figure 5 – Parties to the CMS](#)

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485 CMS Article III(4).
486 CMS Article V(5)(e) and (f).
Another option may be to implement spatial management measures in such areas. These measures may be applied in areas under the jurisdiction of the Range States but not in ABNJ. The provisions under UNCLOS including, *inter alia*, those providing rights to coastal and flag States, are protected through a specific provision contained in Article XII (1). Although this Convention applies to the territorial sea, to the limit of the EEZ, Burns observes that parties to the CMS also committed to protecting migrating species passing across or outside national jurisdiction.489

### 2.6 The Convention on Biological Diversity (CBD)

The CBD has been ratified by a considerable number of states. It was agreed on 5 June 1992 and came into force on 29 December 1993.490 Its main objectives are the conservation of all biological diversity and the sustainable use of its components, which are to be attained through an ecosystem approach.491 The governing body, known as the “Conference of the Parties” (COP), meets every two years, and also proposes ways of implementing the CBD’s provisions.492 The implementation of this Treaty falls within the remit of the

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States party to it.\textsuperscript{493} Maes claims the CBD “is the most important global
convention in support of an ecosystem-based MSP in order to protect marine
biological diversity under the jurisdiction of coastal states.”\textsuperscript{494} Yet, Gjerde, later
argued that hurdles would need to be overcome when it comes to in-situ
conservation, such as marine protected areas,\textsuperscript{495} since the CBD does not
contain specific articles on marine biodiversity.

The Preamble sheds light on the importance of the conservation of biodiversity.

Of particular relevance is that Parties be conscious of the intrinsic value of the
environment and that humankind should share the concern of biodiversity
conservation. It is also noteworthy that in-situ conservation is a basic
requirement and that reference is made to the protection of ecosystems and not
just to a singular species. It also emphasises the need of cooperation at various
levels.\textsuperscript{496}

Under Article 3 of the CBD, the Parties agree that in exercising their sovereign
rights, they must ascertain that no associated activities cause damage to the
environment, irrespective of whether the area in question is under their

\textsuperscript{493} CBD Secretariat. “Guide to the Convention on Biological Diversity Module A-1,” The
\textsuperscript{494} Maes, “The International Legal Framework for Marine Spatial Planning,” 809.
\textsuperscript{495} Gjerde, “Challenges to Protecting the Marine Environment beyond National Jurisdiction,”
844.
\textsuperscript{496} CBD Preamble, selected recitals: “Conscious of the intrinsic value of biological diversity and
of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and
aesthetic values of biological diversity and its components,” and “Noting further that the
fundamental requirement for the conservation of biological diversity is the in-situ conservation of
ecosystems and natural habitats and the maintenance and recovery of viable populations of
species in their natural surroundings.”
jurisdiction or not. In theory, this provision, coupled with others setting out protective measures, if fully implemented and enforced, should suffice to negate the need for specific protected areas, or at least reduce it to a minimum. Nevertheless, the CBD calls for the establishment of protected areas, as a means of in-situ conservation in areas under national jurisdiction. It could be argued that this explicit obligation to establish such areas implies recognition of a lack of effectiveness in the general protective measures contained in the CBD and therefore Parties are to identify particular areas for assured protection.

Parties are to honour the obligations regarding biodiversity in areas within and beyond their jurisdiction. In fact, biodiversity in ABNJ has to be protected from adverse effects of processes and activities occurring in a State’s jurisdiction. Article 8(a) states that “Each Contracting Party shall, as far as possible and as appropriate: (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.” It is noted that terms such as “as far as possible” and “as appropriate” are included and are likely to pave the way for different interpretations: perhaps a consequence of securing agreements between states with differing priorities.

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497 CBD Article 3 “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

498 CBD Article 4 " Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party: (a) In the case of components of biological diversity, in areas within the limits of 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.”

499 CBD Article 8(a)
Article 8(e) calls for spatial protection in adjacent areas. This reflects understanding of the significance of transboundary movement within the marine environment. Such a provision therefore facilitates the effective extension of protected areas and consequently it is feasible for designated areas to be subject to a set of specific regulatory measures.\(^{500}\) In fact, it would be no surprise if in the distant future, once the MPAs are established all over the globe, for there to be a call to connect them, generating one global MPA network.

The Convention recognises the significance of the need for co-operation in ensuring effective management of protected areas in Article 5.\(^{501}\) The measure also calls for cooperation “with other Contracting Parties, directly or, where appropriate, through competent international organisations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.” This can be interpreted as a responsibility placed upon its Parties to conserve biodiversity.

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500 CBD Article 8 “Each Contracting Party shall, as far as possible and as appropriate: (a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity: (c) 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; (d) Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings: (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas:”

501 CBD Article 5 “Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”
on the High Seas.\textsuperscript{502} It allows for the agreement of other protocols such as the establishment and management of MPAs in ABNJ.\textsuperscript{503}

Article 22\textsuperscript{504} safeguards the contracting Parties’ rights originating from other international agreements and does not affect any obligations contained in the same. In both cases these may be overruled if there is serious damage or a threat to biodiversity. This clause may lead to arguments and lack of agreement if a Contracting Party causes or threatens to cause serious damage since the term serious damage is not categorised. Article 22(2) specifically refers to the rights and obligations which are elaborated in UNCLOS.\textsuperscript{505} Noting that certain provisions of UNCLOS which refer to the protection of the environment may be open to a degree of interpretation, Article 22 may result in a lack of agreement between the Contracting Parties, such as for example in cases concerning the designation of MPAs, noting that these are expected in the Party’s jurisdiction. When it comes to managing MPAs the CBD requires particular attention when bioprospecting and MSR projects are of concern. If any of these is expected to

\textsuperscript{502} Gjerde and Kelleher, “High Seas Marine Protected Areas on the Horizon: Legal Framework and Recent Progress,” 12.
\textsuperscript{504} CBD Article 22(1) “The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.”
\textsuperscript{505} CBD Article 22(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.”
have a significant impact on the environment the CBD authorises the coastal State to refuse such activities.⁵⁰⁶

Various COPs have elaborated further on how the establishment of MPAs is to be honoured. In 1995, the COP produced a decision referred to as the Jakarta Mandate on the Conservation and Sustainable Use of Marine and Coastal Biological Diversity calling for the establishment of a global network of MPAs by 2012: this was agreed at the WSSD, outlined above, in 2002.⁵⁰⁷ Due to delays in achieving this target, possibly due to lack of funds,⁵⁰⁸ COP 10 extended the deadline to 2020.⁵⁰⁹ The Parties also agreed to identify areas, officially termed as ecologically and/or biologically significant areas (EBSAs) that are of particular significance because of biodiversity features. This amounts to a science-based process, but one which does not create legal obligations to establish any specific regulations in such areas.⁵¹⁰ Guidelines were adopted to enable this process at COP 9.⁵¹¹ EBSAs are recorded in a repository to encourage cooperative management of such areas.⁵¹²

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⁵⁰⁶ Mossop, “Protecting Marine Biodiversity on the Continental Shelf Beyond 200 Nautical Miles,” 291.
COP 10 adopted the Aichi Targets, noted above, which include that at least ten percent of the world’s oceans should be managed through the designation of MPAs by 2020.\textsuperscript{513} It should be noted that legal instruments normally call for other criteria and not just area coverage, however it is to be assumed that this ten percent limit represents a conservative aspiration. The EU, although having declared its commitment to integrate and implement the CBD’s Strategic Plan for Biodiversity and Aichi targets, only referred to MPAs as a tool for supporting sustainable fisheries – although its own conservation measures go beyond this and made no specific reference to the achievement of Aichi Target 11. Jones and de Santo argue that if the numerical target is aimed for in isolation from other objectives, such as, for example, representativeness and the creation of a MPA network, there could be the risk that while the percentage is reached, it is done so in a way that does meet the real objectives.\textsuperscript{514} This view is supported by Batista who notes that the success of MPAs should not be measured by reference to the total area under designation, but also with the benefits and results obtained through the appropriate management of MPAs.\textsuperscript{515}

\textsuperscript{513} CBD Secretariat, “COP 10 Decision X/2,” \textit{The Convention on Biological Diversity}, https://www.cbd.int/decision/cop/?id=12268 (accessed June 27, 2015): Aichi Target 11: “By 2020, at least 17 per cent of terrestrial and inland water, and 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider landscapes and seascapes.”


Work on EBSAs started and a number of regional workshops were organised prior to COP 12, convened in 2014. During this COP a number of EBSAs were deposited, see Figure 6. It is noticeable that in the regional workshop report for the Mediterranean Sea, Malta expressed its concern regarding the identification process of EBSAs. The progress made in the identification of the EBSAs may potentially instigate the designation of additional MPAs in all marine areas. It also is a good example of how different States can work together on a particular area.

516 CBD Secretariat, "Decisions Adopted by the Conference of the Parties at Its Twelfth Meeting UNEP/CBD/COP/12/29," The Convention on Biological Diversity, https://www.cbd.int/doc/decisions/cop-12/full/cop-12-dec-en.pdf (accessed on June 27, 2015): 113 “…requests the Executive Secretary to include the summary reports prepared by the Subsidiary Body on Scientific, Technical and Technological Advice at its eighteenth meeting, as annexed to the present decision, in the EBSA repository, and to submit them, prior to the thirteenth meeting of the Conference of the Parties, to the General Assembly of the United Nations and particularly its Ad Hoc Open-ended Informal Working Group…”


2.7 The Convention on Wetlands of International of Importance, Especially as Waterfowl Habitat (the Ramsar Convention)

The Ramsar Convention was signed on 2 February 1971 and entered into force on 21 December 1975. It seeks the protection of wetlands important for birds. It calls for the designation of MPAs in the Parties’ territory. Since the features and wetlands to be protected are not likely to exist beyond the territorial sea, this Convention will not be dealt with into detail.\(^{519}\) It calls for the establishment of MPAs through Article 2(1) which states that:

“Each Contracting Party shall designate suitable wetlands within its territory for inclusion in a List of Wetlands of International Importance... The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat.”

In this connection it is worth mentioning that although it allows for the designation of protected areas it does not create additional rights enforceable against foreign vessels.\(^{520}\)

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\(^{519}\) Ramsar 996 UNTS 245: Article 1(1) “For the purpose of this Convention wetlands are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.”

\(^{520}\) Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 446.
2.8 The Agreement Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (FSA)

The FSA entered into force on 11 December 2001.\footnote{United Nations, Office of Legal Affairs, “The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December 2001) Overview,” Oceans and the Law of the Sea, 2013, http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm (accessed September 29, 2014).} It calls for the application of an ecosystem-based approach to management and biodiversity protection.\footnote{Gjerde and Kelleher, “High Seas Marine Protected Areas on the Horizon: Legal Framework and Recent Progress,” 12.} Membership is limited to States with a real, but undefined, interest in the fisheries managed by the Regional Fisheries Management Organisation (RFMO) although some broad conditions that States must satisfy prior joining are specified in the FSA.\footnote{FSA UNTS 2167 3: Article 11. “In determining the nature and extent of participatory rights for new members of a subregional or regional fisheries management organization, or for new participants in a subregional or regional fisheries management arrangement, States shall take into account, inter alia: (a) the status of the straddling fish stocks and highly migratory fish stocks and the existing level of fishing effort in the fishery; (b) the respective interests, fishing patterns and fishing practices of new and existing members or participants; (c) the respective contributions of new and existing members or participants to conservation and management of the stocks, to the collection and provision of accurate data and to the conduct of scientific research on the stocks; (d) the needs of coastal fishing communities which are dependent mainly on fishing for the stocks; (e) the needs of coastal States whose economies are overwhelmingly dependent on the exploitation of living marine resources; and (f) the interests of developing States from the subregion or region in whose areas of national jurisdiction the stocks also occur.” See also. Hannesson, “Rights based fishing on the high seas: Is it possible?,” 670.}

The FSA calls for the precautionary approach to be adopted widely, and, while recognising that a more cautious approach should be taken when information is “uncertain, unreliable or inadequate,” specifically states that lack of scientific...
certainty should not be a reason to postpone any measures that are deemed to be necessary to enhance the conservation of fish stocks.\(^{524}\)

In addition it establishes that the harvesting of such stocks should be carried out by parties to the agreement and those which follow the conditions contained therein.\(^{525}\) The FSA in such situations becomes applicable to non-signatory states.\(^{526}\) The FSA applies *mutatis mutandis* to vessels fishing on the High Sea which fly the flag of a non-party State and, is applicable to all sea areas depending on the relevant fish stock.\(^{527}\) As expected, the FSA should be applied in a manner consistent with UNCLOS.\(^{528}\) It provides for the sharing of information with regard to measures applicable to vessels operating on the High Seas.\(^{529}\) This might be a first step towards the harmonisation of regulations of

\(^{524}\) FSA Article 6(1) “States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment. (2). States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures...”


\(^{526}\) FSA Article 1 2(a) "States Parties" means States which have consented to be bound by this Agreement and for which the Agreement is in force. (b) This Agreement applies mutatis mutandis: (i) to any entity referred to in Article 305, paragraph 1 (c), (d) and (e), of the Convention and (ii) subject to Article 47, to any entity referred to as an "international organization" in Annex IX, Article 1, of the Convention which becomes a Party to this Agreement, and to that extent "States Parties" refers to those entities.

3. This Agreement applies mutatis mutandis to other fishing entities whose vessels fish on the high seas.

\(^{527}\) FSA Article 3(1) “Unless otherwise provided, this Agreement applies to the conservation and management of straddling fish stocks and highly migratory fish stocks beyond areas under national jurisdiction, except that articles 6 and 7 apply also to the conservation and management of such stocks within areas under national jurisdiction, subject to the different legal regimes that apply within areas under national jurisdiction and in areas beyond national jurisdiction as provided for in the Convention.”

\(^{528}\) FSA Article 4 “Nothing in this Agreement shall prejudice the rights, jurisdiction and duties of States under the Convention. This Agreement shall be interpreted and applied in the context of and in a manner consistent with the Convention.”

\(^{529}\) FSA Article 7(8) “States fishing on the high seas shall regularly inform other interested States, either directly or through appropriate subregional or regional fisheries management organizations or arrangements, or through other appropriate means, of the measures they have
fishing vessels on these areas. It may thus be used so that a common set of regulations are devised between the flag States.

Article 8(4) provides that: “[o]nly 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 organisation or arrangement, shall have access to the fishery resources to which those measures apply.” This exclusivity makes the agreement stronger than if non-participants were allowed a free-ride on those willing to be bound by the FSA. But it is still to be seen how cases in which vessels flying the flag of non-signatory parties fishing on such stocks will be resolved. Another point to be considered is whether or not a vessel catching relevant species as bycatch in a fishery not under this agreement, would be considered as participating in the fishing of stocks under the FSA.

Frequently, multi-lateral environmental agreements cover aspects related to conservation and cooperation, but lack provisions on the practicalities of surveillance. The FSA, however, has a provision, albeit rather open-ended, which notes that one of the functions of regional fisheries management organisations is to establish appropriate cooperative mechanisms for not just enforcement but also for surveillance.530 It does not indicate whether a State can adopt specific enforcement measures on vessels of another participating

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adopted for regulating the activities of vessels flying their flag which fish for such stocks on the high seas.”

530 FSA Article 10(h) “establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;”
State; it enables enforcement by all States. Therefore, it seems that unless there is a prior agreement by the concerned States about enforcement practices, the normal international provisions should apply. Provisions are included that may be taken by parties to confront vessels of non-participating States. Such provisions may be useful in the governance of MPAs on the High Sea. States which are not members of a regional organisation and do not comply with the management measures established by such organisation are still obligated to cooperate in accordance with the provisions of UNCLOS and the FSA. Such cooperation includes that their vessels should not be allowed to target stocks to which the management measures apply.

States which are party to a regional organisation should also exchange information on third party States that are targeting the relevant stocks. Furthermore, they should also take the necessary action, in line with international law, to deter such activities. The issue to be determined here is

532 FSA Article 17 (1) A State which is not a member of a subregional or regional fisheries management organization or is not a participant in a subregional or regional fisheries management arrangement, and which does not otherwise agree to apply the conservation and management measures established by such organization or arrangement, is not discharged from the obligation to cooperate, in accordance with the Convention and this Agreement, in the conservation and management of the relevant straddling fish stocks and highly migratory fish stocks.
2. Such State shall not authorize vessels flying its flag to engage in fishing operations for the straddling fish stocks or highly migratory fish stocks which are subject to the conservation and management measures established by such organization or arrangement.
4. States which are members of such organization or participants in such arrangement shall exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organization nor participants in the arrangement and which are engaged in fishing operations for the relevant stocks. They shall take measures consistent with this Agreement and international law to deter activities of such vessels which undermine the effectiveness of subregional or regional conservation and management measures.”
533 FSA Article 17(4) “States which are members of such organization or participants in such arrangement shall exchange information with respect to the activities of fishing vessels flying the flags of States which are neither members of the organization nor participants in the
what action such a State might take. This may lead to an inconsistent action, and/or use of power, by States party to the organisation when facing the same situation.

The flag State’s duties, including on compliance and enforcement, are clearly listed. Various details regarding the course of actions to be adopted in cases of violation are provided. Among these, are that the flag State should provide information to the investigating authority. The FSA also calls upon the flag State to initiate proceedings against the vessel alleged to be in violation of its rules. The FSA does not indicate who is responsible for setting up the investigating authority or what its composition should be.

Article 20(5) provides that “States shall, to the extent permitted by national laws and regulations, establish arrangements for making available to prosecuting authorities in other States evidence relating to alleged violations of such measures.” This provision, designed to promote cooperation, is limited by being required only to the extent permitted by national law. Its full effect is therefore dependent on States targeting stocks covered under the FSA having similar national laws. Article 20(6) creates a restrictive measure regarding a vessel on the High Sea alleged to have carried out unauthorised fishing in an area under the jurisdiction of the coastal state. This provision seeks cooperation between

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534 FSA Article 19 “Compliance and enforcement by the flag State, (c) require any vessel flying its flag to give information to the investigating authority regarding vessel position, catches, fishing gear, fishing operations and related activities in the area of an alleged violation.”
the flag state and the coastal state by the former providing authorisation so that the latter can board the vessel even though it is on the High Sea. Permitting the boarding of a vessel on the High Sea, by not just the flag state, is very relevant in the enforcement of MPAs, since surveillance vessels from the State of the fishing vessel may not be at the place where the infringement occurs and furthermore allows for an efficient use of surveillance vessels among States. Provisions addressing non-compliant situations on the High Sea are included. Such provisions may serve as a deterrent and thereby avoid non-compliant activities.

Further detailed provisions on enforcement calling for cooperation are set out in Article 21. Article 21(1)\textsuperscript{535} gives authority to a State party to a regional organisation in circumstances that it may, when on the High Sea, board the vessel of another State which is party to the FSA to ensure compliance with measures established for straddling stocks by the regional organisation. Article 21(2)\textsuperscript{536} is important because it provides for the prior coordination of enforcement procedures among States and that such procedures are to be

\textsuperscript{535} FSA Article 21(1) "In any high seas area covered by a subregional or regional fisheries management organization or arrangement, a State Party which is a member of such organization or a participant in such arrangement may, through its duly authorized inspectors, board and inspect, in accordance with paragraph 2, fishing vessels flying the flag of another State Party to this Agreement, whether or not such State Party is also a member of the organization or a participant in the arrangement, for the purpose of ensuring compliance with conservation and management measures for straddling fish stocks and highly migratory fish stocks established by that organization or arrangement."

\textsuperscript{536} FSA Article 21(2) "States shall establish, through subregional or regional fisheries management organizations or arrangements, procedures for boarding and inspection pursuant to paragraph 1, as well as procedures to implement other provisions of this Article. Such procedures shall be consistent with this Article and the basic procedures set out in Article 22 and shall not discriminate against non-members of the organization or non-participants in the arrangement. Boarding and inspection as well as any subsequent enforcement action shall be conducted in accordance with such procedures. States shall give due publicity to procedures established pursuant to this paragraph."
made public. Article 21 even extends to vessels without a nationality. Such situations may arise when a vessel is de-registered and no State will accept to register the vessel. De-listing may occur as a result of the State taking action against the vessel or in the process of the vessel migrating from one register to another. Article 21(18) provides a safeguard, in the form of liability for the damage or loss, to ensure that States do not use the wide enforcement powers illegally or unreasonably. Inspection procedures are also included and cover situations where there is a lack of collaboration by a vessel to allow boarding by a State other than the flag State. The requirements go to the extent that the fishing licence is suspended prior to the vessel entering a port. In spite of all these provisions, Letts criticises the FSA’s lack of detail about the level of force that may be used. Further critique has centred upon the omission of provisions to address highly migratory species, such whales, seabirds, and other species; pollution; habitat degradation, and activities occurring on the High Sea. A specific treaty in respect of cetaceans is considered in the following section.

537 FSA Article 18 “States shall be liable for damage or loss attributable to them arising from action taken pursuant to this Article when such action is unlawful or exceeds that reasonably required in the light of available information to implement the provisions of this Article.”
538 FSA Article 22 “Basic procedures for boarding and inspection pursuant to Article 21. (4) In the event that the master of a vessel refuses to accept boarding and inspection in accordance with this Article and Article 21, the flag State shall, except in circumstances where, in accordance with generally accepted international regulations, procedures and practices relating to safety at sea, it is necessary to delay the boarding and inspection, direct the master of the vessel to submit immediately to boarding and inspection and, if the master does not comply with such direction, shall suspend the vessel’s authorization to fish and order the vessel to return immediately to port. The flag State shall advise the inspecting State of the action it has taken when the circumstances referred to in this paragraph arise.
539 Letts, “The Use of Force in Patrolling Australia’s Fishing Zones,” 150.
2.9 The International Convention for the Regulation of Whaling (ICRW)

The International Convention for the Regulation of Whaling,\textsuperscript{541} concluded in 1946 and in force two years later, establishes catch-limits for commercial and aboriginal subsistence whaling\textsuperscript{542} and includes provisions relevant to the designation of protected areas. However, the Convention only applies to marine areas where whaling occurs.\textsuperscript{543} Consequently, some but not all High Seas may be included and the application of the ICRW where whales exist but where there are no whaling activities, and to those areas where whaling may have previously occurred, may be challenged.

The Convention established an International Whaling Commission (IWC),\textsuperscript{544} authorised to govern particular issues, some of which are included in Article V, which include the declaration of open and closed waters, including the designation of sanctuary areas. It is interesting to note that the IWC has allowed States with no interest in whaling to participate in decision-making. This is possibly due to the fact that all States have rights to exploit these resources on

\begin{footnotesize}
\textsuperscript{541} International Convention for the Regulation of Whaling 62 Stat. 1716; 161 UNTS 72.
\textsuperscript{542} ICRW Article V(1) “The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.” See also International Whaling Commission, “Commission,” International Whaling Commission, 2015, https://iwc.int/convention (accessed July 4, 2015).
\textsuperscript{543} ICRW Article I (2) “This Convention applies to factory ships, land stations, and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations, and whale catchers.”
\textsuperscript{544} ICRW Article III “The Contracting Governments agree to establish an International Whaling Commission, hereinafter referred to as the Commission, to be composed of one member from each Contracting Government...”
\end{footnotesize}
the High Sea. There are cases, for example, where such States have blocked the lifting of the moratorium on commercial whaling.\textsuperscript{545} Of relevance to MPAs, is that under Article V, the IWC can designate sanctuaries as well as open and closed areas to whaling activities.\textsuperscript{546} The demands for cooperation rather than compliance, in Article VIII, can lead to circumstances when a State may not adhere to protective measures\textsuperscript{547}.

The sanctuaries established in the Indian and Southern Oceans provide evidence that MPAs are best if they are appropriately planned, include enforcement mechanisms and are established through a formal international procedure.\textsuperscript{548} It is apparent that the IWC has the right to establish MPAs, specific to its purpose, such as for example, by imposing a moratorium, in areas falling under the jurisdiction of its Contracting Parties. This provision may therefore override a State’s intent in its own jurisdiction.

\textsuperscript{545} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 110.
\textsuperscript{546} ICRW Article V (1) “The Commission may amend from time to time the provisions of the Schedule by adopting regulations with respect to the conservation and utilization of whale resources, fixing (a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records.”
\textsuperscript{547} Australia v. Japan: The International Court of Justice, 31 March 2014,
2.10 The Food and Agriculture Organisation of the United Nations (FAO) Code of Conduct for Responsible Fisheries (CCRF)

Beyond specific measures of Public International Law, further measures, such as codes of conduct are applied. The non-binding FAO Code of Conduct for Responsible Fisheries applies to fisheries in all areas, and as per Article 6.12 also includes ABNJ.\textsuperscript{549} Article 6.8, of the provisions of this Code, refers to the protection of particular fish habitats and thus can lead to the designation of MPAs.\textsuperscript{550} The Code is augmented with several plans of action and guidelines that call for the designation of MPAs.\textsuperscript{551} However, non-legally binding FAO instruments may still leave various marine features, particularly those in deep seas, at risk, as was expressed by some States during the UNFAO Committee on Fisheries (COFI) 26\textsuperscript{th} Session in 2005.\textsuperscript{552}

\textsuperscript{549} CCRF FAO Doc. 95/20/Rev/1; UN Sales No. E98.V.11 (1998); Article 6.12 “States should, within their respective competences and in accordance with international law, cooperate at subregional, regional and global levels through fisheries management organizations, other international agreements or other arrangements to promote conservation and management, ensure responsible fishing and ensure effective conservation and protection of living aquatic resources throughout their range of distribution, taking into account the need for compatible measures in areas within and beyond national jurisdiction.” See also Maes, “The International Legal Framework for Marine Spatial Planning,” 804.

\textsuperscript{550} CCRF Article 6.8 “All critical fisheries habitats in marine and freshwater ecosystems, such as wetlands, mangroves, reefs, lagoons, nursery and spawning areas, should be protected and rehabilitated as far as possible and where necessary. Particular effort should be made to protect such habitats from destruction, degradation, pollution and other significant impacts resulting from human activities that threaten the health and viability of the fishery resources.”

\textsuperscript{551} For example, CCRF Article 7.6.9 “States should take appropriate measures to minimize waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species, and negative impacts on associated or dependent species, in particular endangered species. Where appropriate, such measures may include technical measures related to fish size, mesh size or gear, discards, closed seasons and areas and zones reserved for selected fisheries, particularly artisanal fisheries. Such measures should be applied, where appropriate, to protect juveniles and spawners. States and subregional or regional fisheries management organizations and arrangements should promote, to the extent practicable, the development and use of selective, environmentally safe and cost-effective gear and techniques.” See also Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 94.

\textsuperscript{552} Molenaar, “Managing Biodiversity in Areas Beyond National Jurisdiction,” 104.
2.11 The International Convention for the Safety of Life at Sea (SOLAS)

While first impressions may be that SOLAS would have no relevant provisions, a closer analysis in fact demonstrates that it may be useful in protecting the marine environment through MPAs. Through SOLAS, created in 1974 and in force in 1980, as amended, the IMO can designate certain areas as “areas to be avoided” (ATBAs) and “no anchoring areas (NAAs). ATBAs are used for reasons of exceptional danger or especially sensitive ecological and environmental factors. The potential for synergistic effects between ATBAs and MPAs has already been employed for the protection of the environment. Examples, identified by Spadi, include the U.S. Channel Islands Sanctuary and the Greek Marine Park of the Northern Sphorades. Therefore, ATBAs can be applied overlapping any MPA where there is a need to restrict vessels from certain areas. As a matter of fact, once an ATBA is established even where no MPA has been declared, they would still be in a way creating a MPA that is protected from factors related to navigation from ships. The same can be said for NAAs. Once these are established, the benthic environment would be protected from anchoring by ships.

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554 SOLAS Chapter V, Regulation 10 (1) “Ships’ routeing systems contribute to safety of life at sea, safety and efficiency of navigation and/or protection of the marine environment...”


2.12 The International Convention for the Prevention of Pollution from Ships (MARPOL 73/78)

As noted above, the International Maritime Organisation (IMO), as per provisions contained in UNCLOS may establish rules by creating conventions. In the context of this thesis, the IMO’s central convention is the International Convention for the Prevention of Pollution from Ships. It was signed in 1973, revised in 1978 and entered into force in 1983. Figure 7, below, provides an illustration of the Parties to MARPOL 73/78.

![Figure 7 – States that ratified MARPOL 73/78 (dark gray shade)](image)

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557 International Convention for the Prevention of Pollution from Ships 1340 UNTS 184; see also Salomon and Dross, “Challenges in Cross-Sectoral Marine Protection in Europe,” 143.


Special measures related to navigation and technical aspects of pollution other than dumping may be enacted through MARPOL.\textsuperscript{559} Dumping is regulated under other legal instruments which include the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention)\textsuperscript{560} and the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft under the Barcelona Convention. With regard to the conservation of certain areas that are of importance, MARPOL contains a number of provisions. There are two types of such areas, known as “Special Areas” and “Particularly Sensitive Sea Areas” (PSSAs), respectively. These can create a synergetic effect with regard to the governance of MPAs with other Conventions which are more specific to the protection of the environment.

Special areas are defined in Annex I.\textsuperscript{561} Such areas are to have well known oceanographical and ecological features and are threatened by or susceptible to certain factors related to navigation.\textsuperscript{562} In such areas, stricter measures related to the prevention of pollution are applicable. A number of special areas have been adopted by the IMO and these are contained in Annex I of the

\begin{itemize}
\item \textsuperscript{559} Rabaut, et al., \textit{Marine Protected Areas: International Framework, State of the Art, the Belgian Situation}, 7.
\item \textsuperscript{560} London Convention 26 UST 2403, 1046 UNTS 120 (1972);
\item \textsuperscript{561} MARPOL 73/78 Annex I Regulation 1(10) “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. Special areas shall include those listed in regulation 10 of this Annex.”
\item \textsuperscript{562} IMO Resolution A.927(22) Adopted on 29 November 2001 Annex I Guidelines for the designation of special areas under MARPOL 73/78 and guidelines for the identification and designation of particularly sensitive sea areas http://www.imo.org/blast/blastDataHelper.asp?data_id=24553&filename=A927(22).pdf (accessed July 12, 2015).
\end{itemize}
Convention,\textsuperscript{563} refer to Figure 8. It is therefore evident that the identification of a special area overlapping a MPA or, conversely, a MPA designated within a special area, may enhance and facilitate the enactment and enforcement of measures related to navigation, both within and outside areas under national jurisdiction, and therefore the effectiveness of any overlapping MPA. The other form of area that the IMO can designate,\textsuperscript{564} is known as a “Particularly Sensitive Sea Area.” There are various differences between a Special Area and a PSSA but the most important is that in the latter, protective measures may include ones which are unconventional whereas in the former protective measures have to be already available under an existing instrument.\textsuperscript{565} According to a Maltese maritime law expert, the creation of the PSSA concept was the response to the cases in which ships were negatively affecting the natural environment.\textsuperscript{566}

\textsuperscript{563} MARPOL 73/78 Annex I Regulation 10 “Methods for the prevention of oil pollution from ships while operating in special areas (1) For the purposes of this Annex, the special areas are the Mediterranean Sea area, the Baltic Sea area, the Black Sea area, the Red Sea area, the “Gulfs area”, the Gulf of Aden area and the Antarctic area, which are defined as follows: (a) The Mediterranean Sea area…(b) The Baltic Sea area…(c) The Black Sea area… (d) The Red Sea area… (e) The Gulfs area… (f) The Gulf of Aden area…(g) The Antarctic area…”


\textsuperscript{566} Maritime law expert, personal communication, May 31, 2019.
A Resolution adopted, in 1978, during the International Conference on Tanker Safety and Pollution Prevention on PSSAs required the IMO to identify areas which may benefit from protection measures against marine pollution from ships taking into account the natural features of each area. Following a number of revisions of some Resolutions, Resolution A.982(24), adopted on 1 December 2005, incorporates Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas. The Resolution defines a PSSA as “an area that needs special protection through action by the IMO because of its significance for recognised ecological, socio-economic, or scientific attributes

Figure 8 - Special Areas

Source: Maritimemaps, Hartlepool, [http://www.maritimemaps.co.uk/Datasets/datasets.html](http://www.maritimemaps.co.uk/Datasets/datasets.html)


where such attributes may be vulnerable to damage by international shipping
activities.”570 It is evident that there are some overlaps with nature conventions
that refer to the designation of MPAs.571 The Resolution contains a set of
ecological and scientific criteria against which PSSAs have to be examined;572
guidelines on the identification of PSSAs and the adoption of associated
protective measures (APMs).573 APMs are not obligatory even though parties to
MARPOL are expected to abide with them.574 Therefore, to protect the PSSAs
through APMs cooperation is required.575

A PSSA can serve to highlight the environmental sensitivity of an area, increase
stakeholders’ and mariners’ awareness so that the latter are cautious when
passing through the area, and provide the basis for the extension of APMs,576
which have to be approved by the IMO577 and which are critical to the efficacy of
PSSAs.578 It should be noted that PSSAs may be at risk if it is overused by

570 IMO Resolution 982(24) Revised Guidelines for the Identification and Designation of
particularly Sensitive Sea Areas
January 14, 2017), para 1.2.
571 See, for example the criteria in the Specially Protected Areas and Biological Diversity
Protocol, Annex I, refer to Section 3.5.1
572 IMO Resolution 982(24) Revised Guidelines for the Identification and Designation of
Particularly Sensitive Sea Areas
January 14, 2017), Chapter 4.
573 IMO Resolution 982(24) Revised Guidelines for the Identification and Designation of
Particularly Sensitive Sea Areas
574 Scovazzi, “Marine Protected Areas on the High Seas: Some Legal and Policy
Considerations,” 9.
576 Kristina M. Gjerde, “IMO Approves Protective Measures for Cuba’s Particularly Sensitive Sea
Area in the Sabana-Camaguey Archipelago,” The International Journal of Marine and Coastal
Law 14, no. 3 (1999): 421.
577 Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect
Imperilled Marine Ecosystems,” 442.

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vessels, since the negative impacts from navigation and the potential of accidents may increase.

A PSSA may be designated in national waters and the High Sea, as illustrated in Figure 9. However, the designation of PSSA requires that this is proposed by the coastal State. The IMO supports the view that it is legitimate for a State to establish certain measures restricting maritime freedom to protect the resources in its EEZ.

![Figure 9 - PSSAs](http://www.maritimemaps.co.uk/Datasets/datasets.html)

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579 Detjen, “The Western European PSSA - Testing a Unique International Concept to Protect Imperilled Marine Ecosystems,” 442.


582 Source: Maritimemaps, UK, [http://www.maritimemaps.co.uk/Datasets/datasets.html](http://www.maritimemaps.co.uk/Datasets/datasets.html)
The designation of PSSAs on the High Sea requires that a number of issues are addressed.\textsuperscript{583} In fact, Gjerde and Rulska-Domino, noted that issues need to be addressed by IMO to possibly designate PSSAs in ABNJ overlapping HSMPAs.\textsuperscript{584} The designation of a PSSA would imply that environmental protection overrides the freedom of the High Seas.\textsuperscript{585} However, while some measures adopted in PSSAs may \textit{prima facie} appear as hindering, \textit{inter alia}, the freedoms of States, such as innocent passage, in practice they do not. A typical example of this, noted by Detjen, is the obligation that certain vessels are to pre-notify the coastal State 48 hours ahead of their entry into the PSSA to make authorities aware of the potential threat to the marine environment.\textsuperscript{586} A Maltese maritime law expert notes that prohibition of entry into a PSSA can only be done on a temporal basis.\textsuperscript{587}

Whilst the PSSA concept seems to be a straightforward one, there are still some uncertainties with regard to their binding nature. This may, according to Rabaut \textit{et al}, be because PSSAs are based on an IMO Resolution with no defined legal status.\textsuperscript{588} However, Spadi points out that UNCLOS Article 211(6)
can be considered a legal basis for PSSAs,\textsuperscript{589} which is reflected in the Preamble of the IMO’s Resolution.\textsuperscript{590}

In contrast to the FSA, the precautionary approach, as noted in section 3.8, cannot be adopted to establish PSSAs since the IMO’s procedures require direct evidence.\textsuperscript{591} Yet, the precautionary approach has been referred to in a number of court cases but not concerning PSSAs. For example, in the case \textit{Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan)}, ITLOS, though not specifically referring to the term precautionary approach, stated that “the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna.”\textsuperscript{592} The CJEU, although on a subject unrelated to marine issues, in its judgment in the case of \textit{The Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise}, stated that “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent.”\textsuperscript{593}

\textsuperscript{589} Spadi, “Navigation in Marine Protected Areas: National and International Law,” 298.
\textsuperscript{591} Gjerde and Rulksa-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 365.
\textsuperscript{593} Case C-157/96, \textit{Queen v Ministry of Agriculture, Fisheries and Food, Commissioners of Customs & Excise, ex parte National Farmers’ Union, David Burnett and Sons Ltd, R. S. and E. Wright Ltd, Anglo Beef Processors Ltd, United Kingdom Genetics, Wyjac Calves Ltd, International Traders Ferry Ltd, MFP International Ltd, InterState Truck Rental Ltd and Vian}
2.13 The Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC)

Aside from measures focused on the natural environment, the UNESCO World Heritage Convention, open for signature in November 1972 and in force December 1975, has 193 Parties. It could contain principles that may be adopted for the protection of biodiversity through the designation of MPAs. The main reason for considering its provisions is to analyse how protected areas can be established and enforced through this Convention, which is applicable to all marine areas.

The Preamble notes that all States have a responsibility to preserve underwater cultural heritage. It emphasises this concept by asking for cooperation between States and the respect for international law. This collective claim is a first step so that States may be less hesitant at respecting proposed measures that may interfere with their activities or nationals.

Cultural heritage may include entire underwater sites. In other words, if such sites were to become protected they would become marine protected areas. However, the heritage targeted for protection has to be within the territory of the

Exports Ltd. (1998) I-02211


WHC 1037 UNTS 151: Article 2.

WHC Article 1.
It is also important to note that underwater cultural heritage is to be preserved for the benefit of humanity. This may put a degree of responsibility on all States, even if they do not have a direct link with a specific site. States should adopt means of protection that incorporate the best practicable options. However, it could be argued that the best practicable means may not always be the best means. Such a provision might also be reflected to protect specific areas hosting specific biodiversity, such as, for example, when establishing fishing regulations.

Another striking provision allows Parties to involve other States in agreements to preserve cultural heritage, as long as such States have a link with the heritage being considered. This may be useful when proposed measures may affect other laws and principles, such as freedom of navigation and fishing on the High Seas. Responsibility is on the Parties to protect underwater cultural heritage and to adopt measures to achieve this aim.

Article 10(2) states that “The [World Heritage Committee] Committee may at any time invite public or private organisations or individuals to participate in its meetings for consultation on particular problems.” It may serve to adopt a different strategy for the identification and implementation of measures which may be argued to affect the freedom of States on the High Seas. Some Parties,

597 WHC Articles 3 to 5.  
598 WHC Article 5.  
599 WHC Article 6.  
600 WHC Article 6.  
601 WHC Article 10.
such as Malta, may have a Continental Shelf that lies beneath the High Seas. Consequently, if it was to adopt measures to protect underwater cultural heritage in such areas, it may affect the freedoms of other States. For example, this may result from a declaration of no anchoring or no trawling areas or a no entry area for submarines, all of which may also affect biodiversity. This approach, which involves consultation, may prove to be an initial start point for a way forward in agreement with the States concerned.

The Annex contains rules concerning activities directed at protecting underwater cultural heritage. Exclusion of public access in cases where access can be detrimental to the heritage is an option that can be considered. This prohibition creates a protected area and is a strong rule that does not allow the freedom of access to areas lying in various areas under jurisdiction such as the EEZ or Continental Shelf.

Rule 25 indicates further protection measures. Such measures have to be in line with Article 10 in that they are practicable measures. Among the possible scenarios of measures that could be proposed are the prohibition of navigation through an area to avoid risks of anchoring, the reduction of navigation speed to minimise underwater currents to avoid damage to underwater structures and the prohibition of laying of pipelines and cables in certain areas. These may be considered as practicable but may be potentially contrary to the freedom of the seas. The creation of such criss-crosses between one agreement and another, 602 WHC Rule 7.

602 WHC Rule 7.
through similarities of provisions such as, for example, protected areas under this UNESCO World Heritage Convention and those under MARPOL 73/79, without an automatic linkage between them, together with regional treaties and organisations lead to concepts and legal instruments that have been developed erratically over the years to protect marine areas.\textsuperscript{603}

### 2.14 The Antarctic Treaty System

Antarctica is managed by a set of regulations that collectively for the Antarctic Treaty System. The system incorporates a main Treaty and five MEAs: the Protocol on Environmental Protection to the Antarctic Treaty, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), the Convention for the Conservation of Antarctic Seals (CCAS) and the main regulations for the Secretariat of the Antarctic Treaty.\textsuperscript{604}

The Antarctic Treaty, signed in 1959 and entered into force in 1961,\textsuperscript{605} applies to the area south of the 60° latitude albeit that in the preamble and Article I reference is made to Antarctica.\textsuperscript{606} This Treaty establishes an observer scheme

\begin{thebibliography}{99}
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\textsuperscript{606} Antarctic Treaty 402 UNTS 71: Article VI.
and allows for inspections to be carried out at the discretion of the observers.\textsuperscript{607} The Treaty does not aim to protect the environment from the various human activities but is rather focused on the protection from military use of the area and the conservation of the area for the benefit of humankind.

A measure relevant to this thesis is the Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR), adopted in May 1980, at the Conference on the Conservation of Antarctic Marine Living Resources. It includes various references to the Antarctic Treaty and entered into force in April 1982.\textsuperscript{608} Although developed under the Antarctic Treaty, the CCAMLR applies to a larger area than that of the Treaty.\textsuperscript{609} Thirty six States have ratified the Convention, with seven entering reservations.\textsuperscript{610} Within CCAMLR’s Preamble it is noted that States recognise the need for international cooperation in order to protect marine living resources.\textsuperscript{611}

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\textsuperscript{607} Antarctic Treaty Article VII-1 “In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.”


\textsuperscript{611} CCAMLR preamble, selected recital “believing that the conservation of Antarctic marine living resources calls for international co-operation with due regard for the provisions of the Antarctic Treaty and with the active involvement of all States engaged in research or harvesting activities in Antarctic waters.”
The CCAMLR seeks the conservation and rational use of resources by, amongst other things, ensuring that harvesting does not only jeopardise the survival of a particular species, but that it also considers effects on the environment. It focuses on marine living resources, referring to all living organisms, although excluding whales and seals because these species are covered by other international legal instruments. The contracting Parties to agree to observe provisions related to the conservation of biodiversity, recommended by the Antarctic Treaty Consultative Parties. Through Article IX, Parties are required to adhere to the obligations created by the Antarctic Treaty Consultative Parties in relation to the protection of the environment. This may imply that even though such Parties may have no right to vote for such provisions, they would still be expected to respect them.

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612 CCAMLR Article II(2) “… the term ‘conservation’ includes rational use”  
613 CCAMLR Article II(3) “Any harvesting and associated activities… shall be conducted in accordance with the… following principles of conservation: (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment… (b) maintenance of the ecological relationships… (c) prevention of changes or minimisation of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades…”  
614 CCAMLR Article 1(1) “The objective of this Convention is the conservation of Antarctic marine living resources.”  
615 CCAMLR Article 1(2) “Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence.”  
617 See Antarctic Treaty Article IX.  
618 CCAMLR Article V(2). “The Contracting Parties which are not Parties to the Antarctic Treaty agree that, in their activities in the Antarctic Treaty area, they will observe as and when appropriate the Agreed Measures for the Conservation of Antarctic Fauna and Flora and such other measures as have been recommended by the Antarctic Treaty Consultative Parties in fulfilment of their responsibility for the protection of the Antarctic environment from all forms of harmful human interference.”  
A Commission was established\textsuperscript{619} and, in common with other international convention’s governing bodies, this has a legal personality. In addition if agreement with State Parties is secured, it may also enjoy a number of immunities and privileges.\textsuperscript{620} The Commission is highly relevant with regard to the establishment and governance of protected areas since it can designate, \textit{inter alia}, closed areas and MPAs,\textsuperscript{621} including in areas on the High Seas,\textsuperscript{622} for conservation purposes.\textsuperscript{623}

Other important functions affecting MPA governance include the formulations and adoption of conservation measures. However, a member of the Commission may formally object to any measure so that it may either be revised or not binding to the State raising the objection. Furthermore, the Commission is also able to implement a system of observation and inspection in line agreed provisions.\textsuperscript{624} The system gives enforcement jurisdiction to the Commission but any non-compliant cases have to be prosecuted by the flag State.\textsuperscript{625}

\textsuperscript{619} CCAMLR, Article VII(1) “The Contracting Parties hereby establish and agree to maintain the Commission for the Conservation of Antarctic Marine Living Resources.”
\textsuperscript{620} Article VIII.” The Commission shall have legal personality and shall enjoy in the territory of each of the States Parties such legal capacity as may be necessary to perform its function and achieve the purposes of this Convention. The privileges and immunities to be enjoyed by the Commission and its staff in the territory of a State Party shall be determined by agreement between the Commission and the State Party concerned.”
\textsuperscript{621} CCAMLR, Article IX(2) “The conservation measures referred to in paragraph 1(f) above include the following:... (b) the designation of regions and sub-regions based on the distribution of populations of Antarctic marine living resources… (d) the designation of protected species;”
\textsuperscript{624} CCAMLR Article XXIV.
\textsuperscript{625} CCAMLR Article XXIV(2)(a).
The system allows a dedicated scientific body to identify MPAs and the required conservation measures throughout the area to which the Convention applies, but noting that States have a right to object may create free-rider situations whereby the objecting would gain benefits while the complying States might be negatively affected by respecting any imposed measures. The governance of MPAs requires the cooperation of various sectors. In this instance, the IMO is not represented in the CCAMLR albeit that any provisions related to managing navigation may result in an economic burden on the States and companies and that the Antarctic area has been designated as a Special Area.

Talks to create MPAs around the Antarctic have failed after a distinctive position had been adopted by its Parties; putting concerns on the MPAs’ impact on fisheries rather than on biodiversity to be protected. In 2014 there were occasions were the proposal to designate a number of MPAs was blocked by members of the Commission.

In situations that comprise activities originating from vessels of non-Party States that may counteract the objectives of the Convention, the Commission can inform the State concerned. This can negatively affect the degree of freedom that non-Party States flagged vessels can enjoy on the High Sea since


628 CCAMLR Article X.
CCAMLR also applies to certain High Sea areas. Furthermore, a non-Party neither has a voice in the Commission nor is consulted with any measures needed to safeguard the environment. Consequently, this gives no ownership to the non-Party State and may have the potential to lead to non-compliant cases. It may also be seen as a rather anomalous situation in which a State is asked to abide with regulations to which it never expressed an opinion, unless explicitly consulted, even though a non-Party State is not legally bound by the Convention. Also there seems to be bias, in the fact that Article X calls for communication with a non-Party in non-compliant cases but there is no provision to consult non-Parties in specific situations or prior to the establishment of measures to which after all even non-Parties, though not-obligated are expected not to undertake activities that counteract the objectives of such measures or of the Convention. A non-Party may never have the chance to voice its opinion on the measures applicable to High Seas in the Convention area, in which the vessels of the non-Party might fish. The issue becomes more complex if the State concerned may not be abiding to a specific regulation not because it is unable to carry out its duties as a flag State but because it is of the opinion that other management measures should have been adopted to ensure conservation. However, the CCAMLR does not operate on its own but should be interpreted in the light of UNCLOS’s provisions, particularly those relating to cooperation and straddling stocks. The provisions would influence the activities of non-Party vessels.

The Protocol on Environmental Protection to the Antarctic Treaty, signed in 1991 and in force in 1998, emphasises the need to protect the Antarctic
environment. In its Preamble it recalls that Antarctica was designated as a Special Conservation Area under the Antarctic Treaty system. Under Article 2, Parties commit to protect the environment in a comprehensive manner including all biodiversity and physical environmental features. Truly comprehensive protection should lead to the conclusion that the environment will be protected from all activities originating from Parties. Article 3 provides rather detailed provisions to mitigate against potentially detrimental activities. It could also be extended further to include protection from activities originating from non-Parties albeit without prejudicing their rights.

Article 3(2)(c) places an obligation on Parties to perform a prior assessment before conducting certain activities that may harm the natural environment, such as fisheries, navigation, tourism and research, in the Treaty area. The regular monitoring of these activities is also required. Article 3 also covers transboundary impacts on adjacent areas, originating from within the Treaty area. The right provided by UNCLOS for mineral extraction from the Continental Shelf has been renounced through Article 7. Activities that should be screened through an environmental impact assessment (EIA) are listed.

630 Protocol on Antarctic Treaty Article 3.
632 Protocol on Antarctic Treaty Article 3(2c).
633 Protocol on Antarctic Treaty Article 3e.
634 Protocol on Antarctic Treaty Article 6(3).
636 Protocol on Antarctic Treaty Article 8 and Annex I.
while activities that have less than a minor or transitory impact may be conducted without an EIA. The Protocol establishes a Committee, in part to ensure that measures are updated and consistent with new emerging situations. Non-Parties, that are Party to the Antarctic Treaty, may sit as observers. An observer scheme has been adopted through Article 14. This implies that the enforcement jurisdiction enjoyed but the flag State is being shared with authority of the Protocol. It is interesting to note that this Protocol does not contain any provisions, or recitals, that link to the freedoms, rights and duties that are owned by States party to UNCLOS.

2.15 Conclusion

There are many MEAs and regional laws that can be applied to establish MPAs in any area. However, these instruments are not coordinated and there is no specific forum to allow the creation of HSMPAs based on an integrated approach. There are possible overlaps which may create confusion and a lack of effective enforcement measures. In some situations, there is also a lack of consistency between MEAs and this may lead to a possible lack of interest or commitment by States. Notwithstanding the various commitments made by States to establish HSMPAs the open oceans remain poorly protected due to

637 Protocol on Antarctic Treaty Article 11(3).
639 Foster et al., “Improved Oceans Governance to Conserve High Seas Biodiversity,” 19.
the weak international regulatory institutions. In addition there are issues related to various provisions originating from different sectors which most of the time are not coordinated even though they might be trying to achieve similar aims. Therefore, for example, changes in provisions related to navigation and other matters relating to MPAs are needed. Existing measures may collectively be used to achieve the aims of a MPA. \textsuperscript{641} However, it should not be assumed that this will be successful for establishing HSMPAs. \textsuperscript{643} There have been various proposals by experts in the field so that the situation is improved. Others noted that governance of the High Seas using MPAs can be somewhat unachievable. \textsuperscript{644} There is a need to improve governance of various activities on the High Seas to improve the conservation of the marine environment. \textsuperscript{645} High Sea MPAs may remain unachievable unless States find effective ways to control nationals in any marine zone. \textsuperscript{646} Other issues may relate to third party rights of use and enforcement. \textsuperscript{647} In the interim, finding long lasting solutions to the creation of MPAs on the High Sea, States can, among other things, support existing initiatives, conduct assessments on selected activities and promote effective enforcement mechanisms. \textsuperscript{648}

\textsuperscript{640} Norse, “Pelagic Protected Areas: the Greatest Parks Challenge of the 21st Century,” 37.
\textsuperscript{641} Spadi, “Navigation in Marine Protected Areas: National and International Law,” 299.
\textsuperscript{643} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,”
\textsuperscript{644} MRAG Ltd., \textit{Costs and benefits arising from the establishment of maritime zones in the Mediterranean Sea}, 2013, \textit{European Commission},
\textsuperscript{645} Foster et al., “Improved Oceans Governance to Conserve High Seas Biodiversity,” 21.
\textsuperscript{646} \textit{ibid.} 22.
\textsuperscript{647} Morling, “The Economic Rationale For Marine Protected Areas in the High Seas,” 29.
\textsuperscript{648} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 371.
3 Regional Treaties and Maltese laws

This Chapter focuses on regional Conventions, EU law and Maltese laws considered to be relevant for this research. Conventions which are not directly related to the Mediterranean Sea area also examined in order to provide a picture of how issues around MPA designations are being tackled in other parts of Europe. The Barcelona Convention and its relevant Protocol provide the central focus of this chapter and a detailed assessment of their provisions is set out in section 3.5 below. Relevant EU laws are analysed and, as deemed relevant, considered in the context of the Conventions and Maltese laws. Since this study is presenting Malta as an example, its national laws are identified and explained both in contemporary terms and from an historical perspective. The measures will be considered, first, from the perspective of those which have a more general MPA relevance, to those which are specifically focused on the Mediterranean Sea and those to which Malta has developed a specific legal response. As a result the third sub-objective would be achieved.

3.1 Convention on the Conservation of European Wildlife and Natural Habitats (The Bern Convention)

The Bern Convention, signed in 1979 and in force in 1982, calls for the conservation of wild fauna and flora and their natural environment and gives
importance *inter alia* to vulnerable migratory species, some of which may move across areas of the High Seas. The importance of collaboration and coordination between the Parties to ensure that identified protected areas achieve their objectives can be noted, in particular, through two provisions contained in Article 4(4) and Article 10(1). While it does not specifically obligate parties to designate MPAs, it includes a number of provisions that may lead to such designation to protect particular features. For example, the Contracting Parties are to enact legislation to ensure that areas hosting habitats of wild flora and fauna and various listed features are protected. In fact, under this Convention a network of protected areas has been established, known as the Emerald Network. There are no specific references to ABNJ and consequently this Convention is unlikely to be applicable on the High Sea.

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649 Bern Convention 1284 UNTS 209: Article 1(1) “The aims of this Convention are to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation. Article 1(2)...Particular emphasis is given to endangered and vulnerable species, including endangered and vulnerable migratory species.”

650 Rabaut et al., Marine Protected Areas: International Framework, State of the Art, the Belgian Situation. 9.

651 Bern Convention Article 4 (1) “Each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats of the wild flora and fauna species, especially those specified in Appendices I and II, and the conservation of endangered natural habitats; (2) The Contracting Parties in their planning and development policies shall have regard to the conservation requirements of the areas protected under the preceding paragraph, so as to avoid or minimise as far as possible any deterioration of such areas; (3) The Contracting Parties undertake to give special attention to the protection of areas that are of importance for the migratory species specified in Appendices II and III and which are appropriately situated in relation to migration routes, as wintering, staging, feeding, breeding or moulting areas; (4) The Contracting Parties undertake to co-ordinate as appropriate their efforts for the protection of the natural habitats referred to in this Article when these are situated in frontier areas.”

3.2 Convention for the Protection of the Marine Environment of the Baltic Sea Area (HELCOM)

The Convention for the Protection of the Marine Environment of the Baltic Sea Area, or Helsinki Convention,\(^ {653}\) applies to all of the Baltic Sea, and since this has been divided into EEZs of its coastal States does not include the High Seas. Article 15, requires the Parties, individually and jointly, to “take all appropriate measures” to “conserve natural habitats and biological diversity and to protect ecological processes.”\(^ {654}\) In April 2014, a Recommendation was adopted calling for the establishment of a network of MPAs.\(^ {655}\) The Recommendation also included outline criteria of candidate sites as well as other factors associated with MPAs.

3.3 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR)

The OSPAR Convention covers vast marine areas in the Northeast Atlantic ranging from internal waters to the High Seas. The general obligations refer,

\(^{653}\) HELCOM 1507 UNTS 167: was signed in 1992 and entered into force on 17 January 2000.  
\(^{654}\) HELCOM Article 15 “The Contracting Parties shall individually and jointly take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes. Such measures shall also be taken in order to ensure the sustainable use of natural resources within the Baltic Sea Area. To this end, the Contracting Parties shall aim at adopting subsequent instruments containing appropriate guidelines and criteria.”  
\(^{655}\) HELCOM Recommendation 35/1. This Recommendation supersedes HELCOM Recommendation 15/5. Adopted 1 April 2014, having regard to Article 20, Paragraph b) of the Helsinki Convention.
inter alia, to the protection of marine ecosystems. Article 2 calls upon the Contracting Parties “take all possible steps to prevent and eliminate pollution” and to

“take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.”656

There is no reference to the specific type of measures that can be adopted and therefore MPAs could be one measure that the Parties may, individually or jointly, adopt to conserve the marine environment. Assisting in this are obligations to both monitor and research,657 which may provide important information on the status of biodiversity leading to justification of the need for designation of a MPA.

Under OSPAR, the world’s first network of MPAs on the High Seas was established in 2010, covering 286,200 km² of the northeast Atlantic, and created through the designation of six MPAs,658 as shown in Figure 10, and noted further in sections 1.4 and 3.3.1. OSPAR does not regulate fishing activities within OSPAR MPAs, although the Commission is beginning to cooperate and coordinate its activities with selected RFMOs and other

656 Helcom Article 2 “(1.a) The Contracting Parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas which have been adversely affected.
(1.b) To this end Contracting Parties shall, individually and jointly, adopt programmes and measures and shall harmonise their policies and strategies.”
657 OSPAR 2354 UNTS 67: Articles 6 and 8.
organisations under the auspices of recently concluded Memoranda of Understanding with those organisations.\textsuperscript{659}

\begin{center}
\textbf{Figure 10 - High seas MPAs}\textsuperscript{660}
\end{center}

To ensure that this Convention is being implemented, a Commission, composed of representatives of the Contracting Parties is established. Its duties are listed in Article 10. Article 13 provides for the decision-making process and includes details on voting. Both Articles contain provisions that may be adapted in the governance of HSMPAs. Adoption of decisions or recommendations (as to which section 3.3.1 below offers more information) is through a unanimous vote. In case this is not achieved, the Commission may adopt a three quarters

\textsuperscript{659} Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 853.

majority system. The OSPAR Convention also notes that while decisions are binding, recommendations are not. Other provisions regarding amendments to the Convention are contained in other Articles including Article 15 which is about the amendments of the Conventions and Article 17 about amendments to Annexes.

Articles 22 and 23 contain mechanisms related to enforcement and implementation of decisions. The former deals with compliance and gives power to the Commission so that it can, after analysing the reports submitted by the Parties, call upon for adherence to particular provisions. This form of compliance mechanism is useful in ensuring effective application of the Convention and Decisions and/or Recommendations.

Annex V, which considers the protection and conservation of biological diversity is directly linked to the measures referred to in Article 2, which recalls the obligations emanating from the Convention on Biological Diversity. It calls upon Parties so that, among other considerations, where practicable they restore marine areas and elaborate plans for the conservation of biological diversity. In order to restore marine areas, specific measures may need to be set up for a particular area, with the potential that this may in turn become an official MPA. The protection of biodiversity may also require general measures applicable to

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661 There is noticeable difference when compared to the Specially Protected Areas and Biological Diversity (SPA/BD) Protocol, which seeks consensus to adopt HSMPAs. Since HSMPAs are binding to the Parties of the SPA/BD they may be of similar nature as a decision of the OSPAR Convention. On the other hand, amendments to the Barcelona Convention and its Protocols would require two thirds majority vote.
wider areas that may not necessarily lead to a *formally* protected area. Article 3 places a duty upon the Commission to establish plans for the control of human activity; and 3(1)(b)(ii) provides that in doing so the Commission should consider measures, described as “…protective, conservation, restorative or precautionary…”, that may be applied after taking into consideration any relevant international laws. The Article thus explicitly seeks the application of a precautionary approach when formulating conservation measures. It is also noted that reference to the protection of particular areas is mentioned at Convention level rather than at Protocol level. The following section will provide an illustrative overview of a number of OSPAR decisions and recommendations as are seen relevant in the context of this thesis. They are identified and set out on the basis that they provide an insight into the development of the MPA as a central means of area governance within the Northeast Atlantic. As will be seen the acceptance of the measure and the frequency of their designation has increased.

3.3.1 Selected OSPAR Recommendations and Decisions

In 2003, OSPAR adopted a non-binding Recommendation on MPAs.\(^{662}\) The same Recommendation provides for a concerted and coordinated effort for the creation of a MPA Network by 2010. This further enhances coordination

\(^{662}\) OSPAR Commission, OSPAR Recommendation 2003-03 on a Network of Marine Protected Areas, as amended by OSPAR Recommendation 10-02
between the Parties because rather than providing broad criteria that can be interpreted differently by the Parties, it provides detailed criteria. In a way, this recommendation creates governance principles or a form of marine spatial planning. Guidelines to elucidate the selection and reporting process were established through a separate recommendation.\(^{663}\)

OSPAR Recommendation 2003-03 on a Network of Marine Protected Areas, section 3.5 makes further provision for the establishment of MPAs. In this connection the Commission recognised MPAs established under the EU *nature acquis*. Therefore, it can be assumed that the selection criteria of the EU *nature acquis* satisfy, or align with, OSPAR’s criteria. OSPAR further recognises the management attributed to MPAs under the EU *nature acquis*. Therefore, in order to avoid duplication of work with regard to the management of MPAs particularly with regard to management plans and reporting, the Recommendation waives Parties’ obligations to take other action but demands that any reports sent to the EU Commission about a particular area are also sent to OSPAR Commission.

This is a rather practical approach that ensures that resources are efficiently used. However, noting the wording of paragraph 3.5 (c) is referring to any report sent to the European Commission may give rise to some conflicts in case the Party sends confidential or restricted reports to the European Commission.

\(^{663}\) OSPAR Commission, OSPAR Recommendation 2003-17, “Guidelines for the Identification and Selection of Marine Protected Areas in the OSPAR Maritime Area.”
Paragraph 3.5 (c) has no reserves for such cases and therefore may possibly lead to case-by-case approach. Section 5 allows Parties to cancel a MPA and also provides a target date, which is 31 December of each year so that Parties inform the Commission of any new MPAs or changes in the applicable measures.

As noted above, the 2003 Recommendation was amended in 2010 by Recommendation 2010/2 which made specific reference to developments arising under the Convention on Biological Diversity. The relevant developments are referred to in the recitals of the amended Recommendation: decision VII/28, Decision VII/30 of COP 7 and CBD’s Articles 8 (a) to (e). Recital nine also contains a clue to the basis of Recommendation 2010/2, namely that despite efforts to secure their establishment “…the network of MPAs in 2010 is not yet considered to be ecologically coherent throughout the entire OSPAR maritime area” (emphasis added). Consequently, the OSPAR Commission took action to address this lack of achievement without delay. This persistency, through non-binding Recommendations, rather than addressing it through binding Decisions, may provide some insight with regard to the importance given to MPAs as a tool for conservation, yet it can also be perceived that political matters may come into play. Section 2 has been revised to set new target dates to achieve a managed coherent network. It is evident that whilst the original Recommendation was only referring to areas under national jurisdiction, the amendments included ABNJ, covering a larger area.
than before. The process to set MPAs in ABNJ is also outlined in the Recommendation. This time the amendment notes that MPAs in ABNJ, unlike those designated in national jurisdiction areas have to be proposed to OSPAR’s Commission rather than direct reporting.

OSPAR Decision 2010/05 established one of the High Seas MPAs in OSPAR’s network, known as The Josephine Seamount High Seas Marine Protected Area. Mention can also be made of measures undertaken in September 2010 relating to the establishment of MPAs in ABNJ with one of them, the Mid-Atlantic Ridge North of the Azores, providing a similar situation to the Mediterranean whereby part the sea bed which is subject to a submission by Portugal to the Commission on the Limits of the Continental Shelf (CLCS) for an extended continental shelf claim lies beyond the High Seas water column. The designation of MPAs on the High Seas served as a learning curve and it was observed that the process can be facilitated with an agreement on the selection criteria, target dates, conservation objectives, respectively;

665 OSPAR Commission, OSPAR Recommendation 2003-03 on a Network of Marine Protected Areas, as amended by OSPAR Recommendation 10-02 “3.1(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.”
independent evaluation of MPAs and a commitment on multiparty monitoring, control and surveillance.\textsuperscript{668}

A number of Recommendations have been adopted that deal with the establishment and management of MPAs. These Recommendations recognise that effective management has to address stakeholders and the activities originating from various States, including those that may not necessarily be Contracting Parties to OSPAR. An attempt to overcome this hurdle is provided in OSPAR Recommendation 2010/12, Paragraph 3.3.5, which calls Contracting Parties to seek the cooperation of third Parties to observe conservation measures applicable to the area. This proviso is common to many Recommendations involving the management of MPAs.\textsuperscript{669}

It is noticeable that a number of Decisions entered into force between 2010 and 2012 which provide for the establishment of MPAs. Consequently, all the Contracting Parties have to respect the presence of these protected areas. On the other hand, a number of Recommendations on the management of the MPAs, approved through Decisions, have entered into force. These management provisions, in contrast, are not binding on the Contracting Parties. This issue may lead to a number of arguments. The fact that Parties are

\textsuperscript{669} OSPAR Commission, OSPAR Recommendation 2010/12 on the Management of the Milne Seamount Complex Marine Protected Area “3.3.5(a), engage with third parties and relevant international organisations... with a view to promoting the delivery of the conservation objectives... set for the Milne Seamount Complex MPA and to encourage application of the above programmes and measures...” https://www.ospar.org/convention/agreements/page10 (accessed, May 5, 2016).
recognising the MPAs without committing to the management measures may result in non-effective or ‘paper MPAs’, as defined above. It may be politically, and in policy-terms, cumbersome to agree to measures which may impinge on the freedoms enjoyed in such areas. The optimum situation would be where Decisions exist both for the establishment and management of the same areas, with an acceptance within an international context. However, it is evident that this is still a hurdle that needs to be overcome. It seems that the international community is admitting the importance of MPAs. This is believed because in the recitals of most of OSPAR’s Decisions and Recommendations reference is made to a UN Resolution on this subject. The Resolution, *inter alia*, re-affirms the need for States to apply MPAs within the context of international law.

It should also be noted that a further measure, OSPAR 2010 10/3/2-E attempted to collate a number of the key objectives established under both the of the Habitats Directive and Marine Strategy Framework Directive\(^670\) under its Biological Diversity and Ecosystems Strategy to enhance marine protection in all marine zones.\(^671\) These Directives, among others seek the protection of biodiversity and natural area by *inter alia* improving the quality of environmental features and the status of conservation of species. This broader focus, encompassing a more holistic view of ecosystems, provided a clear example how existing regulations can be used in synergy and collectively to produce the

desired results. A more directly applicable, species-specific measure is considered in the section below.

3.4 International Convention for the Conservation of Atlantic Tunas (ICCAT)

Through the International Convention for the Conservation of Atlantic Tunas, signed in 1966 and in force in 1969, the RFMO, International Commission for the Conservation of Atlantic Tunas (ICCAT) was established as the only fisheries organisation to manage tunas and tuna-like fishes in the Atlantic Ocean.\(^{672}\) It applies to the Atlantic and adjacent seas including the High Seas.\(^{673}\) As such, ICCAT, does include specific provisions for the establishment of measures akin to MPAs, although perhaps limited in their scope. However, it can be used in synergy with other MEAs to regulate specific activities in MPAs. These may address threats emanating from other sectors such as recreational fishing, pollution or vessel traffic.\(^{674}\) ICCAT’s functions include making recommendations to its Parties on the conservation of species falling within its


\(^{673}\) ICCAT 673 UNTS 63: Article I “The area to which this Convention shall apply, hereinafter referred to as the “Convention area”, shall be all waters of the Atlantic Ocean, including the adjacent Seas.”

Recommendations may include the closure of areas thereby serving as MPAs. By virtue of Article IX(1) which states that:

“The Contracting Parties agree to take all action necessary to ensure the enforcement of this Convention. Each Contracting Party shall transmit to the Commission, biennially or at such other times as may be required by the Commission, a statement of the action taken by it for these purposes,”

the Contracting Parties to ICCAT are encouraged to enforce the Convention, including seeking to manage non Parties by taking legal proceedings. Recommendations may also apply to MPA governance on the High Sea such as, for example, the implementation of a regional observer programme and the joint scheme of international inspection.

A number of commentators have noted concerns regarding the efficacy of ICCAT over the years – particularly in the face of significant stock collapses in certain species. Sumaila and Ling Huang, for example have noted the uncertainty of cooperation between Parties,

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675 ICCAT Article VIII(1)(a) “The Commission may, on the basis of scientific evidence, make recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch…”


677 Sumaila and Ling Huang, “Managing Bluefin Tuna in the Mediterranean Sea,” 508.


non-ICCAT Parties targeting bluefin tuna, and the non-restrictive implementation of policies.\textsuperscript{681}

3.5 Convention for the Protection of the Mediterranean Sea against Pollution (Barcelona Convention)

The Barcelona Convention was opened for signature on 16 February 1976 and entered into force on 12 February 1978.\textsuperscript{682} This Convention has been ratified by all States bordering the Mediterranean Sea, except for Montenegro which only signed the ‘Acceptance of Amendments,’ refer also to Figure 11. Prior to the Convention, work was already underway in respect of this particular semi-enclosed sea: a Mediterranean Action Plan (MAP), for example, had been adopted in 1975,\textsuperscript{683} which itself had its basis in the UN Regional Seas Programme of 1974. Given the focus of such regional conventions, the MAP very much set the developmental aspirations of the States surrounding the Mediterranean as part of the context for the measure. It is still the case that certain States will tend to prioritise socio-economic matters over environmental

\textsuperscript{681} Sumaila and Ling Huang, “Managing Bluefin Tuna in the Mediterranean Sea,” 508.
\textsuperscript{682} Barcelona Convention 1102 UNTS 27, “The Convention for the Protection of the Mediterranean Sea Against Pollution was adopted on 16 February 1976 by the Conference of Plenipotentiaries of the Coastal States of the Mediterranean Region for the Protection of the Mediterranean Sea, held in Barcelona. The original Convention has been modified by amendments adopted on 10 June 1995 by the Conference of Plenipotentiaries on the Convention for the Protection of the Mediterranean Sea against Pollution and its Protocols, held in Barcelona on 9 and 10 June 1995 (UNEP(OCA)/MED IG.6/7). The amended Convention, recorded as “Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean” has entered into force on 9 July 2004.”
\textsuperscript{683} UNEP/WG.2/5 available from http://wedocs.unep.org/bitstream/handle/20.500.11822/5251/75wg2_5_mapphasei_eng.pdf?sequence=1&isAllowed=y (accessed April 2015)
protection and noted more recently by de Viviero and Mateos. These differences in motivation may well affect the progress in the implementation of the Action Plan.

The Barcelona Convention has seven Protocols, one of which is the Protocol concerning Mediterranean Specially Protected Areas and Biodiversity (SPA/BD Protocol) of 10 June 1995, which is elaborated more fully in section 3.5.1.

The Barcelona Convention tries to focus efforts to preserve the Mediterranean Sea by *inter alia*, identifying a number of measures that can be employed and employed and

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directed towards specific activities. The Preamble recognises that the Contracting Parties “fully aware of their responsibility to preserve this common heritage for the benefit and enjoyment of present and future generations.” The Preamble also recognises

“the need for close cooperation among the States and international organizations concerned in a coordinated and comprehensive regional approach for the protection and enhancement of the marine environment in the Mediterranean Sea Area.”

One recital States that

“existing international conventions on the subject do not cover… all aspects and sources of marine pollution and do not entirely meet the special requirements of the Mediterranean Sea Area.” (Emphasis added)

Since the Barcelona Convention was revised in 1995, and such a statement remained in place, it can be deduced that this statement may be referring to international Conventions such as UNCLOS and the CBD. It does not refer to ACCOBAMS\(^{687}\) which did not exist at the time. ACCOBAMS came into force following the amended Barcelona Convention. Two arguments in this regard can be presented. First, is that the Convention was not enough to ensure adequate protection of cetacean species and other marine mammals, and secondly that the Convention allowed for and provided impetus to the Contracting Parties to create further specific agreements to enhance the protection of the marine environment. If the latter is true, then it may be expected that in the future, Parties could create further specific collaborative

\[^{687}\text{Agreement on the conservation of cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area, I-38466.}\]
agreements focused on identified features. Among these could be an elaborated agreement on High Sea Marine Protected Areas (HSMPAs).

According to Article 1, the Convention is applicable to the ‘Mediterranean Sea Area,’ which is all the Mediterranean Sea including the High Sea; excluding internal coastal waters and the seabed. One reason for excluding the seabed, may be that at the time of writing the main perceived threats to the marine environment were those originating from navigation. Consequently, the importance of specifically including the seabed might have been overlooked. If this appears too naive, another reason could be a deliberate exclusion due to political reasons to allow States freedom to exploit mineral resources from the seabed and its subsoil.

A number of provisions, if appropriately applied, should lead to an enhanced conservation of the Mediterranean marine environment. Under Article 31(3), all proposed actions must be in conformity with UNCLOS and relevant international law.688

Article 4(3) obligates Parties to apply the precautionary principle and the polluter pays principle.689 Article 4(3)(d) states that the Contracting Parties should


689 Barcelona Convention Article 4 (3). “In order to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area, the Contracting Parties shall: (a) apply, in accordance with their capabilities, the precautionary principle, by virtue of which where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be
“promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse effect on the marine environment of other States or areas beyond the limits of national jurisdiction, on the basis of notification, exchange of information and consultation.”

This implies that activities carried out on the High Sea, such as for example fishing by vessels registered with a Contracting Party, may need to be screened through an EIA. Additionally, although the Convention does not apply to the seabed, activities carried out on the seabed, such as drilling, and inland, such as discharges into rivers, by the Contracting Parties, would also need to have an EIA to assess, among other things, any potential effects on the water column areas under jurisdiction of a Contracting Party and beyond. Therefore, it is argued that by strictly abiding to this Article would imply that High Sea areas would be effectively protected.

Prior to the continuation of the analysis of this Convention it may be appropriate to note that some of the provisions contained within it will be analysed even though they do not have a direct effect on the designation of MPAs. The reason for their inclusion is that it may be hypothesised that if such provisions are implemented the need to designate MPAs may be questioned. In fact noting all these provisions together with those from other relevant conventions the call for

used as a reason for postponing cost-effective measures to prevent environmental degradation; (b) apply the polluter pays principle, by virtue of which the costs of pollution prevention, control and reduction measures are to be borne by the polluter, with due regard to the public interest; (c) undertake environmental impact assessment for proposed activities that are likely to cause a significant adverse impact on the marine environment and are subject to an authorization by competent national authorities; (d) promote cooperation between and among States in environmental impact assessment procedures related to activities under their jurisdiction or control which are likely to have a significant adverse effect on the marine environment of other States or areas beyond the limits of national jurisdiction, on the basis of notification, exchange of information and consultation;”
MPAs may be the result of the push given from the epistematic community, refer to section 1.2.

Articles 5 to 9 and 11, focus on various pollution sources. A remark needs to be made about the spatial applicability of the provisions. Article 7, clearly indicates that pollution originating from exploration and exploitation activities of the seabed and its subsoil, shall as much as possible, be eliminated from the Mediterranean Sea Area, that is the water column, but there is no requirement included which obligates Parties to eliminate such pollution from the seabed.\textsuperscript{690}

Article 10 is highly relevant as it focuses on the conservation of biological diversity. It states that

"The Contracting Parties shall, individually or jointly, take all appropriate measures to protect and preserve biological diversity, rare or fragile ecosystems, as well as species of wild fauna and flora which are rare, depleted, threatened or endangered and their habitats, in the area to which this Convention applies."

The word appropriate recognises that measures have to be effective and directed towards specific biodiversity components yet not hinder the rights of other Parties and third States. However, noting that cooperation between the States is called for by this Convention and UNCLOS, it would be awkward to have a non-collaborating Party, especially if such measures are deemed appropriate based on rigorous scientific studies. Article 10 applies to biodiversity in the area to which the Convention applies, which as noted above

\textsuperscript{690} Barcelona Convention Article 7 “The Contracting Parties shall take all appropriate measures to prevent, abate, combat and to the fullest possible extent eliminate pollution of the Mediterranean Sea Area resulting from exploration and exploitation of the continental shelf and the seabed and its subsoil.”
does not include the seabed. Therefore those species which are associated with the seabed such as the sedentary species as included in UNCLOS (as discussed above in section 2.1.7) may not be covered by this or indeed any other provision of this Convention. Species that live very close to the seabed and are dependent on species living within the same area may also be vulnerable.

Article 14 calls upon States to adopt legislation to ensure that the Convention and Protocols can be implemented. Overall, it seems that achievements are lagging and there is still much to do in order to be able to attain the targets of this Convention.691

3.5.1 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean (SPA/BD Protocol)

The SPA/BD Protocol692 applies to all the Mediterranean and has the aim of establishing, managing and monitoring specially protected areas693 in areas under jurisdiction and those that are ABNJ, as a tool for marine biodiversity

692 The SPA/BD Protocol 2102 UNTS 181: Adopted on 10 June 1995 (Barcelona); entered into force: 12 December 1999 The Annexes to the SPA and Biodiversity Protocol were adopted on 24 November 1996 (Monaco); Annexes II and III of the Protocol were amended by Decision IG.21/6 of the Contracting Parties and adopted on 6 December 2013 (Istanbul) and entered into force on 30 March 2014. Previously, Annexes II and III of the SPA and Biodiversity Protocol had been amended by Decision IG.19/12 (adopted on 5 November 2009, in Marrakesh). The amended Annexes were in force since 13 February 2011).
693 Specially Protected Areas is the term used in this Protocol for MPAs.
conservation. The Protocol is divided into six parts of which Part II is solely dedicated to MPAs. In addition, one of the three annexes contain criteria for the selection of MPAs. It also provides for and demands the creation of a list of Specially Protected Areas of Mediterranean Importance (SPAMI) including on the High Sea. A SPAMI may be established in all marine areas, that is, from the internal waters to the High Seas. States are required to reach a consensus for protected areas that are in ABNJ or areas where jurisdiction limits are not yet settled. The provisions of Article 28(2) of the Protocol ensure that any measures adopted by the Parties have to be consistent with international law and that no Party practises any activity that is contrary to the principles and purposes of the Protocol. The effectiveness of the Protocol is dependent on both cooperation between States and government’s intention to develop protected areas.

Indeed, the only SPAMI that has been designated across the jurisdiction of different States and on the High Sea is the Pelagos Sanctuary. Established in 1999, under a number of legal instruments, it aims to protect marine

696 SPA/BD Protocol, Article 8(1).
697 See SPA/BD Protocol Article 9(2)(b)
700 UNEP-MAP, RAC/SPA, “Specially Protected Areas in the Mediterranean Assessment and Perspectives,” 36.
mammals through an agreement between France, Italy and Monaco. The important areas for such species lie in ABNJ and management in such areas can be problematic. More information on the Pelagos Agreement is provided in section 3.6.

The Barcelona Convention permits its Protocols to define their geographical coverage. In the case of the SPA/BD Protocol, it covers the water column (internal waters to the High Seas) but also specifically covers the seabed and the subsoil.

Article 2(2) of the Protocol protects the rights of States with regard to the use of the sea, as provided for in other Conventions, notably UNCLOS. This is written in such a manner that may require interpretation. In fact, it states that

“Nothing in this Protocol nor any act adopted on the basis of the Protocol shall prejudice… the nature and extent of the jurisdiction of the coastal State, the flag State and the port State”

and notes that whatever is adopted through the Protocol, nothing will prejudice the rights of claims of any State relating to UNCLOS. The significance of this rests with the fact that in the Mediterranean Sea there may be situations where an area lying on the High Sea is designated as a MPA under the Protocol, which may then be claimed as an EEZ by a coastal State. Such a State may eventually possibly claim it has justification to remove the MPA. However, such

704 See Article 1(2) of the Barcelona Convention.
705 See UNCLOS Article 8.
706 See UNCLOS Article 86.
707 See Article 2(1) of the SPA/BD Protocol.
a move could be interpreted as against the spirit of the Protocol, particularly if made by a coastal State that had previously voted in favour of the MPA’s designation. It might also prove to be quite cumbersome for the coastal State to prove that such an area does no longer merit designation as a MPA. Therefore, such a move may put the coastal State in a rather awkward position even though the Protocol gives it certain rights. Consequently, this might be a factor that would keep States on a cautious alert and thus not consent to the designation of HSMPAs in ABNJ contiguous to waters under their jurisdiction. Furthermore, the Protocol cannot be used as a basis for resolving disputes or contentions relating to jurisdiction or sovereignty.708

Furthermore, any measures adopted in a HSMPA, which may affect certain sectors, activities and States not party to the Protocol would have to be approved through the relevant United Nations organisations, such as the IMO. The Protocol ensures, inter alia, that freedom of navigation on the High Sea and other modalities are not prejudiced. Such a provision may be interpreted as a leeway to allow third States not to honour rules, such as routeing measures, albeit with an environmental objective.709

Article 3(1) states that:

“Each Party shall take the necessary measures to:
(a) protect, preserve and manage in a sustainable and environmentally sound way areas of particular natural or cultural value, notably by the establishment of specially protected areas;
(b) protect, preserve and manage threatened or endangered species of flora and fauna.”

708 SPA/BD Protocol Article 2(3).
This seems to create an inherent demand on Parties to use MPAs to achieve their conservation targets, but not an obligation to do so. Annex I, may be more direct in the use of MPAs since it states that "...The SPAMIs will have to constitute the core of a network aiming at the effective conservation of the Mediterranean heritage."

Part II of the Protocol carries the title “Protection of Areas.” The first section is entirely dedicated to marine protected areas, referred to under the Protocol as Specially Protected Areas (SPAs). The objectives of these include the protection of a number of features such as representative types of ecosystems, habitats in danger of disappearing or important for particular species and sites of particular scientific, aesthetic, cultural or educational interest. Different interpretations can be attributed leading to an incoherent application of the Protocol when States unilaterally select MPAs. Furthermore, different interpretations may lead to incongruities among States, especially when MPAs are located in contiguous areas under the jurisdiction of different States.

Article 4(a) targets representative types of ecosystems of adequate size to ensure their long term viability. To ensure that there is consistency between the Parties on their definitions for different types of ecosystems and to overcome the use of different classification systems which could lead to a lack of standardisation among the Parties, the Classification of Benthic Marine

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710 SPA/BD Protocol Article 4.
711 Article 4(a) “representative types of coastal and marine ecosystems of adequate size to ensure their long-term viability and to maintain their biological diversity;”
Habitat Types for the Mediterranean Region\(^{712}\) was adopted 10\(^{th}\) Ordinary Meeting\(^{713}\) of the Barcelona Convention. As regards the application of the term ‘adequate size’ referred to in Article 4(a) disagreement between States may emerge, especially for areas on the High Sea.

Article 4(b) and 4(c) targets habitats, *inter alia*, in danger of disappearing; threatened or endangered species. The criterion to be employed to classify habitats in danger of disappearing does not seem to have been agreed by the Parties. It is possible that the International Union for Conservation of Nature (IUCN) Red List\(^{714}\) can be employed. However, this leaves room for lack of standardisation when different Parties implement this provision unless it would not have been agreed to in a COP.

Article 4(d) focuses on sites of particular importance because of their scientific, aesthetic, cultural or educational interest. Such a broad basis for designation results in the measure being open to considerable interpretation, which may potentially lead to disagreements between the Parties as well as incoherent application. The connection between these criteria and the conservation of biodiversity is questionable, although it may provide a complementary means. Annex I notes that the SPAMI’s basic aim is to conserve natural heritage while at the same time noting that other features such a cultural heritage is highly


\(^{713}\) Tunis, 18-21 November 1998.

desirable to be considered. Therefore, it transpires that aesthetic, educational and cultural criteria are only applicable to SPAs but not to SPAs of Mediterranean importance (SPAMIs). This may be reasonable in view that a SPAMI would have to be adopted by all Parties and not all Parties may appreciate the cultural heritage of other Parties. Also, interpretations are too wide, such as for example aesthetic criterion. Notwithstanding all these arguments, if Parties find no objections to such wording, the Protocol’s application may proceed but incoherence, among areas and in time, may prevail. The Protocol provides various geo-political situations, in which a State may establish protected areas, refer to Figure 12.\(^{715}\)

<table>
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<tr>
<td>Marine area under State’s jurisdiction</td>
<td>SPA</td>
<td>SPA</td>
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<tr>
<td>Marine ABNJ</td>
<td>SPA</td>
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<td>SPA</td>
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**Figure 12 – Simplified scenarios where the SPA/BD Protocol provides for MPA designation\(^{716}\)**

Article 5(1) states that “each Party may establish specially protected areas…” This measure may appear to be soft when compared to Article 3(1) which states that “each Party shall take the necessary measures to protect… areas of particular natural value… notably by the establishment of specially protected areas.” (Emphasis added)

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\(^{715}\) SPA/BD Protocol Article 5 and Article 9.

\(^{716}\) Source: author
There seems to be incoherence with regard to the degree of Parties’ obligations to designate MPAs. In all parts of Article 5 Parties are asked to cooperate through the phrase “shall endeavour to cooperate.” This phrase does not create a persistent demand upon Parties to cooperate for the sake of designating MPAs. More precise wording to demand cooperation and how it is expected would have created a clearer obligation of what is expected from the Parties – although may be difficult to conclude. However, if Parties are to take the necessary measures, then the creation of SPAs may only be eliminated after all the measures have been considered.

The efforts made by non-Parties at protecting biodiversity are also considered and Parties are to collaborate with them when these seek to establish MPAs adjacent to an area under their jurisdiction. It is also noted that the Protocol allows Parties to designate MPAs on their continental shelf under the High Sea. This may lead to conflicts in its governance since in order to implement measures to protect the seabed’s features, a Party may affect activities by other Parties and non-Parties, occurring in or above the water column, and which are allowed by international law. It seems that the Protocol could have catered for such situations by at least requesting States to cooperate with neighbouring States. The reason being that these may be the ones likely to be most affected albeit that if a full EEZ would be established by the designating Party, the water column would eventually turn out to be its EEZ. For those situations where a MPA is planned on at the fringes of the Continental Shelf when it is adjacent to another State’s shelf, cooperation is sought.
Governance aspects in the form of a non-exhaustive list of protection measures in the management of MPAs are set out in Article 6. The regulation of navigation is one of the measures included without details on how this can actually be applied. This may be hard to achieve noting that other regulations which protect the rights of third State might be affected and also the role of the IMO at regulating navigation.

Article 6(d) seems to be rather confusing as it speaks on regulating the introduction or re-introduction of a species which is or has been present in the protected area. A species which is present in an area cannot be introduced because the species is already there but rather specimens of that species can be introduced. Article 6(h), calls for the regulation or prohibition of any activity likely to disturb the species in a protected area. Article 6(h) takes a precautionary approach, targeting all activities likely to cause disturbance,

717 SPA/BD Protocol Article 6. “The Parties, in conformity with international law and taking into account the characteristics of each specially protected area, shall take the protection measures required, in particular:
(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."
however, it can be argued that any anthropogenic activity is likely to disturb a species. Some means of distinguishing between activities, or indeed a scale of disturbance differentiating between long term and significant, and temporary and insignificant may have been of assistance and could have either been annexed or approved in COPs.

Section Two or Part II of the Protocol focuses on specially protected areas of Mediterranean importance (SPAMIs). It speaks on the establishment, listing and de-listing of SPAMIs. Article 8 is mostly dedicated to the criteria that allow a site to qualify as a SPAMI (see Table 1) and demands the creation of a SPAMI list which is thus an indirect but firm obligation to create SPAMIs, in other words MPAs, since to populate the list, Parties have first to designate SPAMIs. One of the criteria is that a SPAMI can include an area of special aesthetic or cultural level. Earlier similar arguments also apply here. As per Article 8(3), the Parties agree to recognise the particular importance of these areas, comply with the applicable measures and also not to allow any activity contrary to the objective of the SPAMIs.\footnote{SPA/BD Protocol Article 8(3i) “The Parties agree: (i) 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.”}

\begin{table}[h!]
\centering
\begin{tabular}{|l|c|c|}
\hline
\textbf{Criterion} & \textbf{SPA} & \textbf{SPAMI} \\
\hline
Representative ecosystems & ✓ & ✓ \\
Habitats in danger of disappearing & ✓ & \\
Habitats critical for endangered species & ✓ & ✓ \\
Habitats critical for endemic or threatened species & ✓ & \\
Sites of scientific cultural aesthetic or education interest & ✓ & ✓ \\
Area important for conserving Mediterranean biodiversity & ✓ & ✓ \\
\hline
\end{tabular}
\caption{SPA and SPAMI criteria\footnote{Source: author.}}
\end{table}

\footnote{Source: author.}
Article 8 however, is subject to Article 2(2) Parties must be able to enjoy the rights given to them through other Treaties. An international Treaty will take precedence over a Protocol and therefore the rights emanating from UNCLOS would prevail over the duties arising from the Protocol. However, it is important to note the provisions contained within UNCLOS with regard to protection of the environment and cooperation between States. Article 9, similar to Article 5, provides for different geo-political situations in which SPAMIs may be established (Article 9(2), see Figure 13 below) and details on the procedure to add an area to the list of SPAMIs.

Article 9(2)(b) notes proposals SPAMIs may be submitted by “by two or more neighbouring Parties concerned if the area is situated, partly or wholly, on the High Sea” while Article 9(2)(c) notes that the neighbouring concerned Parties can establish a SPAMI in areas where jurisdiction has not yet been defined. Although this Article provide for HSMPAs it should not be taken as the ultimate solution to HSMPAs because as Gjerde and Rulska-Domino note, MPAs designated at regional level may not be recognised by certain States or organisations outside the region.\footnote{Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 369.} Notwithstanding, the enabling provisions of the Protocol, to date, there has been limited designation of HSMPAs in the Mediterranean Sea.\footnote{Scott, “Conservation on the High Seas: Developing the Concept of the High Seas Marine Protected Areas,” 852.} Back to Article 9(2), it therefore, seems that a Party concerned about the creation of a SPAMI in areas very far away from water under its jurisdiction such as for example on the opposite edge of the
Mediterranean Sea would not be in a position to make this proposal. The term neighbouring is not defined and this may lead to different interpretations and ambiguous situations. For example, if a Party wants to create a SPAMI that slightly extends into the adjacent High Sea, the proposal cannot come from this Party even though such a MPA may be too distant from other neighbouring Parties. Additionally, as per Article 9(2)(c), noting that most of the Continental Shelves have not been defined, it may imply that a Party would have to submit the proposal with a neighbouring Party, even though the footprint of the SPAMI would definitely lie in an area where there is an informal agreement that the Continental Shelf appertains to the proponent Party.

![Figure 13 – Areas where SPAMIs can be adopted](Image)

Article 9(3)(a) and 9(3b) refer to the documentation, including a management plan for the area, that is to be submitted to RAC/SPA. Article 9(4) provides details on the procedure to be adopted so that the SPAMI is established. The main rules of a management plan are included in Annex I, Part D.\(^\text{723}\) The plan has to be consulted among all the proponent neighbouring concerned States.

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\(^{722}\) Source: author
\(^{723}\) SPA/BD Protocol Annex I, Part D, 7.
concerned. After three years a detailed management plan is to be presented. This requirement seems to create confusion for there is no distinction between the first version of the management plan that is to be submitted with the SPAMI proposal and the detailed plan that is to be provided within three years. Furthermore, according to Annex I, the proposal should also present a management body that has enough powers to establish control within the SPAMI. Although this may at first appear as a simple task, in reality it requires significant cooperation between the Parties. Notwithstanding this, such a body is also hindered by existing international law, for in order for it to have such powers various other legal provisions emanating from such law would need to be honoured. This may require international consensus.

In case of a SPAMI located entirely within a one Party’s jurisdiction, the proposal is submitted to the National Focal Points (NFPs), which will assess it against the criteria and guidelines adopted pursuant to Article 16. At this point it is of note that non-Parties to the Protocol also have an appointed National Focal Point even though Article 24 indicates that these have to be appointed by Parties to this Protocol. In fact non-Parties also attend and vote at the meetings for National Focal Points. This assessment, as per Article 24, is to be performed during a meeting of the NFPs. Following this, the Organisation, which according to the Barcelona Convention, is the United Nations Environment Programme (UNEP), will inform the meeting of the Parties of the

724 SPA/BD Protocol, Article 24, “Each Party shall designate a National Focal Point to serve as liaison with the Centre on the technical and scientific aspects of the implementation of this Protocol. The National Focal Points shall meet periodically to carry out the functions deriving from this Protocol.”
Protocol to decide whether or not the SPAMI should be included in the list. As can be seen the decision is not about the establishment of the SPA but upon its inclusion in the list of SPAs that are of Mediterranean importance. This is understandable noting the Party is creating a SPA in its own jurisdiction.

In case of a SPAMI in ABNJ, Article 9(4)(a) and 9(4)(c) apply, with RAC/SPA transmitting the documentation to UNEP, which in turn will inform the meeting of the Parties. Article 9(4c) states that “the decision to include the area in the SPAMI list shall be taken by consensus by the Contracting Parties.” However, only the term “Parties” is defined in Article 1(g). These are “the Contracting Parties to this Protocol [SPA/BD Protocol].” The term “Contracting Party” is used in the Barcelona Convention, to which the Article 9 refers. In fact, the Article notes that it is the “Organisation” which will take the decision. Organisation here means as intended in Article 2(b) of the Convention. The Organisation, as per Article 17(v) is “[t]o perform the functions assigned to it by the protocols to this Convention.” In Article 17 and throughout all the Barcelona Convention, the term “Contracting Parties” is used. If, therefore, it is assumed, that the Contracting Parties to the Barcelona Convention would take a decision, then there may be anomalous situations where contracting Parties to the Convention may take a vote for a proposal emanating from the Protocol to which they might not be Parties, such as, for example, Libya and Lebanon.

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SPA/BD Protocol Article 9(4a) and Article 9(4b).
The procedure for inclusion in the SPAMI list seems to be a rather lengthy and costly one – although one which, perhaps, reflects the complexity of the geopolitical differences in a contested area. The fact that a management plan is to be presented together with the proposal, creates further costs since the preparation of such a plan will require data, research, professional and technical staff and consultation meetings between the Parties concerned. As the procedure stands, there may be occasions where all this work may be in vain since the Organisation may eventually not reach consensus for a particular SPAMI. It seems SPAs beyond national jurisdiction must be of Mediterranean Importance for them to be considered for establishment. There are no provisions for the procedure to review the management plan. The formulation of a management plan requires broad coordination at a national and regional level. Significant coordination is also required to bring together various national authorities to promote and enforce regulations. For example, in the English Channel, the results of the projects Channel Arc Manche Integrated Strategy (CAMIS) and Promoting Effective Governance of the Channel Ecosystem (PEGASEAS) revealed a lack of coordination between both different sectors and the States involved.\textsuperscript{726} In this example the States are currently all members of the EU, so it would be no surprise if difficulties are encountered in the Mediterranean Sea where not all States are EU members.

According to Article 9(5), the Parties making the joint proposal have to implement the proposed management measures and Contracting Parties

accept to observe the same measures. The Contracting Parties of the Barcelona Convention, may include those not Party to the Protocol. The process for acceptance guarantees the assessment of the proposal in terms of criteria and guidelines but not with regard to the proposed measures.

Article 28 solicits Parties to invite non-Parties and international organisations to cooperate in the implementation of the Protocol. Hence, if neighbouring Parties intend to set a HSMPA, any neighbouring non-Parties may be invited to cooperate. Since, the level and other details of cooperation are not included in the text, Article 28(1) would be somewhat open to different interpretations as how cooperation can be achieved or encouraged. Annex I, Part A(e), demands that Parties are to ensure that SPAMIs are complemented, *inter alia*, with the protection measures. This may sound to be a rather strong demand which the Parties cannot guarantee since certain protection measures would need to be adopted by relevant international organisations. This holds true unless the Protocol is demanding that protection measures should be abided to by the proponent Parties only.

The Party or Parties originally making the proposal for inclusion of a site in the SPAMI list have no right remove such a site from the list. The procedure for de-listing has to follow a similar process as that for listing and hence the problems of a similar nature to those already discussed may be re-encountered. De-listing may be required for reasons including, among other, over-riding

\[727\] SPA/BD Protocol Article 10.
public interest or because an area has been significantly damaged by a third State. Even in such situations, the proponent Party or Parties cannot take a decision on their own.

Part III of the Protocol deals with the protection and conservation of species. In this context, there is no direct reference to the use of protected areas. However, Articles 4(c) and 8(2), as explained earlier, would apply. They solicit Parties to cooperate with non-Parties to enhance the efficacy of conservation measures. The management of sites also face policy issues from different sectors. For example, as identified by Clapham, the Pelagos Sanctuary SPAMI, is within an area where there is significant ferry traffic, and issues related to navigation measures surfaced. It was noted that the CMS can be more favourable to navigation restrictions than a treaty like the Barcelona Protocol.

In order to promote the implementation of the provisions contained in the Protocol, a strategic document entitled, Strategic Action Programme for the Conservation of Biological Diversity in the Mediterranean Region was published in 2003. This applied to all Parties to the Protocol. Action 2.2.4

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732 UNEP-MAP-RAC/SPA, “Strategic Action Programme for the Conservation of Biological Diversity (SAP BIO) in the Mediterranean Region,” (Tunis: UNEP-MAP-RAC/SPA, 2003), Action 2.2.4: “Declaration and development of new coastal and marine protected areas particularly in the south and eastern Mediterranean and offshore, including the high sea.”
calls for the designation of MPAs in ABNJ. Yet, to date no HSMPAs have been established. It is also important to note that the EU has accepted this Protocol\textsuperscript{733} and considered that the setting up of the Natura 2000 Network would be a way to implement various provisions contained in this Protocol.\textsuperscript{734}

3.6 Agreement concerning the Creation of a Marine Mammal Sanctuary in the Mediterranean (Pelagos Agreement)

The Pelagos Agreement signed in 1999, between France, Italy and Monaco, confirms the presence of an area of particular importance for the conservation of cetaceans in the north of the Mediterranean Sea, declaring a marine area comprising of High Sea and areas under national jurisdiction as a sanctuary,\textsuperscript{735} refer to Figure 14. In 2002, the Sanctuary was included\textsuperscript{736} in the list SPAMIs in line with Article 16.\textsuperscript{737} Although binding only on Parties, Article 17(1) extends an invitation to other States to respect the measures in the Agreement.\textsuperscript{738} It lists a

\begin{itemize}
\item Council Decision 1999/800/EC of 22 October 1999 on concluding the Protocol concerning specially protected areas and biological diversity in the Mediterranean, and on accepting the annexes to that Protocol (Barcelona Convention).
\textit{OJ L 322, 14.12.1999, 1–2 (ES, DA, DE, EL, EN, FR, IT, NL, PT, FI, SV)}
\item Council Decision 1999/800/EC, Article 3.
\item Pelagos Agreement 2176 UNTS 247: Article 3 “The sanctuary is composed of maritime areas situated within the internal waters and territorial seas of the French Republic, the Italian Republic and the Principality of Monaco, as well as portions of adjacent high seas....”
\item Pelagos Agreement Article 16 “As soon as the Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean enters into force for them, the Parties will present a joint proposal for inclusion of the sanctuary in the list of specially protected areas of Mediterranean importance.”
\item Pelagos Agreement Article 17(1) “The Parties invite other States, exercising activities within the area defined in Article 3, to take protection measures similar to those foreseen by the
\end{itemize}
number of conservation measures such as regular monitoring, the control of pollution and prohibits the intentionally disturbing of marine mammals.\textsuperscript{739} One particular measure, to primarily facilitate enforcement, includes the boarding of fishing vessels.\textsuperscript{740}

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Figure_14.png}
\caption{The Pelagos Sanctuary\textsuperscript{741}}
\end{figure}

\begin{quote}
\footnotesize
present Agreement, taking into account the Action Plan adopted within the UNEP/MAP framework for the conservation of cetaceans in the Mediterranean and the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, or any other pertinent treaty."
\end{quote}

\textsuperscript{739} Pelagos Agreement Article 4 “The Parties undertake to adopt within the sanctuary, the appropriate measures mentioned in the following articles, so as to ensure the favourable conservation status of marine mammals…

\textsuperscript{740} Pelagos Agreement Article 5 “The Parties shall cooperate with the intent of periodically assessing marine mammal population status…"

\textsuperscript{741} Pelagos Agreement Article 6(1) “…the Parties shall conduct monitoring activities within the Sanctuary and shall intensify the fight against any form of pollution… 6(2) The Parties will adopt national strategies aimed at phasing out the release of toxic compounds within the sanctuary…"

\textsuperscript{740} Pelagos Agreement Article 7(b) “Within the Sanctuary the Parties… shall comply with international regulations and those of the European Community, regarding the use and the keeping of fishing equipment known as "pelagic drift net"…regulations relating to the use of new fishing equipment that could result in the indirect capture of marine mammals or that could endanger their sources of prey, while also considering the risk of loss of or deliberate disposal of fishing equipment at sea."

\textsuperscript{741} Source: \url{http://www.rac-spa.org/node/1126} accessed 22 July 2019.
Articles 8 and 9, provide for the regulation of whale watching and high speed motorboat competitions, respectively.\(^{742}\) These Articles do not contain specific and measurable objectives and may lead to inconsistencies between the Parties, albeit that Article 10 calls for consistency as much as possible.\(^{743}\)

Article 8, makes no reference to other types of high-speed vessels or situations which might also affect cetaceans, such as, for example, high speed catamarans. The effects of other high-speed vessels are only addressed through an awareness building campaign.\(^{744}\)

However, subsequent to the signing of the Agreement, initiatives were taken to control navigation, in line with Article 11, which permits the enactment of new regulations in this regard.\(^{745}\) The result of this was an IMO Resolution,\(^{746}\) that recommended Governments to “prohibit or at least strongly discourage the transit of the Strait of Bonifacio by laden oil tankers and ships carrying dangerous chemicals or substances in bulk liable to pollute...”\(^{747}\)

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\(^{742}\) Pelagos Agreement Article 8 “In the sanctuary, Parties shall regulate the watching of marine mammals for touristic purposes.”

Pelagos Agreement Article 9 “The Parties shall exchange views with the aim of regulating and if appropriate, forbidding high-speed motorboat competitions within the Sanctuary.”

\(^{743}\) Pelagos Agreement Article 10 “The Parties shall exchange their views in order to harmonies, as far as possible, the regulation measures pursuant to the previous articles.”

\(^{744}\) Pelagos Agreement Article 12(1) “The Parties shall hold regular meetings for the implementation and the follow-up of the present Agreement. The Parties shall establish the organizational aspects required for such meetings taking into account the presence of already existing structures. (2) In this framework they shall favour and encourage... b) awareness-building campaigns geared at professional and other marine users, and non-governmental organizations, with particular emphasis on campaigns regarding the prevention of collision between vessels and marine mammals and the need to communicate the presence of dead or distressed mammals to the competent local authorities.”

\(^{745}\) Pelagos Agreement Article 11 “Without prejudice to the relevant provisions of international law and if appropriate of the European Community regulations, nothing in the preceding provisions shall prevent the Parties from enacting stricter national regulation measures.”


With regard to enforcement, the Parties did not agree to share enforcement jurisdiction but as per Article 13, only agreed to exchange information and facilitate the use of ports. In fact, Article 14(1) makes it clear that only the coastal State, party to this agreement is allowed to carry out enforcement in waters under its jurisdiction. For enforcement on the High Sea, Article 14(2) does not provide any additional measures than the ones existing in international law. Therefore, whilst the agreement was done between three States on the very specific matter of protecting marine mammals, shared enforcement jurisdiction is not been tackled. This may be a reflection of the small number of Parties involved, however if developments involving arise more States and/or more issues, shared enforcement jurisdiction may be particularly critical to ensuring effectiveness.

Article 20(1) permits both interested States and international organisations to accede the Agreement. This may require some attention since a situation similar to that of the IWC may be created whereby States with no connection to the area or objective accede the agreement. In the case of other States acceding, since the protected area is situated very close to France, Italy and Monaco, any other State is unlikely to have marine areas contiguous to the

748 Pelagos Agreement Article 14 (1) “In the part of the Sanctuary located within the waters subject to its sovereignty or jurisdiction, each of the State Parties to the present Agreement is responsible for the application of the relevant provisions.”
749 Pelagos Agreement Article 14(2) “In the other parts of the sanctuary, each of the State Parties is responsible for the application of the provisions of the present Agreement with respect to ships flying its flag as well as, within the limits provided for by the rules of international law, with respect to ships flying the flag of third States.”
750 Pelagos Agreement Article 20(1) “The Parties may invite any other interested State or international organization to accede to the present Agreement. Accession will be open after the entry into force of the Agreement.”
Sanctuary. Therefore, when considering such a scenario a number of factors would require careful consideration, including, the real interest of such a State to ensure its intentions were genuine; and that any recommendations they may propose are consistent with the objectives of the Sanctuary, and acceptable to the ‘real stakeholders.’

In the case of the accession of organisations may create a situation whereby these would have an important role in the decision of the State Parties which in reality are the ones that would also need to bring into play the socio-economic factors. The fact that an organisation may be on the same level as that of State may require further analysis to ensure that appropriate balance between the rights of an organisation and a State Party is maintained.

The management of the Sanctuary faces policy issues from different sectors. For example, the call to reduce navigation speed and re-direct traffic\footnote{Panigada et al., “Mediterranean Fin Whales at Risk from Fatal Ship Strikes,” 1287–1298. 1287.} is in direct contrast to the trend of increasing traffic speed.\footnote{P.J. Clapham, “Are Ship-Strikes Mortalities Affecting the Recovery of the Endangered Whale Populations off North America?,” \textit{European Cetacean Society Newsletter} 40 (2002): 13–15.} Another issue raised is the enforcement on vessels on the High Sea within the Sanctuary and flying the flag of non-Party States. In this case, taking into consideration the jurisdictional situation and the Pelagos Agreement provisions, Parties are permitted to apply enforcement measures on such vessels.\footnote{Scovazzi, “\textit{Marine Protected Areas on the High Seas: Some Legal and Policy Considerations},” 14.} Furthermore, since most cetacean species migrate to and from the Pelagos Sanctuary, the conservation efforts

may be jeopardised by pressures exerted on these species in other areas.\textsuperscript{754} To counteract such issues, ‘dynamic’ MPAs that move with cetacean specimens, have been suggested although there are differing views on the practical use of this concept due to problems that may be encountered putting them into practice.\textsuperscript{755}

3.6.1 Agreement on the conservation of cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area (ACCOBAMS)

The Agreement on the conservation of cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area emanated from the provisions of the CMS. It was signed on 24 November 1996 and entered into force on 1 June 2001.\textsuperscript{756} Primarily aimed at minimising threats to cetaceans,\textsuperscript{757} it is applicable to all areas in the Mediterranean Sea and part of the adjacent Atlantic Ocean and the Black Sea,\textsuperscript{758} refer to Figure 15.


\textsuperscript{756} ACCOBAMS, UNTS 2183 (p.303): ACCOBAMS Permanent Secretariat, "Introduction," \textit{Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic area} \url{http://www.accobams.org/about/introduction/} (accessed April 27, 2019).


Parties are called on to cooperate to create a network of MPAs, explicitly recognizing their importance as a tool for the cetaceans’ conservation. There is no specific indication if MPAs are to be set on the High Sea apart from areas under a State’s jurisdiction. The Agreement also calls upon Parties to protect habitats, hosted in areas under their jurisdiction, which are important for cetaceans.

According to Annex 2, paragraph 3, “Parties shall endeavour to establish and manage specially protected areas for cetaceans... Such specially protected areas should be established within the framework of the Regional Seas

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760 ACCOBAMS Article II(1) “Parties shall take co-ordinated measures to achieve and maintain a favourable conservation status for cetaceans. To this end, Parties shall... create and maintain a network of specially protected areas to conserve cetaceans.”
761 ACCOBAMS Article II(3) “In addition, Parties shall apply, within the limits of their sovereignty and/or jurisdiction... the conservation, research and management measures prescribed in Annex 2... which shall address.... c) habitat protection...”
Conventions…or within the framework of other appropriate instruments.” This obligation makes no direct reference to any particular marine area, thus there is no explicit confirmation of MPAs extending to ABNJ. However, it does refer to establishing MPAs within relevant frameworks.\(^{762}\) One Regional Sea Convention, the Barcelona Convention (as discussed above in section 3.5) with its Specially Protected Areas and Biological Diversity (SPA/BD) Protocol (as discussed above in section 3.5.1), does refer to the establishment of protected areas in ABNJ. By inference it is likely that ACCOBAMS also refers to such areas with regard to the identification of important areas for cetaceans since such species thrive also on the High Sea and ACCOBAMS applies also to ABNJ.

The linkage between ACCOBAMS and the SPA/BD Protocol is a clear example of how legal instruments need to be brought together to function in synergy. While ACCOBAMS promotes the use of MPAs, it does so through relying on regional Conventions and other appropriate instruments for their establishment – its lack of specific provisions on the designation and governance of MPAs, avoids potential conflicts with these.

The highly migratory nature of cetaceans has led commentators such as Norse to argue that a dynamic form of MPA is required.\(^{763}\) To help ensure consistency

\(^{762}\) ACCOBAMS, Annex 2, 3 “Parties shall endeavour to establish and manage specially protected areas for cetaceans… Such specially protected areas should be established within the framework of the Regional Seas Conventions… or within the framework of other appropriate instruments.”

by Parties, for each sub-region, ACCOBAMS prescribes the setting up of co-
ordination units to facilitate the implementation of measures.\footnote{764}

Further provisions refer to Parties acting as flag States to ensure that they have
established the right conservation measures that would also apply to such
vessels in ABNJ. Another important provision is to ensure that measures are
accompanied with the right enforcement mechanism.

\begin{figure}
\centering
\includegraphics[width=\textwidth]{Figure_16-ACCOBAMS_CCH.png}
\caption{Figure 16 – ACCOBAMS CCH\footnote{765}}
\end{figure}

Regular meetings of the Parties adopt decisions,\footnote{766} a number of which are
relevant to MPAs. Resolution 3.22, adopts the advice from ACCOBAMS’s

\footnotesize{\textsuperscript{764} ACCOBAMS Article III(7c).}
\footnotesize{\textsuperscript{765} Source: ACCOBAMS Resolution 3.22}
\footnotesize{\textsuperscript{766} ACCOBAMS Article III “All decisions of the Meeting of the Parties shall be adopted by
consensus except as otherwise provided in Article X of this Agreement. However, if consensus
cannot be achieved in respect of matters covered by the annexes to the Agreement, a decision
may be adopted by a two thirds majority of the Parties present and voting. In the event of a vote,
any Party may, within one hundred and fifty days, notify the Depositary in writing of its intention
not to apply the said decision.”}
Scientific Committee, advocating Parties to cooperate in the creation of MPAs,\textsuperscript{767} identified by the Committee, some of which lie on the High Sea, as illustrated by Figure 16 and Figure 17. This Resolution also contains significant information on the criteria to be used to identify important areas and the elaboration of a conservation plan. Resolution 4.15, pursued the work on MPAs and called upon Parties to implement the development of High Seas Specially Protected Areas of Mediterranean Importance as part of a regional network, working in conjunction with UNEP-MAP RAC/SPA and to promote the establishment of the areas of special importance for cetaceans in the ACCOBAMS area.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{IMMAs.png}
\caption{ACCOBAMS IMMAs\textsuperscript{768}}
\end{figure}


3.7 Laws adopted by the General Fisheries Commission for the Mediterranean (GFCM)

The GFCM is the RFMO for the Mediterranean Sea. It can adopt binding recommendations for fisheries conservation and management. According to the agreement under which it was established, the GFCM can establish fisheries restricted areas (FRAs), without as such giving an explicit definition of what these areas are. In the meantime, the GFCM has in fact established such areas both within the Territorial Sea of its Parties and also on the High Sea. The GFCM also coordinates its regulations with those of the SPA/BD Protocol to the extent that one of its resolutions is about SPAMIs under this Protocol in conjunction with FRAs under its remit. The GFCM is responsible to designate FRAs including those situations where these overlap SPAMIs without prejudice to the rights of the coastal State in designating the FRA in areas under its jurisdiction. When there is overlap the GFCM is committed to cooperate with UNEP/MAP and other competent organisations.

770 Agreement for the Establishment of the General Fisheries Commission for the Mediterranean, Article 8(b)(iv) “to establish fisheries restricted areas for the protection of vulnerable marine ecosystems, including but not limited to nursery and spawning areas, in addition to or to complement similar measures that may already be included in management plans;”
772 GFCM Resolution, Resolution GFCM/37/2013/1 on area based management of fisheries, including through the establishment of Fisheries Restricted Areas (FRAs) in the GFCM convention area and coordination with the UNEP-MAP initiatives on the establishment of SPAMIs http://www.fao.org/3/a-ax392e.pdf accessed on 17 July 2019.
The identification of a FRA can be based by information provided by scientific institutions or observers. Therefore, it is apparent that non-institutional organisations can also voice their views on the designation of FRAs. The counterbalance of such a situation may be to also include as observers any representatives of stakeholders that make use of marine areas. It seems that GFCM therefore is mandated to exert its role with regard to FRAs in any marine zone outside the inland waters. Another interesting provision that emanated from GFCM is the prohibition of trawling at depths beyond 1000 meters. Once again this is a provision that mimics the creation of management measures of a MPA.

3.8 The Nature Acquis of the European Union

The EU has developed an extensive set of laws and policies that govern natural features. Some refer specifically to the marine environment and to MPAs. The EU Nature Acquis provides for the creation of a network of protected terrestrial and marine sites. This network is known as the Natura 2000 Network. This network is limited to areas within the national jurisdictions of EU Member States (MSs), that is not extending beyond the limit of the outer Continental Shelf or the Exclusive Economic Zone. More information is provided in the following sections.
Figure 18 – Natura 2000 Network (EU28 - Birds and Habitats Directives)\textsuperscript{773}

3.8.1 EU Habitats Directive

Member States (MS) are obligated to identify areas for special protection measures. These sites and those designated under the Birds Directive\footnote{Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20, 26.1.2010, 7–25.} form the Natura 2000 network.\footnote{Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p.7) EC Habitats Directive, Article 3 (1). “A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000... The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.”} This network is comprised of terrestrial and marine protected areas established under the Habitats and Birds Directives in the territory of EU MSs. The Habitats Directive\footnote{See EC reference to Site of Community Importance in Habitats Directive Article 4(4).} contains criteria to identify and designate areas for enhanced protection,\footnote{ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L 20, 26.1.2010, 7–25.} in Annex III. Annexes I and II contain the habitat and species, respectively, for which protected areas are to be set. The designated areas are known as “Special Areas of Conservation” (SACs) but when they are in the marine environment they are popularly known as MPAs. During the designation process, the same area is attributed various names prior attributing to it the name of SAC.\footnote{ EU Habitats Directive Article 1 (I) “special area of conservation means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.”} A MS is obligated to set conservation measures for the features for which the SAC was designated, to ensure that these features reach or are maintained at a good conservation status.\footnote{ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, 7) Fenberg et al., “The Science of European Marine Reserves: Status, Efficacy, and Future Needs,” 1013.} The area to which the Habitats Directive should be implemented, and
therefore the area in which MPAs are expected to be designated, is the territory of EU MSs where the Treaty applies. Therefore, at this stage it is useful to clarify the range of the Habitats Directive.

UNCLOS defines the marine areas, refer to section 2.1, it does not define the range of a territory. It is also argued that the EEZ may not form part of a State’s territory. Long and Grehan argue that the Habitats Directive is not limited to MSs territories but extends to all maritime zones, including the EEZ, under the jurisdiction or sovereignty of the MSs. In these two situations it is evident that the term territory is being interpreted differently. A judgment by the Court of Justice of the European Union ruled that the Habitats Directive is to be applied beyond the Territorial Sea where a State has sovereign rights. The area of applicability has also been tackled by Fock and Maes, with the latter also referring to the Birds Directive. The ECJ does not seem to express an opinion or judgment as to which areas constitute a territory. Yet the judgment also included that the Treaty applies to areas such as the EEZ and the continental shelf.

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780 EU Habitats Directive Article 2(1) “The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.”
783 Commission v. United Kingdom, Case C-6/04, Failure of a Member State to fulfil obligations, Directive 92/43/EEC, Conservation of natural habitats – Wild fauna and flora. Judgment of the Court (Second Chamber) 20 October 2005, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004CJ0006:EN:HTML accessed 25 July 2019, para. 117 “As the Advocate General has rightly observed in points 132 and 133 of her Opinion, it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States’ territorial waters. It follows that the directive must be implemented in that exclusive economic zone.”
785 Maes, “The International Legal Framework for Marine Spatial Planning,” 809
shelf. According to UNCLOS\textsuperscript{786} States have sovereign rights, \textit{inter alia}, to exploit natural resources but these do not extend to conserving and protecting the environment. Therefore, this might create hurdles when it comes to manage MPAs designated through these Directives in certain marine areas. Furthermore, MSs do not have sovereign rights on all the biodiversity for which the Habitats and Birds Directives demand the designation of MPAs. If the area is beyond the Territorial Sea the coastal State has to follow established procedures through the Commission so that protection measures may be adopted.\textsuperscript{787} Hence, it transpires that territory is that area in which a State has sovereign rights.

Since the Directive applies to the territory of MSs, then it is questionable if species thriving on the High Sea, listed in Annex IV of the Habitats Directive, can be protected in line with the provisions of Article 12. This Article prohibits specific negative actions in confront to such animals. It should be noted that species contained in Annex IV include all cetacean species as well as other marine species. Furthermore, a vessel or a citizen on the High Sea cannot be considered as territory even though a State would still have jurisdiction on the former two elements.

\textsuperscript{786} UNCLOS Article 56.
Further provisions that may be related to MPAs and spatial planning may be found in Article 12 which is linked to Annex IV (Lists fauna that need to be strictly protected). In some situations, the provisions of Article 12 can be interpreted as leading to the need to establish MPAs, notably through the prohibition of the deterioration of breeding or resting sites of animals listed in Annex IV.\footnote{EU Habitats Directive Article (12)1. “Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting: (a) all forms of deliberate capture or killing of specimens of these species in the wild; (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; (c) deliberate destruction or taking of eggs from the wild; (d) deterioration or destruction of breeding sites or resting places.”}

The selection criteria do not include socio-economic factors.\footnote{EU Habitats Directive Article 4.} Management measures and other regulations are to be set to ensure the proper conservation of features for which the MPA was identified. Article 6, part of which is also applicable to the Birds Directive\footnote{EU Habitats Directive Article 7 “Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC.”} provides for assessments that would need to be carried in cases of plans, projects or operations, within or near such areas that may cause a significant impact on the protected area. Issues may arise in cases of MPAs located adjacent or contiguous to the EEZ of other MSs that would not have declared MPAs on their side. These issues might also arise even if MPAs have been designated. In such cases, additional complexity may arise if the management measures are not complementary or similar to each other assuming that the MPAs were created for the same features and having the same physical and oceanographic parameters.
Other issues also surround both the Habitats and Birds directives albeit that Natura 2000 sites have proved successful at helping species to increase their range. These include the lack of agreement between States of a common definition of certain habitats that ought to be protected. Another is the amount of habitat that should be protected. The EC Guidelines for the establishment of the Natura 2000 network in the marine environment make reference to specific numbers in a certain context but “these figures have often been misunderstood to mean that between 20% and 60% of a species population or habitat area should be protected.” Another issue involves the selection process which is to take only scientific criteria into consideration. In reality this may not be proved and in practice MSs may to some extent be taking socio-economic factors into consideration during the selection process.

3.8.2 Birds Directive

The Birds Directive focuses on the conservation of wild birds in the territory of EU MSs by, inter alia, protecting their habitats and specifically obligating...

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793 EU Birds Directive Article 1(1). “This Directive relates to the conservation of all species of naturally occurring birds in the wild State in the European territory of the Member States to which the Treaty applies...”
794 EU Birds Directive Article 1(2). “It shall apply to birds, their eggs, nests and habitats.”
MSs to designate protected areas, known as Special Protection Areas (SPAs). SPAs should focus on the habitat of species listed in Annex I and those which are regularly occurring migratory species. They are to be governed by special conservation measures. In addition to special protection areas, designated through Article 4 targeting Annex I and regularly migratory birds, are “Protected Areas,” which are intended to protect the habitats of indigenous wild birds and designated under Article 3(2). SPAs together with protected areas designated under the Habitats Directive form part of the Natura 2000 Network.

For some birds, such as for example, *Puffinus yelkouan*, *Calonectris diomedea* and *Hydrobates pelagicus*, SPAs that are important for their survival may also be located beyond the land territory. Thus, SPAs, in such circumstances are commonly referred to as marine SPAs and commonly referred to as MPAs. The measures that need to be adopted in such areas are likely to affect the

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795 EU Birds Directive Article 3. "In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1. 2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures: (a) creation of protected areas; (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones; (c) re-establishment of destroyed biotopes; (d) creation of biotopes."

796 EU Birds Directive Article 4. “The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In this connection, account shall be taken of: (a), species in danger of extinction; (b), species vulnerable to specific changes in their habitat; (c), species considered rare because of small populations or restricted local distribution; (d), other species requiring particular attention for reasons of the specific nature of their habitat. Trends and variations in population levels shall be taken into account as a background for evaluations. Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies. 2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes..."
stakeholders that make use of such areas. These measures are to be adopted in the same manner as those of the Habitats Directive.

### 3.8.3 Marine Strategy Framework Directive (MSFD)

The MSFD\(^{797}\) applies to marine areas under the jurisdiction of MSs with certain specific exceptions.\(^ {798}\) Such areas include the territorial sea, EEZ, Continental Shelf and fisheries protection zone.\(^ {799}\) Provisions regarding the trans-boundary effects on the environment of third States are included.\(^ {800}\) These provisions do not refer to the effects on contiguous High Sea areas. In some Mediterranean geo-political situations, waters under jurisdiction are divided by the High Sea and therefore any effects originating from a MS may attenuate on the High Sea such that they do not affect a third State. Noting the threats to the European marine environment, the MSFD seeks to achieve Good Environmental Status (GES) in EU waters by 2020. The primary initiative for achieving GES is the implementation of coherent networks of MPAs, without explicitly obligating the


\(^{798}\) MSFD Article 3(1) "‘marine waters’ means: (a) waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where a Member State has and/or exercises jurisdictional rights, in accordance with the UNCLOS, with the exception of waters adjacent to the countries and territories mentioned in Annex II to the Treaty and the French Overseas Departments and Collectivities."


\(^{800}\) EU MSFD Article 2(1) “… shall take account of the transboundary effects on the quality of the marine environment of third States in the same marine region or subregion.”
use of marine reserves. The MSFD promotes the establishment of MPAs: in its Preamble, strong wording indicates that the implementation of the MSFD should include the designation of MPAs. The preamble also gives importance to the MPAs designated under the EU Nature Acquis by noting that their establishment is an important contribution to achieve GES under the MSFD. Reference is also made to the WSSD and CBD COP VII regarding the designation of MPAs and the creation of a MPA network and notes that the MSFD should support and contribute to the designation of MPAs, including a network of such areas.

Protected areas are referred to in Article 13(4). It is noted that the programmes of measures set under the MSFD should contribute to the setup of a network of MPAs through the existing EU Nature Acquis and international agreements. The latter is a positive step towards the implementation of provisions contained in such agreements especially those regarding the establishment of MPAs.

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802 EU MSFD Recital 5. “The development and implementation of the thematic strategy should be aimed at the conservation of the marine ecosystems. This approach should include protected areas and should address all human activities that have an impact on the marine environment”.
804 EU MSFD Recital 7 “Establishing such protected areas under this Directive will be an important step towards fulfilling the commitments undertaken at the World Summit on Sustainable Development and in the Convention on Biological Diversity, approved by Council Decision 93/626/EEC, and will contribute to the creation of coherent and representative networks of such areas.”
805 See EU MSFD Recital 18.
806 EU MSFD Article 13(4). “Programmes of measures established pursuant to this Article shall include spatial protection measures, contributing to coherent and representative networks of
Consequently, such MPAs may cover biodiversity features which may not be well covered under the Habitats or Birds Directives. As such the MSFD is not seeking to establish new obligations for the designation of MPAs other than honouring those in existing provisions. In a way this gives more importance to MEAs and allows MSs to devote more resources to achieve their implementation. MSs’ progress on MPA establishment will be monitored.⁸⁰⁷

3.8.4 Maritime Spatial Planning Directive (MSP)

The continuous and recently rapid growth in the use of the marine environment⁸⁰⁸ is one of the main factors that may have led the EU to adopt Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning.⁸⁰⁹ This Directive aims, *inter alia*, to promote the sustainable use of marine areas and their resources while also enhancing cross-border cooperation.⁸¹⁰ It applies to the same areas as the MSFD but not to those under a MS’s town and country marine protected areas, adequately covering the diversity of the constituent ecosystems, such as special areas of conservation pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine protected areas as agreed by the Community or Member States concerned in the framework of international or regional agreements to which they are parties.⁸⁰⁷

⁸⁰⁷ MSFD Article 21 “On the basis of the information provided by the Member States by 2013, the Commission shall report by 2014 on progress in the establishment of marine protected areas, having regard to existing obligations under applicable Community law and international commitments of the Community and the Member States…"  
⁸⁰⁸ Refer to EU MSP recital 1.  
⁸¹⁰ EU MSP Article 1(1) “This Directive establishes a framework for maritime spatial planning aimed at promoting the… the sustainable development of marine areas and the sustainable use of marine resources; (2) taking into account land-sea interactions and enhanced cross-border cooperation, in accordance with relevant UNCLOS provisions."
planning regulations.\footnote{MSP Article 3(4) “‘marine waters’ means the waters, the seabed and subsoil as defined in point (1)(a) of Article 3 of Directive 2008/56/EC and coastal waters as defined in point 7 of Article 2 of Directive 2000/60/EC and their seabed and their subsoil.”} MSs are obligated to establish one or more marine spatial plans,\footnote{EU MSP Article 4(1) “Each Member State shall establish and implement maritime spatial planning.”} which must consider environmental aspects and apply an ecosystem-based approach,\footnote{EU MSP Article 5(1).} to \textit{inter alia}, contribute to the preservation and protection of the marine environment.\footnote{EU MSP Article 5(2).} In so doing, MSs are called on to cooperate with other States, whether they are EU members or not.\footnote{EU MSP Articles 6(2)(f), 6(2)(g).} This cooperation is further elaborated in Articles 11 and 12. A provision that makes reference to MPAs is Article 8(2). MSP may include, at the MS’s discretion, the use of MPAs. This is another reference, in EU law, to consider the use of MPAs. Their specific inclusion further enhances the general importance that is given to MPAs when managing the marine areas in a sustainable manner taking care to protect the environment.

3.8.5 Mediterranean Regulation

establishment of Fishing Protected Areas (FPAs). These are intended to protect marine resources and on a bio-centric note they can also be used to protect marine ecosystems.\textsuperscript{817} MSs were to submit information prior to 2007, to the Commission, about areas that deserve to be protected as spawning or nursery grounds, or for the ecosystems that they host, which require the protection from the harmful effects of fishing activities. These areas can extend on the High Sea. Therefore, FPAs can lie in ABNJ and thus can be a form of MPA on the High Sea.\textsuperscript{818} However, at this stage it is noted that MSs were only asked to submit information since another provision indicates that it will be the Council which will identify the borders of FPAs in areas beyond the Territorial Sea.\textsuperscript{819} This approach may be interpreted as going beyond the EC Treaty which includes that policies for the protection of the environmental should cater for various regions where MSs have jurisdiction\textsuperscript{820} and not for areas on the High Sea.

This Regulation may allow the management of fishing once MPAs beyond the Territorial Sea become established. Such measures would only apply to fishing vessels of EU MSs. However, through scientifically and politically-oriented discussions agreements may be reached with third countries so that such areas, whether they are FPAs or MPAs, are respected. This may also serve as

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an exemplary approach of how other sectors may be dealt with particularly navigation.

3.8.6 Conclusion

In these sections of the legal review it emerged that in regions beyond the Mediterranean Sea, the designation of HSMPAs is progressing. This does face certain issues related to governance of certain activities which after all would also be issues that would be likely faced by Mediterranean HSMPAs. While it was noted that the EU acquis regulates the EU territory, the regional treaties, in particular, the SPA/BD Protocol, applies to all the Mediterranean Sea, including the High Seas. This Protocol can be identified as an enabling tool that would allow Parties to create HSMPAs. While it was noted that some procedural aspects may need to be refined to provide more assurance to Parties that decide to apply its provisions to identify a HSMPA. An analysis of Maltese laws will follow so as to identify to which extent Malta can provide its share to create a HSMPA.

3.9 Laws of Malta

Since this research is providing a focus on Malta, it would be beneficial if relevant laws of Malta are presented and reviewed. The laws considered
include those related to maritime claims, spatial planning, fisheries and environmental protection.

The Maltese legal system is a dualist one; Conventions may be ratified after Parliamentary approval. The Attorney General will implement the Convention directly or through transposition into Maltese laws. As Malta has a rich history premised on a number of colonial powers, there remain a number of echoes of that within its legal system. In Malta, Civil Law is influenced by French Law but includes substantial influences from British Law in terms of Common Law, based as it is on precedents in past cases. Maltese Law may be divided in Civil Law and Criminal Law; Public Law and Private Law; Substantive Law and Procedural Law; and Municipal Law and Public International Law.

The legal hierarchy of Malta is topped by the Constitution. Maltese laws in fact consist of Acts of Parliament, Regulations, Rules, Orders and Bye-laws, EU Law, including decisions of the Court of Justice of the European Union and International treaties, most of which are incorporated into national laws. The national legal system generally consists of an Act through which other regulations can be established, normally in the form of a set of regulations, as Subsidiary Laws (S.L.), Bye Laws or Government Notices (G.N.). Furthermore, EU law or International Conventions may be directly applied if National Law on enforcement of restrictions and obligations relating to the relevant convention is

Published.\textsuperscript{822} However, generally, EU Directives and International Conventions are normally transposed into National Law. If a conflict transpires between Maltese and EU law, various authors note that EU Regulations are more powerful than National law.\textsuperscript{823}

A close look at Maltese maritime jurisdiction is beneficial prior engaging in analysis of the Maltese laws. Starting off with the internal waters which are enclosed by a baseline that encompasses all the Maltese islands. Malta has no archipelagic waters. The territorial sea extends seaward to 12 NM from the baselines. The territorial sea is super-imposed by the contiguous zone which reaches the 24 NM seaward limit. Malta did not claim a full-blown EEZ but it did claim a management zone for fisheries which goes out to 25 NM from the baseline, as illustrated in Figure 19.

\textsuperscript{822} See for example, “Enforcement of Sea Fishing Conventions Order,” S.L. 425.08, 

Beyond the fisheries management zone, lies the High Sea and is not contiguous to neighbouring States’ waters. The Maltese Continental Shelf presented in Figure 20, lies partially beneath the High Sea.

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Malta had to settle part of its Continental Shelf border with Libya through ICJ Case settled in 1985. The judgment was only about a segment of the Continental Shelf border between Malta and Libya. It did not cover the whole border. The border claims presented by Malta and Libya are show below in Figure 21 and Figure 22, respectively. The final judgment which was not simply placing a border midway between the two States, was far from both claims as presented in Figure 23.

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825 Continental Shelf Department, *Government of Malta* 2018, https://continentalshelf.gov.mt/en/Pages/Continental-Shelf.aspx, (accessed July 24, 2019). This map does not imply that all the borders have been agreed with neighbouring States.


This does not imply that now Malta has no litigation over the Continental Shelf border. In fact, according to the former Minister for Foreign Affairs, Dr. Tonio Borg, as reported in a local newspaper, Malta, at least up till 2011 (the publication of the article), had contestations for certain areas with both Libya and Italy.  

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Italy’s claims on the Continental shelf concerning Malta are presented in Figure 24. It is observable that the eastern border descending towards Malta and the area between Malta and Sicily have not been demarcated in full. It is also noted that the western border concerning Malta is not the same as the border claimed by Malta, refer to Figure 20. Hence, it is proven that on the west side of Malta, overlapping of claims does exist.

Towards the east side the contention is even more evident when the Italian map about areas open for activities related to mineral extraction is considered, refer to Figure 25. A close look at this map reveals huge overlapping areas contested by Malta and Italy.

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The border limit of the Maltese shelf is a debate that has not yet been resolved. It is not the intention of this research to provide the exact border but such information shows the contentions on the shelf that exist in different parts of the Mediterranean and which may possibly also affect the inclination to adopt joint HSMPAs. The information about Continental Shelf issues was presented without any attempt to analyse any contestations or judgment since this information sustains the fact the Mediterranean Sea, including the areas around Malta conflicting claims still exist and also because it is not the objective of this study to do so.

The Constitution of Malta of 1964, as amended, provides the powers so that the Parliament may add areas to form part of the Maltese territory. The

833 Constitution of Malta of 21 September 1964, Article 1(2) “The territories of Malta consist of those territories comprised in Malta immediately before the appointed day, including the territorial waters thereof, or of such territories and waters as Parliament may from time to time by law determine.”
Constitution indicates that the Maltese territory includes the territorial sea and areas in Malta. Hence, it is evident that water column beyond the territorial sea and the Maltese Continental Shelf may not be referred to as Maltese territory unless the Parliament determines as such. Yet, taken in a wider sense, noting that various Maltese laws regulate a number of activities in such areas, these areas are in fact treated as part of the Maltese territory.

3.9.1 Territorial Waters and Contiguous Zone Act

The Territorial Waters and Contiguous Zone Act of 10 December 1971, Chapter 226, as amended (TWCZA) stipulates that the Territorial Sea of Malta stretches out to twelve nautical miles from the baseline\(^834\) the location of which is specified by a set of coordinates in a schedule to that same Act. It is noticeable that Malta’s baseline runs from one island to another. This may be fully justifiable when read in the context of provisions of UNCLOS, particularly Article 47(1) which indicates that archipelagic waters exist when the ratio of water to land is between 1 to 1 and 9 to 1. In Malta’s case this ratio is not exceeded and hence the baseline is created by linking one island to the other giving rise to internal waters and no archipelagic waters.\(^835\)

\(^834\) Chapter 226 Article 3(1) “Save as hereinafter provided, the breadth of the territorial waters of Malta shall be twelve nautical miles measured from baselines determined using the method of straight baselines joining appropriate points on the low-water line, defined by the coordinates in the Schedule.”

The Territorial Sea is further extended out to 25 NM as per Article 3(2) that states:

“For the purposes of the Fisheries Conservation and Management Act and of any other law relating to fishing, whether made before or after this Act, the territorial waters of Malta shall, with respect to the exercise of sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and, or non-living natural resources therein, extend to a breadth of twenty-five nautical miles from the baselines from which the breadth of the territorial waters is measured, and, for the purposes aforesaid, jurisdiction shall extend accordingly.”

The zone created between the baseline and the 25 NM limit is referred to as the Management Zone.\textsuperscript{836} Since the Management Zone can be regarded as a derivative of an EEZ, it can be said that it is not in complete conformity with UNCLOS’s provision. UNCLOS indicates that the EEZ starts beyond the territorial sea whereas the Management Zone starts from the baseline. This may not lead to contentions since as such Malta has more rights in the Territorial Sea than in the Management Zone. Among the regulations that can be enacted within the 25 NM zone include those related to the conservation of living resources and preservation of the marine environment.\textsuperscript{837} Therefore, it can be said that area-based conservation measures, hence including MPAs, can be established within this zone. In fact, even the European Commission

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\textsuperscript{837} See Chapter 226 Article 7 “(1) The Prime Minister may make regulations to control and regulate the passage of ships through the territorial waters of Malta, and, without prejudice to the generality of the foregoing, may by such regulations make provision with respect to all or anyone or more of the following matters: (a) the safety of navigation and the regulation of marine traffic… (d) the conservation of the living resources of the sea; (e) the prevention of infringement of any law or regulation relating to fisheries; (f) the preservation of the environment and the prevention, reduction and control of pollution thereof;… (j) the punishments, whether by way of fine (multa or ammenda) or of imprisonment, to be applied in respect of any contravention or non-observance of any regulation made under this Article.”
\end{flushright}
obligates EU Member States to establish protected areas in such zones.\textsuperscript{838} The TWCZA also provides for a 24-nautical mile contiguous zone within which Malta declares jurisdiction in line with international law.\textsuperscript{839}

3.9.2 Continental Shelf Act

The Maltese Continental Shelf is governed by the Continental Shelf Act, Chapter 535 of 8 August 2014, (CSA). This repealed a previous Act published in 1966. The new Act had the aim to bring this law in conformity with UNCLOS’s provisions noting that the superseded Act was not.\textsuperscript{840} In fact, the old Continental Shelf Act of 1966, Chapter 194, defined Continental Shelf on the basis of depth

http://ec.europa.eu/environment/nature/natura2000/marine/docs/marine_guidelines.pdf, (accessed January 3, 2019), 18, “Application of the Habitats and Birds Directives p 18. “…the opinion of the Commission is that recognition by a coastal State of exclusive rights in a maritime zone brings not only rights but obligations. Exclusive right to exploit natural resources implies a similar duty to preserve natural resources. Therefore, community law relative to the conservation of natural resources applies in all maritime areas where Member States exercise such rights. That includes the following maritime areas: The internal waters and the Territorial Sea, The Exclusive Economic Zone (EEZ) and/or to other areas where Member States are exercising equivalent sovereign rights (fishing protection zones, environmental protection zones…)”

\textsuperscript{839} Chapter 226 Article 4(1) Without prejudice to the provisions of Article 3(2), in the zone of the open sea contiguous to the territorial waters of Malta as defined in Article 3(1) (such zone being in this Act referred to as “the contiguous zone”) the State shall have such jurisdictions and powers as are recognised in respect of such zone by international law and in particular may exercise therein the control necessary: (a) to prevent any contravention of any law relating to customs, fiscal matters, immigration and sanitation, including pollution, and(b) to punish offences against any such law committed within Malta or in the territorial waters of Malta as defined by Article 3(1) or (2), as the case may require.
(2) The contiguous zone shall extend to twenty-four nautical miles from the baselines from which the breadth of the territorial waters is measured.

\textsuperscript{840} Hon. Dr. Joe Mizzi as reported in The Times of Malta, “Bill will redefine continental shelf,” available at, accessed on 7 July 2018.
and exploitability of resources.\textsuperscript{841} In contrast, the new CSA, defines the
Continental Shelf and notifies that its limits shall be in accordance with
international law.\textsuperscript{842} The Act indicates that the Continental Shelf starts from the
baselines. Yet, in the Continental Shelf Regulations of 2015, S.L. 535.02\textsuperscript{843}
enacted through the provisions of the latest CSA defines the Continental Shelf
as starting from behind the baseline that is, from internal waters and only
extends to the limit of the Territorial Sea.

Further from the CSA, with regard to a definition of natural resources, it includes
non-living and living resources. Living resources are further categorised, in
Article (2)(b) so as to include only living organisms belonging to sedentary
species. The term sedentary species is further defined.\textsuperscript{844} Corals are a typical
example that fall under this definition. Article 3(1) of the CSA reflects Article 77

\textsuperscript{841} Chapter 194 Article 2: "the continental shelf" means the sea bed and subsoil of the
submarine areas adjacent to the coast of Malta but outside territorial waters, to a depth of two
hundred metres or, beyond that limit, to where the depth of the superjacent waters admits of the
exploitation of the natural resources of the said areas; so however that where in relation to
States of which the coast is opposite that of Malta it is necessary to determine the boundaries of
the respective continental shelves, the boundary of the continental shelf shall be that
determined by agreement between Malta and such other State or States or, in the absence of
agreement, the median line, namely a line every point of which is equidistant from the nearest
points of the baselines from which the breadth of the territorial waters of Malta and of such other
State or States is measured;

\textsuperscript{842} Chapter 535 Article 2. "continental shelf" means the seabed and subsoil of the submarine
areas that extend beyond the territorial waters of Malta to a limit established in accordance with
international law, measured from the baselines from which the breadth of the territorial waters is
measured; so however that where in relation to States of which the coast is opposite that of
Malta it is necessary to determine the boundaries of the respective continental shelves, the
boundary of the continental shelf shall be that determined by agreement between Malta and
such other State or States or, in the absence of agreement, the median line, namely a line every
point of which is equidistant from the nearest points of the baselines from which the breadth of
the territorial waters of Malta and such other State or States is measured...

\textsuperscript{843} SL 535.02 Regulation 11: In these regulations, the term "continental shelf" includes the sea
bed and subsoil of the submarine areas within the limits of the internal waters and the territorial
waters of Malta:

\textsuperscript{844} Chapter 535 Article 2, "sedentary species" means 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 subsoil."
of UNCLOS in that the right to exploit the natural resources of the Continental Shelf is exclusive. Article 3(3) states that:

“The rights referred to in sub-article (1) are exclusive in the sense that if the Government of Malta does not explore the Continental Shelf or exploit its natural resources, no one may undertake the activities referred to in the preceding sub-Article without the express written consent of the Prime Minister.”

Yet, it does not transpire that non-Maltese fishing vessels trawling over the Maltese Continental Shelf beyond 25 NM limit were ever arraigned in court or given any permission, from the Maltese Government, to proceed with their operations. Trawling may lead to catches of, or harm to, sedentary species as defined in the CSA. On the other hand, it can also be argued that such vessels do not target sedentary species.

Further provisions infer more rights to Malta, arguably even more than UNCLOS would specify because Article 4(1)(n) allows the government to create laws to protected the environment, not just sedentary species, on the Continental Shelf.845 This does not discriminate between the powers within the Territorial Sea and outside the Territorial Sea. This Article adds to the definition of the Continental Shelf by adding the seabed area beneath the internal waters and the Territorial Sea. This seems to be quite clear that it allows Malta to exercise environment protection rights in the contiguous zone and the fisheries

845 4. (1) The Prime Minister may, from time to time, make regulations with respect to all or any one or more of the following purposes: (a) regulating the exploration and exploitation of the natural resources of the continental shelf;… (n) protecting the marine environment.
4(3) In this Article, the term "continental shelf" includes the seabed and subsoil of the submarine areas within the limits of the internal waters and the territorial waters of Malta: Provided that nothing in this Article shall affect the rights and powers of the Government of Malta under the appropriate laws in respect of areas within the limits of the territorial waters of Malta."
management zone. Arguably these may have been acclaimed because of the general obligations under UNCLOS to protect the marine environment.

Article 4(1)(c) allows the Prime Minister to enact regulations with regard to artificial islands not just on the shelf but also above the shelf. This may be an attempt to shift the rights into the water column. It is also noticeable that ‘safety zone’ as defined in Article 2 makes no reference to any measurable distance as inferred by UNCLOS. The Maltese continental shelf expert elucidated that measures taken to protect the environment from exploration and exploitation operations on the continental shelf are in line with the Offshore Safety (Oil and Gas) Regulations (Subsidiary Legislation 156.02), the ‘Best Available Techniques Guidance Document on upstream hydrocarbon exploration and production’ issued by DG Environment (European Commission) and international obligations. Exploration and production authorisations bind the operator to abide with these regulations and conditions. Additional rights beyond UNCLOS can be extracted when taking into consideration Article 4(1)(i). This Article allows Malta to regulate harmful factors that may affect living resources of the sea. Once again, such resources go beyond the sessile species. If this was not so, the term, natural resources or living organisms, would have been used. Both terms are defined in the same Act as belonging to the sedentary species, whereas, living resources is undefined. It cannot be assumed that such inclusions were not made on purpose.

846 Maltese continental shelf expert, personal communication, April 30, 2019.
3.9.3 Fishing Waters (Designation) and Extended Maritime Jurisdiction Act

Through the provisions of the Fishing Waters (Designation) and Extended Maritime Jurisdiction Act, Chapter 479 of 26 July 2005, Malta can make claims to marine waters for the purposes including the installation of structures, protection of the environment or for marine research.\textsuperscript{847} This legislation seems to allow Malta to claim an EEZ or any other derivative of an EEZ. However, to date these powers have not yet been applied to bring additional areas under Maltese jurisdiction other than those areas claimed before this Act came into force. It should be noted that the power to expand Malta’s sovereignty are specifically and clearly given to the Prime Minister rather than to the Maltese Parliament as indicated earlier.

3.9.4 Authority for Transport in Malta Act

Other legislation that may influence MPA governance includes that related to maritime transport. According to the Authority for Transport in Malta Act of 2007, Chapter 499, (ATMA) Malta’s jurisdiction over navigation, particularly that related to shipping, does not extend beyond the Territorial Sea. Since as

\textsuperscript{847} Chapter 479 Article 2(2) “The Prime Minister may also by Order published in the Gazette provide for the exercise of jurisdiction beyond the territorial waters of Malta with regard to (a) the establishment and use of artificial islands, installations and structures; (b) marine scientific research; and (c) the protection and preservation of the maritime environment.”
previously discussed, certain biodiversity may benefit from regulating aspects related to shipping including shipping lanes, vessel speed and lights, it is therefore apparent that Malta may be limited in its abilities with regard to being able to create appropriate regulations beyond the Territorial Sea. This may be due to the fact that Malta did not claim an EEZ but on the other hand as seen in section 3.9.1 Malta has the right to protect living resources out to 25 NM. The ATMA therefore may limit Malta’s powers when it comes to regulating negative impacts from shipping on living resources.

3.9.5 The Development and Planning Act

Further information of Malta’s maritime claims is available in the Development and Planning Act of 2016, Chapter 552 (DPA). Through the provisions of this Act, the Executive Council of the Planning Authority is to prepare a spatial strategy for the environment and development. The Executive Council is established through the provisions laid in Part V of the DPA. The spatial strategy is defined in Article 2. It also constitutes the maritime spatial plan.\(^848\) As regards spatial coverage, the strategy, according to Article 44(1)(a) is to include “the whole territory and territorial waters of the Maltese Islands.”\(^849\) It is arguable

\(^{848}\) See S.L. 552.27 Regulation 5. “(1) Further to the provisions of Article 44 of the Act and for the scope of these regulations, the Strategic Plan for Environment and Development or any replacement spatial strategy shall constitute the Maritime Spatial Plan.”

\(^{849}\) DPA 44. “(1) The Spatial Strategy for Environment and Development or “Spatial Strategy”: (a) is a strategic document regulating the sustainable management of land and sea resources covering the whole territory and territorial waters of the Maltese Islands; (b) shall be based on an integrated planning system that ensures the sustainable management of land and sea resources together with the protection of the environment;”
that this Article is creating some ambiguity in the elaboration of spatial coverage. Territory is not defined in the Act and on the other hand territorial waters form part of the Maltese territory. Unlike the Constitution of Malta, refer to the initial part of section 3.9, it seems that the DPA does not consider territorial waters to be part of the territory because it refers to them separately. However, these terminologies were also referred to in a judgment inferred by the CJEU.\textsuperscript{850} The DPA seems to use the term territory to include only terrestrial areas and possibly internal waters, and separating them from territorial waters. Hence the Contiguous Zone, Fisheries Management Zone and the Continental Shelf are not included. Shaw also argues that territory only includes land and Territorial Sea.\textsuperscript{851}

\textbf{3.9.6 Maritime Spatial Planning Regulations, S.L. 552.27}

Through the DPA, the Maritime Spatial Planning Regulations of 2016, S.L. 552.27 of 2016 (MSPRs) were published.\textsuperscript{852} Regulation 2(1) denotes that the MSPRs are applicable to the marine waters for which a definition is given in Regulation 3(1) as those areas defined by the “Marine Policy Framework Regulations and the Water Policy Framework.” The latter legislation is analysed


\textsuperscript{851} Shaw, “Territory in International Law,” 89.

\textsuperscript{852} Maritime Spatial Planning Regulations, S.L. 552.27.
further below. Regulation 4(b) may somewhat be in conflict with the EU Habitats Directive, or to put it milder, clarifications could be sought. This regulation indicates that economic issue will be considered during the maritime spatial planning process without any reserves.\footnote{853} MPAs are a MSP tool and MPAs are an obligation under the Habitats and Birds Directives, respectively. The EU Habitats Directive indicate that economic factors are to be considered when adopting measures\footnote{854} but they do not form part of the criteria, included in Annex III, when identifying the borders of MPAs.\footnote{855} There are also a number of CJEU decisions which address the issue. Hence, it is questionable whether it would be honouring the obligations of the EU Habitats Directive, if economic issues factor in when devising the maritime spatial planning related to MPA locations. In fact, the MSP could be jeopardising, the setup of the Natura 2000 network, by identifying areas for existing and future MPAs.\footnote{856}

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\footnote{853} S.L. 552.07 Regulation 4 “In implementing maritime spatial planning the Competent Authority shall: (b) consider economic, social and environmental aspects as well as safety aspects to support sustainable development and growth in the maritime sector, applying an ecosystem-based approach, and to promote the coexistence of relevant activities and uses.”

\footnote{854} EU Habitats Directive Article 2(3) “Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.”

\footnote{855} See EU Habitats Directive Annex III.

\footnote{856} S.L.552.27 Regulation 5(3) The Maritime Spatial Plan shall identify the spatial and temporal distribution of relevant existing and future activities and uses in their marine waters, in order to contribute to the objectives set out in regulation 4 and in sub-regulation (2). Relevant activities, uses and interest may include:(i) aquaculture areas;(ii) fishing areas;(iii) installations and infrastructures for the exploration, exploitation and extraction of oil, of gas and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources;(iv) maritime transport routes and traffic flows;(v) military training areas;(vi) nature and species conservation sites and protected areas;(vii) raw material extraction areas;(viii) scientific research;(ix) submarine cable and pipeline routes;(x) tourism; and(xi) underwater cultural heritage.
3.9.7 Strategic Plan for Environment and Development

Malta has adopted the “Strategic Plan for Environment and Development” officially also referred to as SPED, in 2015 under the obligations of Environment and Development Planning Act of 2010 (EDPA) which was in force prior to the adoption of two different Acts to cater, separately, for the environment and development planning, respectively. The SPED does not make any specific reference to Articles upon which it was based. It makes reference to the EDPA and the DPA. However, the DPA notes that a spatial strategy for environment and development, in short referred to as spatial strategy, is to be prepared. This defers slightly from the title of the SPED.

The SPED has a spatial coverage of up to the 25 nautical mile limit. Issues related to the implementation or administration of the Continental Shelf Act are not addressed. This is clearly presented in the SPED. It transpires that there is a lack of coherence to both the DPA, Article 44(1)(a) and to MSPRs Regulation 2(1) and Regulation 3. The former indicating that the SPED should apply to the Maltese territory and the latter indicating that marine waters include the outer continental shelf limit.


\[858\] DPA Article 44(1).


Issues regarding the spatial applicability of the SPED also gives rise to the question about how Malta will be dealing with the obligations of the SPA/BD Protocol under the Barcelona Convention, as regards the identification of MPAs on the High Seas and other areas. But not just that, but also how obligations emanating from EU law, transposed into national law, mainly through ‘The Flora, Fauna and Natural Habitats Protection Regulations, S.L. 549.44, refer to section 3.9.10, regarding the designation of MPAs on Malta’s territory, including the continental shelf beneath the High Seas water column are going to be met.

The SPED includes a number of objectives each of which expands into a number of proposals or visions. Thematic Objective 8 is “to safeguard and enhance biodiversity, cultural heritage, geology and geomorphology.” According to the same Objective this is partially to be achieved by promoting the safeguarding of MPAs. It is noted that this calls only to protect existing MPAs rather than to also include the designation of new ones so as to be in line with the law that transposes the Habitats and Birds Directives, respectively, as well as other Conventions.

Coastal Objective 1, paragraph (2) calls for the facilitation of the implementation of the MSFD and hence can be interpreted as providing a spatially limited support for the designation of MPAs, noting that MSFD applies to all the territory whereas SPED applies only to the 25 nautical zone limit. Under the same Coastal Objective, paragraph (4)(b) refers to the territorial sea limit as the boundary to manage activities and development (shipping, fisheries, infrastructure and oil exploration) but makes no reference to activities pertaining
to biodiversity protection; paragraph (4)(c) sets the contiguous zone border only for the management of cultural heritage and paragraph (4)(d) notes that the management of fisheries is up to the 25 NM zone and hence not incorporating any fisheries on the continental shelf targeting or by-catching sessile species. It would have benefitted the environment and fisheries if protection of the environment was included in paragraph (4)(d). Additionally, the SPED is not incorporating the inland waters as an area for fisheries management.

3.9.8 Environment Protection Act

The Environment Protection Act of 1991 (EPA of 1991) was the first Act specifically dedicated for environment protection. It was complemented with Act XII of 1977, Marine Pollution (Prevention and Control). The EPA of 1991 did not contain any specific provisions about MPAs. It put an obligation on the Government to protect all biodiversity\(^ {861}\) and to safeguard the sea from pollution. The provisions to protect the environment referred to both terrestrial and marine areas. However, this Act did not indicate the spatial coverage for marine areas. This law has to be taken in context of the international and regional context when most fora put the emphasis on pollution rather than MPAs. So much so, that this was also reflected in the Barcelona Convention.

\(^{861}\) EPA of 1991 Article (2)(f).
The Act in force is the Environment Protection Act of 2016, Chapter 549 (EPA). This Act is the evolution of previous environment Acts. The EPA superseded the EDPA. The latter catered for development planning and environment protection. During the time when the EDPA was in force the authority that had the remit to manage development and protected the environment was the Malta Environment and Planning Authority (MEPA) and hence it was logical that one Act encompassed both themes. Prior to 2002, MEPA was not yet merged and two separate entities existed. Planning was the remit of the Planning Authority while the environment was the remit of the Department of the Environment. Consequently, the Acts that regulated planning and the environment were separate.

The current Environment Protection Act allows for subsidiary legislation to be enacted. This often focuses on specific topics. Additionally, Government Notices and other laws of lower hierarchy may also be published. There is no specific geographic area to where the EPA applies. This lack of coverage is striking when considering the provisions about MPA designation. However, Article 54 addressed spatial application as regards *inter alia* the protection of biodiversity. According to EPA Article 54(1)

“The Minister may, acting in accordance with the provisions of Article 55, make regulations for the better carrying out of the provisions of this Act and may in particular by such regulations appoint the Authority or any person or body to be the designated authority for the purposes of any international obligation to which Malta may be a party. (2) Without prejudice to the generality of the provisions of sub-Article (1) such regulations may, in particular:… (m) in relation to the protection of biodiversity and other natural features: (vi) declare any areas or sites on land or in the internal or territorial waters, or beyond such waters where Malta may have jurisdiction for the purpose of the
The interpretation of this Article needs to be taken in the light of Malta’s maritime claims in view that it did not claim an EEZ. Malta’s claims are contained in the TWCZA. The claims include jurisdiction on living resources in the water column up to 25 NM, as noted further in section 3.9.1. On its Continental Shelf beyond the 25 NM limit, as noted in section 3.9.2., Malta has jurisdiction on sessile species. Therefore, it transpires that this Act can be used to designate MPAs for features in these areas. Furthermore, noting that the provision above can be applied to areas beyond where Malta may have jurisdiction may imply that this empowers the Minister of the Environment to declare MPAs not just on Malta’s Continental Shelf beneath the High Sea but also on the High Sea. The provision refers to jurisdiction for the “protection and control of the environment. The TWCZA and the CSA infer powers to conserve living and non-living resources. Collectively these two factors make up the environment. Conservation can be carried out by regulating, managing and hence protecting. The fact that this provision is detailing spatial applicability can also be interpreted that the legislator intended that this should be applied beyond the Territorial Sea otherwise without incorporating spatial applicability, the provision would only be applicable to Malta’s Territorial Sea. A last observation on this provision is that the phrase “declare any areas” rather than “designate any areas” is being used. Possibly this is because declaration of protected areas clearly would not infer any additional territorial rights and hence avoid any potential conflicts with neighbouring countries in case these are declared beyond beneath the High Sea or on the High Sea. In the latter case,
however, unless the SPA/BD Protocol has been followed and unless there is a consensus among the SPA/BD Protocol Parties, any MPA regulations would only be applicable to Maltese nationals. It may be possible that Parties who have agreed to this MPA would oblige their citizens to honour any relevant regulations. However, this is not likely to be through the SPA/BD Protocol in view that consensus would be needed for the MPA to proceed.

This does not imply that EPA creates an easy mechanism for HSMPAs and in fact does not resolve how Malta can proceed with the process of HSMPAs under the SPA/BD Protocol, as observed in section 3.5.1 above. On the High Sea, where Malta can never claim jurisdiction for the protection of the environment it can still declare MPAs. It should be noted that Malta has jurisdiction on vessels flying its flag wherever they are and consequently, Malta, can also indicate areas on the High Sea as protected areas for biodiversity with respect to those vessels. Yet, it is likely that if Malta would declare unilateral HSMPAs with a broader application it may lead to protests by other States.

EPA Article 54(2)(e) gives the Minister the power give effect to any international treaty or instrument. It is possible that this can be employed so that Malta identifies areas on the High Sea as MPAs, noting that declaration of MPAs is not a claim for an extension of jurisdiction or territory.
The “Marine Policy Framework Regulations, of 2011, S.L. 549.62,” of 4 March 2011, (MPFRs) is a comprehensive legislation that transposes the provisions of the EU Marine Strategy Framework Directive. As noted, one of the main concerns in governing marine areas is the nature of the fragmented regulatory framework which provides for different authorities to regulate different activities.

But, Regulation 1(3) of the MPFRs, recognises this issue and notes that the regulations contained therein should be carried through coordination between different authorities to result in an integrative approach at protected the environment.  

As regards spatial applicability, Regulation 1(4) makes it clear that these apply to all marine waters but also recognise the importance of noting that the matters in the marine environment do not have political boundaries. Regulation 2(1) defines ‘marine waters’ as the

“waters, the seabed and subsoil on the seaward side of the baseline from which the extent of territorial waters is measured extending to the outmost reach of the area where Malta has and, or exercises jurisdictional rights, in accordance with the UNCLOS and general international law.”

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862 SL 549.62 Regulation 1(3) “These regulations shall contribute to coherence between, and aim to ensure the integration of environmental concerns into the different policies, agreements and legislative measures which have an impact on the marine environment.”

863 SL 549.62 Regulation 1(4) “These regulations shall apply to all marine waters as defined in regulation 2(1) and shall take account of the transboundary effects on the quality of the marine environment of third States in the same marine region or subregion as defined in regulation 5.”
Hence, referring back to the MSPRs, section 3.9.6, it transpires that, maritime spatial planning has to be performed towards the outer limits of the Continental Shelf. Hence, MPAs are to be designated on the Continental Shelf beneath the High Sea.

Regulation 5 subparagraphs 2(a) and 2(b) call for a coordinated approach among neighbouring EU States. This is an approach that could pave the way to a High Seas MPA set by the relevant States by initially creating a collaborative and working environment among them. Regulation 5(3) allows Malta, to consider working with neighbouring EU States to devise plans to improve the status of marine waters. Noting that water columns under the jurisdiction are not contiguous but that Continental Shelf limits are, it is likely that any measures taken to improve the status within areas of jurisdiction would have a positive effect on the contiguous High Sea areas which also happen to be on the Continental Shelf of involved States. As per definition given in Regulation 2(1) marine waters do not just refer to the water column but also to the seabed and subsoil. The same regulation notifies that this legislation is applicable to all areas over which Malta has jurisdictional rights. Hence, it can be deduced that it is applicable to the continental shelf below the High Seas water column. From an eco-centric perspective this is quite promising, also noting that a strategy is to be developed to protect the marine environment. In other words, Malta would be protecting the marine environment from coastal waters to the outer

864 SL 549.62 Regulation 4(1) “The marine strategy shall be developed and implemented in accordance with the plan of action set out in regulation 5(2), in order to: (a) protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected;”
limit of its continental shelf. This is to be achieved through the measures contained in a marine strategy for Malta’s marine waters.\textsuperscript{865} Furthermore, positive effects are also to spread over High Sea areas noting that the strategy is to consider that marine waters are part of a larger marine region, namely, the Ionian and the Central Mediterranean Sea, respectively. This spatial spread which emanates from the EU MSFD may be looked at as an attempt to increase the spatial applicability of relevant EU environmental law albeit the limitations imposed to restrain such regulations to the EU’s territory. In order to be able to do so Regulation 5(4) seeks the regional legal instrument, that is, the Barcelona Convention.\textsuperscript{866} The demand to also watch the environment in the relevant sub-regions seems to create some anomaly noting that monitoring will only be ongoing in Maltese marine waters,\textsuperscript{867} at least as regards Malta’s obligations. Hence, a question might arise as to how and when Malta would be aware that measures would need to be taken to address issues on the High Sea in one of the relevant sub-regions. Furthermore, Regulation 10(1) stipulates that Malta is to identify any actions that need to be implemented in Maltese waters but taking into account the relevant sub-regions. Yet, it is clear that a good environmental status is to be achieved not just in areas under the Maltese jurisdiction but also

\textsuperscript{865} SL 549.62 Regulation 3(1).
\textsuperscript{866} SL 549.62 Regulation 5(4) “In order to achieve the coordination referred to in sub-regulation (2), the competent authority shall, where practical and appropriate, use existing regional institutional cooperation structures, and as far as possible, build upon relevant existing programmes and activities developed in the framework of structures stemming from international agreements including those under the Convention for the Marine Environment and the Coastal Region of the Mediterranean Sea; and SL 549.62 Regulation 5(5) “For the purpose of establishing and implementing the marine strategy, the competent authority shall make every effort, using relevant international forums, including mechanisms, structures and building upon relevant existing programmes and activities developed in the framework of the Convention for the Marine Environment and the Coastal Region of the Mediterranean Sea, to coordinate actions with third countries having sovereignty or jurisdiction over waters in the Ionian Sea and the Central Mediterranean Sea marine subregion.”
\textsuperscript{867} See SL 549.62 Regulation 6(1).
in the marine sub-region. It follows that in order to ensure this target is reached regular monitoring of the sub-region is also made. This provision can be seen as either being potentially in conflict with Malta’s current actions or else not completely being met, when referring to Malta’s actions that have or are being carried out.

A set of measures are listed under the provisions of Regulation 10 which can be adopted in Malta’s marine waters, which as previously explained include all areas under the Maltese jurisdiction. A complementary provision is presented in Regulation 10(10) whereby if Malta deems it appropriate, it could also include measures to improve the environmental situation outside its marine waters. However, this would be a prerogative of the Maltese Government and is not expressed as a stand-alone obligation. This seems to allow the Government to designate a MPA on the High Sea.

Regulation 10(6): “Programmes of measures established pursuant to this regulation shall include spatial protection measures, contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems, such as special areas of conservation pursuant to the Habitats Directive, special protection areas pursuant to the Birds Directive, and marine

868 SL 549.62 Regulation 7(1) “Good environmental status shall be determined at the level of the marine subregion as referred to in regulation 5 on the basis of the qualitative descriptors in Schedule I. Adaptive management on the basis of the ecosystem approach shall be applied with the aim of attaining good environmental status.”
870 SL 549.62 Regulation 10(10) “The competent authority shall consider the implications of the programme of measure on waters beyond Malta’s marine waters in order to minimise the risk of damage to, and if possible have a positive impact on, those waters.”
protected areas within the framework of international agreements to which Malta is a contracting party.”

This provision instigated spatial measures referring to the EU Habitats and Birds Directives, respectively, and also to the Barcelona Convention. Specific reference is made to the designation of MPAs. Noting, that Article 10 also includes reference to the sub-region, the application can also be linked to HSMPAs, even though measures as such have to be taken in Malta’s waters and hence not covering High Sea areas. Yet, this provision allows Malta to designate MPAs on its continental shelf beneath the High Sea water column but raises a point of interrogation with regard to the applicability of the EU Habitats Directive noting that latest studies\(^{871}\) in Malta to identify new MPAs were only covering up to its 25 NM limit in order to seek a classification of sufficiency by the EU Environment Commission. Furthermore, it seems to be included that if Malta considers necessary, MPAs on the High Seas can be adopted through a regional process by approaching the relevant organisation.\(^{872}\) Such an action is not clearly indicated but could be a possibility.

\(^{872}\) SL 549.62 Regulation 10(7) “Where the competent authority considers that the management of a human activity at Community or international level is likely to have a significant impact on the marine environment, particularly in the areas addressed in subregulation (6), it shall, individually or jointly with neighbouring competent authorities, address the relevant competent authority or international organisation concerned with a view to the consideration and possible adoption of measures that may be necessary in order to achieve the objectives of these regulations, so as to enable the integrity, structure and functioning of ecosystems to be maintained or, where appropriate, restored.”
3.9.10 Flora, Fauna and Natural Habitats Protection Regulations, S.L. 549.44

The Flora, Fauna and Natural Habitats Protection Regulations, S.L. 549.44, of 2006 (FFNHPRs) represent probably the main legal instrument in Maltese law that contributes most to the designation and governance of MPAs. These Regulations are created by virtue of the EPA and reflect a number of drivers, including those from measures of EU and regional laws which were discussed above. According to Regulation 2(3):

“These Regulations provide the provisions required for the implementation in Malta of: (a) Council Directive 92/43/EEC of 21 May 1992 on the Conservation of Natural Habitats and of Wild Fauna and Flora, (b) 2009/147/EC of 30 November 2009 on the Conservation of Wild Birds, (c) the Convention on Biological Diversity, (d) the Convention on the Conservation of European Wildlife and Natural Habitats, (e) the Convention on the Conservation of Migratory Species of wild Animals, and (f) the Protocol for Specially Protected Areas and Biological Diversity in the Mediterranean of the Barcelona Convention; they shall be read and construed as one with such legal instruments.”

The FFNHPRs aim to contribute towards the conservation of biodiversity in all EU Member States. The area of application is all the territory of these States and therefore does not incorporate the High Sea and therefore is questionable whether or not the provisions of the SPA/BD Protocol applicable to the High Sea could be honoured. The term territory is not defined. However, based on analysis in other sections, it can be deduced that it is applicable to the outer

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873 Flora, Fauna and Natural Habitats Protection Regulations, S.L. 549.44
874 SL 549.44 Regulation 2(1) “The aim of these regulations is to contribute towards ensuring biodiversity in the territory of the Member States of the European Community through the conservation of natural habitats and of wild fauna and flora in the Maltese Islands.”

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limit of the Continental Shelf, see section 3.8.1. This contrasts drastically with the fact that Malta seems to be only concentrating energies to designate MPAs in line with the EU Habitats and Birds Directives up to the 25 NM limit. It is also striking when compared to the spatial applicability of the MSP which is up to the 25 NM limit from the baseline.

The FFNHPRs allow for the designation of MPAs for features listed in Schedules I to III. These Schedules are populated with lists of habitats and species. The first two Schedules are identical to the Annexes contained in the EU Habitats Directive. The third contains lists of species of national importance. It is clear that these criteria do not immediately reflect those of the SPA/BD Protocol, see Table 1, and because none of the three Schedules incorporates all the cetacean species, declaring MPAs for these does not seem possible, apart for two species which are also listed in the EU Habitats Directive. So while S.L. 549.44 is to implement the SPA/BD Protocol’s provision it does not seem that it can do this to complete fulfilment.

Another issue is that if the FFNHPRs are transposing the SPA/BD Protocol, then they should also provide for the identification of HSMPAs. The nomenclature used for protected areas are Special Areas of Conservation of International Importance, Special Areas of Conservation (SACs) of International which refer to features listed in the EU Habitats Directive, SACs of National Importance which focus on Schedule III features and Special Protection Areas which focus on bird species listed in Schedule I. This implies that there may be a lacuna if Malta wants to list a MPA of national importance under the SPAMI
list because the SPAMI list comprises areas of Mediterranean importance. If to satisfy the SPAMI list, Malta applies the SAC of International Importance, it would still not be able to fully honour the obligations of the SPA/BD SPAMI criteria because as discussed certain features that are listed under SPAMI criteria are not included in Schedule I or II, apart from the fact that the SPAMI criteria have not been specifically included.

To date Malta has declared a number of protected areas under the SPA/BD Protocol but all are in terrestrial coastal areas\(^{875}\) and also a number of MPAs, as shown in Error! Reference source not found.. The FFNHRPs are invoked when the Government designates MPAs through the publication of Government Notices.

3.9.11 The Marine Mammals Protection Regulations, SL. 549.35

The Marine Mammals Protection Regulations of 2003, S.L. 549.35 is being included in this research as it is an important law that protects cetacean species even though it does not call, neither directly nor indirectly for the designation of MPAs. These regulations do not just govern the Maltese Territorial Sea but also the actions of Maltese flagged vessels on the High Sea.

3.9.12 The Convention on Biological Diversity (Incorporation) Regulations, SL 549.27

The CBD is a rather all-encompassing obligation although there is no specific mention of HSMPAs. The Convention on Biological Diversity (Incorporation) Regulations, of 28 June 2002, S.L. 549.27, enacted under the EPA brought the CBD in its entirety, into force in Malta. These Regulations, in fact, annotate the Convention in a schedule. Article 4 notifies that the Convention forms part of the Laws of Malta. The preamble has also been incorporated and hence including the recital which related to the adoption of protective measures even in cases of lack of scientific data. Essentially a direct transposition of the CBD is effected through these Regulations – a consequence, as noted above of Malta’s dualist approach to measures of international law.

3.9.13 Fisheries Conservation and Management Act

Although fisheries legislation may not necessarily be considered as nature legislation, its provisions and their enforcement would also normally benefit biodiversity. The Fisheries Conservation and Management Act, of 4 June 2001, Chapter 425, (FCMA) and related relevant Subsidiary Legislation, as well as, various EU fisheries Regulations which are directly applicable, include various provisions that enhance conservation efforts of natural features. Furthermore, current fisheries legislation in Malta gives the government significant powers to
ensure the proper management of fishers. The Act also allows for a licensing system which would apply to any area as declared by relevant Maltese authorities.

The licencing system has a role in the management of fisheries operations, such as, for example trawling within the Fisheries Zone is only allowed in specific areas as may be specified on a fishing licence. A licensing system may be used to govern fishing within MPAs, such as for example, the need for a specific licence to fish in certain areas within a MPA, even though this measure has never been considered. The management of the Maltese fisheries is mainly based on technical and input controls rather than output controls which include Total Allowable Catches (TACs). Only the bluefin tuna and swordfish fisheries are managed through TACs to be in line with ICCAT requirements.

A licencing system may be seen as setting property rights. However, the Maltese systems attempts to control such rights and seeks to avoid having unused licences associated with a fishing vessel. The evidence is provided in Fishing Vessels Regulations, S.L. 425.07, enacted under the FCA, which include a provision that states:

“If a fishing vessel of category A or B does not register a catch and sale of fish of value as shown in Schedule III, such vessel shall be recorded in a temporary register where it can remain for three years, in which period it could or shall restart its commercial fishing activity totally or **shall otherwise continue to work on a low scale and shall therefore be included in Category C**. (Emphasis added) A vessel

losing its registration in Category A or B shall pay €2,683.30 in order to regain its right of registration in these categories.”

The licence of fishing vessels is based on three categories, namely A, B and C. As seen above, a fishing vessel can lose its Category A licence if it is not active for a certain period and if it does not commercialise a certain value of fish. Retention of a licence after decommissioning of a vessel, while it is subject to Regulation 9 described above, is not a vessel owner’s right unless specifically authorised by the Fisheries authority.

With regards to quotas, in Malta, these are associated with the vessel rather than the owner, however, a vessel owner can transfer quota from a decommissioned vessel to another vessel. The Maltese licensing system, similar to the UK’s, allows for fishing licences becoming owned by a smaller number of fishers.\textsuperscript{877} This can be done by having vessel owners selling their vessel together with their licence. By associating the licence with the vessel and selling these conjointly, a vessel price may increase rather than if that vessel was sold without a licence.

Bluefin tuna is managed with quotas established by ICCAT. Such quotas can be sold but the quota is to be fished. This has in common with the UK quota system which as such becomes a form of individual right but on the other hand contrasts with the UK system, since as Appleby notes, in 2007, vessel owners kept their quota without actually using it since the vessel was

decommissioned. In Malta quota is associated with a fishing vessel rather than the fisher.

Maltese fishers do not have a producer organisation. This fact may have its advantages because in the UK many large-scale operators grouped into producer organisations and this have had a negative effect on the small-scale fishers and on those did not opt to join such an organisation. Furthermore, quotas in Malta are managed and allocated by the Government in cooperation with the fishers’ cooperatives rather than being managed by the producers organisations as in the UK system. However, similar to the UK, Maltese vessel owners can still trade their quota among themselves.

As regards the designation of MPAs among the most important provisions related directly to MPAs, there is Article 4(1)(k) which provides for consultation between the fisheries and environmental authorities, respectively, which would focus on enhancing protection measures to safeguard a protected species from extinction. Such provisions could also lead to the setting up of MPAs. It could also have led to setting up MPAs on the High Seas if clearer provisions were provided with regard to government powers outside the fishing waters. However, similar effects to a HSMPA can be obtained, as regards the regulation of fisheries, since a local commercial fisher has to have a licence to fish in any

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878 Ibid. 14.
880 FCMA Article 4(1) “This Act shall be administered by the Director who shall be a public officer, appointed by the Prime Minister, and who shall be responsible for: (k) the taking of appropriate measures in consultation with such authority as may from time to time be responsible for the environment for the safeguard against extinction of protected species;”
area. Hence, conditions of this licence may infer specific regulations to limitations in certain High Sea areas.

According to Article 3, “The fishing waters of Malta comprise: (a) the internal waters; (b) the territorial waters declared under article 3(2) of the Territorial Waters and Contiguous Zone Act; and (c) any other marine waters over which sovereign rights for the purpose of exploring and exploiting, conserving and managing the living resources therein are claimed by proclamation, law or convention for the time being in force, or having the force of law, in Malta.” Yet, as indicated below that Act can also be implemented beyond the fishing waters of Malta. The point to be raised here is that beyond the 25 NM, Malta has sovereign rights on sessile living organisms but not on the water column and therefore Article 3(c) seems to be unclear with respect to being in line with UNCLOS’s provisions. Furthermore, it does not transpire that Malta exercise sovereign rights on sessile organisms beyond the 25 NM limit.

Noting that Article 38(1) states that:

“[T]he Minister may make regulations for the better carrying into effect of the purposes of this Act. (2) In particular and without prejudice to the generality of sub-Article (1), such regulations may provide for... (b) the conservation, management and protection of fish resources including the establishment of closed areas and closed seasons... (c) the establishment and management of marine areas for the preservation of fish stocks... (w) compliance with, and the implementation of, obligations of Malta under any convention and, or treaty...”

This can be interpreted that this Act can facilitate the implementation of the SPA/BD provisions on the High Sea. These provisions allow for the establishment of spatio-temporal regulations, by for example, providing for the
setting of closed areas and designation of area for which special management measures would apply. The FCMA does not seem to impose any spatial limit to where such regulations may be applied and hence it is apparent that they can also be set in areas on the High Seas. Yet, a Maltese flagged vessel is to adhere to the FCMA even beyond the Maltese territory. Furthermore, noting that these provisions relate to the environment they can also be applied in synergy with the provisions of the EU Mediterranean Regulation which also seeks the protection of certain habitats, refer to section 3.8.5.

3.10 Concluding Remarks

Malta has an elaborated set of legal instruments to govern the marine realm. These laws have been developed within the scope of the various relevant international and regional laws. Maltese laws are amended as required from time to time. The marine area up to the limits of the Territorial Sea is well legislated for but not the same can be said for areas beyond especially in terms of MPA governance. This is not surprising since Malta has not claimed an EEZ but only a Fisheries Management Zone. It seems that the general obligation under UNCLOS to protect the marine environment needs to be incorporated more clearly. However, various Maltese laws do allow a certain degree of protection to the marine environment. Maltese laws do allow enhancement of environmental protection beyond the Territorial Sea once Malta makes the relevant claims. On the other hand, the applicability of some regulations under the EPA and its SLs, and spatial coverage of the Minister for the Environment
are rather open for interpretation and extrapolation, especially those regarding the protection of the environment beneath the High Seas water column but on Maltese continental shelf. It is noted that Malta has declared a number of MPAs beyond its Territorial Sea within its Fisheries Management Zone. It is evident that laws may be interpreted such that MPAs can be designated in such areas. Malta has ratified the SPA/BD Protocol that calls for the designation of MPAs on the High Seas but there does not seem to be any specific regulation that clearly allows Malta to establish such MPAs. While it can be argued that a State can never have jurisdiction on the High Seas and hence cannot legislate for it, it can be provided for within the laws so that a State’s government may propose a HSMPA. Alternatively, the inclusion of provisions to collaborate with neighbouring States, to establish HSMPAs may be included, similar to those that allow for the transposition of the Marine Strategy Framework Directive. Legal instruments evolve. New ones are published and existing ones amended to reflect new realties, expectations and needs. Hence, Maltese laws may also be amended so as to clarify the obligations towards HSMPAs.
4 Methodology

4.1 Introduction

Having reviewed both the literature and the various legal measures which apply to the subject of the thesis in the chapters above, this chapter presents an explanation of the research methodology adopted. Beginning with a justification for the research design, including an explanation of the appropriate legal and other qualitative research methodologies, it sets out to demonstrate how the chosen methods are suited to addressing the central research question in respect of High Seas Marine Protected Areas (HSMPAs) in the Mediterranean. The chapter concludes with a consideration of the validity and reliability of the data which is brought to the answer and how the limitations of the research are identified and addressed.

The research design guides the developmental framework to be applied to both the collection and the analysis of the data necessary to answer the research question. In short it is the plan of how to undertake the necessary steps in the process. Cited in Kumar, Thyer, writing in 1993, stated that “a traditional research design is a blueprint or a detailed plan as to how the research study is to be completed,”881 The design applied to this thesis consists of an

epistemological inquiry which draws upon both doctrinal and socio-legal
research methodologies.

The review of the literature and legal instruments revealed various provisions
targeted towards the establishment of MPAs, with the principal objective of
protecting the marine environment, apply to those States bordering the
Mediterranean Sea. Such provisions can be found in multilateral environmental
agreements rooted in Public International Law, regional laws, particularly those
promulgated by the European Union, and national laws. Of particular
significance to the Mediterranean Sea, is the Barcelona Convention. A
Protocol to the Convention, in force since 1995, is of particular relevance in that
it provides a mechanism for the designation of MPAs on the High Seas. As a
means of complementing this provision, considerable work has occurred and is
on-going to identify important areas of the High Sea. This on-going work is
conducted between those States bordering the Mediterranean, the Secretariats
to international organisations, the EU, and interested eNGOs.

Whilst it is over twenty years since the adoption of the Protocol to the Barcelona
Convention referenced above, no Mediterranean State has yet identified and/or

882 Barcelona Convention, “The Convention for the Protection of the Mediterranean Sea Against
Pollution was adopted on 16 February 1976
883 The Specially Protected Areas and Biological Diversity in the Mediterranean was adopted on
10 June 1995 (Barcelona); entered into force: 12 December 1999 The Annexes to the SPA and
Biodiversity Protocol were adopted on 24 November 1996 (Monaco); Annexes II and III of the
Protocol were amended by Decision IG.21/6 of the Contracting Parties and adopted on 6
December 2013 (Istanbul) and entered into force on 30 March 2014. Previously, Annexes II and
III of the SPA and Biodiversity Protocol had been amended by Decision IG.19/12 (adopted on 5
November 2009, in Marrakesh). The amended Annexes were in force since 13 February 2011).
designated a MPA on the High Sea by virtue of its provisions. At the time of writing, there is only one designated site which includes an area of High Sea. This, however, was identified, proposed and designated under a specific, tripartite agreement between the involved States and, indeed, was established prior to the Protocol.\textsuperscript{884} One reason for this, may be that the designation of HSMPAs involves highly sensitive jurisdictional issues. A complicating factor is that many Mediterranean States have recently made claims to extend areas under their jurisdiction, although there remain significant areas of High Sea in the Mediterranean. An additional complicating factor militating against the designation of HSMPAs might also be one focused towards financial commitment, since their proper management requires significant resourcing. Attempting to establish common barriers to establishment; and how that situation applies within a Maltese context was one of the motivating factors in undertaking this research project.

4.2 Study Design

In order, then, to address the basic research question as to reasons why there remains a basic failure of the Barcelona Convention parties to agree designation of HSMPAs the following methodology was designed and

\textsuperscript{884} See also Giacomo Salvini, “Confini Mare Italia-Francia: Ecco Cosa Sta Succeedendo,” Termometro Político, February 18, 2016, http://www.termometropolitico.it/1208429_confini-mare-italia-francia-ecco-cosa-sta-succeedendo.html?utm_source=rss&utm_medium=rss&utm_campaign=confini-mare-italia-francia-ecco-cosa-sta-succeedendo (accessed July 1, 2017): This site is known as the Pelagos Sanctuary. Today, it lies within areas claimed by Italy and France and hence there is no High Sea enclosed within this MPA.
implemented. In summary, a solely desk-based, doctrinal legal-research methodology was considered initially, but it was soon realised that this would be limiting because it would be confined to exploring existing law and policy.

Chynoweth cites Arthurs’ diagram explanation of legal research types, which is reproduced in Figure 26.885 The thesis is about the law in context and is both applied and positioned more closely to an interdisciplinary methodology. The additional data collection described below enables the contextual evaluation.

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As above, it is assumed law provides both the impetus and necessary mechanisms to establish HSMPAs in the Mediterranean, but to date it has not delivered any. The questions as to why, first, this could be the case; second whether progress could be made by adopting different means; and finally how these processes may be viewed through the lens of a Maltese perspective required a broader qualitative investigation to be undertaken. This approach was adopted and refined to broaden the scope of the investigation and thus complement the review of the legal measures and literature in the earlier chapters. One dimension of this was empirically focused and designed to capture the views of a pre-determined list of stakeholders. It was undertaken via the medium of a questionnaire and analysis of responses. For reasons elaborated in more detail below, the questionnaire did not achieve a response rate, which was response significant enough to provide meaningful data. The explanation of the approaches is explained in more detail in the following sections.

The research design for this thesis consists of both a doctrinal and a socio-legal theoretical framework which adopts a qualitative methodology. Qualitative research is targeted towards obtaining an appreciation of the richness of data as opposed to its numerical data. The term ‘rich data’ describes the notion that qualitative data and data collected should reveal the complexities and the richness of what is being studied.887 In this respect qualitative data is most often collected using observational techniques, interviews and documentary

What is then done with the collected data is then a matter to determine through a general social science approach. Here interpretivism, detailed more fully below, is the principal social science research approach adopted. An interpretivist approach applies to the plan to seek to gain better and deeper insights into the data, here the official documentation from the meetings of the Parties. It would also seek to appreciate more clearly the views of participants in the research, in case of the Maltese expert’s, or other actors with influence, so as to develop an appreciation of their reality or perspective. An interpretivist approach was felt to be the most apt due to the nature of the study, with the aim of developing a deeper understanding of the lack of HSMPA designation in the Mediterranean despite the enabling SPA/BD Protocol.

4.2.1 Doctrinal or Black-Letter

A beginning point of any legal research has to be the law itself. Any attempt to understand a consequence created by law must contemplate what the law ‘is’. The first research tool adopted is a doctrinal or ‘black-letter’ analysis. This methodology concerns the understanding of legal ‘doctrines’ by analysing legal rules and Chynoweth notes that it is “characterised by the study of legal texts

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888 Webley, L. Qualitative Approaches to Empirical Legal Research, in Cane, P and Kritzer, HM (Eds.). The Oxford Handbook of Empirical Legal Research (UK: OUP, 2010), 928.
and, for this reason, it is often described colloquially as ‘black-letter law.’

Those legal rules are found in specific legal instruments such as Treaties, legislative acts and case law amongst others. On its own though, it is rare that such instruments can provide a complete understanding of the law for a researcher looking to its effects. If the research solely relied on a black letter law analysis, it would concentrate on narrow statements of the law, and not extra-doctrinal considerations, such as policy or context. Both of those are important in being able to appreciate the situation in the Mediterranean this thesis is seeking to examine. Due to the need for that baseline legal understanding, some form of black-letter law analysis is likely found in all forms of legal research to some degree or another. Whilst a black letter law analysis is concerned with discovering and developing legal doctrines and utilised to answer research questions, a more in-depth investigation is required into extra-doctrinal considerations. At certain points the legal review takes the form of a comparative analysis, and the approach adopted throughout this part reflects the overlap between theoretical and doctrinal research. The latter includes analysis of existing law, whereas the theoretical research focuses on a single action and analyses the cumulative effect of a range of applicable laws. The black letter law analysis involves a purely desk-based evaluation of


available legal materials, the results of which were presented in Chapter 3. The doctrinal approach demonstrates the creation of opportunity to act within the Mediterranean region and to explore the laws related to MPA creation and management that have relevance to this thesis. Chynoweth, citing Kelsen, states that “legal rules are normative in character as they dictate how individuals ought to behave." Adopting a black letter law approach is helpful to this thesis as it will establish what parties to the various mechanisms ought to do in order to create HSMPAs. In the context of this thesis, the extent to which the existing legal frameworks are able to deliver HSMPAs, or the potential reasons for their failure cannot be determined only from the law. As a result a more contextual approach needed to be taken.

In order to further that approach some empirical work was felt to be necessary. The point of empirical research is to enable the researcher to gain knowledge through their observation, experience and data collection. In the context of this thesis the aim of adopting an empirical dimension was to examine how law works in practice and to understand what factors might be present in its not being fully utilised. This encompasses matters including how laws are made, how and to what extent law influences the actions and attitudes of Government and Non-Governmental Organisations, as well as establishing what people think the law is and their attitudes towards it. Here the primary focus was on HSMPA development potential; and the initial method selected method of empirical

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research was to seek information from the national bodies via a questionnaire. As explained, this was not able to proceed as a reliable and valid methodology given the very small response rate. In the alternative as content analysis was undertaken drawing from the meetings of the RAC/SPA to, gather and interpret the data which was gleaned from those documents. In addition, views from interested parties in Malta were also sought in the shape of semi-structured interviews. The process for each will be set out below is more detail.

4.2.2 Qualitative and Quantitative Research

Webley has stated that qualitative research methods are often identified within the social sciences more generally than within the discipline of law. However, for the purposes of this thesis, it was believed the correct approach. Citing Kirk and Miller, Webley writes qualitative approaches are distinct from quantitative ones in that: “technically, a ‘qualitative observation’ identifies the presence or absence of something, in contrast to ‘quantitative observation,’ which involves measuring the degree to which some feature is present…” Continuing the explanation she states that qualitative research does not rely on being quantified through statistics, but instead “attempts to categorise social phenomena and their meanings.”

897 Webley, L. Qualitative Approaches to Empirical Legal Research in Cane, P and Kritzer, HM (Eds.), The Oxford Handbook of Empirical Legal Research. (UK: OUP, 2010), 927.
898 Ibid.
899 Ibid. p 929.
A further difference between the two approaches is in the objective subjective distinction. Quantitative data is primarily statistical and thus tends to be viewed as more objective, whereas there is the potential for qualitative data to become more subjective in character. Punch, cited in Webley notes that, “quantitative research methods are objective and are used to provide an answer to a specific hypothesis.” In the context of this thesis, although not a perfect example, a quantitative methodology could be applied to determine how many Mediterranean MPAs are in countries’ coastal waters. It is a straight-forward examination which does not have a subjective dimension. This research has as its central question ‘why’ something has not occurred. Adopting a more qualitative approach creates some space for there to be detail collected around that and a degree of subjectivity.

The qualitative approach here seeks to gain an understanding of how the issues examined are voiced and acted upon, or not, by States parties. This was undertaken by a documentary review. A qualitative research approach was deemed a better fit for two principal reasons: first, because the subject-matter tends towards the subjective; and, second, because relevant statistical data is readily available from other sources and as a result a quantitative analysis would not significantly contribute to a greater understanding of the issues at hand. On that basis, the justifications and reasons why States have not yet

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adopted HSMPAs, despite the legal ability to do so, will be explored through a narrative, as opposed to numerical approach.

A further method, in using semi-structured interviews with open-ended questions was adopted for a number of Maltese experts to enable the researcher to gain the fullest appreciation of the situation in Malta, and is explained in section 4.10 below.

An advantage of such an approach is that responses may be more meaningful and less constrained. In addition, it creates space for the researcher to ask questions about the participants’ responses to add more to the data.

As all methods of research there are limitations to qualitative approach using a qualitative method. Qualitative research as be referred to as messy, due to the lack of rigidity that comes with using quantitative methods. However due to the flexibility of this method, it allows the researcher to embrace the messiness and gather potentially useful data. Webley in this relation states that qualitative research “…usually yields extensive data, much of it descriptive in its initial stages, from which the researcher often seeks to derive an understanding of key patterns or themes.” She continues by the observation that with qualitative research “it is not unusual to discover that one’s findings are actually relatively

901 Braun, V., and Clarke, V. Successfully Getting Started in Qualitative Research. Fundamentals of Qualitative Research (UK: ResearchGate, 2013).
modest in scope, if insightful."\textsuperscript{904} Others, such as Mellor agree that while qualitative data can be messy, it does produce richer and more diverse data for a better understanding of a particular issue.\textsuperscript{905} Qualitative data can also be difficult to replicate, this is because a lot of qualitative research carried out is unstructured and it would be extremely difficult to conduct a true replication, especially given the potential for a subjective analysis by the researcher.\textsuperscript{906}

4.2.3 Interpretivism

Undertaking an interpretivist methodological approach involves the researcher interpreting the study data. The researcher interprets and integrates human dimensions into their study.\textsuperscript{907}

An advantage of utilising this approach is that the diverse views obtained provide insight into a phenomenon that interpretivist researchers can use to develop a deeper understanding of them in their social context. It is suited to a qualitative analytical approach to the data. Referencing Myers, Dudovskiy offers the view that “interpretive researchers assume that access to reality… is only through social constructions such as language, consciousness, shared meanings, and instruments.”\textsuperscript{908} One limitation identified using interpretivism relates to developing

\textsuperscript{904} Ibid.  
\textsuperscript{908} Ibid.
a deeper insight and understanding of a particular phenomenon. This can become difficult, rather than generalising the results to other people and other contexts, leaving a gap in verification, validity and usefulness of the research outcome with using scientific procedures. However, issues that are related to validity and reflexivity will be addressed below in this chapter.

4.2.4 Socio-Legal Theory

Doctrinal research is clearly a useful methodological approach, it is unable to provide the sole analytical framework do all of the work necessary to address the research question. As a result, a socio-legal approach, has been adopted: one which attempts to set the law in its context. This appreciates that there are factors which shape the law and the way it operates. David Schiff, writing in the Modern Law Review notes that a socio-legal approach can be described as “an analysis of law which is directly linked to the analysis of a social situation to which the law applies.”\textsuperscript{909} The Socio-Legal Studies Association (SLSA) broadly defines socio-legal studies as research involving “… the social effects of law, legal processes institutions and services and with the influence of social, political and economic factors on the law and legal institutions.”\textsuperscript{910} The SLSA also notes that socio-legal

research is broad in scope "covering a range of theoretical perspectives and a wide variety of empirical research and methodologies."^{911}

So, there is a recognition that a broader socio-legal approach works as the basis for the theoretical framework. For instance, this research aims to determine the relationship between the law, the issue of HSMPAs in the Mediterranean Sea and the socio-legal factors that shape the realities of the current situation and its legal culture. A ‘legal culture’ may include individual attitudes to law, expectations of how others may behave in relation to a legal provisions and the way that political institutions and legal personnel interact. Once more, looking beyond the functional legal provisions for HSMPAs and seeking to discover the motivations and obstacles have preventing their development to date is facilitated by the approach undertaken.

A socio-legal approach may be framed as wide and all encompassing, but it offers a helpful basis to underpin the study, by permitting the researcher to appreciate the functional reality of the law: how the law relating ot the provisioning of HSMPAs is written and what it enables is one dimension, how it works or is used in reality might become something entirely different.

The review of the relevant legal instruments also informed the themes adopted for coding of the data gained from the other sources as explained later in this chapter. This research methodology was then augmented by further thematic

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^{911} Ibid. section 1.2.2.
analyses based on those codes. Finally, a focus on the on approaches taken in Malta, in law and policy offers an insight into one small nation’s experience. A number of civil servants and academics were interviewed in respect of their thought as to potential obstacles, solutions and the reasoning behind them. The approach is described more fully in section 4.10 below. In the Maltese context as well as analysing the applicable provisions, the laws’ objectives were tested against their practical application as a way to gain an understanding of the factors that may assist or hinder the process of HSMPA agreement. This was done by taking into consideration the progress made in the implementation of the various legal provisions related to MPAs. In addition, a content analysis of key, official documents was completed. The results of the data collection and their analysis are presented and discussed at length in Chapter 5.

Following both the thesis-framing literature review and doctrinal exploration of the law in the preceding chapters, the basic methodological framework of this study, then took a number of steps, as shown in Figure 27 below. The literature and legal context were central in the development of the further analysis, and informed the author as to the general direction of the inquiry. Each of the subsequent stages is outlined below.

The remainder of this chapter will explain the following:

a) The coding of the thematic literature presented in Chapter 2 which is also then reflected in Chapter 5; and

b) The questionnaire and semi-structured interviews.
4.3 Thematic Analysis

Given the reservations elaborated above, alternative sources of information had to be identified to be able to determine States’ positions. Noting that the author did attend on several occasions to the Meetings of the Parties of the Specially Protected Areas and Biological Diversity Protocol and therefore aware of the discussions held in such meetings and also the fact that this is the major regional Treaty, under the Barcelona Convention, which deals with MPAs in the Mediterranean Sea, it was thought that the documents emanating from their meetings of the Parties might present information on the States’ approach for HSMPAs. Additionally, such documents would also allow to examine how the position of States progressed over time. These documents included aspects in which Parties would commit to attain certain targets and noting that a number of years have elapsed this research can identify whether or not these commitments materialised. This part of this research was in fact considered to be leading to the factual position of Mediterranean States while noting that any replies to questionnaires may be based on providing the right diplomatic reply.
Documents emanating from Meetings of the Parties under other Treaties are presented. Mainly these provide information about EBSAs.

Apart from documents pertaining to Meetings of the Parties documents additional documents were published by the National Audit Office on this topic. In fact, the Audit Office embarked on a project with a number of other European States to analyse the situation of MPAs. Knowledge of the publication of these documents was acquired since the author was actively involved in providing information to the Audit Office as part of his on-the-job duties.

Following the dissemination of the questionnaire as part of this research, it was acquired that RAC/SPA disseminated a questionnaire to all the Parties of the SPA/BD Protocol and the results were published online. Hence, this in a way directly replacing the questionnaire sent as part of this research.

The three main alternative information sources presented above are analysed in Chapter 5. This combination of sources was used to try to provide a picture of the actual situation and how it evolved.

4.4 Coding

Coding is a systematic process of analysis of the primary materials sets the foundation for what comes later. Saldana describes a code in qualitatively based research as being “a word or short phrase that symbolically assigns a
summative, salient, essence-capturing, and/or evocative attribute for a portion of language-based or visual data.”912 It has otherwise been defined as the application of labels or names against different pieces of data with the aim of picking out themes and identifying patterns which can then be analysed. The data involved may be drawn from a number of sources, including, but not limited to interview transcripts and documentary sources and literature.913 In the context of the thesis the relevant data was collected through the use of a comprehensive literature review, the law in respect of both MPAs and HSMPAs, to frame the investigation; a questionnaire; semi-structured interviews and an analysis of RAC/SPA meeting documents. It is difficult to present and analyse raw data in its initial format and so it will require organisation and sorting by the researcher. It then needs to be reduced in volume to make it manageable, readable and easy to understand. Following collection, it was then able to be coded into themes relevant to the question posed by the thesis.

Undertaking a coding process assists in reducing large amounts of empirical material, produces data readily accessible for analysis, and is able to assist the researcher in organising the quality if the analysis and finding so that final conclusions can be drawn and verified.914 One specific benefit to coding is that it assists the researcher in developing a comprehensive and a detailed insight into the data that has been collected. After having collected the data, coding enables the researcher to judge its meaning and application, for example in this thesis the recognition of differences in the purposes of certain MPAs and their

913 Ibid.
governance. It is also a helpful means of making sure that the researcher gains as much from the data as possible, in case that something was missed on an initial sift or interview transcription to revisit all aspects of the data that may not have been noticed during the initial transcription. In addition, arranging the material into codes provides easy access to important and necessary aspects of the data, assisting more in the analysis of it.915 During the coding process the researcher can make judgements about each individual element in the data in order to ascertain if it is relevant or not. This process, according to Linneburg and Korsguard “reduces the amount of data…to take into the final analysis and can make the analytical process easier.”916 The authors also point to the means by which coding can overcome issues in respect of the quality criteria applied to qualitative research.917 Coding provides way in which the researcher can provide a link to the reader/consumer through the data to the consumer, so that there is a link between the evidence underpinning the basic argument and the ultimate conclusion. That process should then be transparent. By ascribing certain codes to the information acquired from literature.

In addition, others have noted there is a risk of over-coding.918 What has been described as a ‘coding trap’, can occur when the researcher begins to over code their initial data so that there are a number of codes (or sub-codes) applied which might make the process of addressing the research question very

915 Ibid. p. 261
916 Ibid. p. 262.
917 Ibid. p. 263.
difficult. Roller has observed that researchers can become over eager about coding everything, creating many categories.\textsuperscript{919} This sort of coding can be detrimental to a project as the construction of the meanings can become challenging to grasp. To avoid the trap, and to overcome the view expressed by Richards and Morse \textquotedblleft if it moves code it,\textquotedblright\textsuperscript{920} it is essential that all coding must have a purpose.\textsuperscript{921} That purpose is then explained by Boyatzis as \textquoteleft a \textquoteleft good code\textquoteright\ is one that captures the qualitative richness of the phenomenon.\textsuperscript{922} The codes adopted for this thesis and as outlined below are limited, specific and are designed to capture the important dimensions to understanding the position on HSMPA establishment. Although it may be that there is scope to expand them, there is the possibility that by doing so they may become difficult to interpret within the scope of the thesis.

Overall, then coding becomes the important and transparent means by which the data is seen to inform the findings. There is a validity in this approach because it makes it possible to construct an answer to the researcher’s questions, allowing for that fact that these may change as more knowledge is gained. After having explained the purpose of coding and how it relates to the approach taken in this thesis establishing the use of coding, it is necessary to

\textsuperscript{919} Ibid.
differentiate between the different methods of coding, and those which are applied to the analysis of the collated material.

4.5 **Inductive and deductive coding**

There are two different ways to code data, inductive and deductive. An inductive approach has a strong tradition in qualitative research of developing codes directly from the data. An inductive approach is more relevant when carrying out an exploratory study, or when there are no theoretical concepts immediately available to help the researcher determine the phenomenon being studied. In some situations, a researcher will adopt a more narrow and deductive approach to coding. When using deductive coding a pre-defined list of codes is established in a framework before the data is coded. The potential fit of both inductive and deductive coding approaches in respect of this thesis are explained below.

4.6 **Inductive Coding**

First, research which adopts inductive coding takes a so-called ‘bottom-up’ approach, which develops codes from the data itself. So, the researcher will look to the detail of the data and then use phrases or terminology used by the participants themselves rather than imposing the researcher’s own. An inductive approach is most relevant when undertaking an exploratory study or, when
there are no existing theoretical concepts are available to assist the research. An advantage of inductive coding is that the codes stay closely related to the data, mirroring what is there, rather than the ideas and understandings of the researcher. However, it can be difficult to find a balance between having a workable number of codes and capturing the complexity and diversity of the data is difficult. Within the scope of this thesis a significant literature exists in respect of MPAs more generally and HSMPAs more specifically, which suggests it is not the best way to approach the data so inductive coding has not been adopted.

4.7 Deductive Coding

While inductive coding has the advantage of being shaped and directed by the data, there is a risk of the coding process becoming too complex and so not able to be focused. Deductive coding involves the researcher developing a pre-determined list of themes in a framework before starting to code the data. A narrow and more defined approach to coding helps focus on specific issues that are known to be important in the existing literature. For example, key issues were identified, such as drivers for establishing MPAs, their management and enforcement for example. A full list of the themes and sub-themes which now provides the research frame is represented at Table 2. Linneburg and Korsguard cite earlier work by Rowley and Eisenhardt, which notes that the

deductive approach is helpful if the aim of the study is to generalise analytically across cases. The basis of the coding in the thesis was to draw ideas and discoveries from the existing literature, the law and later the official RAC/SPA documentation.

4.8 Content Analysis

Content analysis as a research method is a means by which a systematic and objective means of describing and quantifying phenomena is undertaken. In the context of this thesis it is the method that was applied to the analysis of documentary sources in the form of the RAC/SPA reports.

The findings from a directed content analysis offer supporting and non-supporting evidence for a theory. The evidence can be presented by showing codes with examples or offer descriptive evidence. The main strength of applying a directed approach to content analysis is that the existing theory can be supported and extended. In addition, as research in the area grows, a directed approach makes explicit reality that researchers are unlikely to be working from a naïve perspective.

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<table>
<thead>
<tr>
<th>CODE</th>
<th>SUB-CODE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Historical aspects</td>
<td>Policy development</td>
</tr>
<tr>
<td>Marine zones</td>
<td>Political issues</td>
</tr>
<tr>
<td></td>
<td>Biodiversity issues</td>
</tr>
<tr>
<td>MPAs definitions</td>
<td>On definitions</td>
</tr>
<tr>
<td></td>
<td>MPA network definition</td>
</tr>
<tr>
<td>Purposes of MPAs</td>
<td>Heritage protection</td>
</tr>
<tr>
<td></td>
<td>Biodiversity</td>
</tr>
<tr>
<td></td>
<td>Management of activities at sea</td>
</tr>
<tr>
<td></td>
<td>Unjustified use (mis-use)</td>
</tr>
<tr>
<td></td>
<td>De facto MPAs</td>
</tr>
<tr>
<td>Drivers to designate MPAs</td>
<td>Legal factors</td>
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<tr>
<td></td>
<td>Application of precautionary principle</td>
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<tr>
<td></td>
<td>Biodiversity</td>
</tr>
<tr>
<td></td>
<td>Fisheries management</td>
</tr>
<tr>
<td></td>
<td>Socio-political</td>
</tr>
<tr>
<td>MPAs identification &amp;</td>
<td>Criteria aspects</td>
</tr>
<tr>
<td>designation</td>
<td>Socio political influence</td>
</tr>
<tr>
<td></td>
<td>Scientific aspects</td>
</tr>
<tr>
<td>Governance</td>
<td>Policy fragmentation and different institutions</td>
</tr>
<tr>
<td></td>
<td>Socio-economic aspects</td>
</tr>
<tr>
<td></td>
<td>Mediterranean political issues</td>
</tr>
<tr>
<td></td>
<td>MPAs governance</td>
</tr>
<tr>
<td></td>
<td>MPAs political issues</td>
</tr>
<tr>
<td></td>
<td>MPAs proposal vis international law</td>
</tr>
<tr>
<td>Managing activities at sea</td>
<td>Negative impacts of activities</td>
</tr>
<tr>
<td></td>
<td>Management of marine activities</td>
</tr>
<tr>
<td></td>
<td>Socio economic issues</td>
</tr>
<tr>
<td></td>
<td>Lack of scientific knowledge</td>
</tr>
<tr>
<td></td>
<td>MPAs management factors</td>
</tr>
<tr>
<td>Enforcement</td>
<td>Limiting factors</td>
</tr>
<tr>
<td></td>
<td>In different marine zones</td>
</tr>
<tr>
<td>MPAs performance/ efficacy</td>
<td>Biodiversity</td>
</tr>
<tr>
<td></td>
<td>Design</td>
</tr>
<tr>
<td></td>
<td>Unsuccessful MPAs</td>
</tr>
</tbody>
</table>

Table 2 - Table of codes
4.9 Questionnaire

In order to complement a strict doctrinal method, which mainly incorporates non-quantifiable results and is primarily based on written sources, a questionnaire is developed, or an interview planned, with identified stakeholders. This approach sought insight into possible reasons for the designation of MPAs, or indeed decisions not to do so, and offered participants an opportunity to provide their opinions or official positions on the efficacy of existing legal instruments, as well as possible ways forward, of significance when determining potential recommendations, explored towards the end of this study.

Following the confirmation of ethical approval from the University of Plymouth’s research Ethics Committee, stakeholders were approached in order to gather information on the existing situation in the Mediterranean Sea as well as information that may be relevant to implementing actions to establish MPAs on the High Seas. Such an approach to data collection, that is, directly from institutional stakeholders, was foreseen to be cumbersome. A number of mitigation measures were taken to enhance the response rate. These included making the questionnaire relatively short, directed and with statements premised on a Likert basis. The Likert Scale provides a method whereby it allows the respondent to rate a reply based on a scale. This facilitates analysis

particularly when rating factors against each other that are of importance to the respondent. A typical statement using the Likert Scale is accompanied with a scale of say, one to five, with the numbers relating to the importance or lack of importance to the interviewee. There should be an odd number of response options so that a neutral position may be opted for. There was also scope for participants to add their own views via some free text opportunity. The questionnaire was distributed more than once and follow-up communications were undertaken.

4.9.1 Selection of Stakeholders

Since this study addresses, *inter alia*, governance issues, stakeholders’ participation was of primary importance given their expertise and influence. A particular challenge was to gather information from as many as possible, another was that the majority of them were foreign nationals based overseas. Table 3 presents the set categories of stakeholders. A number of factors were considered in planning the stakeholder research to cater for representativeness, reliability and validity, as well as the extent to which the participants can be contactable. It was ensured that the stakeholders approached came from different spectra, in terms of their interest and governance of MPAs. The

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questions posed were elaborated in such a manner to allow repeatability and to be focused on the topic. The questions were direct so that the respondent could provide a reply that is direct and relevant for the question posed. In order to ensure that the questionnaire is relevant, the questions were elaborated after an extensive empirical literature and legal review were carried out.

<table>
<thead>
<tr>
<th>Geographical Range</th>
<th>Stakeholders’ Categories</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Institutional</td>
</tr>
<tr>
<td>National</td>
<td>✓</td>
</tr>
<tr>
<td>Regional</td>
<td>✓</td>
</tr>
<tr>
<td>International</td>
<td>✓</td>
</tr>
</tbody>
</table>

Table 3 – Stakeholders’ categories

In total thirty-three stakeholders were approached. These were made up of seventeen States; five national experts related to MPAs; one national eNGO; five regional institutions and seven non-institutional regional stakeholders.

4.9.2 National Institutions (Table 4)

National institutions have the most important operational roles. They lead policies and create new legal obligations and also are at the heart of developing soft law mechanisms. Additionally, they are the representative of States, which collectively create and vote to enact new international law. With their differing positions and perspectives, States may influence the extent to which an agreed rule becomes binding. In fact, there may be variations on the extent to which international and regional laws are binding on different States. This variation
may be a factor of specific reservations made by individual States and the ratification status of the specific legal instrument.

The States that were approached included those bordering the Mediterranean Sea whose marine waters are contiguous to the High Seas. A balance was sought between those along the southern coast and those along the northern. The main reasons for this being that, most of the latter form part of the EU and hence might tend to have common approaches for some aspects, as well as a more uniform development. The ones along the southern coast mainly consist of Arab countries that do not officially share a common environmental approach. With regard to States on the eastern border of the Mediterranean, once again a balance was sought, in this case to ensure optimal political representation. In addition, States that were thought able to make a valid contribution included non-coastal and distant States. The reasoning behind their inclusion is that all States have rights and responsibilities in matters related to the High Seas. Furthermore, distant selected States have citizens or vessels operating on the Mediterranean High Sea. Some of these States are also known to operate flags of convenience. Hence, it was concluded that this study would benefit from the inclusion of their perspective with regard to the designation of HSMPAs. In order to make this exercise manageable, the number of these States was kept to a minimum.

The first point of contact for each State was always either the office of the prime minister or, as deemed more appropriate in specific States, the office of the president. In order to assist in the distribution of the questionnaire, the author
sought to utilise a network of acquaintances established through attendance at various regional meetings, with the intention that this would enable queries to be directed to appropriate, specific authorities within that State. These could include, for example, ministries for the environment and fisheries. Furthermore, it was hoped that this would ensure that if an authorisation was granted, other national authorities may be encouraged to provide a response.929

Non-governmental stakeholders have an increasingly important role to play in the formulation of new laws and compliance with them. In fact, they may often provide the impetus and/or influence a State’s position within international fora. However, it is very likely that the standpoint of these groups is biased in favour of their objectives. For example, a fishers’ cooperative would not necessarily be in favour of the restrictions that would be called for by an eNGO. Since social research involving all these entities would require a disproportionate amount of time in the context of this research, it was decided to keep these to a minimum and thus only Maltese ones were approached directly. Stakeholder groups from other States were not approached because, apart from the limitation of resources to conduct this research, it was assumed that their views would have been considered by their respective States. Furthermore, it is ultimately their State’s position which would influence the way forward in the region.

Originally, the first mail shot was sent in February 2017 and targeted various States, institutional organisations, and eNGOs. There was a low response rate, which prompted the shortening and re-drafting of the questionnaire. The two versions of the questionnaire are available in Appendix – Consent Form for Recording / Interviewing. A second attempt was made between December 2017 and January 2018, this time using different recipients for various States and targeting more stakeholders. As before, the response rate remained low and could not provide representative data. Consequently, another attempt was made in October 2018, targeting most of the Mediterranean States having coastal waters adjacent to the High Sea. In November 2018, fewer countries were targeted, mainly via their respective Ministries of Foreign Affairs.

Whilst it was anticipated that a significant response rate would be difficult to achieve, it was not expected to be so low. Among the main factors that possibly led to the low response rate were that Mediterranean HSMPAs is an active topic that has been discussed by Mediterranean States, and still is, at various regional meetings. A State’s perspective and position may therefore be somewhat still in formation stage and therefore not yet conclusive or else even if a State would have its own position this would not to be divulged unless as a formal State’s position to be voiced at the right time rather than in response to a researcher’s questionnaire. The Mediterranean situation, as was also confirmed in the literature and legal reviews, is a rather complex and sensitive one with

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930 RACSPA has published a call for tenders in September 2018 with one deliverable being to produce replies to a questionnaire addressed to Parties’ SFPs about the implementation of the roadmap which includes HSMPAs.
HSMPAs that may be perceived as influencing other Parties’ rights. This setback created a challenge to the chosen methodology necessitating a different approach.

<table>
<thead>
<tr>
<th>National Target</th>
<th>Justification</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Malta</td>
<td>These are EU Mediterranean coastal States and therefore their position was considered to be important. Aspects related to cooperation between these States and use of resources on the High Seas can be reflected in their response. Furthermore, noting that there could be the potential that the High Seas can be claimed as an EEZ in the future.</td>
<td>This would allow gathering a clearer picture of the situation of the Mediterranean and also establish whether or not there are common trends in this topic among EU member States. The recommendations could be influenced by their input noting that in practice coastal States have an important role to establish HSMPAs.</td>
</tr>
<tr>
<td>Spain</td>
<td></td>
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<tr>
<td>France</td>
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<tr>
<td>Italy</td>
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<tr>
<td>Croatia</td>
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<tr>
<td>Greece</td>
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<tr>
<td>Cyprus</td>
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<tr>
<td>Albania</td>
<td>These are non-EU States whose waters are contiguous to High Sea areas. Their participation could provide information on issues and opportunities to sustain the designation of MPAs on the High Seas.</td>
<td>Input of perspectives from non-Mediterranean States is essential as it could influence the nature of provisions to be adopted.</td>
</tr>
<tr>
<td>Turkey</td>
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<tr>
<td>Israel</td>
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<tr>
<td>Libya</td>
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<tr>
<td>Tunisia</td>
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<tr>
<td>Algeria</td>
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<tr>
<td>Morocco</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Japan</td>
<td>These are countries whose flagged vessels fish in the Mediterranean Sea. Hence, acquiring knowledge on their views is important.</td>
<td></td>
</tr>
<tr>
<td>Austria</td>
<td>On the High Seas every State has its rights and responsibilities. The views of European and non-European States were considered essential since these would also have a role with regard to HSMPAs.</td>
<td>The inclusion of such States could bring a different perspective to the subject as regards the position of States without a direct involvement of HSMPA governance. This may reflect those which may not have a direct interest in such MPAs. Consideration of such comments may lead to the identification of the line of discourses in potential future international meetings about HSMPAs.</td>
</tr>
<tr>
<td>China</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 4 - Selected States
4.9.3 Regional Stakeholders

The protection of the marine environment, beyond the Territorial Sea, through the designation of MPAs is profoundly influenced by regional stakeholders, whether institutional or not. Regional institutional stakeholders, see Error! Reference source not found., are all too often the organisers of relevant conferences and seek to secure input from different States, often to establish new guidelines or rules. They are normally concentrated on a specific topic. They also operate in close cooperation, if not even under the auspices, of larger international organisations such as, for example, the UN.

<table>
<thead>
<tr>
<th>Regional Institutional Stakeholders</th>
<th>Acronym</th>
<th>Justification</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 RAC/SPA</td>
<td>This is the secretariat for the Barcelona Convention’s SPA/BD Protocol. This protocol is probably the most useful legal instrument currently in force that calls and sustains the designation of HSMPAs.</td>
<td></td>
</tr>
<tr>
<td>23 ACCOBAMS</td>
<td>This institution focuses on cetaceans and hence can provide input on the need for HSMPAs and possible regulations that would need to be adopted.</td>
<td></td>
</tr>
<tr>
<td>23 EU DG Environment</td>
<td>The role of these institutions could provide policy direction on the need to proceed with the elaboration of a process to identify MPAs on the High Seas from different perspectives.</td>
<td></td>
</tr>
</tbody>
</table>

Table 5 - Regional Institutional Stakeholders

The regional non-institutional stakeholders, see Table 6, are of high relevance. Again, these tend to have a future perspective based generally on scientific grounds. They also regularly conduct research on various topics focusing on
marine issues, including MPAs. Resource-users stakeholder groups, including fishers and others such as oil-drilling enterprises and shipping companies were not approached. The main reason for this was due to the fact that the study is about the designation of HSMPAs and as such does not delve to depth with regards to socio-economic aspects. The focus of this research is on legal instruments. Only environmental NGOs were approached noting their active role in various national and international for a with regards to proposals on way forward including aspects related to HSMPAs.

<table>
<thead>
<tr>
<th>Target</th>
<th>Justification</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>IUCN Med</td>
<td>IUCN provided studies which show the legal scenario and importance of natural features on the High Sea.</td>
<td>These organisations’ experience benefits the study as it could indicate potential conflicts and issues that need to be overcome, potentially also providing information of States’ aptitude.</td>
</tr>
<tr>
<td>Medpan Association</td>
<td>A number of projects have been conducted within MPAs. Regular meetings on MPAs are held at regional level.</td>
<td></td>
</tr>
<tr>
<td>Oceana</td>
<td>This organisation has conducted various marine researches and its work also included the identification of important High Sea areas.</td>
<td></td>
</tr>
</tbody>
</table>

Table 6 – Regional non-institutional stakeholders
4.9.4 International Stakeholders

The Mediterranean situation influences, and is influenced by, decisions taken at the international level. International organisations may be responsible for the facilitating of both international and regional rules. Such pressure groups may be responsible for demanding the designation of MPAs, and are thereby a source of continuous lobbying in international fora. Approaching such institutions is important to enable the gathering of further information to complete the picture of the existing situation and possible future scenarios in the Mediterranean. With regard to other organisations, these included a number of the main relevant eNGOs, which commit funds to enhance knowledge of marine ecosystems and also participate in international meetings on various topic, including issues related to MPAs.

<table>
<thead>
<tr>
<th>International Institutional Stakeholders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Target</td>
</tr>
<tr>
<td>-----------------</td>
</tr>
<tr>
<td>International Maritime Organisation</td>
</tr>
<tr>
<td>Convention on Biological Diversity</td>
</tr>
</tbody>
</table>

*Table 7 – International institutional stakeholders*
Birdlife International

These organisations are on the vanguard with regards to studies on natural features. They have presented various research results that indicate the need to ensure effective protection of the sea.

It was believed that their input will sustain the need to ensure that sound legal instruments exist, allowing effective governance of High Seas MPAs.

<table>
<thead>
<tr>
<th>Target</th>
<th>Justification</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>29</td>
<td>Birdlife International</td>
<td>These organisations are on the vanguard with regards to studies on natural features. They have presented various research results that indicate the need to ensure effective protection of the sea.</td>
</tr>
<tr>
<td>30</td>
<td>Greenpeace</td>
<td>It was believed that their input will sustain the need to ensure that sound legal instruments exist, allowing effective governance of High Seas MPAs.</td>
</tr>
<tr>
<td>31</td>
<td>WWF</td>
<td></td>
</tr>
<tr>
<td>32</td>
<td>PEW</td>
<td></td>
</tr>
</tbody>
</table>

Table 8 - International non-institutional stakeholders

4.9.5 Maltese non-institutional stakeholders (Table 9)

MPAs are very much likely to affect the fisheries sector and to be of interest to environmental groups. Environment groups put pressure on the authorities to establish rules aimed at protecting the environment. Although their claims might not always be based on scientific grounds, they would still provide input to identify specific areas for enhanced protection. Fishers make consumptive use of marine resources. While, it is considered important that the fisheries are involved as they may also enhance the effectiveness of MPAs through compliance with the provisions of specific fishing regulations and because they may also benefit through claims of spill-over effect – whereby increased yields are obtained outside of MPAs as a result of the MPAs existence, they were not approached noting that this study focuses on legal and not on socio-economic aspects.
4.9.6 Response from questionnaires

A total of four replies, two from regional institutional and two from regional non-institutional stakeholders, were received from the first shot of the questionnaire while another three came from the second run. This response came from one regional non-institutional stakeholder and two from States. Noting the low response more information was needed to be able to identify the factors that led to the existing situation. Such information is also important as it would be reflected in the recommendations.

4.10 Semi-structured interviews

In addition, a number of individual experts were identified and consulted, including from the fields of law and marine resources. The main queries posed to these experts were on specific technicalities, although within the semi-
structured nature of the interviews, the opportunity was taken to also ask general questions on MPAs.

To reflect the Maltese dimensions a total of five Maltese experts were approached and recruited for interview. The identified experts were selected on the basis of their practical and academic involvement in the Maltese, and broader, Mediterranean marine environment.

Each interview was premised on a semi-structured basis with the use of a set of standard open-ended questions so as to permit discussion around various factors related to MPAs and such that their particular experience and expertise could be appreciated by the researcher. An approach which adopted a method of using identical, closed questions was not considered to be optimal as this would potentially constrain the chance for the researcher to benefit from the richness and diversity of the interviewees' expertise. Malta is a small island state with a population of less than half a million. The pool of expertise in respect of the matters being examined in this research is therefore relatively small. The five interviewees between them have responsibilities in respect of the natural environment, continental shelf and shipping matters. Their views are expressed in a personal capacity and do not necessarily reflect the views of the organisation they represent.

<table>
<thead>
<tr>
<th>Expert</th>
<th>Justification</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>19  Marine Environmental Law Expert</td>
<td>A lawyer with a maritime background was considered to provide relevant input particularly with regard to the applicability within the existing legal regime. The lawyer could also provide insight into the various legal issues across different uses of the sea as well as indicate potential solutions.</td>
<td>A lawyer was considered to provide input on State law, interpretation of various provisions, and to discuss general legal issues of MPAs on the High Sea.</td>
</tr>
<tr>
<td>20  Maritime law expert</td>
<td>An expert in maritime policy can could private historical and practical information on marine law development and its implementation and enforcement.</td>
<td>The input from this expert can feed into recommendations in view that it was expected that discussions would also include foresight on problem solving.</td>
</tr>
<tr>
<td>21  Continental shelf expert</td>
<td>Such an expert could provide relevant information concerning the complex situation in the Mediterranean Sea with regards to governance on the continental shelf.</td>
<td>The feedback from this expert would feed into analysis and recommendations of this study such that both the analysis and recommendations are set within the limits of the complex existing situation.</td>
</tr>
<tr>
<td>22  Academic expert</td>
<td>A legal expert focusing on maritime law could provide insight from different perspectives about different topics related to MPAs.</td>
<td>Views from this expert will feed into the analysis of the existing situation and also assist in the formulation of recommendations.</td>
</tr>
<tr>
<td>23  Environment law expert</td>
<td>Such an expert could allow to provide an overview of issues regarding legal aspects at protecting the environment.</td>
<td>An environment law expert was considered to provide input on State law, interpretation of various provisions, and to discuss general legal issues regarding regulating to enhance the protection of the environment.</td>
</tr>
</tbody>
</table>

Table 10 – Experts approach through a semi-structured interview
4.11 Conclusion

The information that was hoped to be gathered from the questionnaires did not materialise. However, the information from semi-structured interviews yielded valuable information. In order to overcome the lack of information particularly with regards to information concerning States, an alternative method was elaborated. However, the replies from questionnaires are also referred to in this thesis, particularly within section 5.4.1.1. This process which delved into the official documents prepared at regional meetings organised mainly by the secretariats of RAC/SPA and the Barcelona Convention, respectively, provided a reliable alternative source. The information acquired from such sources is analysed in the following chapter.

The information gathered from different sources owns variations in reliability and validity. The nature of information that was being sought is deemed to be highly influenced by political factors which in turn would be affected by private stakeholders’ aspiration, financial aspects and regional inter-State politics. The questionnaires sent directly to States may not have a significant validity to be able to produce an overall picture of the situation and future outlook. This noting that the response received was scanty. Also, the replies given to such questionnaires may be politically influenced. This was noted prior to setting the questionnaire. The same may apply to the information obtained from the questionnaire set by RACSPA. On the other hand information acquired from official documentation can be considered to be reliable and also valid in view that these are official records and that the positions adopted by States as
indicated in such documents would be politically binding the concerned States. As regards the empirical data, acquired from various sources, it can be argued that such that is both valid and reliable. This noting that this section includes various sources, re-iterating identical or similar arguments and that the source may not have any influence that would lead to a biased output. Overall, the sources of information used, be it for empirical data and for the gathering of actual information from States and stakeholders, are deemed to collectively provide a significant and realistic picture of the existing situation as well as on future outlook with regards to the declaration of HSMPAs.
5 Data Collection and Analysis

5.1 Introduction

As discussed in Chapter 4 setting out the methodological basis, apart from the literature and legal reviews and their analysis, the collection of data focussing on the Mediterranean Sea, from various stakeholders, was considered to be beneficial towards the completion of this research. This chapter will present the information that was acquired and offer an interpretation of the available data, allowing for the achievement of sub-objective four. It is noted that the Specially Protected Areas and Biological Diversity Protocol contains provisions to commit towards the establishment of HSMPAs. This was formally signed by the majority of States bordering the Mediterranean Sea. In addition to this, RAC/SPA embarked on a project (from now on referred to as ‘the project’), agreed to by the Parties, to identify Mediterranean potential HSMPAs with a view to later declare them. However, to date there are no HSMPAs. This analysis will seek to present the reasons for this existing situation.

In this chapter, the insights from the questionnaire and other relevant information that is available are analysed by reference to the coded themes to identify which factors have the most influence in practice on HSMPAs, their establishment and the relative lack of success in the Mediterranean. The main focus is on Malta as a case study. For purposes of this research, Malta provides a case study of the national context. It has generated a body of law regarding
MPAs and their governance and these were reviewed to establish and critically assess their validity and effectiveness in Chapter 3. For reasons of space, the national laws of other Mediterranean States were unable to be specifically considered. As noted in Chapter 4 there was an attempt, albeit unsuccessful, to include other coastal Mediterranean States by means of a questionnaire. In addition, since a significant number of States that border the Mediterranean Sea, including Malta, are members of the EU, the EU Nature Acquis was considered so far as it is applicable in Chapter 3. The sources from which information will be presented and analysed in this chapter include the follow:

- Official documents emanating from the Conference of the Parties (COPs) of the Barcelona Convention, meeting of the National Focal Points (NFPs) of the SPA/BD Protocol, reports of regional meetings organised by RAC/SPA;
- Questionnaire run as part of this research;
- Results of a questionnaire run by RAC/SPA;
- Reports published by the National Audit Office of Malta; and
- Semi-structure interview with Maltese experts.

Details of information from the above sources is provided in the following sections, linking them with the themes identified in Chapters 2 and 3 which in turn reflect the codes presented in Chapter 4.

In view of the fact that the questionnaire presented as part of this study did not yield a significant response to provide the data for an effective analysis, the
position of States parties to the SPA/BD Protocol and any contribution made towards HSMPAs was sought from documents pertaining to meeting of the Parties of the relevant Treaties. Such documents are not to be considered are part of the literature review but as a means to provide an alternative source to the planned questionnaires. Therefore, highly relevant information from official documents emanating from meetings such as Conference of the Parties is presented and analysed in this chapter.

A brief context of the SPA/BD Protocol, explained in detail in Chapter 3 above, is initially portrayed since this is considered to be the most important legal instrument to establish HSMPAs in the Mediterranean Sea. Malta ratified, without reservations, the SPA/BD Protocol which calls for the establishment of HSMPAs of Mediterranean importance. Furthermore, when MPAs on the High Sea were discussed during various NFPs meetings of this Protocol, neither Malta nor any Party objected to the need to create HSMPAs. Lack of objections might also imply that States were recognising, that as such they have no real commitment to protect the High Sea since any State has the same rights is this area. Yet, the SPA/BD Protocol refers to neighbouring Parties to the High Sea that can identify HSMPAs. The Protocol therefore distinguishes between Mediterranean coastal States and States in any other part of the world. The Protocol’s substance in this regard therefore seems to be interpreted that neighbouring States to the High Sea are to take necessary measures to create MPAs on the High Sea which is contiguous to the marine areas under their jurisdiction.
In various official meetings that took place at a regional level, the States collectively, and on certain occasions, individually, established their ambitions and raised their concerns with regards to the actual implementation of declaring HSMPAs. It is noticeable that over time there has been a shift of target dates and the milestones to be reached.

In view of the fact that while Ecological/Biological Sensitive Areas (EBSAs) are not MPAs, they can be considered to be precursors for the establishment of MPAs. Therefore, Mediterranean EBSAs on the high sea will also be analysed. This analysis will examine aspects of the correlation and conflicts between the borders of the proposed HSMPAs and EBSAs.

5.2 Thematic aspects

The project organised by RAC/SPA with the approval of the Parties was commissioned to identify HSMPAs network in the Mediterranean Sea. Part of this project involved the elaboration of criteria to identify MPAs that would compose the network. The sole use of the criteria contained in the SPA/BD Protocol was not employed. The criteria were elaborated in such a manner so as to allow connectivity among proposed MPAs, which as noted in chapter 2 is an important factor. In the following sections, each thematic factor is analysed

within the context of the Mediterranean Sea and referring to Malta as deemed appropriate.

5.2.1 Drivers to designate MPAs

In the Mediterranean Sea, the impetus to embark on a project regarding HSMPAs was a combination of various factors. These factors are elaborated further in this section.

Legal factors, mainly with reference to the SPA/BD Protocol provisions and to the Convention on Biological Diversity and related commitments to create MPAs, are considered to be the major legal driving forces. This is also corroborated by the result of an audit performed for various MPAs in Malta, Albania, France, Cyprus, Greece, Portugal and Slovenia.933 Such obligations may have been the motivation to place on the agenda of the COP 16 of the Barcelona Convention, an item related to work towards the creation of a network of MPAs which led to the adoption of “the regional programme of work elaborated by RAC/SPA and its partners.”934 A milestone was agreed such that by 2012, a HSMPA network would be in place. This was based on a roadmap, ________________________


as well as, the selection criteria to be applied. A proposed activity, with respect
to the identification of preliminary priority conservation areas agreed to in this
Decision, states that:

“The areas which are most ecologically critical for the Mediterranean
are identified, including High Seas areas, transboundary areas and
areas suitable for ecological corridors.” (Emphasis added)

Malta was one of the Parties that had also agreed to this approach and to also
include the high sea. However, this cannot be considered that there would have
been Maltese agreement on any potential HSMPAs identified as a result of the
project commissioned by RAC/SPA. In fact, to date these HSMPAs are not yet
in place. However, it can at least be said by reference to the measure that
Mediterranean States do have an outlook to eventually create HSMPAs. This
implies that legal factors may be a contributing factor so that Malta and other
States seek a way forward to agree to establish HSMPAs.

A further important driver is the protection of biodiversity. The literature review
identified a series of key factors pushing for the establishment of MPAs. The
commonly cited factor for establishing a MPA is related to conservation,
especially biodiversity. Since entering the political discourse, biodiversity has
become central to it and, as might be expected, the various stakeholders have
also placed it high on their list. Examples here would include the European
Union, numerous non-government organisations, and to a lesser extent some
fisheries managers. However, it is also clear that biodiversity is not a driving
force for relevant stakeholders equally. Those stakeholders with a lesser view of
its importance when set against their interests for example include, but are not
limited to, fisheries to a certain extent, marine mineral extraction lobby and
shipping. As a result, it becomes clear that while it dominates the discourse and public opinion, it is not an undisputed concept – accounting for some hesitancy in implementing MPAs. Biodiversity is one of the key elements referred to in both existing legal instruments and declarations by the Parties agreed to from time to time, when it comes to the need to set a HSMPA network. Notwithstanding this, and the results of the project, which identified HSMPAs for biodiversity conservation taking into consideration also a precautionary approach, these MPAs were not declared.\footnote{See also the Specially Protected Areas and Biological Diversity Protocol, Article 2(1) and Article 3(1)(a) \url{https://www.rac-spa.org/sites/default/files/protocole_aspdb/protocol_eng.pdf} (accessed February 14, 2021); Decision II.S.3- Implement the project for the creation and management of protected areas, developed through the GEF project PDF B, adapted to the funds made available, in collaboration with pertinent partners (FAO-GFCM, WWF-MedPO, etc.) included in UNEP-MAP-RAC/SPA. \textit{Progress Report on RAC/SPA’s Activities} (Palermo, Italy, 6-9 June 2007). UNEP-RAC/SPA, 2007. \url{http://www.rac-spa.org/sites/default/files/meetings/nfp8/wg.308_04_eng.pdf}, (accessed February 14, 2021).} Some possible reasons for this inaction could have its roots in political and economic factors and possibly also some uncertainties as regards the methodology employed to identify these potential HSMPAs. It would appear that between stakeholders a balance is needed between conservation efforts and economic activities within MPAs.\footnote{EUROSAI. \textit{Are adequate mechanisms in place for the designation and effective management of MPAs within the Mediterranean Sea?} Malta: National Audit Office, July 2019. \url{https://nao.gov.mt/en/recent-publications} (accessed July 30, 2019).} These factors are tackled further in the following sections.

As noted above, fisheries management has also been identified as something as a driver for HSMPA designation, albeit that on other occasions it has also been identified as one of the primary reasons to oppose and impede their creation. This controversial approach may be because fisheries management is
not just about protection of stocks but also about meeting the fishers’ lobbying, which may not be in favour of MPAs. Also, it is worth noting that distant flag States of fishing vessels may not be really concerned about the creation of MPAs, particularly if they are not bound by an agreement not to fish there. In a contested space such as the Mediterranean, parties to the SPA/BD protocol may be unwilling to give up their own claim to a fishery within a HSMPA to outside parties. Successful fisheries management can be encompassed in the ecosystem approach to management and in the sustainable use of marine resources. The ecosystem approach and sustainable use are two key components frequently cited in declarations agreed to by the Parties at various COPs. Yet, while HSMPAs may be looked at as a tool for fisheries management, aspects related to governance will emerge. This theme (governance) which was also referred to in chapter 2 will be further elaborated below in the context of the Mediterranean Sea.

Socio-political forces have also been identified as major players to progress with MPAs. As noted earlier, environmental lobbyists and general public’s opinion put pressure on their government to take action towards the protection of the environment. In Malta, designation of coastal MPAs did not face

938 See also section 1.6.4
opposition and as such has been welcomed by various groups such as eNGOs and various authorities such as the Malta Tourism Authority and Malta Transport Authority. Political factors feature in too, both at a national and at a regional level. For example, it is noted that Malta had signed relevant Treaties and also agreed to various declarations (elaborated further in this chapter) that demand HSMPAs. The success of having such a high number of Parties making commitments at such events may be indicative of the fact that this may be due to political pressure. This might be manifested in two main ways: that non-agreement would reflect badly on the state with its international partners; or that the non-agreeing state would be criticised within its own domestic situation. Demonstrating a commitment to environmental protection would be better at both levels: with peers and at home and with other States, especially those who are committed to the same aim.

The RAC/SPA driven project referred to at the beginning of this chapter, was funded by the European Commission’s DG Environment to identify areas to be declared as SPAMIs on the High Sea. The Steering Committee setup consisted of UNEP, European Commission, FAO, GFCM, IMO, REMPEC, ACCOBAMS, IUCN and WWF. It is noticeable that there was no State Party in this Committee. The fact that the European Union was funding this project can be interpreted as political pressure to drive States to create HSMPAs in areas where the European Union otherwise does not have jurisdiction. This is further made evident when considering that, in relation to the project,
“The European Union confirmed its strong interest in the creation of SPAMIs in the open seas but warned that MedOpenSeas project funds would be re-allocated to other RAC/SPA activities if Party engagements were not sufficient.” (Emphasis added).

This makes it evident that the European Union is putting political and financial pressure to proceed with a programme of HSMPAs but at the same time reckoned that there might be a lack of drive by Parties.

Collectively, the different driving forces to create HSMPAs are adding pressure on states to propose them. However, to date states appear still to continue to resist and no HSMPAs have materialised. In order to make progress the socio-economic and political factors identified will need to be systematically addressed with input from a range of stakeholders with more certain commitments. Aside from these factors, more easily identifiable reasons for the establishment of MPAs (and HSMPAs) are considered as a theme on the basis of what was identified as being relevant in Chapter 2.

5.2.2 Purposes of HSMPAs

The potential use of MPAs, in general, as a means to protect certain features, as explored in the two chapters dealing with the legal review above, is also

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940 In this section the terms MPAs and HSMPAs are used interchangeably because the purpose of coastal and HSMPAs can serve the same purposes.
included among others in the SPA/BD Protocol. The purposes - which then form the basis of this theme of analysis include, heritage protection, biodiversity conservation and management of activities at sea. An additional category of MPAs, referred to as *de facto* MPAs, is also dealt with in this section. The designation of MPAs, as described in Chapter 1, may not always be adequately justified or appropriately applied, that is either MPAs are designated in situations where goals could have been reached without the need to set MPAs or had their borders identified on lack of scientific data or improper use of the precautionary principle. Such MPAs are is also considered in this section.

Various Mediterranean States, including Malta, have already designated a number of MPAs for biodiversity conservation in areas under their jurisdiction. As regards HSMPAs, while these have been identified to conserve biodiversity, still no agreement has been reached. It seems that this is not due to how States look at MPAs but more related either to their governance or to their border identification criteria, as discussed in the previous section.

943 See also section 3.6, page 217.
Mediterranean States do not concur that MPAs benefit biodiversity, they would have designated less or no MPAs in their marine zones. Hence, there is a need to further explore thematic topics related to governance to analyse hurdles that are potentially keeping back the States to agree on HSMPAs.

Another identified use is the protection of heritage. In Malta and without doubt also in other Mediterranean States, MPAs with such objectives are already in place.944 This situation cannot be extrapolated into the high sea because the proposed HSMPAs (discussed earlier in this chapter) do not deal with any cultural heritage subjects. In Malta, the creation of MPAs for heritage protection does not face any opposition and as a matter of fact cultural heritage at sea is protected through specific laws.945 While heritage, as such is not a primary driver, an underlying line of reasoning relates to natural heritage. The main argument here is the ancillary protection provided by the marine heritage sites, which is a side effect of designating MPAs, in particular the prevention of marine development and fishing which are the key dangers to these sites. This expands the coalition in favour of MPAs at the political level, especially being of high salience to the general public.946

946 Marine environment law expert, personal communication, April 17, 2019
It should be noted that the designation as an MPA maybe a misleading guide to assessing marine protection since there are other, more easily achievable or analogous policy instruments available. These may have a more limited scope but their de facto impact is still to offer some protection and can pave the way for stronger legal designations. De facto MPAs may normally arise from the need to manage activities at sea. These may include PSSAs (more information on PSSAs is available in chapter 2), the use of which in the Mediterranean is very limited and the safety zones around oil rigs. Also, worth noting that during a meeting of the Focal Points, the GFCM representative “raised the question of whether Fisheries Restricted Areas under the auspices of GFCM could be considered protected marine areas.”

The management of fisheries also deals with the establishment of protected areas due to fisheries identified priorities. In the Mediterranean Sea there are about five of such MPAs on the high sea. Three of these are located within the Sicilian Channel with one in particular being of high relevance to the Maltese fishing fleet because this overlays an area which is used by some Maltese fishers. Another measure of protection which includes huge parts of the Mediterranean high sea, is that, established through the GFCM, which prohibits trawling beyond the depth of one thousand meters. This measure has been

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948 See Recommendation GFCM/29/2005/1 on the management of certain fisheries exploiting demersal and deep-water species and the establishment of a fisheries restricted area below 1000 m. https://gfcm.sharepoint.com/CoC/Decisions%20Texts/REC_CM_GFCM_29_2005_1.pdf?originalPath=aHR0cHM6Ly9nZmNtLnNoYXJlcG9pbnQuY29tLzpiOi9nL0NvQy9y9FVjBBcG1qUzh6NUUqU2J5dnNIU0c0SUJ1cDdGbJMTU5PcmNIkLk55S0t3ZVpBP3J0aW1IPTZjaVpHTZRMkVn (accessed February 14, 2010).
agreed to by Mediterranean States. It thus transpires that States are willing to enhance the protection of biodiversity on the high sea. Again, this raises the issue that States are wary about declaring HSMPAs and not about protecting biodiversity on the high sea. This perhaps is suggestive of issues that relate less to purpose and more to political or territorial reasons.

On the contrary to declaring MPAs for a justified use, States may also inappropriately use MPAs. This implies that States would designate MPAs were there is no need or based on poor scientific evidence and without a significant justification. The results of RAC/SPA project lead to huge areas which comprise even areas which when studied at a national level revealed that they may not merit to form part of a MPA. For example, in Malta’s case, studies were conducted to identify areas important for various seabirds. The results of the RAC/SPA project also included those areas which, according to Maltese authorities, were deemed that they do not satisfy the criteria to become a MPA. This conclusion by Maltese authorities was also agreed to by eNGOs. In fact, this study was led by a Maltese eNGO. The results of the RAC/SPA project therefore, may have promoted some degree of mis-trust among the States which are to be considered as primary stakeholders. On another note, there is a drive to protect a certain percentage of the sea area, as is evident when the Parties agreed to work to develop a network of MPAs located also on the High

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950 Bidi.
Sea, setting a target that at least this would cover ten percent of the Mediterranean Sea by 2020.\textsuperscript{951} Yet, up till the third quarter of 2019 this percentage seems to be far from being achieved since no HSMPAs have been created other than that referred to earlier which is the Pelagos Sanctuary.\textsuperscript{952} It seems that while Parties are agreeing to such commitments, the ten percent may be looked at as a target to be achieved collectively, including commitments about the High Sea, and Parties may be relying on each other but without any of them taking definitive action to create HSMPAs. Such targets may lead to having MPAs declared just for the sake of declaring them or else may be completely or partially un-managed, resulting in paper MPAs and ultimately as inappropriately used MPAs.

As explained above, MPAs are employed to manage activities at sea. In turn the management of activities at sea has its challenges. These management concepts were identified within the literature explored in chapter 2 and will be analysed from a Mediterranean perspective in the following sections.

\textsuperscript{951} Paris Ministerial Declaration adopted by the Barcelona Convention Contracting Parties (COP 17, Paris, France, February 2012), page 3: “by developing, a coherent, well-managed network of coastal and marine protected areas in the Mediterranean, including on the high seas... in particular to meet the target of 10 percent of marine protected areas in the Mediterranean by 2020; https://wedocs.unep.org/bitstream/handle/20.500.11822/5965/12ig20_8_ann1_parisdeclaration_eng.pdf?sequence=5\&isAllowed=y accessed July 21, 2019.

\textsuperscript{952} See also section 3.6
5.2.3 MPAs identification criteria and designation process

The project to identify the borders of HSMPAs also adopted the criteria which was agreed to by the SPA/BD Protocol Parties.\textsuperscript{953} The proposed HSMPAs give rise to some queries particularly with regards to any political factors that may have also been subtly considered and also to certain scientific aspects, in the setting of the borders. These issues, together with others concerning the management of HSMPAs, might have paved the way, to the lack of support by the Parties.

Scientific evidence lends credence to the establishment of MPAs. Yet, even a lack of scientific evidence is not an argument against action, given that the EU operates on the basis of the precautionary principle, but this neither implies that where scientific evidence is possible it should not be accounted for, nor not to scrutinise any scientific data.\textsuperscript{954} The precautionary principle is an established legal principle in the context of law of the sea and wider environmental concerns even though not entirely uncontested.\textsuperscript{955} There is clear evidence, in the


\textsuperscript{954} See also: UNEP-MAP-RAC/SPA. Report of the Extraordinary Meeting of the Focal Points for SPAs (Istanbul, Turkey, 1st June 2010). Tunis: UNEP-RAC/SPA, 2010. RACSPA 2019, page 6, para 42: “However, several delegations argued that this element should not be regarded as an impediment to pursuing the second-phase process and activities.”http://www.rac-spa.org/sites/default/files/meetings/nfp_r_ext_1/wg.348_05_eng.pdf (accessed February 14, 2021).

Mediterranean Sea of overfishing while there are various peer reviewed publications on the efficiency of MPAs in resolving this problem (refer also to chapter 2). The Mediterranean Sea is also facing loss of biodiversity because of extractive industries and loss of habitat through development and pollution. On the other hand, working against scientific arguments may be the biased sectoral groups.

The results of the project were presented in an extraordinary meeting of the SPA/BD Protocol focal points meeting.\(^{956}\) This included a map showing HSMPAs, also referred to as SPAMIs in line with the nomenclature of the Protocol, refer to \textbf{Error! Reference source not found.}. This meeting was attended by Algeria, Bosnia & Herzegovina, Croatia, Cyprus, European Commission, France, Greece, Italy, Libyan Arab Jamahiriya, Malta, Morocco, Monaco, Montenegro, Slovenia, Spain, Syrian Arab Republic, Tunisia and Turkey. The list of Parties is being presented to emphasise that any decision taken was agreed to by a significant number of Mediterranean States. The meeting’s report notes that:

\begin{quote}
“[T]he 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 among the priorities of the Mediterranean Action Plan.” Emphasis added
\end{quote}

\footnotesize
Figure 28 - Proposed SPAMIs in 2010 (MPAs)957

There seemed to be a general agreement among the Parties that the proposed areas are based on a lack of sound scientific data so much so that the GFCM representative suggested that the criteria for identification may need to be fine-tuned.958 The fact that the criteria was also applied to areas within the jurisdiction of coastal States raised a number of points. During this meeting Cyprus requested the removal of an area from a proposed SPAMI since this area falls completely within the EEZ of Cyprus and argued 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.”

This position may have been shared by other Parties because, as can be seen from Figure 29, many of the proposed SPAMIs incorporate areas under the jurisdiction of a Party. Consequently, Cyprus’s position may be shared by other Parties even though the latter never expressed this. This is evidence that the Protocol’s selection process may have been misinterpreted as to how it is to be applied and hence the lack of agreement to these HSMPAs. There were Parties who agreed to proceed with the proposed HSMPAs such as for example France, Spain and Slovenia. It is striking to note that “the European Commission [representative] 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.”

A case related to a scientific aspect, for example, is that areas important for blue fin tuna located to the west of Italy were not included in the proposed MPAs. Also noticeable are, that the borders, such as, for example those important for cetaceans have changed along the course of years following new studies and that the EBSA and SPAMI have different borders. This may lead to think that borders are not being identified on robust scientific data.


961 Ibid, see for, example page 6, para 42: “The discussion between the participants highlighted the problem of the lack of data on zones that were often poorly understood from a scientific and ecological standpoint…” (accessed February 14, 2021).
The issue related to identification criteria is further compounded when EBSAs are considered. In fact, in parallel with the project, the CBD Secretariat was organising regional meetings to identify EBSAs at a regional level. This involved the Parties of the SPA/BD Protocol, working on both HSMPAs and EBSAs. In 2010, during an extraordinary meeting of the SPA/BD Protocol focal points meeting a map showing draft EBSAs was also presented, refer to Error! Reference source not found..


Figure 29 - EBSAs identified in the Mediterranean Sea in 2010

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In 2014, The CBD Secretariat organised a regional workshop on Mediterranean EBSAs. The report 'Mediterranean Regional Workshop to Facilitate the Description of Ecologically or Biologically Significant Marine Areas,'⁹₆⁴ was produced and CBD COP 12 DECISION XII/22 marine and coastal biodiversity: ecologically or biologically significant marine areas (EBSAs) was adopted.⁹₆⁵ The workshop resulted in the identification of EBSAs in the Mediterranean as can be seen in Error! Reference source not found..

Figure 30 - Mediterranean EBSAs in 2014⁹₆⁶

These EBSAs deposited in the UN repository do not match the borders of the EBSAs presented in 2010. The borders of certain EBSAs presented in 2010 seem

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to purposely not host any Territorial Sea and this might not be based on a scientific justification.

Some important changes are visible between the original EBSAs and those deposited in the repository. Some of these seem to be almost politically motivated whereby it seems that the waters under the jurisdiction of a coastal State were originally not included within the EBSA but later they were. Also evident is the removal of large chunks of areas from certain zones. Noticeable are areas south of Italy and south of Cyprus. The removal of such large areas raises concern on the reason for their removal and also on the process applied both to identify the first set of EBSAs in 2010 and the final process (refer to Figure 29 and Figure 30). Since EBSAs are not a commitment by States to declare them as MPAs it is even more of concern why the areas were removed. It seems that, allegedly, the EBSAs are likely to be expected to be designated as HSMPAs and possibly States, acting cautiously, insisted that EBSAs should not contain specific areas. Striking differences between EBSAs and HSMPAs are also evident as can be seen in Error! Reference source not found..\textsuperscript{967} It can be observed that the SPAMI borders as presented in previous meetings, in some cases have shifted, for example, for the area overlapping the sea under the national jurisdiction of Malta. It is also visible that one SPAMI in the eastern basin has notably shrunk and above all most borders for EBSAs are far from overlapping those of the SPAMIs.

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While this study is focussing on legal issues, these factors need to be highlighted since laws need to reflect facts and evidence and the application of legal provisions need also to be backed up by science. Noting that SPAMIs are areas of Mediterranean importance, then it is expected that these are also areas of biological and ecological significance. In fact, such expectations may be verified by reviewing the criteria on how these areas are identified. Hence, a SPAMI and an EBSA may be expected to have the same or at least very similar footprints. There might be various reasons as to why the borders do not overlap apart from

Figure 31 - Latest SPAMI and EBSA proposals

968 The proposed SPAMIs shown in this map are also available at http://www.rac-spa.org/node/597; (accessed February 18, 2019).
the fact that these were likely identified by different experts and based on different studies. All these issues may lead to questioning both the process and the data upon which they were based.

Differences in such areas would imply differences in the funds that would be needed to manage such areas and which ultimately would weigh upon the concerned States’ finances and more importantly on their citizens. In the same figure it is rather discussable as to why a study presented by RAC/SPA is indicating that Maltese waters, including the Territorial Sea, are forming part of shared MPA, when such areas are to be governed only by Malta. It is also evident from the same map that there seems to be an intended omission of what seems to be the Territorial Sea of other States. Recall of the study presented by ACCOBAMS about the identification of important areas for cetaceans (refer to chapter 3) should also be made because a number of these areas do neither match the SPAMI nor the EBSA borders, as illustrated by Figure 16 and Figure 17. The point for highlighting these factors is that these may be of concern to the States being called to create shared MPAs. These issues are described in detail because they can be a contributing factor for the lack of progress recorded in the Mediterranean Sea. Such issues might have led to mistrust on how scientific data was interpreted. In addition to inconsistencies related to border identification, at the sub-regional level, two examples at a national level are provided below. One concerning Spain and the other concerning Malta.
In 2018, Spain declared a MPA for cetaceans and turtles. This MPA is shown in Error! Reference source not found.. When comparing this area to the proposed SPAMIs shown in Error! Reference source not found., it is evident that it does not exist within the proposed SPAMI south of Spain. Consequently, this raises a point about the scientific data used to identify the EBSAs and proposed SPAMIs. It may affect other States’ attitude towards the proposed SPAMIs because of the scientific data upon which they were based.

![Figure 32 - Migratory corridor](image)

Furthermore, referring to Error! Reference source not found. which shows a map of the Maltese MPAs, similar arguments are brought up. These MPAs ensure

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969 46.385 km² marine corridor, located off the Spanish Mediterranean coast, has been declared ‘Marine Protected Area’ by the Government of Spain in June 2018. The measure will benefit around 3,500 fin whales migrating through this strip of water, and more than 19,000 loggerhead turtles and 6,000 striped dolphins. [http://web.unep.org/unepmap/key-development-barcelona-convention-mediterranean-cetacean-corridor-becomes-marine-protected-area](http://web.unep.org/unepmap/key-development-barcelona-convention-mediterranean-cetacean-corridor-becomes-marine-protected-area)

complete coverage in terms of EU Habitats and Birds Directives within the 25 NM limit for selected seabirds, cetaceans, turtles and benthic habitats. It is evident that these do neither match the borders of the proposed SPAMI nor that of the EBSA. The robustness of the science behind the broad SPAMIs and EBSAs may be questioned and may also have an impact on the States’ inertia to make progress on the large proposed areas. The proposed SPAMIs apart from having to meet the appropriate compliance and enforcement standards needs to also have a management plan. The creation of a management plan covering extensive areas which might not be up to the standard of being of Mediterranean importance may imply excessive use of funds and time which would likely create unjustified burden on concerned States.

Figure 33 - MPAs around Malta

It is evident that there is unanimous position admitting the need to take action to protect marine areas in ABNJ through the establishment of MPAs. States seem to be either threading with caution or else have a lack of motivation, or both, to agree to designate such MPAs. A possibility also is, that at present some States may not have such environmental issues high on their agenda for various reasons. Furthermore, diplomatic issues may be one factor that is limiting site assessments on the High Sea. Also evident is the fact that when MPAs in ABNJ are on the agenda of the COP of the Barcelona Convention, there are no Parties that object to MPAs in ABNJ. Also evident is that all Mediterranean States, except five which include Libya and Greece, have ratified the SPA/BD Protocol that recommends the designation of MPAs in ABNJ.

The designation process needs also to be analysed. The creation of a HSMPA around Malta requires discussions with the neighbouring States. If Malta will not agree to enter into discussions with neighbouring States then it will be unlikely that a MPA, that extends in ABNJ adjacent to Malta’s waters, can be designated. This is because the SPA/BD Protocol, through Article 9(c), incites that the neighbouring Parties have to propose such a MPA in these situations. In Libya’s case, a non-Party to the SPA/BD Protocol, it is likely that the HSMPA can proceed noting that Article 28(1) of the SPA/BD Protocol allows to invite non-Parties to

cooperate in the implementation of the Protocol even though Article 9(c) states that “Proposals for inclusion in the List may be submitted:...c) by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined.” There may be different considerations on how to apply this provision. First of all, it should be noted that, also considering other provisions, the spirit of the Protocol is to involve non-Parties in the implementation of this Protocol and also to instil cooperation between Parties and non-Parties. Article 9(c) does not specifically include non-Parties when it speaks about HSMPA unlike Article 5(4) which specifically allows non-Parties to create MPAs in their jurisdiction. Four scenarios are presented below:

i. Article 9(c) may be taken as that MPAs on the High Sea with neighbouring non-Parties are not possible.

ii. Alternatively, recalling also Article 28(1), MPAs in this case may be possible through cooperation.

iii. A further option is that HSMPAs with neighbouring non-Parties can proceed with or without their consent since as per Article 9(c) does not refer to the need for their consent.

iv. Another scenario, recalling Article 9(c), in which it is a neighbouring Party that does not agree to the HSMPA, then such a MPA is likely not to be possible since the submission has to come by the neighbouring Parties concerned.

On the other hand, the definition of “neighbouring Parties concerned” is not given and this may pave the way such that the proposal can proceed without the non-agreeing Party’s consent. In the spirit of cooperation, also noting the political
situations and implications that may arise, the involvement of non-Parties is considered to be essential. In fact, Libya, a non-Party, is also participating in the initiative to promote MPAs in ABNJ in the Mediterranean Sea.

5.2.4 Managing activities at sea

There are many activities occurring on the high sea. Most of these do have an impact on the environment. As discussed above, the management of these activities is regulated by national legislation, with States, creating provisions that create obligations on their nationals or flagged-vessels even they are on the high sea. However, these provisions and their enforcement varies among States. International Treaties also address certain activities, but these have to respect the limitations established by UNCLOS, relative to the different marine zones. This is a challenging situation since it may be rather cumbersome, if at all possible, for a coastal State to protect the marine environment in its own jurisdiction from transboundary influences and that within the high sea lying in proximity of marine areas under its jurisdiction from the activities carried out by nationals from another State. States enjoy a degree of freedom when carrying out activities on the high sea. This freedom does not imply that it is a laissez-faire but free from the obligations that could have been imposed by other States. This is an important aspect that could have also impacted on the States’ position towards HSMPAs. While currently States impose their own regulations, for example, with regard to oil extraction and military exercises, a joint HSMPA may lead to States imposing restrictions on other States. Hence, it may be
allegedly said, that Mediterranean States do not want to add any interference from other States when managing activities on their own continental shelf beneath the high sea water column. This may be a determining factor for the lack of HSMPAs in this region noting that most high sea lies above continental shelf of various States. More aspects on governance are dealt in the following section.

5.2.5 Governance aspects

While the RAC/SPA-led project yielded results relating to border identification without delving into the merits of whether these were agreed by the States or not, it did not shed any light with regards to the governance aspects. It can be argued that governance is eventually a prerogative of the concerned States and not of the project's results. This may be true but it should be noted (as explained in chapter 3 under the SPA/BD Protocol section) that HSMPAs borders are to be presented to the meeting of the Focal Points, together a management plan compiled and agreed to by the concerned States. This step was overlooked when the HSMPAs were proposed and consequently the process contained in the Protocol was not followed. This resulted in a process in which Parties were asked to agree to HSMPAs without having an appreciation of the detail of what their management would involve, how it could

974 Marine environment law expert, personal communication, April 17, 2019
975 See SPA/BD Protocol Article 9(3)
Also section 3.5.1
affect their rights and how much it would cost, among other factors. Consequently, it is suggested that this might be one of the major failures as to why HSMPAs were not designated, particularly if taking this management aspect within the context of the complex political situation in the Mediterranean region and the reference above to satisfying a domestic political reality. It may also be counter argued that prior to preparing the management plan there needs to be an agreement on the HSMPAs border. While this may be true, the Protocol’s process, that is, to present both the borders and the plan, must be adhered to and only an agreement in principle may have been asked about the proposed borders. The reason for this being such that resources allocated by the States to proceed with the compilation of a management plan would be on an agreed area thereby significantly reducing any chances that conflicts among the States arise due to disagreement about the HSMPAs’ borders which would result in wasted funds and time to generate the management plan.

As noted above, the political environment in this region is rather complex and at times also tense. Various examples were given in earlier chapters. These examples also included how even EU Member States also have overlapping territorial claims, for example, Malta and Italy as regards the continental shelf beneath the high sea. This strenuous political situation results in cautious moves by the Parties so as not to jeopardise any future claims or inherent rights on the high sea. Albeit that such rights are protected by provisions contained in the SPA/BD Protocol. Further analysis premised on official documents will also be presented in this section.
In the course of this research, various Focal Points Meetings discussed the implementation of the project’s results. The Eleventh Meeting, organised in 2013, was not attended by Malta. The reason for Malta’s absence is unknown. It might be that Malta wished to avoid getting involved into commitments or that it was simply unable to attend.

The scenario of the governance of any HSMPAs can be daunting and rather slow when it comes to setting specific regulations. Two main reasons for this being the existing policy fragmentation and the different institutions that are involved, with the latter having an institution for different activities. Policy fragmentation is due to the fact that the enactment of provisions to regulate various activities within a HSMPA are to be based on existing legal instruments. The same is also applicable to regional Treaties which target different objectives. Such fragmentation is complemented by the fact that different institutions regulate different activities. The issue of institutions may also be found at a national level. In fact, in Malta, common activities occurring at sea such as fisheries, oil exploration, environment protection, navigation, military exercises and heritage protection are competencies of different authorities. It can be deduced that for Malta to compile and establish a management plan for a MPA would require a significant amount of time and resources noting that it

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977 The main authorities concerned with MPAs governance are the Department of Fisheries and Aquaculture, the Continental Shelf Department (for oil exploration and permits to conduct research at sea), the Environment and Resources Authority (for environment protection), the Malta Maritime Authority, the Armed Forces of Malta, the Police of Malta and the Superintendence for Cultural Heritage.
would be expected that relevant authorities are to be consulted by the leading institutions and that such authorities have to give their go ahead to proceed.\textsuperscript{978}

The aspect of fragmentation may also be extrapolated from a Party’s request asking the RAC/SPA Secretariat so that it officially contacts the authorities of the countries concerned through the appropriate diplomatic channels. In fact, this was considered as

"essential to initiate the process of SPAMI creation in areas embracing high seas and would serve to sensitise decision makers and competent national institutions concerning the activities developed under this project."\textsuperscript{979}

This request raises a point on how effective communication is among different authorities at the National level. Policy fragmentation may be considered as an accidental hindering factor as it multiplies the number of agencies and stakeholders which are not necessarily mainly interested in MPAs but have a strong preference on overlapping policy areas. Furthermore, on the high sea there the following situations may emerge:

- lack of adequate impact assessment, in respect of, for example, tourism, marine development and minerals; military uses; navigation and heritage;
- problems related to management given there may be key stakeholders from different jurisdictions;

\textsuperscript{978} In Mata, the leading and co-ordinating authority to designate MPAs for the protection of the environment is the Environment and Resources Authority.
• institutional coordination weaknesses evident when different government departments do not communicate;
• national bodies may not have jurisdiction for ABNJ, leaving the practical management in an institutional void.

Similar to the enforcement issues, the difficulties surrounding policy fragmentation are caused by the institutional complexities rather than a consideration of MPAs in particular.

A similar situation is reflected at a regional level, where activities on the high sea are regulated by different institutions such as for example IMO, GFCM and RAC/SPA, the detail of which was explained earlier in the thesis, which may have different basic purposes to make as a priority. Hence, for States concerned with the governance of a HSMPA, most regulations, if they are expected to be respected by third States, have to be established through the relevant institution. This should not be thought of as a stumbling block to create HSMPAs by the Parties but it may also be making a contribution to holding Parties back, as they would not know how to proceed HSMPA management with sufficient certainty.

The details of HSMPA management would likely have an economic impact. This might be related to the different sectors such as for example shipping, fisheries and mineral extraction. For Malta, shipping is an important sector, also noting that it has a freeport and that most goods are transported to the island by ship. Oil exploration is also on-going in Maltese waters and any restriction of such an
activity is likely to affect the Maltese economy and what are considered to be societal gains. Such arguments shed light on how HSMPA governance has to deal with socio-economic factors.

The contracting parties vary in their willingness to establishing MPAs in their domestic setting or territorial waters. Malta sees the value in establishing MPAs but is held back by the institutional setup which underlies the policy and competing interests within the government. This could be due to Institutional inertia as a result of lack of expertise; resource limitations in terms of human capital; and institutional deficiencies more broadly.

These institutional challenges hinder the design and implementation of MPAs but are not conscious factors but rather the result of the broader State resources. As a result, while they influence MPAs, they are not to be considered MPA specific and would have to be addressed as part of the broader marine policy and its resource provision.

Further diplomatic and governance issues are highlighted in the meetings. In 2015, for example, Malta did not attend the Twelfth Meeting of Focal Points for SPAs, which set an informal working group to continue with the project’s

980 Malta has designated 18 sites that cover over 4100 km² equivalent to more than 35% of water under the jurisdiction of Malta. See also Environment and Resources Authority, “Marine Protected Areas,” Malta: 2021. https://era.org.mt/topic/marine-protected-areas-2/ (accessed January 22, 2021).
981 Marine environment law expert, personal communication, April 17, 2019.
results. However, there were reservations expressed on the output of this group, including by Cyprus, Spain and France. It was observed that:

“The representative of Tunisia said that her country was available to participate in a consultation process with respect to the establishment of SPAMIs in open seas. Tunisia was not ready for the time being to have a position on the issue.” (Emphasis added).

Noting the lack of progress, there may be other States sharing Tunisia’s position even though they never voiced this. Once again, the cautious approach being adopted by some Parties surfaces. It is also noticeable that while most SPAMIs identified through the RAC/SPA project were included in the EBSA repository, the concentration by RAC/SPA remains on three of these SPAMIs, which include that in the central Mediterranean Sea, the Alboran Sea and the Adriatic Sea. Hence, the concerned Parties might have been suspicious as to why RAC/SPA is concentrating on a number of selected HSMPAs and not treating all proposed HSMPAs in the same manner.

Later, in 2016, the Parties decided\(^{983}\) to confirm the roadmap,\(^{984}\) that the target date to set HSMPAs is 2020. Parties agreed to establish HSMPAs but this does not imply that they have agreed to the proposed borders. Furthermore, the Decision notes that Roadmap is not binding but puts forward recommendations.


\(^{984}\) Objective 1 of the roadmap includes to “strengthen networks of protected areas at national and Mediterranean levels, including in the high seas and in ABNJ, as a contribution to the relevant globally agreed goals and targets.”
Such provisos may have been considered necessary to be included to encourage Parties to agree to the Roadmap which also makes reference to HSMPAs and to resolve the status quo of lack of progress. In fact, noting the reservations expressed by certain Parties in previous meetings and the general lack of progress on regional meetings, it would have been likely that a number of Parties might either not have agreed to it or else agreed with reservations. Additionally, in 2016, the Parties referred to a resolution and commitment towards the implementation of the Barcelona Convention and its protocols. Hence, the link to the creation of a SPAMI list including those in areas on the High Sea. No specific inclusions were made to the SPAMIs that were identified by RAC/SPA.

5.2.5.1 Enforcement

One of the most complex issues at managing HSMPAs would be enforcement. In fact, enforcement is another key theme which emerged from empirical data. If designation of an area and making sure it appears on the relevant charts is not the difficulty, the, actually policing effort, however, requires enforcement resources which are harder to bear for a small State such as Malta and generally more difficult offshore. This is re-enforced by the provisions in the international Treaties which leave enforcement to the national state.986

986 See for example UNCLOS Section 6.
Regulations in ABNJ areas are binding to the regional body’s Parties only. As a result, the common international approach to focus on obligations and aspirations while leaving enforcement to the nation State is particularly important for smaller and poorer states such as Malta who are more likely to lack the resources to meet the targets, given that MPAs are often not of high political salience in the domestic political arena. Yet, policing of, for example, a State’s own fishing fleet by another State, without any reciprocation, might be looked as a submissive operation. Enforcement issues cannot be referred directly within the scope of the project led by RAC/SPA since such an activity would be part and parcel of a management plan after having agree to the HSMPA borders. Noting that the plan was never prepared an analysis of enforcement measures cannot be carried out. However, noting that there were difficulties for agreements with borders it is also likely that States would also find hurdles to agree on enforcement on the high sea if this was to be shared.

5.3 Further specific details concerning the proposed HSMPA around Malta

In order to further elaborate on the complex political situation in the Mediterranean Sea with a focus on aspects concerning Malta, some further specific analysis is presented in this section. The information here will be about the project’s proposal regarding the HSMPA around Malta.

Apart from the COP and meeting of the National Focal Points, RAC/SPA sought to organise a number of sub-regional meetings with the aim to have concerned States agreeing to their relative HSMPA. Notably, the areas that were given high priority were Gulf of Lyon; Alboran Sea; the Adriatic Sea; and the Sicily Channel/Tunisian Plateau – the one of concern to Malta.988

The output of the meeting held for the Adriatic Sea resulted in positive developments because this lead to a shared management concept of marine areas among the relevant coastal States.989 This is being said to show that positive outcome is possible which as shall be seen below is unlike that concerning Malta.

Two consultation meetings between neighbouring countries of the Sicily Channel/Tunisian Plateau (Italy, Libya, Malta and Tunisia) were held.990 It is


989 UNEP-MAP-RAC/SPA, Progress Report of the “Joint Management Action of EC with UNEP/MAP for identifying and creating Specially Protected Areas of Mediterranean Importance (SPAMIs) in the open seas, including the deep seas” (MedOpenSeas Project) (UNEP(DEPI)/MED WG.408/Inf.9 rev2), (Tunis: UNEP-MAP RAC/SPA, 2015), Annex I: “We, country-designated experts from Albania, Bosnia and Herzegovina, Croatia, Italy, Montenegro and Slovenia, riparian countries of the Adriatic Sea, Parties to the Barcelona Convention, confirm the environmental relevance of the areas considered during the Adriatic SPAMI process, already recognized by the joint UNEP/MAP-CBD workshop on EBSA held in Malaga, Spain, in April 2014 (the three Adriatic EBSAs adopted afterwards by the CBD COP 12 on October 2014). For this purpose, we stress the importance to continue cooperating for the establishment and implementation of efficient and realistic area based management measures for the protection and sustainable use of those areas, or parts of them, including MPAs which might be listed as SPAMI(s) in the Adriatic Sea.” http://rac-spa.org/nfp12/documents/information/wg.408_inf09_rev2_eng.pdf (accessed February 14, 2019).

990 The first was held in September 2014 in Tunisia; the second was held in April 2015 in Sciacca, Sicily.
noted that the report for the second meeting was never completed and hence never published. It is noticeable that while Libya was included in these discussions to create a joint SPAMI that extends on the High Seas, Libya has not yet ratified the relevant Protocol.\textsuperscript{991} Hence, Libya’s participation to create a joint MPA on the High Sea raises some concerns. It should be considered that Article 5(4) of the Protocol allows non-Parties to create MPAs in areas under their jurisdiction. Article 9 of the same Protocol, which is about MPAs on the High Sea, does not make any reference to non-Parties. Hence, whether non-Parties are able to participate to declare HSMPAs through the SPA/BD Protocol process or not is a concern. It is recognised that Article 28(1)\textsuperscript{992} does allow for cooperation but does not indicate how and to what level.

The outcome of the regional meetings held about specific proposed SPAMIs indicate that not much progress has been recorded. In fact:

“only the report of Trieste meeting is attached in Annex 1, not being the final agreed version of Sciacca meeting ready at the time of the 12 SPA FP meeting.”\textsuperscript{993} (Emphasis added).

It is of concern that a report between four States was not completed within one month from Sciacca’s meeting. This raises some questions as to why this was never concluded. The main one being if the Parties ever reached an agreement.


\textsuperscript{992} SPA/BD Protocol Article 28(1) “The Parties shall invite States that are not Parties to the Protocol and international organizations to cooperates in the implementation of this Protocol.”

\textsuperscript{993} UNEP-MAP-RAC/SPA, Marine and Coastal Protected Areas, including in the open seas and deep seas (UNEP(DEPI)/MED WG.408/Inf.9 rev2), (Tunis: UNEP-MAP RAC/SPA, 2015). http://rac-spa.org/nfp12/documents/information/wg.408_inf09_rev2_eng.pdf (accessed July 24, 2019).
5.3.1 Conclusion on existing situation

It is evident that the situation to declare HSMPAs in the Mediterranean Sea is at a status quo, that is, no action is being taken. This is likely being caused by various factors most notably being those related to science and politics. It is also emerging that RAC/SPA is drifting away from its target to the extent that there was a gradual phasing out of placing HSMPAs on the agendas of meetings. In fact, in 2012, at the Barcelona Convention COP 17, and subsequent meetings the text of meeting’s decisions became softer as regards HSMPAs. For example, in 2012, the Parties agreed with their endeavour to proceed with the EBSA process, omitting any commitment statements. In the following COP, COP 18, concerns about the development of HSMPAs were evident and there was a reaffirmation to proceed with the EBSA process and the roadmap towards the 2020 target.

The lack of progress in establishing MPAs in ABNJ and the reluctance among States to cooperate in this regard is included in a report presented in 2017 at the focal points of the SPA/BD Protocol. It refers to cooperative actions, taking

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place at a slow pace and only being carried out with regards to project rather than also including the setting up of MPAs. The EU funded project was completed by 2018. This report also presents the main factors, as expressed by the Parties that are hindering the implementation of the provisions of the SPA/BD Protocol. These factors include those related to:

- Insufficient financial resources;
- Institutional and administrative issues; and
- The lack of awareness on conservation needs.

With regard to the lack of progress recorded in the implementation of the network which has long been agreed in principle to be set, it is important to present an excerpt, from a report, that provides a clear situation of the status quo of the project. Notably, it states that:

“At Mediterranean regional scale, UNEP/MAP and its Regional Activity Centre for Specially Protected Areas, through the EC funded project MedOpenSeas, already selected twelve priority areas in the pelagic and deep-sea domain supported by the advice of the organizations concerned by the current joint strategy development. Those areas were endorsed in an extraordinary meeting of SPA FP held in Istanbul in 2010. Some key consultation meetings followed from 2011 to 2015 on the establishment of SPAMIs in five out of those twelve agreed priority areas in the Mediterranean: Gulf of Lions, Alboran Sea, the Adriatic Sea, the Sicily Channel and the Tunisian Plateau. For all those priority sites thematic reports, containing compiled and new scientific data, were elaborated (specifically thematic reports on cetaceans, seabirds and fisheries, with emphasis in elasmobranchs; as well as overall ecology reports). Notwithstanding their interest, these multiple initiatives kept the stakeholders in a non-decision situation.”

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997 UNEP-MAP-RAC/SPA, Progress report on activities carried out by SPA/RAC since the twelfth meeting of Focal Points for SPAs - Enhancing UNEP/MAP Cooperation on Spatial-based Protection and Management Measures for Marine Biodiversity with regional partners
This provides a clear picture that while in the beginning the Parties showed an
endeavour and enthusiasm of creating a HSMPA network, this was transformed
into a standstill with little or no progress recorded and with Parties showing an
aversion to make tangible commitments.

This in fact, is further re-affirmed by the Parties limiting themselves to only make
a broad collective declaration whereby they reaffirmed their commitment to
ensure the implementation of the Barcelona Convention and its Protocols.998
Unlike the Paris Declaration, nothing is mentioned about the target to set a MPA
network, in areas under jurisdiction and beyond, by 2020. It seems that there are
difficulties to implement the results of this project. It is remarkable that no specific
Decision about HSMPAs was recorded in the COP meeting held in Tirana in
2017, although reference to commitment taken in past meetings by the States
Parties was made in the preamble of one decision.999

By 2019, at the meeting for Focal Points for SPAs, no specific discussions took
place about the HSMPAs project although one agenda item was about the
‘conservation of sites of particular ecological interest’ included the results of a

through SPA/RAC (UNEP(DEPI)/MED WG.431/Inf.7), (Tunis: UNEP-MAP RAC/SPA, 2017).

http://www.rac-
spa.org/nfp13/documents/02_information_documents/wg_431_inf_7_enhancing_cooperation_w

998 Tirana Ministerial Declaration adopted by the Barcelona Convention Contracting Parties (COP 20, Tirana, Albania, December 2017).
https://wedocs.unep.org/bitstream/handle/20.500.11822/22571/17ig23_23_tiranadeclaration_en
ge.pdf?sequence=1&isAllowed=y (accessed July 21, 2019).

999 See UNEP-MAP, Report of the 20th Ordinary Meeting of the Contracting Parties to the
Convention for the Protection of the Marine Environment and the Coastal Region of the
Mediterranean and its Protocols Tirana, Albania, 17-20 December 2017, Athens 2017, Decision
IG.23/9. https://www.rac-
spa.org/nfp14/documents/03_reference_documents/17ig23_23_eng.pdf (accessed February
14, 2021).
survey carried out among the Parties. This survey will be dealt with in the dedicated sections of this chapter.

5.3.2 Analysis of the Malta's position

While Malta, is not objecting towards the implementation of the roadmap for HSMPAs, it does not seem that Malta did or is carrying out any studies on the marine environment in such areas. This may either suggest that Malta would rely on studies presented by RAC/SPA, or that it will eventually contract its own researchers, or that it would seek to would delay the HSMPAs target date further. It can also be understood that the High Sea does not appertain to Malta and hence there is a better opportunity cost for funds that would be needed to perform such expensive studies on the High Sea if such funds are used for studies within the national territory.

The Maltese inertia has also been perceived by Malta’s National Audit Office when it solicited Malta to initiate discussions with neighbouring States about HSMPAs. This noting that Malta has no formal agreement with its

1001 National Audit Office. Performance Audit: The designation and effective management of protected areas within Maltese waters, 35.
neighbouring countries with respect to SPAMIs. This may be possibly due to the:

“ongoing negotiations between Mediterranean countries on national marine jurisdiction and boundaries; political difficulties, particularly those relating to North African countries, that have shifted downwards marine conservation priorities; the fact that Malta has not yet extended assessments of biodiversity within the high seas; and work and funds being focused on the Maltese waters to establish and manage MPAs within Malta’s legal jurisdiction.”

It is also conspicuous that the report of the second RAC/SPA regional meeting that focussed on the proposed MPA in the Sicily Channel/Tunisian Plateau has not yet been concluded to date in conjunction with the fact that the Maltese representative at the meeting on EBSAs in Malaga expressed certain reservations as regards certain scientific data about the areas concerning Malta. Combining these two factors together it might be possible that there may be some concerns with the identified borders for the proposed HSMPA noting that the latter has almost the same footprint as the relevant EBSA.

It is also noticeable that since the proposed large MPA is covering waters under the jurisdiction of neighbouring States and High Seas, then it seems that this could lead to a degradation of the rights that neighbouring States enjoy in waters under their jurisdiction. The existing situation is such that MPAs with a State’s jurisdictions are being identified and somehow pushed by RAC/SPA.

Mediterranean Importance [SPAMIs]) in conjunction with neighbouring countries. Such action would contribute towards creating MPAs within the Mediterranean high seas. Cooperation and coordination on a bilateral or multilateral basis between Mediterranean countries widen the scope of conservation of the marine environment.”

While it is evident that the Protocol includes provision 9(c) for MPAs that are partly on the High Sea, this provision may lead to shared sovereign rights. This can be held true because even if governance in waters under jurisdiction will be carried out solely by the coastal State, the fact that the borders, within the water under jurisdiction, had to be agreed with neighbouring States, this can be considered as sharing of sovereign rights.

Seeing that work on the management plan for the large MPA has not yet been initiated it is unlikely that Malta will be in time to cooperate with its neighbours to propose the large SPAMI in time for 2020 as agreed on the roadmap. Both the EBSA and the proposed SPAMI cover most of the entire Maltese continental shelf. This implies that if ever Malta wishes to extend its EEZ, all the Maltese EEZ would consist of one MPA, which might be considered politically difficult, although it would depend on the management measures applied to the MPA. While the SPA/BD Protocol allows for de-scheduling it would sit in obvious contrast if Malta would seek to de-schedule any part of the MPA noting that it would have initially agreed for its creation. Also, at present, this would imply that somehow the Maltese rights on its continental shelf would also likely to be affected, especially certain activities that would likely negatively affect the objectives of the large MPA in the High Sea water column. Once again, the focus of the MPA and the management features would seem to be a determining factor in the likely declaration of the site.

1004 See also Figure 20 - Continental shelf of Malta and Figure 31 - Latest SPAMI and EBSA proposals
1005 See SPA/BD Protocol Article 10.
Further factors affecting Malta’s progress are included in a report by the National Audit Office. These are that: the discussions between concerned States are not yet concluded; north African States’ political priorities do not include marine conservation; Malta is still focused on the governance, including the establishment of specific regulations, of MPAs within national jurisdiction, and Malta did not make any ecological assessments on the High Seas.

In conclusion it is evident that while it is noted that HSMPAs have not yet been declared, the Parties keep dragging on the process without as such openly declaring their position on a State-by-State status but at the same time showing an inclination to implement the provisions of the SPA/BD Protocol. While this approach may be politically convenient it leaves a room for interpretation for this lack of motivation to declare HSMPAs. As can be observed there has been a gradual cooling off from the project that should have led to HSMPAs.

5.3.2.1 Enabling law

An added legal concern for Malta is that, following the analysis in Chapter XX, it transpires that Maltese laws would not allow the Government to officially and

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1008 Author’s note: Malta is not obligated to make assessments on the high seas since Malta has no jurisdiction in this area.
specifically declare support for a MPA on the High Seas. This is because the SPA/BD Protocol has been transposed through S.L. 549.44 and this only applies to the Maltese territory. Therefore, it seems that there is no enabling law. It was also discussed, refer to section 3.9.8, that the EPA contains provisions so that Malta can support declaration of MPAs beyond areas under its jurisdiction. However, for this to be possible it is likely that the Government would have to publish a Subsidiary Legislation to bring into effect any MPAs declared under this Act. This is unlike the case of the CBD Convention for which Malta enacted direct implementation Regulations.\textsuperscript{1009} It may be possible that other Mediterranean States are in the same situation whereby their laws would limit the powers to initiate the designation of a MPA to within areas under their own jurisdiction. This is a situation that would depend on each State’s legislation and Constitution. In fact, to date, there are various States beyond the Mediterranean that have established MPAs on the High Seas.\textsuperscript{1010} Hence, the national legal system put in place and the legal process employed to allow such designation may be mirrored by interested Mediterranean States.

5.4 The Questionnaires

A survey was conducted among Mediterranean States and various stakeholders to acquire information about HSMPAs. Later, RACSPA also launched a questionnaire about the same topic. Information from both questionnaires is

\textsuperscript{1009} Subsidiary Legislation 549.27, see also section 3.9.12
\textsuperscript{1010} See section 3.3
presented in the following sections. Noting that they contained different questions and were conducted at different times, they will be analysed separately.

5.4.1 Questionnaire conducted as part of this study

The collective results of the questionnaires are being presented in this chapter. Overall, there was a very poor response rate and although questionnaires were sent to all Mediterranean States, only two replies were received. Some replies were received from non-institutional stakeholders. Alternative routes to acquire information about States had to be identified.

While it is not certain as to why there was a low response rate, it might be a consequence of any of the following reasons:

- The subject of MPAs on the High Seas, especially in the Mediterranean Sea, is a sensitive topic that may also be attributed to issues of sovereignty of marine areas;
- Discussions on the topic at regional level are on-going and hence information may need to be kept restricted;
- There may be issues related to enforcement of third-party nationals;

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1011 Two replies from States and four replies from eNGOs were received.
• Albeit the SPA/BD Protocol is in force since 1995, no MPAs on the High Seas have yet been set through its process apart from one area which was not originally designated through this Protocol;
• States may attribute such a commitment to limitations of their rights in marine areas;
• There was, shortly after the start of the thesis, UN activity in relation to the ABNJ measure to amend UNCLOS; and
• It is not uncommon that questionnaires from research students are given low priority by government departments and hence remain unanswered.

5.4.1.1 The Results of the Questionnaire

As outlined in the methodology, the questions sought to acquire information about the views on the need of MPAs in ABNJ as well as to identify possible issues that would need to be overcome to facilitate States to embark on a designation process. The responses from the two coastal Mediterranean States indicated an agreement for the need of HSMPAs. One of the replies emphasised the need that these should be based on sound scientific evidence. From the three replies received from eNGOs there was an agreement that MPAs in ABNJ are necessary. These would not necessarily be suitable for all situations and therefore the suggestion was that different tools should be applied as relevant to the specificity of the problem. While it is acknowledged that the SPA/BD Protocol is a strong tool to allow the designation of MPAs in
ABNJ, there are a number of factors that are keeping States from declaring such MPAs. These are related to:

- shared governance,
- lack of agreements on borders between some States, and
- the anticipated loss of rights on mineral resources extraction.

A number of activities would need to be specifically regulated in order to ensure MPA efficacy. Topping the list were oil extraction and military exercises. Other activities such as navigation and fishing also rated high. The regional approach to instigate MPAs in ABNJ was indirectly solicited and in fact some mentioned that the EU has provided, at a regional level, better conservation of the marine environment. One particular reply mentioned the fact that there are a number of Mediterranean States that are proclaiming EEZs or similar areas thereby reducing the ABNJ areas. If this was to proceed it would be likely that ABNJ areas would be very limited in their range and hence new measures within a Mediterranean Action Plan might be the way forward to address the new emerging situation. Such an approach would be able to treat different situations with different measures and agreements among States. Comments were also received about enforcement mechanisms. Among those that rated higher than the rest include:

- Countries involved in the MPA in ABNJ should share jurisdiction by allowing arrest on the High Sea MPA or beyond and prosecution of
alleged person causing illegal activity (from one of the involved countries) in the country making the arrest;

- Countries should share resources for monitoring for enforcement purposes of MPAs on the High Seas;
- A special enforcement group should be created among the countries involved and this group would have the power to arrest and prosecute in any country.

5.4.2 RAC/SPA questionnaire

During the research process of this thesis, RAC/SPA distributed a survey to Parties of the SPA/BD Protocol. The survey was similar in character and content to the questionnaire that was distributed as part of the intended data collection methodology proposed in the thesis. The latter was disseminated prior to the RAC/SPA survey. The survey was conducted by RAC/SPA among the Parties of the SPA/BD Protocol. The results were interpreted by RAC/SPA but further analysis is also being provided in this analysis. The survey had the intent to evaluate the progress made regarding the achievements of the

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objectives of the Roadmap.\textsuperscript{1014} The report of this survey notes that “some countries do not consider the declaration of marine conservation areas under other international instruments, such as the Ramsar sites (Ramsar Convention), the Vulnerable Marine Ecosystems (VME of CBD), the Particularly Sea Sensitive Areas (PSSA of IMO) or the Biosphere Reserves and World Heritage Sites (BR and WHS of UNESCO) or the regional ones, such as the Fisheries Restricted Areas of the GFCM.\textsuperscript{1015} This seems to affirm that MPA nomenclatures are creating confusion even at the Government authorities’ level and hence it is not surprising that the user stakeholder becomes more confused on what is a MPA. Furthermore, this may also hint that the ten percent target may not be reached by 2020 if such areas are not considered as a MPA. This can lead to a lack of consistency between the regions by having more areas declared under one instrument other than the SPA/BD Protocol. The report further notes that:

“The management of existing MPAs is a weak point in the Mediterranean, due to different factors, and in particular the lack of political will; strategy and action plan for MPAs and other effective based area conservation measures; dedicated administration with a proper mandate; coordination between administrations; proper legislation allowing control, enforcement and dissuasive fines; budget for management including staff equipment and running costs; funding options for emergencies; and options for adaptive management for quick response to threats or impacts.”


The survey discussed by the meeting consisted of a questionnaire comprising 25 questions. Those that are considered to be highly relevant for this study are being reproduced below together with the associated replies complemented with a brief discussion. The questionnaire was sent to 21 Parties but only 8 replies were received highlighting the difficulties in such an approach. The report notes that there was a low response which was lower than 40%. No presumptions are made as to the reasons of the low response but it notes that the reasons may vary dependent on the country. Referring back to the questionnaires sent as part of this study, it is no surprise that no replies were received albeit sent for more than one time to different authorities within the same State. The relevant questions are outlined below and comment is offered in respect of them.

“Question 11. Has your country proposed regional or international types of designations for ABNJ?

0 – No (70%)
1 – No, but my country is about to propose (an) area(s) for a regional/international designation (10%)
2 – Yes, my country has proposed (an) area(s) for a regional/international designation but it/they is/are not yet designated (20%)
3 – Yes, my country has proposed (an) area(s) for a regional/international designation and it/they has/ve been designated (0%)

This is clearly a very relevant question about HSMPAs. No Party has replied that it has proposed areas in ABNJ. If France, Italy and Monaco sent their replies it may imply that they are considering the Pelagos Sanctuary (MPA) as lying within areas under jurisdiction even though it was originally designated partly on the High Sea. At least six out of eight, some 75%, of
respondents have taken no action on HSMPAs. This is of concern since respondents may be classified as keen on the subject of MPAs and yet lack of progress to implement the results of the HSMPAs project was high. The various reports of meeting of the National Focal Points and COPs were indicating that progress is dragging and the survey confirmed this. However, some progress is still recorded because 20% replied that they are about to propose areas in ABNJ. Once such a move is carried out it may serve to encourage other Parties to follow suit. No target date has been set by when such proposals are to be actualised and therefore this may be a response that may not lead to concrete results in the near future.

Question 16. Improvement with efficient surveillance and enforcement (e.g. Number of hours of surveillance, collaborations for increased surveillance, increase number/capacity of sworn staff)?

0 – No action has been taken (40%)
1 – Some small action(s), routine type (30%)
2 – Some potentially relevant action(s), yet starting or incomplete (10%)
3 – Significant action(s) has(ve) been taken (10%)
No answer (10%)

The issue about paper MPAs has been referred to on a number of occasions within this study. From the replies to question 16 it is evident that only 20% out of the eight respondents indicated that there is significant action being taken with regards to enforcement aspects. 70% indicate no action or routine actions. This is of concern due to the fact that regulations within MPAs need to be well enforced to ensure their success.

Coincidentally the 20% tallies with the 20% for the previous questions which
is about new MPAs in ABNJ. However, without the actual responses of the
survey being available, a correlation test cannot be performed.

**Question 22. How has evolved since 2016 the budget allocated by your country to planning and establishing new MPAs?**

0 – the Budget has decreased (40%)
1 – the Budget has slightly increased allowing to plan new MPAs (30%)
2 – the Budget has increased allowing to plan and establish new MPAs but remains insufficient for running the management (20%)
3 – the Budget has significantly increased allowing to plan, establish and run new MPAs (0%)
No answer (10%)

The interpretation of the results for this question is that at first sight, there is again only 20% that have recorded a positive inclination towards MPAs by declaring an increase in the budget. 40% did not register any increase in budgets and this may lead to conclude that these will not consider MPAs on the High Sea noting that such MPAs would surely require significant funding.

Based on the survey responses the declaration of HSMPAs is likely to be a very slow process if it is ever to be implemented. It is also evident that MPAs may not be considered as a suitable tool to manage and protect natural resources. More knowledge sharing about positive results may be required at a State level.

A closer look at the results shown leads to a number of questions related on the per cent categories. If only 8 questionnaires were received and if no
answers to specific questions were indicated as part of the reply, then the percent ratings would be equivalent to the numerical values as indicated in Table 11.

<table>
<thead>
<tr>
<th>Number of replies</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
<th>7</th>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total replies</td>
<td>8</td>
<td>8</td>
<td>8</td>
<td>8</td>
<td>8</td>
<td>8</td>
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<tr>
<td>Percent equivalent</td>
<td>12.5</td>
<td>25.0</td>
<td>37.5</td>
<td>50.0</td>
<td>62.5</td>
<td>75.0</td>
<td>87.5</td>
<td>100</td>
</tr>
<tr>
<td>Percent (rounded)</td>
<td>10</td>
<td>30</td>
<td>40</td>
<td>50</td>
<td>60</td>
<td>80</td>
<td>90</td>
<td>100</td>
</tr>
</tbody>
</table>

**Table 11 – Percent and numerical responses to the questionnaire**

Hence, it is evident that the results cannot show a 20% or 70% response rate. This is assuming that each Country only selected one reply for a specific question. This assumption makes sense because if this was not so the interpretation of the percentages would not really lead to the actual number of Countries. Yet, various results are showing rates of 20% and 70%. More evident is that while a 25% figure may be considered to be rounded down rather than up and hence reads 20%, the results could then never be able to show a 30% response. The anomaly is that for some questions results having a rate of 20% and 30% are shown for the same question. It transpires that the results of this survey need to be better explained since their interpretation for the reader may lead to interpretations or queries on the collation of responses.
5.5 Overall Conclusion

It appears that all Mediterranean States are in principle, in favour of HSMPAs. To date there is only one MPA that is on the High Sea and this has not been originally declared through the SPA/BD Protocol procedure. Hence, it seems that notwithstanding all the efforts being made by the UN regional body, RAC/SPA, there has been little to no progress. Therefore, there may be factors that are impeding Parties from making progress. This study sought to identify and extrapolate these factors. Unless such factors are addressed, while some progress may be registered, it is unlikely that Mediterranean HSMPAs will materialise.

The impeding factors identified in this chapter mirrored those referred to in chapter 1. As identified and elaborated in chapter 1, apart from inter-State political aspects there may be various other factors that could be affecting the progress with MPAs. A number of these could include the fact that the criteria for identification of MPAs may not be clear and leaves room for interpretation and this could lead to MPAs being contested by the users. In fact, the public perception with regard to the use and management of MPAs is important as this could influence the general public’s attitude and also their inclination to comply with the MPA’s relevant regulations. The fact that, in a State, different activities at sea are normally regulated by different authorities may also be leading to intra-State lack of agreement due to the fact that authorities, other than environmental ones, may not be appreciating the importance of the need to set HSMPAs, let alone the positive externalities that such MPAs may generate.
Therefore, the governance by different authorities, leading also to fragmentation of policies may also be a cause for the lack of progress.\footnote{Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 354, 357.} This scenario is also mirrored at the international level noting the different international institutional organisations in existence. While, eventually, inter-State authorities may agree, and MPAs are designated, their governance is likely to be shared among them with each authority enacting policies and legal provisions to regulate specific activities under their remit. As explained in chapter one, this can lead to confusion among the MPA users noting the likely scenario of fragmentation of policies.

Notwithstanding, the potential factors that need to be overcome, Parties to the SPA/BD Protocol did not forfeit their ambition to declare HSMPAs. This could be possibly due to the fact that there are legal commitments, political aspects and above all due to the fact that MPAs, if well managed, would generate a range of benefits. Chapter 1, in fact, reviewed aspects of both good and bad MPA management practices and the potential effect that these may have on the users. Furthermore, in the same chapter, factors that need to be considered to lead to good management were delved into. Another, important factor that is to be mentioned is the aftermath of the declaration of HSMPAs. As explained in chapter 1, enforcement on the High Sea is a rather complex practice. There are various international legal provisions that govern enforcement and coordination among the Parties concerned needs to be factual.
Moreover, if they will be designated, it is unlikely they will be effective due to, *inter alia*, either lack of specific regulations or enforcement, or due to lack of resources. A way forward needs to be found to ensure that UNLCOS Article 192: “States have the obligation to protect and preserve the marine environment,” which applies to all marine areas is implemented to the benefit of conservation. The undertaking of this chapter led to the attainment of the fourth sub-objective, refer to page 24.

The situation for Malta is very similar to those for other Mediterranean States. Malta did not declare any HSMPAs. This situation was analysed also by Malta’s National Audit which performed an audit on the topic while this study was being carried out. Among the most important factors that may be contributing to this situation could be: the alternative cost of financial resources; insufficient diplomatic channels with neighbouring States; fragmentation of policies and the involvement of various institutions concerned with the management of activities occurring at sea; and the lack of available robust scientific data.

Noting the lack of progress made in the Mediterranean Sea as regards the declaration of HSMPAs, the next chapter will focus on suggesting a number of proposals with the aim to unblock the current situation.
6 Discussion and Recommendations

6.1 Introduction

The necessity to ensure the conservation of marine biodiversity is currently making news around the globe. Aside from public opinion, it can be assumed that stakeholders at all levels are also aware of the need to take action in this regard. While today marine conservation is in many ways mainstream, awareness of and action to protect the marine environment have been a feature of coastal communities’ experiences for centuries, particularly in island nations with a close connection to it. The adoption of special regulations for certain areas, a concept that itself has been employed for over hundred years, led to the conceptualisation of what today now is a popular conservation tool: marine protected area (MPA). This tool has been adopted to accommodate specific needs at national level but more importantly it has also been included in various international and regional Conventions. It is evident that positive results for the marine environment are anticipated through the declaration of MPAs. Such results will benefit not just the environment per se but also primary stakeholders and humankind in general, since healthy marine ecosystems are central to the functioning of beneficial ecosystem services and other environmental phenomena that affect life on earth.

Yet MPAs are not a panacea and it cannot be considered that their designation alone is the ultimate goal to be achieved. In so doing failure might be the expected result. MPA declaration is one of the first steps, others that should
follow include the establishment of specific regulations that need to be adequately enforced to ensure compliance. Otherwise, MPAs become so-called paper parks and their designation may be undermined when considering their potential beneficial effects when set against competing external pressures to, say, stock or resource exploitation.

However, as can be expected, similar also in other aspects of governance, there may be stakeholders that are dubious about the use of MPAs. This may be the result of inappropriate use and enforcement of MPAs or the inadequate selection of an area to become a MPA. Such doubts need to be addressed through proper designation, implementation and management of MPAs.

A considerable literature exist on MPAs as has been discussed and integrated in to this thesis. These works cover various aspects such as management, identification, scientific monitoring and socio-economic issues; and positive and negative experiences. Responsible authorities need to be aware of latest available information and rather than simply designating MPAs to honour any legal obligations they need to be possibly more involved.

The fact that various Conventions are referring to the use of MPAs is encouraging. Normally, obligations contained in Conventions would trickle down into national laws. Additionally, Parties attending to the various COPs would refer back to their State any information about MPAs. This is possibly leading to a standardisation in the application of this tool. Conventions normally operate
on their own. Some sort of coordination is needed especially as regards the application and reference to MPAs.

While the designation of MPAs to protect biodiversity in areas under national jurisdiction are progressing at an acceptable rate not the same can be said for MPAs on the High Sea. This is no surprise. In fact, this has been acknowledged at the global level and work is currently underway at the United Nations level to address the implementation of MPAs on the High Sea. The governance of HSMPAs faces various issues. First and foremost being that all States enjoy the same rights and that different sectors carrying out various activities at sea are governed at a global level by different international and regional institutions. So apart from facing the need to have coordination and agreements among the States there is also the added factor to have harmonisation among the different institutions. Yet, pioneer HSMPAs have been declared in various parts of the globe notably in the north Atlantic and in the areas around Antarctica. The process was not a straightforward one and various hurdles had to be overcome to agree on such HSMPAs. While HSMPAs may actually be ineffective, any positive and negative experiences from these areas need to be shared so that

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“1. Decides to develop an international legally binding instrument under the United Nations Convention on the Law of the Sea1 on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction and to that end:

2. Also decides that negotiations shall address the topics identified in the package agreed in 2011, namely the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, in particular… measures such as area-based management tools, including marine protected areas...;”
they serve as a learning experience towards successful HSMPAs in other parts of the globe.\textsuperscript{1018}

More concrete actions need to be taken on the High Seas. These areas contain important and sensitive habitats and new regulations are required to ensure protection.\textsuperscript{1019} Furthermore, the establishment and management of MPAs in ABNJ will require cooperation and political willingness between coastal States and competent organisations.\textsuperscript{1020}

A further factor that emerged from this study, while seemingly not important at first glance, is that concerning the multitude of names referring to MPAs. This may lead some degree of confusion and possibly interferes to apply a harmonised and coordinated approach by the concerned States. In fact, it has been recently acknowledged that any area that has a special set of conservation measures, established under any law, may be considered as a MPA and hence part of the Aichi target.

While an implementation agreement under UNCLOS may be looked at as a one-solution-fits-all it may potentially not meet such expectations. This may be due to the different political situations in different parts of the world, the persisting lack of disagreement between States as regards the delimitation of

\textsuperscript{1020} O'Leary et al., "The First Network of Marine Protected Areas (MPAs) in the High Seas: The Process, the Challenges and Where Next," 604.
the Continental Shelf beneath the High Sea and aspects related to the nature of biodiversity and oceanographic elements, among others. Consequently, a regional approach might need to be more implementable. The Mediterranean Sea is one region that hosts its own complexities. However, the SPA/BD Protocol that also incorporates a process to allow declaration of HSMPAs was agreed to over twenty years ago, back in 1996. While HSMPAs have essentially not been created and initiatives taken by the EU and RACSPA to designate HSMPAs do not seem to be yielding positive results, it does not automatically imply that this cannot be overcome. The issues that appear to be troubling the Parties need to be identified and addressed in an effective way. Conferences of the Parties to the Barcelona Convention can organise plenary sessions or workshops to allow for frank and open discussions among States. This may be one of the ways forward to unblock the situation.

The study will not be complete by only analysing the existing legal instruments and situation concerning MPAs on the High Sea. Therefore, a number of recommendations are also being presented which are rooted in the findings of the analysis are also being presented so as to offer potential solutions, or at least provide a platform for further investigation by researchers into the future.

The recommendations being put forward took into consideration existing efforts and the tools used to work towards the goals expressed in the measures agreed by States. The recommendations primarily focussed on the Mediterranean Sea as the focus of this study, although they may potentially be applied in other contested marine spaces with multiple coastal States. They are
also shaped by the experience of Malta, which is a very small regional presence, but with a very close connection to the marine environment. In order to put forward a number of suggestions it was important to consider the various stakeholders, hence the uses, rights and responsibilities of each of these. Hence, the exercise was to be approached from different perspectives and not just from an environmental aspect.1021

The recommendations attempt to keep new tools to a minimum. Existing legal instruments and international and regional institutions are factored to avoid re-inventing the wheel and making duplication, implying funds and time which may be used to achieve more progress rather than making efforts which may not provide new solutions. The recommendations do not include aspects that would affect the marine jurisdiction areas, this implies, for example, that they do not include actions to extend the EEZ, even though such an extension was proposed by Hannesson to be a step further towards finding a solution to the management of migratory stocks.1022

1022 Rognvaldur Hannesson, “Fishing on the high seas: cooperation or competition?,” Marine Policy 19, no. 5 (1995): 372: “The management of stocks that migrate across national boundaries at sea requires cooperation between the countries involved. This is in fact somewhat similar to the second jurisdictional principle that can be applied to migratory and straddling stocks, namely cooperation between all interested parties without any further extension of the economic zone. The difference is that without the enlargement of the economic zone the number of interested parties will be much larger and, more importantly perhaps, indeterminate. For stocks fully contained within one or more economic zones the number of interested parties is circumscribed, while anybody has access to fishing on the high seas. The cooperative solution will therefore be more easily accomplished with a further extension of jurisdictions at sea.”
6.2 General discussion at the global level

Work is currently ongoing on an Implementing Agreement under the auspices of the UN, although at the time of the submission of this thesis it was still going through its stages, a measure to develop and agree a measure to protect ANBJ, was expressed in the following terms:

“In its [UNGA] Resolution 72/249 of 24 December 2017, the General Assembly decided to convene an Intergovernmental Conference, under the auspices of the United Nations, to consider the recommendations of the Preparatory Committee established by resolution 69/292 of 19 June 2015 on the elements and to elaborate the text of an international legally binding instrument under the United Nations Convention on the Law of Sea (UNCLOS) on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, with a view to developing the instrument as soon as possible.”

UNCLOS Article 237 notes that other obligations arising from other Conventions should be consistent with the general principles of UNCLOS. This is important to note since if a new Convention or Agreement is proposed it has to take Article 237 into consideration. It is appreciated that the completion of this Agreement requires significant efforts and input to be completed and it remains to be seen what its final form will be and how long it will take to become effective. Such a drive was surely taken based on studies on what tool to opt for to seek a way forward with HSMPAs. Therefore, progress for HSMPAs at a global level is in fact on-going. This section will not attempt to re-invent the wheel but only provide some comments in this regard. The Maltese law

\[\text{footnote text}\]

1024 UNCLOS Article 237 Obligations under other conventions on the protection and preservation of the marine environment.
environment expert interviewed as described in chapter 4, noted that in view that the High Sea cannot appertain to a jurisdiction an implementing agreement can be a trigger so that States enhance their cooperation and respect the protection provisions of HSMPAs.\footnote{\textsuperscript{1025} Maltese environment law expert, personal communication, April 29, 2019).}

Gjerde and Rulska-Domino in 2012 published a possible way forward to ensure the conservation of the marine environment in ABNJ.\footnote{\textsuperscript{1026} Gjerde and Rulska-Domino, “Marine Protected Areas beyond National Jurisdiction: Some Practical Perspectives for Moving Ahead,” 373.} Their recommendations included \textit{inter alia} the preparation of a declaration that would also allow for cross-sectoral cooperation and to seek the support from relevant international institutions. In fact, inter-disciplinary cooperation is the way to ameliorate ocean management but needs to be elaborated for different levels ranging from regional to international levels.\footnote{\textsuperscript{1027} Vallega, “Ocean Governance in Post-Modern Society - a Geographical Perspective,” 413.}

An interesting approach was adopted during an international seminar, held in France, on HSMPAs.\footnote{\textsuperscript{1028} E. Druel et al., “A legal scenario analysis for marine protected areas in areas beyond national jurisdiction,” \textit{Report from the Boulogne-sur-Mer seminar, 19-21 September 2011}, Paris: IDDRI, 2011. \texttt{IDDRI https://www.iddri.org/fr/publications-et-evenements/etude/legal-scenario-analysis-marine-protected-areas-areas-beyond} (accessed March 21, 2014).} Four different scenarios were considered: regional scenario, UNCLOS implementing agreement scenario, CBD additional protocol scenario, and precautionary scenario. The exact details of the outcome of this seminar will not be reproduced here, but the basic frameworks described. The approach covered different situations, taking into consideration, among others, the roles that can be adopted by RFMOs, international institutions, and new...
global authorities or organisations. The seminar also identified the need for an improved EIA and SEA process. One of the scenarios referred to the Nagoya Protocol model and the CBD Clearing-house Mechanism. An innovative approach was that all activities in ABNJ have to be duly permitted and to allow a system of universal jurisdiction with enforcement powers delegated to the United Nations with ITLOS permitted to judge cases against contravening third parties rather than the flag States. Given the political tensions discussed in chapter 5, this might be an ambitious idea.

While it is noted that EBSAs located on the High Sea have been identified this does not imply that they will become HSMPAs. Work needs to be done to elaborate a system in which States can cooperate together on how regulations are going to be identified and enforced. Some flag States may not have enough capacity and resources to be able to monitor their vessels in different regions of the globe, although the increasing use of satellite tracking technology may in time overcome this problem, and is certainly an area likely to be researched more fully into the future, but is beyond the scope of this thesis. Consequently, some form of shared jurisdiction would most likely improve compliance in any HSMPAs. Any agreed sharing of jurisdiction should be documented to the fine detail to ensure clarity of roles; that it can function to achieve its aims; and that it does not allow for future conflicts between the flag State and the policing State. To minimise conflict, preferably, court sessions are to be either at the flag State or in some sort of international or regional court that would need to be established.
Enforcement operations on the High Sea are costly and complicated to monitor. Fisheries enforcement is no less expensive, but this does not diminish the duties of the flag State to establish a proper surveillance system. An added issue is that an international body may need to be recognised to tackle any non-compliant situations or else if the current process and institutions are used they may not be effective. To overcome this, the United States Congress turned on to establishing trade sanctions when there is lack of compliance with environmental regulations. Compliance is facilitated if an effective and simple set of regulations is in place and hence may reduce the enforcement costs and possibly the avoidance of complex political situations. Success is achieved when users “comply with the law readily rather than have to seek enforcement.” While enforcement generally leads to the surveillance of at sea operations by the flag State, other options are to also include port State control. Sanctions against fishing in contravention of RFMO regulation seem, however, to be accepted as legitimate. the UN Fish Stocks Agreement, at Article 21, allows for inspection at sea by a coast guard vessel from Country A of suspect fishing vessels from Country B, but Country B is to be notified if the suspicion turns out to be well founded, leaving it to Country B (the flag State) to take further steps.

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1031 Prof. Simon Borg – State of the Environment Conference, Malta, 2018
There is a trend to consider fishing operations not compliant to RFMO regulations as incompatible with international law. This can deliver positive results so that there is an increase in compliance with any regulations that are applied to specific areas, including those on the High Sea. If binding regulations cannot be employed, UNGA resolutions can be resorted to, so that the need to take effective measures is brought to light. The shape of the UNGA measure on ABNJ will provide scope for future research and development in this area.

A detail that can be considered and is expanded upon in the following section is that nomenclatures emanating from different MEAs may be reviewed to avoid misinterpretations by institutions and stakeholders. After all, whatever the title of the protected area, be it for example, a Special Area of Conservation or a Special Protection Area, they share certain basic conservation objectives and are both commonly referred to as MPAs.

The above recommendations are to be considered for a general global approach. It is evident the existing setup would not be enough to ensure the right level of protection and that different routes may be employed to reach the HSMPA target. Once HSMPA regulations are in place and able to be enforced, it might also be worth considering that as time progresses, especially where there are enforcement concerns, that there should be a link between the procedural and substantive obligations. In so doing aspects that may lead to

1034 ibid, 670.
controversial situations as occurred in the Case Concerning Pulp Mills on the River Uruguay may be avoided. Once MPAs are managed, compliance is a key factor to ensure their success.

6.3 Recommendations at Mediterranean level

At a more local level in the context of the thesis, there is scope for additional recommendations. Problems are there to be tackled and there should be a positive attitude towards resolving issues related to HSMPAs, since aspects involving customary international law and the principle of freedom of the sea can be tackled.

Figure 34 presents a generic diagrammatic summary of highlighted problems that this research has highlighted. Broadly, the recommendations are divided into two groups namely those related to designation and those related to management. A description of this figure is provided in the following sections.

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Significant legal instruments are in place and that a lot of progress has already been made. Furthermore, the on-going work in the Mediterranean region is also to be appraised. The recommendations for the Mediterranean Sea take into account that the seabed beneath the High Sea forms part of a Continental Shelf of one or other coastal State. The SPA/BD Protocol is considered as the building block since it has strong provisions agreed by most State parties.

The output of the project carried out by RACSPA in which a number of SPAMIs were identified should be further elaborated. If Parties have a high level of inertia in respect of the designation process, then it is recommended that each Party is approached to acquire information on what is keeping it from proceeding and also to acquire information or suggested changes on the process to seek a way forward. The fact that these potential HSMPAs have been contemplated but to no effect for a relatively long time implies that Parties are already aware of their selection, why it was selected and that it is a long road travelled. Hence, starting all over again should not be an option.

Figure 34 – Highlighted issues
contrast, some recommendations for consideration are being listed and explained below. These five recommendations therefore deal specifically with the already identified SPAMIs and to seek the implementation of results from the EU funded project. In addition to these more recommendations are proposed with the aim to be applied for other potential SPAMIs and as an attempt to improve the process.

1. The proposed SPAMIs should have their borders divided to allow a clear delineation of those areas that fall within a sea that is under a State’s jurisdiction; areas that are on the High Sea but fall under an agreed or acceptable limits of a State’s Continental Shelf; and areas that are on the High Sea but fall on a contested Continental Shelf by more than one State. This would allow the coastal State to better identify any issues in terms of governance and provides a guarantee that SPAMIs would not jeopardise contested areas. Noting also that proposed MPAs falling in areas under jurisdiction would be clearly defined it would be up to the coastal to decide on the way forward for such areas. It may be probable that the coastal State would decide to declare a MPA contiguous to an existing one on the High Sea to enhance protection. This demarcation and approach ensure that the coastal State’s rights are in no way compromised and gives more assurance.

2. The joint declarations should only proceed for those areas on the High Sea that are upon agreed or acceptable Continental Shelf borders. The non-consideration of areas where borders are not agreed should remove any concerns about any effect that MPAs might have of future claims. While this is
clearly inferred in the provisions of the SPA/BD Protocol, the actual non-inclusion of such areas may be the better way forward. Once a joint declaration would be agreed between two or more States, then it would be up to the relevant coastal State to manage those areas that lie above its Continental Shelf even though the MPA would be on the High Sea. In such cases the States should endeavour to coordinate the actions to create either one joint management plan or else a plan for each State’s area. In the latter case, the plans are to complement each other. Preferably they would be similar both in objectives and contents. The management plan should be a prerequisite to approve the SPAMI. Noting that a MPA on the High Sea is to be approved by consensus from the Parties the contents of management plans would be viewable prior to the COP meeting by each Party. Any changes to be made to such a management plan is to be approved by consensus. This would ensure that the Parties would be aware of how that High Sea area is going to be managed and also would be able to vote on known fact. Regular meetings between these States, preferably under the auspices of RACSPA are recommended. These meetings will allow for effective communication and to discuss concerns and share positive experiences. It would also allow so that individuals within relevant authorities build strong relationships which should lead to more effective remote communication and also more trust.

3. Wherever the proposed SPAMI lies, RACSPA together with relevant coastal States and experts should carry out an exercise to minimise their footprint. It was seen that these are huge areas. The actual proposed areas should really concentrate on those areas which are highly significant for biodiversity and
which clearly satisfy the selection criteria. The selected areas should be based on sound scientific information without any extrapolation of data. Preferably, the new proposed borders are to be ascertained by performing broad brush surveys. Such surveys should not take a long time to complete and would not require significant funding as much as a detailed survey would do. Small MPAs may be easier to manage and hence may be more effective since enforcement and surveillance may be more effective. Positive results may lead to a positive feedback towards the creation of more MPAs. Positive results may impinge on the user stakeholders, the government authorities and boost the status of the coastal State. Noting that HSMPAs are innovative in the Mediterranean Sea, starting with good results and positive working experiences is important. This will affect future approaches and progress.

4. Once there would be an agreement for a SPAMI on the High Sea, the coastal State or other concerned coastal States, with the assistance from RACSPA, are to seek a way forward to propose this area to the UNGA and to IMO to declare it as a PSSA.

5. A final recommendation is to also define how enforcement on a vessel flying the flag of a non-concerned Party or third State are to also be included in the management plan.

While the above five recommendations may seem to be naïve, or at least ambitious, they may in actual fact, at least partially, be part of the solution and to ensure that the Parties consensus is given freely without any undue
pressure. This should lead to more ownership of the decisions and therefore to significant commitment by the coastal State. The aspect of achieving the ten percent Aichi target should not be the aim of these SPAMIs but rather their declaration should be an externality to achieve the Aichi target.

The core of further general recommendations that are not targeted toward the project undertaken by RACSPA, focuses on the need for a coordinated approach. This should make up for the fragmentation of legal instruments and procedures that are highly relevant to MPAs. Apart from this, the political situation among Mediterranean States is considered by recommending more details about HSMPAs, especially in those areas where either there is lack of agreement between neighbouring States or in High Sea areas noting that the latter exist on the Continental Shelf of a coastal State. The aim of this approach was to provide the States more control over the areas on which they deem to have control at present or in the future should EEZs be claimed. This should also give States a sense of more security about territories.

In-depth information for each recommendation at the Mediterranean level as shown Figure 35 and Figure 36 are provided in the following pages. The recommendations touch upon various factors that may affect the designation process. Aspects related to designation are divided into three categories, namely, Coherence in Law, Identification Criteria and Designation Process. These are included in the recommendation since standardisation of laws and processes among States is considered to be an important factor. Figure 35 attempts to set this out in a diagrammatic format for ease of reference.
### Designation Aspects

#### Enabling legislation

**Regional**
- Once HSMPA is designated – UNGA resolution
- Link MEAs to SPA/BD
- Nomenclature: all MEAs to use MPA
- ACCOBAMS, SPA/BD, GFCM, EU Directives
- IMO
- SPA/BD Protocol to be the official enabling tool for all HSMPAs including PSSAs
- Once HSMPA is designated: inform IMO to designate PSSA
- All Mediterranean coastal States should enact a law to propose HSMPAs
- Link between the authorities from different sectors and States

**National**

**Identification criteria**

**Review criteria**
- ACCOBAMS, SPA/BD, IMO, EU, CMS, Ramsar, IWC, CBD (EBSAs) and other MEAs that call for HSMPA in the Mediterranean Sea are to review their criteria in cooperation with their Parties
- SPA/BD identification criteria to include other MEAs & IMO criteria (to allow MPAs to become HSMPAs if relevant)
- Joint HSMPA to include only high sea
- MPA’s area under jurisdiction to be managed solely by coastal State

**Legal text** to indicate designation is to be based on systematically collected data

**Border**

**Designation process**

- HSMPA can be proposed unilaterally
- SPA/BD MPA proposal process to exclude management plan
- Management plan & revised versions to be adopted by MOP of Barcelona
- MPAs = PSSAs; MPAs = FRAs

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**Figure 35 – Recommendations on designation aspects**
6.3.1 Coherence in law

The recommendations in his section are intended, among others, to address aspects related to the fragmentation of policy and involvement of various institutions. These issues were referred to in this thesis in section 1.6.3, and also presented in chapter 5.

There has to be an enabling legislation at a regional and at a national level. At a regional level the SPA/BD Protocol is in place and this can be considered as the enabling law. The current text does provide for the declaration of HSMPAs but there may be space for refinement of the text and also the process to establish HSMPAs.

Since the SPA/BD Protocol applies to its Parties and since the Mediterranean Sea hosts important shipping routes and distant States may participate in fisheries on the High Sea, any decisions taken by the Parties will not bind other States. In order to seek obligations by other States it might be valid if the coastal States that have initially proposed the HSMPA to the Meeting of the NfPs of the SPA/BD Protocol call for a UNGA resolution so that the specific Mediterranean HSMPA becomes recognised by other States with the expectations that they would respect any specific regulations that would apply to this area. If this resolution is adopted, it will give the HSMPA a better standing. It would be expected that States that would have approved would also unofficially bind themselves to adhere to the regulations of this MPA. Should this resolution, and the others that would follow, not be adopted, they may likely
serve as a catalyst so that HSMPAs in other regions would also be proposed. In the beginning, some opposition is to be expected. However, one might expect that eventually, there may be a turning point at some point when such HSMPA would become adopted.

The Parties of the SPA/BD Protocol are most likely also parties to other regional MEAs that call for MPAs. This also applies to EU member States that are Parties to the SPA/BD Protocol. The MOP of the SPA/BD Protocol may adopt a decision to recommend to Parties of other relevant MEAs, which most likely would be from the same State of origin that the SPA/BD Protocol is to be invoked as a tool to designate Mediterranean HSMPAs. On their part the other COPs of such MEAs are to adopt the SPA/BD Protocol as the main tool to designate HSMPAs. This process should mainly be applied to ACCOBAMS, CMS and GFCM. A relation needs to be established between the SPA/BD Protocol and IMO’s PSSAs proposals in the Mediterranean Sea. PSSAs are areas of ecological importance and hence special measures are adopted by IMO. There should also be a reverse link between HSMPAs established through the SPA/BD Protocol and PSSAs. The Maltese maritime law expert suggested that HSMPAs could be complemented by having the same area approved as a PSSA but instead of having patrols performed by the coastal State, these could be done by setting up a maritime regional policing organisation.\textsuperscript{1039} The viability and likely success of such a development would again be a topic for further research amongst the regional stakeholders. It would be rather awkward,

\textsuperscript{1039} Personal communication, May 31, 2019.
however, that in situations if the IMO will take the first step towards the proposal of a PSSA and such an area would never be proposed as a HSMPA under the SPA/BD Protocol. Hence, there needs to be a link such that when IMO proposes a PSSA there is consultation with the SPA/BD secretariat to ensure that the selected area truly merits to be classified as a sensitive area. However, it can also be argued that if a PSSA is the first step towards its adoption, it would have implied, much likely, that Mediterranean States would have accepted the PSSA. Consequently, there would be less of a need to consult the SPA/BD Parties. At least it has to be ensured that there is intra-national consultation between authorities leading on PSSAs and those leading on HSMPAs. While the IMO can still proceed with its PSSA, the PSSA should be attributed to the neighbouring Parties of the SPA/BD Protocol so that they propose it as HSMPA. The converse should also apply. In the sense, that if the HSMPA is adopted under the SPA/BD Protocol, then this should be presented to IMO so that it is adopted as a PSSA. All IMO members, including non-Mediterranean ones would be voting for its adoption and this may lead to such an area not being accepted as a PSSA. However, the same approach should be practised as explained in cases of recommendations for UNGA resolutions. Should, the PSSA become adopted it is likely that all adopting States would respect the HSMPA’s regulations.

The same principle should apply when the GFCM designates specific areas for enhanced protection. Once again, it would be the coastal States, being also Parties of the SPA/BD Protocol that would approve such FRAs on the High Sea. Hence, the need to link GFCM proposals to the SPA/BD Protocol. It transpires
that there seems to be a different attitude and approach by different authorities within the same State when it comes to adopt special measures on the High Sea about specific activities. This is to be addressed under the recommendations at a national level.

Further aspects related to legal instruments include those related to nomenclature as discussed in chapter 1. In this study it was presented that the multitude of nomenclatures that exist to name a MPA may be creating confusion among the stakeholders and the authorities. Various MEAs that are applicable to the Mediterranean Sea call for the designation of MPAs. Each of these MEAs has its own name for such MPAs, for example IMMAs and CCHs by ACCOBAMS, SPA and SPAMIs by the SPA/BD Protocol. Then there are those that originate from non-environmental laws such as PSSAs. While it is noted that, for example, ACCOBAMS, would identify important areas under specific names such as CCH rather than MPA, there should be a system whereby the criteria used by ACCOBAMS would lead to identify those areas that are important as habitats for cetaceans but the name, or better the title, given to such areas should be marine protected areas.

This should apply because the SPA/BD Protocol allows for designation whereas the others do not allow for designation of HSMPAs. When it comes for waters under jurisdiction the same approach should be applied. After all, the SPA/BD Protocol should cover all aspects that are covered by the other MEAs. It raises

\[1040 \text{ Section 1.4}\]
a question as to how can an area be a CCH and then not be worth protecting as a SPA, or how can it be a PSSA and not be a SPA. Since the SPA/BD does not focus on any species or habitat but is rather an all-encompassing Protocol so much so that it also covers educational and cultural aspects, then it can be ascertained that the criteria of other more subject specific MEAs would fall within the SPA/BD criteria. The reason for these different titles is that some MEAs refer to these identified areas based on the criteria or objective for which they were chosen while others refer to these areas based on the protection they are intended to receive. However, it can be assertively said that MPA is the most common used term and hence is the one that should prevail in MEAs and other relevant international agreements. Hence the recommendation is that the SPA/BD Protocol and the relevant EU Directives are reviewed so that SPAs and SPAMIs; SACs and SPAs, are titled as MPAs and MPAs of Mediterranean Importance, hence MPAMIs, as relevant.

CCHs and IMMAs designated under ACCOBAMS are to be referred to as potential marine protected areas for cetaceans. These would be proposed as MPAs. PSSAs identified by IMO noting that these are important areas because of their environment and are identified so that special navigation rules apply, then they are being protected from certain potential navigation externalities, therefore, they are also another type of protected areas. These should be renamed as MPAs. CBD MPAs to be retained; CBD EBSAs: noting that these areas are not identified so that they are automatically treated as protected areas it would be rather contrasting that these are proposed to be referred to as MPAs. On the other hand, if an area is biologically or ecologically significant, it
might be substantiated that the area should also be protected. Therefore, the term potential MPA may be opportune.

The following recommendations present actions that can be considered for adoption at the national level of all Mediterranean States. Preparatory work, unless not already undertaken, needs to be carried out so that the SPA/BD Protocol relevant provisions can be applied. Each State has to ensure that the right provisions at national level are in place through the required process.

It should be ensured that all SPA/BD Protocol Parties have an enabling law in place so that it allows the State to implement all the provisions within the Protocol. While transposition of each provision may not be required an implementation law might be necessary. Attention should be given to the fact that normally, national laws allow their government enact laws for activities for which they have jurisdiction in areas where the government has jurisdiction. It should be ensured that the laws would allow the government to propose MPAs in ABNJ. For example, in Malta’s case it seems that this is lacking, in view that the SPA/BD Protocol has been transposed through a law that only applies to the Maltese territory. However, Malta can still opt to issue a specific set of rules for its nationals that would apply on High Sea areas. This would imply that any HSMPAs can still be regulated.

Furthermore, Parties need to be organised and act in a coordinated fashion. In fact, according to Ringbom:
“Maritime matters, more than international legal issue in general, have considerable advantages to gain from coordinated regulation at a global level.”

While coordination between MEAs is important, the same can be said for coordination among national authorities that regulate different activities at sea, and for inter-State communication. This is even more so if such activities occur in ABNJ. Though it might be expected that authorities would cooperate as a normal procedure, the truth might not always reflect this. Hence, to ensure proper communication that should be geared towards cooperation, a law may be enacted to establish a national HSMPA committee comprising of relevant national authorities. This coordination requirement is evident when it comes to meeting the obligations of the MSFD. This committee can discuss MPA identification criteria emanating from different legal instruments and possible management measures that would be in line with the relevant international laws noting that experts from different sectors would be expected to attend. This approach would also assist in the streamlining of discussions around common subject in international and regional fora such as for example, IMO conferences and MOPs of various conventions. Hence, securing a better link between the relevant MEAs, IMO and UN aspects.

6.3.2 Identification Criteria

Recommendations presented under the identification criteria do not just pertain to the scientific factors, that are to also be included in legal text, but also deal with aspects related to political aspects. Aspects related to identification criteria were briefly referred to in the previous section. As was discussed in chapter 5, issues pertaining to identification criteria may be a withholding factor for progress within the Mediterranean Sea.

If considered necessary, the COP of the SPA/BD Protocol should instigate a process to review the criteria that allows for the identification of HSMPAs and also for coastal MPAs. This should be carried out in the light of the other criteria emanating from different MEAs, such as ACCOBAMS, CMS, Ramsar, IWC and CBD (MPAs and EBSAs), as well as those for PSSAs. An endeavour should also be made to analyse the criteria against those from the EU Habitats and Birds Directives, respectively. While it is recognised that EU laws do not apply for non-MSs, it is likely that on scientific grounds the EU criteria would be in harmony with that of other MEAs and hence there should be no opposition from other States. Any non-conformity would need to be tackled by the SPA/BD Protocol. This can be done if the Protocol accommodates the other MEAs’ criteria. It would rather ambitious to expect an international legal instrument to adopt a regional instrument’s criteria as it would become binding to a larger number of Parties and the Mediterranean criteria is not expected to be relevant at a global scale and hence may result in useless burden on other non-Mediterranean States. It is also recommended that the criteria listed in Annex I,
Part B of the SPA/BD Protocol, is periodically reviewed so as to incorporate any new criteria from other legal instruments.

MPAs, once designated and effectively managed may affect various stakeholders. Hence, it is important that MPAs are designated on sound systematic scientific data. This requirement is to be enshrined in law so that there is a common approach when it comes to HSMPAs. Failure to base MPAs on sound data may lead to controversies.\textsuperscript{1042} Furthermore, HSMPAs may not just affect the coastal State, which State might be one of the HSMPA proponent but also other States. Building on robust data may lead to enhance cooperation and acceptance by other States including those that are not Mediterranean. If it will be ensured that the SPA/BD Protocol criteria will cater for other MEAs’ criteria, and that all MPAs are based on scientific data, then all HSMPAs identified under whatever MEA are to lead to more or less the same areas as having the features to become MPAs and thus avoiding ambiguities.

The borders of HSMPAs are a factor that may lead to a lack of consensus among States. Issues related to MPA borders were also referred to in chapter 1, section 1.6.1. Additionally, it is unlikely that States would like to consider co-management with neighbouring States for MPAs that extend over the High Sea. This situation can be avoided but coastal States would need to cooperate to ensure consistency. This would be relevant when it comes to identification of MPAs, because for example, if there is an important ecological area at the

\textsuperscript{1042} See also chapter 1, section 1.6.4.
fringes of waters under a jurisdiction, it is likely that the area protrudes into the High Sea. Thus, if one of these is designated as HSMPA it would be up to the coastal State to also designate the area under its jurisdiction a MPA. Management of contiguous MPAs, that are, MPAs in area under a jurisdiction contiguous with HSMPA, would need to be complementary to each other and the coastal State would need to avoid transboundary negative effects on the HSMPA.

The SPA/BD Protocol allows for a joint HSMPA proposal that would include High Sea areas and area under a State’s jurisdiction. This may lead to uncertainties among States. It is deemed that it would pay if political borders and State’s sovereign rights are not in any way compromised and that this is clearly set not just by declarations but by avoiding compromising situations. All Mediterranean High Sea lies on the Continental Shelf of a State, as illustrated in Figure 4 and Figure 3. Proposed HSMPA should not be considered as a continuation of a MPA under a jurisdiction. This should be compulsory so as to avoid States shying away from designation especially if other collaborating States would be proposing extended HSMPAs. In conclusion any HSMPAs are to include the Continental Shelf borders so that each State is aware of the political boundaries. In those cases where the Continental Shelf border is not agreed, the contentious area is to be identified and preferably, HSMPAs should steer away from containing such areas. This will avoid political issues when it comes to establishing regulations and enforcement of the same.

\[1043\] See Figure 3 – Continental shelf delimitations

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6.3.3 Designation process

The current designation process contained in the SPA/BD Protocol needs also to be refined. Currently, Mediterranean HSMPAs cannot be proposed unilaterally. The SPA/BD Protocol allows such that neighbouring States may jointly propose a HSMPA. This may lead to situations whereby, for example, a coastal State would not be able to propose a HSMPA contiguous to an existing MPA under its jurisdiction, no matter the size of the proposed HSMPA. In fact, such a HSMPA can be proposed within the limits of its Continental Shelf whose borders are also agreed with neighbouring States. The SPA/BD Protocol’s provision seems to also associate High Sea area with neighbouring coastal States while it can be argued that any State has the same rights in High Sea, even the landlocked ones.

If the High Seas really do not appertain to any State, then in limiting the designation of a HSMPA to an agreement between neighbouring States may imply that the State wishing to propose such a MPA would be facing a situation that may not be legitimate. While it is true there may be political implications with the other neighbouring States that would not agree on this proposal, the rights of the proponent State are to be respected. The recommendation to allow unilateral proposals for HSMPAs may also allow distant States, within the Mediterranean Sea, to propose a HSMPA. This recommendation is also based on the fact that it may be a lengthy procedure for neighbouring States to agree on the boundaries of HSMPAs. Therefore, the proponent State can present its proposal at the meeting of the NfPs of the SPA/BD Protocol. The Parties will
then have a certain period to consider this proposal and subsequently submit their vote. It should be noted that HSMPAs have to be agreed unanimously.

Furthermore, the SPA/BD Protocol allows for non-Parties to use its provisions to establish MPAs in areas under their jurisdiction and to cooperate towards the implementation of this Protocol. This can be taken as to also include HSMPAs. Noting these arguments, some recommendations are being put forward with regard to the reviewing of the Protocol’s provision. Namely this would allow a unilateral HSMPA proposal by both Parties and non-Mediterranean Parties. The latter would only be allowed to propose HSMPAs within the limits of their Continental Shelf as long as there are no contentions on such borders. However, caution is to be exercised in this move since the original non-inclusion of non-Parties in this Article may have been deliberate. Non-Parties, being not bound by this Protocol may use this provision as a political move. Therefore, some more provisions might be needed so that non-Parties, in such cases, become bound by the management plan. Hence, it is proposed that the text of Article 9 of the SPA/BD Protocol should be reviewed.

When Parties decide to propose a HSMPA they have to present it at the NfPs meeting together with a management plan. Time has proven that it may already be difficult for States to come together to propose a joint HSMPA. Therefore, it can be safely said that it would be no less difficult to agree to a management plan. Taking into consideration the EU protected areas designated in line with the Habitats Directive, MSs are allowed to take six years to produce the first set of measures while in the meantime they ensure that the conservation status of
the features does not decrease: the SPA/BD Protocol process could also allow a number of years until the first management plan is set. Three years are recommended. The proposed management plan would also need to be approved at the NFPs meeting.

Since situations change, it is recommended that the management plan is reviewed every five years and these changes have to be approved by consensus at the MOP of the Barcelona Convention, in a similar fashion that the original management plan was adopted. The management plan should include a map indicating the political boundaries. Any contentious zones are to be marked. For those areas where boundaries are agreed it would be up to the individual Coastal State to set regulations. However, other neighbouring States are to be consulted and these may also submit their comments. The results would be that the management plan for a shared HSMPA would be composed from parts compiled by the concerned coastal States. Harmonisation of regulations is important to ensure that the HSMPA attains its objectives.

Aspects related to nomenclature and the designation of HSMPAs through different legal instruments are discussed in the previous sections. As a summary, any HSMPAs, and preferably also those with areas under jurisdiction are to be known as MPAs. For HSMPAs, designation under the SPA/BD Protocol should be mirrored as PSSA, or areas designated by the GFCM and vice-versa.
In order to provide a holistic set of recommendations, a number of proposed actions are aimed to target the management of HSMPAs. This is considered important because the goal of designating HSMPAs does not imply that the aim of HSMPAs has been achieved. HSMPAs once designated need to be functional and not remain paper MPAs. The management procedures to be adopted in HSMPAs are to be clearly set to ensure that the Parties will be aware that their rights or contended areas will not be affected or influenced because of shared management. This section will discuss recommendations about various management aspects as set out in Figure 36.
Management Aspects

**Regulations**

<table>
<thead>
<tr>
<th>In jointly prepared management plan by proponent States approved by Barcelona Convention MOP</th>
<th>Management by coastal States on the CS</th>
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<tbody>
<tr>
<td>Specific activities</td>
<td>Navigation activities</td>
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<td></td>
<td>Research activities</td>
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<td></td>
<td>Transboundary pollution</td>
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<tr>
<td></td>
<td>Fishing operations</td>
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<tr>
<td></td>
<td>Other activities</td>
</tr>
<tr>
<td>Measures to include those acceptable to PSSAs</td>
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<tr>
<td>To coordinate with:</td>
<td>GFCM</td>
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<td></td>
<td>ICCAT</td>
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<td></td>
<td>IMO</td>
</tr>
<tr>
<td>To contain provision making it binding to approving States</td>
<td>Approving States to enact law to enforce management plan</td>
</tr>
<tr>
<td>Activities from sovereign rights on continental shelf</td>
<td>Robust national legislation including EIAs</td>
</tr>
</tbody>
</table>

**Enforcement**

<table>
<thead>
<tr>
<th>SPA/BD Protocol new annex on enforcement</th>
<th>Neighbouring proponent States empowerment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Periodical reporting to NFP SPA/BD</td>
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<tr>
<td></td>
<td>Set arraignment procedure</td>
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<tr>
<td></td>
<td>Shared remote HS</td>
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<tr>
<td></td>
<td>Joint surveillance schemes</td>
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<tr>
<td>Action and boarding are allowed if officer from flag State is present or flag State consents</td>
<td></td>
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<tr>
<td>Arraignment in flag State</td>
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</tbody>
</table>

**Scientific monitoring**

To be done jointly unless proponent States consent otherwise

**Other**

Figure 36 – Recommendations: management aspects
6.3.4 HSMPAs Regulations

It is very important that once any MPA is designated specific regulations are enacted as soon as reasonably possible to ensure the proper management of activities especially those which may threaten the features for which it was designated. The regulations, apart from seeking the cooperation of the flag State for enforcement, may also include provisions to seek the cooperation from port States so that measures by the port State can complement on field enforcement. The following deal with regulatory aspects.

For HSMPAs that are based on joint proposals, the concerned Partied are to submit one management plan. This is to be approved at the MOP of the Barcelona Convention. Consensus should be aimed for noting that this would be applicable for a HSMPA but if this would not be possible the Parties that would not vote in favour are to be approached by the RAC/SPA to gather information from opposing Parties on the concerns that they may have with specific provisions. Subsequently, a cooperative approach should be taken to seek their approval and if this is not possible a call may be made to seek to amend the relevant measures as long as these do not impinge negatively on the features for which they are aimed. If consensus is not possible, the management plan should still be brought into effect for those Parties which vote positively. Each proponent Party, unless it wishes to cooperate more closely with the other concerned neighbouring Parties, should be allowed to propose its

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1044 Marine environment law expert, personal communication, April 17, 2019.
regulations for those High Sea areas that lie over its Continental Shelf. The Maltese expert of the Continental Shelf noted that management plans in the context of maritime spatial planning help to avoid conflicts between the various activities on the continental shelf. Furthermore, for the effective implementation of both the Marine Strategy Framework Directive and the Maritime Spatial Panning Directive regional cooperation is important. The Continental Shelf expert also indicated that over the past years the Government encouraged joint exploration for hydrocarbons in such areas of the continental shelf over which States have overlapping interests.\textsuperscript{1045} Furthermore, The Maltese expert in Maritime law noted that CS rights would be stronger than any HSMPA regulations that may exist over the Maltese CS.\textsuperscript{1046}

Not all HSMPAs might host the same activities that need to be regulated. Therefore, the main activities that are likely to be a threat are to be targeted. It is suggested that the regulations do not aim to regularise each and every activity occurring within the HSMPAs and furthermore regulations need to be kept simple. First of all, it might already prove difficult to regularise a few activities, secondly it should be remembered that the context is within the High Seas where a high degree of freedom exists or is perceived to exist and hence creating limitations on all activities may be regarded as a threat to the existing norms by the non-concerned States. Furthermore, enforcement of many regulations, some of which might not be necessary, would lead to more funds being required for enforcement purposes and/or enforcement would not be

\textsuperscript{1045} Personal communication, April 30, 2019.  
\textsuperscript{1046} Personal communication, May 24, 2019.
Effective. Additionally, having the enforcement resources required to monitor a higher number of activities might lead to resources not being employed to actually monitor the more important activities of concern. Among the activities that may be considered are: navigation, research, transboundary pollution, and fishing.

Navigation is an activity that needs to be adequately managed. In chapter 1, section 1.6.3, it was noted that navigation can negatively affect conservation measures. It is also noted that navigation routes in the Mediterranean Sea link the Indian Ocean with the Atlantic Ocean and hence, navigation aspects are important to be considered – both from a conservation and an economic perspective, respectively. For navigation activities, measures should include those acceptable to PSSAs. Such measures would need to be adopted by IMO so that they become binding to other States. A situation when the flag State does not take action on an own flagged vessel that causes pollution on the High Sea after receiving a note verbale from another State, that vessel may not be allowed to leave port.\footnote{Marine environment law expert, personal communication, April 17, 2019.} Such measures that are already in place need to be conglomerated into a management plan to facilitate governance of HSMPAs.

At first glance research activities may appear to be harmless however, if these are carried out without the necessary precautions, they may have a detrimental effect on biodiversity. A typical example may be the use of sonar and intrusive research on sensitive benthic biodiversity.
The regulation of trans-boundary pollution is already addressed in various international and regional treaties. However, safeguards should also be contained within the management plan. Regulations on this aspect should reflect the existing norms and any relevant international judgments. They should include clauses so that the coastal State informs the others of any activity it may undertake that may affect the HSMPA, monitoring protocols for any effects in the HSMPA, consultation with neighbouring States and the undertaking of EIA for specific activities.

The fisheries sector can be considered as one of the prime stakeholders of MPAs. It may affect fish stocks and natural habitats. The GFCM already makes specific regulations. Regulations that may affect the fisheries on the High Sea are to be proposed to the GFCM, preferably allowing for consultation prior committing in the management plan. Alternatively, it may be the GFCM that may identify the need for regulations and if these are agreed, they are to be included in the management plan. Preferably, there should be also harmonisation in this aspect so that an area is rules by a specific set of regulations rather than having different regulations emanating under different authorities or legal instruments. This should only apply to those activities that are highly relevant to the success of HSMPAs as otherwise it would be probably impossible to accomplish.

There may be other activities which may be a threat to the MPA’s success. In such cases these activities need to be addressed and regulations enacted in a similar manner to that described for the other activities above.
A further recommendation with regards to cooperation among different sectors is that concerning the different regional bodies of the Barcelona Convention, in particular those related to the different Protocols of the Conventions. These Protocols govern various factors that may affect the success of a MPA. Typical regional bodies, better referred to as regional activity centres, being referred to include all the six centres that are The Regional Marine Pollution Emergency Response Centre for the Mediterranean Sea (REMPEC), The Plan Bleu Regional Activity Centre (PB/RAC), The Priority Actions Programme Regional Activity Centre (PAP/RAC), The Specially Protected Areas Regional Activity Centre (SPA/RAC or RACSPA), The Regional Activity Centre for Sustainable Consumption and Production (SCP/RAC) and The Regional Activity Centre for Information and Communication (INFO/RAC). This coordination is expected to lead to better regulations and dissemination of information among stakeholders. This coordination can link to more effective communication with other international bodies from different sectors. Ultimately it should result in better enforcement and hence more compliance.

In order to avoid paper MPAs, as variously discussed above in sections 1.6.2 and 3.3.1, it is important the MPA regulations bind the approving Parties and

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those that approve the MPA to become a PSSA. On the other hand, the approving Parties, as relevant to their judicial system, are to enact a law to make the management plan binding at a national level. Such recommendations should preferably be inserted in a revised version of the SPA/BD Protocol rather than having decisions taken at the MOP of the Barcelona Convention. This would avoid fragmentation of obligations.

It has to be considered whether Parties may approve the management plan with reservations to particular measures and thus to avoid being bound with them. There may be situations where a State might need some more time than others to abide with a particular measure and consequently would lead to a failure to achieve consensus on the whole management plan if reservations are not allowed. Accepting reservations would imply that biodiversity would be at least protected from other States’ activities and therefore there would be space for improvement.

Failure to comply with relevant measures is to be associated to applicable penalties. It is not expected that the penalties would be the same in all States since not all have the same GDP. However, penalties are to reflect equity when compared to the different GDPs from different States.\textsuperscript{1049}

\textsuperscript{1049} An example of such an approach may be seen in the CJEU’s approach to the imposition of penalty payments consequent on a breach of Art. 260 TFEU. In Case 387/97 Commission v Greece (Chania Waste) the court applied the EU Commission’s formula, which takes account of a state’s ability to pay.
The activities that are carried by coastal States on their Continental Shelf has already been referred to in various recommendations. A probable innovative provision to be contained in the management plan is that related to sovereign rights on continental shelf beneath the High Sea water column within the MPA. As previously described the High Sea in the Mediterranean exists above the States’ Continental Shelf. Proponent coastal States might feel that they would be compromising their sovereign rights if a HSMPA is designated. Alternatively, noting that as recommended, HSMPAs can be proposed even when not all neighbouring States would be consenting, the non-consenting State may feel jeopardised if a HSMPA is created above its continental shelf and hence, if also a Party of the Barcelona Convention, might oppose the HSMPA and hence consensus would not be achieved and therefore the HSMPA cannot be created. If the recommendation that consensus may not be required, it would be practical that the coastal State upon whose Continental Shelf the MPA is being proposed has to agree to it otherwise the MPA cannot be designated. In order to mitigate any effects from activities on the Continental Shelf and to establish a cooperative approach among States, various activities are to be assessed through an EIA procedure. This obligation should be enshrined in national laws.

6.3.5 Enforcement

The enforcement and compliance issues are tackled in this part. Enforcement and related activities are one of the topics that may raise most questions and debate among States. Enforcement encompasses four main pillars which are
monitoring, control, surveillance and arraignment. Broad agreement on enforcement is necessary so that States that would have a keen interest to jointly propose a HSMPA would know *apriori* how enforcement, in principle, would be carried out. In fact, the Maltese expert on environmental law notes that enforcement by States at regional level is rather complex but a process similar to that employed under the UN Framework Convention on Climate Change (UNFCCC) for climate change penalties may be adopted;¹⁰⁵⁰ these provisions would have to be adopted through a multi-lateral agreement. Provisions from the FSA, refer to section 2.8, may be mirrored in an Annex to the SPA/BD Protocol. Enforcement aspects have been divided into a number of subcategories and recommendations are attributed to each of them.

Since enforcement can lead to complex inter-State situations it is deemed to be better to compile a set of principles in a dedicated annex within the SPA/BD Protocol because its creation would imply that most, if not all, Parties would have agreed to it and also it would ascertain States’ rights and responsibilities. It also allows for a standardisation of enforcement procedures across MPAs within the Mediterranean Sea. The details of this annex are to be provided by experts in the field of enforcement and legal experts to cater for various activities especially fisheries, navigation, Continental Shelf rights and obligations. Legal expertise would ensure that any action against non-cooperating Parties and concerned non-Parties would be legitimate. Positive experiences from other MEAs especially, the Straddling Stocks Agreement can

¹⁰⁵⁰ Personal communication
be adopted. Some factors that can be included within this annex are described below.

The neighbouring proponent States may consider to agree empowering each other by sharing jurisdiction over each other’s nationals and also by establishing a joint surveillance system. This should be a voluntary scheme. Surveillance on the High Sea is a costly exercise and if States create synergy by joining together or sharing resources there will be increased efficiency and possibly also efficacy. In the Mediterranean Sea a typical joint surveillance scheme is that organised by the ICCAT during the bluefin tuna season, as noted above in section 3.4.

Joint surveillance schemes can consider various options. This may include a coordinated approach and an established scheme whereby enforcement officers from the proponent States can be on-board. Furthermore, noting that the management plan would have been adopted also by non-proponent Parties, it may be possible to consider that even such States are involved by inviting officers to join surveillance trips. This may facilitate to arraign nationals of non-proponent States in case of any observed non-compliance with the management plan or any applicable legislation.

In view that at-sea surveillance, by vessel or aircraft, can be rather costly, remote surveillance can be resorted to. Remote surveillance would still allow space for a number of cooperation schemes. For example, flag States may allow other proponent States to view a vessel’s movement when with the
HSMPA. Port States may also be called in to cooperate. Remote surveillance hubs may be monitored, pending agreement on a scheme, by officers from different States. This would allow better cooperation and trust among the States and also is a move towards more transparency in governance. It also allows enforcement authorities from different States to build a professional relation and hence may possibly pave the way so that when carrying out enforcement on the High Sea, officers from different States, can feel as forming part of one group, that is, a High Sea enforcement authority. Such cooperation may eventually trickle into the relationship among States and can also lead the way as a good example of how States are to cooperate for the protection of biodiversity of the High Sea. This may also be eventually applied to other regions around the globe.

It is important to avoid situations which might lead to confrontation and action being taken by a States against another for performing unauthorised enforcement action against another State’s national. This would take the clock back as regards cooperation. No action or boarding is recommended unless there has been *a priori* written detailed agreement with the flag State. It is also recommended that boarding is only agreed to when an officer from the flag State is present during the operation. Unless there is a clear allegation based on observations it is not recommended that boarding takes place. This will avoid unnecessary interference with fishing operations and appropriate enforcement may be more welcome by fishers and might also lead to collaboration between fishers and enforcement authorities.
If the HSMPA becomes adopted by the UN or by IMO as a PSSA, additional flag States, that are those who approved the HSMPA, may be monitored, but not necessarily boarded. Any observed irregularities are to be recorded preferably using photographic records and communication with the flag is preferably made instantly so as to await any directions that can be given by the flag State. In some cases, a flag State may decide to share its jurisdiction and provide for more action to be taken.

The annex should also contain an obligation of periodical reporting to secretariat of the Barcelona Convention through the secretariat of the SPA/BD Protocol, and a report is to be presented at the meeting of the SPA/BD NFPs. It is recommended that at least an annual report is sent to RAC/SPA, however two reports per year are better in view that most fisheries operations occur outside the winter season and would also allow for any queries to be raised among the proponent parties during their compilation. The report is to be compiled by the proponent States and should also include any unilateral action and surveillance that was taken on nationals and vessels flying the flag of the same State. Additionally, any open court cases, follow-ups and court judgments are to be included. If the report would include references to cases involving national or vessels from non-proponent Mediterranean States or any other State, than a copy of the finalised report should also be sent to the State involved.

The annex should also include an agreed arraignment procedure and if agreement is not achieved, then different options that can be considered may
be included. This would allow proponent States to consider these options when compiling the joint management plan. Since any non-compliant activity would have happened on the High Sea, and since enforcement by the non-flag State was only possible due to the consent of the flag State, it is recommended that arraignment only occurs in the flag State.

Another aspect related to management is the system in place to allow to rate the effectiveness and identify the shortcomings of the HSMPA. This can be achieved through a monitoring exercise. Monitoring will provide the required information whether or not the MPA is achieving its objectives. The results may give an indication if enforcement is carried out diligently, if regulations are effective and provides the drive for States to continue with their efforts. The methodology does not need to be included within the SPA/BD Protocol but it should be reported to the NfPs meeting so that as much as possible the same methodology is employed or adapted to different parts of the Mediterranean and hence allowing for calibration. Monitoring should also include topics related to socio-economic factors. It is very important that monitoring is carried out on a sound scientific methodology that it is to be agreed by proponent Parties. In case when there is disagreement, the State may still proceed with its studies.

Other issues regarding enforcement may need to be considered. Topics may be brought up by the States to reflect different situations. These can be tackled and assessed how they can be standardised and included in the annex or a formal document.
6.3.6 Funding

For a HSMPA to function, it requires to be adequately financed. Aspects about funding are thus being included also noting that HSMPAs are not owned by any State since the declaration of MPAs in ABNJ does not infer any territorial claims. Consequently, HSMPAs are for the common benefit of States and the environment. Figure 37 summarises the recommendations.

The designation of a HSMPA also requires substantial funds to be identified. Unless there is no sponsor to perform such studies, the concerned States are to fund these studies. The proponent States are to ensure that the provisions contained in their management plan can be adequately funded. A funding scheme may also be considered. This can be implemented either by having all Parties providing a donation based on their annual GDP or else elaborating a calculation whereby all Parties that are users of the area provide a donation. Otherwise both options can be considered in combination.

In addition to States, regional institutional organisations such as ACCOBAMS secretariat and GFCM can also participate in the funding of HSMPAs especially
if these MPAs have been set up in line with their criteria. It is probable that such an action would require the consensus of the Parties to these Treaties.

6.4 Re-Thinking the Concept of MPAs

It is felt that the recommendations pertaining to the re-thinking of the concept of MPAs should be included under a separate section. The reason is that these recommendations will move away from the generally accepted MPA concept.

In section 1.2, reference was made to a possible neo-Seldenian agenda that might be a driver behind the dilution of the freedoms of the High Sea. Whereas in section 1.6.2 it was seen that the Epistematic Community and Advocacy Coalition might be playing a significant role for the drive towards the creation of MPAs. It was seen that many are those Conventions calling for the creation of MPAs and this call went to the extent that a target coverage of ten percent of the sea are to be designated as MPAs. This makes it like a race against time to achieve the target whatever the effectiveness and distribution of such MPAs might be.

Before this drive for MPAs there was already the existence of area based management measures which in actual fact are still being used without ever proclaiming a MPA, see for example, section 1.1. Furthermore, it is now confirmed that such areas can be considered as a MPA for statistical purposes. This is somewhat agreeable, and this leads a higher number of MPAs than
those that are actually officially designated as MPAs. The last recommendation is questioning the real need for the existence of the MPA concept. Recalling the definition of MPA (set out in section 1.4 above) which in brief is an area that has stricter regulations than other areas, the marine biodiversity can be continued to be governed by the establishment of specific regulations to achieve a set of conservation aims. This would take away the pressures from States and user stakeholders, as well as, halts any negative perception of MPAs, and rather than focusing on declaring MPAs with the possibility of becoming paper MPAs it might prove to be more effective and efficient if States continue to concentrate on setting regulations for conservation in any area as might be needed.

As regards the protection of biodiversity on the High Sea, the same approach can be adopted. Typical examples of measures existing on the High Sea without any MPA declaration include:

i. The protection of cetaceans wherever they may be, under EU Law;

ii. Prohibition of trawling beneath depths of 1000 meters in the Mediterranean Sea, as per GFCM resolution;

iii. Moratoria on whaling establish through the IWC;

iv. Minimum reference sizes for certain fish under EU Law; and

v. Closed seasons for bluefin tuna in the Mediterranean Sea under ICCAT.

It might be that conservation efforts have become entrapped in the MPA concept for the sake of creating MPAs. This is allowing energies to be used for MPAs at an opportunity cost of making tangible regulations to enhance
conservation. It might be that policy makers need to stop and re-think the MPA concept.

It was seen that reserves are the strictest form of MPA. In fact, these are the real protected areas (emphasis added). There are many areas in the marine areas around Malta to where specific regulations exist and also in the Mediterranean Sea. In fact, it was noted earlier that trawling beyond 1000 metres is prohibited. Yet, such areas are not officially declared as MPAs. Noting that the designation of MPAs may be simply complemented with a number of regulations that target specific features then the two areas brought as an example have the necessary regulations to be looked at as MPAs. This in fact has been recently acknowledged when it was agreed that areas having specific measures can be added up to the per cent coverage of MPAs to achieve the Aichi target. The re-thinking of the concept of the use of MPAs can consider that the MPA title can only be applied to reserves or to areas where consumptive use is prohibited since after all these are the real protected areas. This may also lead stakeholders to acknowledge what a MPA area is and can also lead to more benefits in terms of productivity which may spill into adjacent areas. Hence, there would be more credibility among the stakeholders and even the general public.
6.5 Conclusion

The Mediterranean marine realm hosts different environments supporting a variety of biodiversity. The sea offers a significant and irreplaceable number of services. Some of the species serve as a consumptive resource, for example for the fisheries sector, while others may serve as a non-consumptive resource, such as for diving tourism. In order to ensure that such uses are maintained throughout time one has to look from an ecological perspective and deal with the marine environment in a holistic manner. The conservation of resources has been upheld in many international fora for various interests that include anthropocentric and biocentric perspectives. An emerging conservation tool is the use of marine protected areas (MPAs). Experience has shown that the successful designation of such areas, need a sound preparatory work and involvement of stakeholders at an early stage. Today one finds a significant number of MPAs in areas under a Coastal State’s jurisdiction. Various international organisations and interest groups have been calling for such designation but such development is lethargic.

MPAs are an effective tool to ensure sustainable growth.\textsuperscript{1051} Hence, their designation on the High Sea is also to be approached with assertiveness by all coastal States, even in the Mediterranean Sea. This keeping in mind that while the High Sea can be used by all, it seems that nobody wants to effectively take concrete measures.\textsuperscript{1052} In fact, while legal provisions are in place to set

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\textsuperscript{1051} Invild Ulrikke Jakobsen, *Marine Protected Areas in International Law*, 66.

\textsuperscript{1052} Maltese environment law expert, personal communication, April 29, 2019).
HSMPAs in the Mediterranean Sea, HSMPAs are lacking. The nature of certain legal texts that allow for different interpretations and avoidance need to be considered.

Significant work has been done and is currently on-going with respect to the creation of HSMPAs. The SPA/BD Protocol appears to be an innovative and pioneering agreement for the creation of HSMPAs. The creation of another legal instrument for the Mediterranean Sea may therefore not be the most efficient way to proceed. The fact that negotiations on an international treaty on the subject are on-going, it may create an opportunity to re-open negotiating sessions between the Parties of the SPA/BD Protocol or to include a more detailed annex focusing on MPAs in the same Protocol.

The way forward for HSMPAs to be created in areas where there is a real need for them and being based on sound scientific data need the States’ momentum to kick-off. Five factors are considered important, namely:

- Coordination among States;
- Consultation among stakeholders;
- Avoidance of duplication of legal instruments;
- Ensuring and protecting rights of States in areas over their Continental Shelf; and
- Addressing concerns by coastal States.

It is hoped that at least this research would have a small role at giving its share for the protection of the marine environment since this is not just the
responsibility of politicians\textsuperscript{1053} but also of scholars. This study apart from providing some possible solutions may also have identified other required research that may carried out.

Should the results of the ongoing activities, to facilitate the governance of HSMPAs, do not render the expected output, more energy and possibly a different approach is to be inputted so that one day there can be a clear process agreeable. This noting, that MPAs are an important tool to conserve the marine environment in all areas of the sea\textsuperscript{1054} and that international law is constantly evolving.\textsuperscript{1055}

It is envisaged that to have an effective management system in MPAs both on the High Sea and even in areas under jurisdiction, the States making use of such areas are to cooperate with the regulatory measures.

\textsuperscript{1053} Beyerlin and Marauhn, \textit{International Environmental Law}, 376
\textsuperscript{1055} Hannesson, “Rights based fishing on the high seas: Is it possible?,” 670.
This study sought to present and analyse the situation pertaining to the declaration of HSMPA in the Mediterranean Sea, focussing on Malta. To put research in context a literature review was undertaken and the key discoveries presented. It is evident that MPAs, whether in areas under national jurisdiction or beyond, do face a number of issues. As was seen in chapter 1, these related, among others, to MPA designation and governance which is further compounded with issues emanating from socio-economic and political sectors. It transpired that if MPAs are adequately implemented, they can be a valuable tool to perform marine spatial planning and that there are many good experiences from around the globe with regard to conservation of biodiversity.

At the international and regional level, various Treaties call and some even obligate Parties to designate MPAs in all marine zones as may be relevant. Treaties considered to be relevant to HSMPAs that do not apply to the Mediterranean Sea were analysed to evaluate their application such that good experiences may be brought into play for the Mediterranean situation. In doing so, various legal provisions were also scrutinised to assess their applicability and robustness. In view that this research is about the Mediterranean Sea, the Treaties applicable to this region were tackled to great depth focussing on provisions related to HSMPAs. A description about the political situation in the Mediterranean Sea was provided since this is considered to be a main factor that is influencing the progress of HSMPAs in this region. This research was not able to go beyond an overview of this situation, which is an acknowledged
limitation and something that would be worthy of further research. In the aftermath of this legal review it was reckoned that legal provisions contained within the Specially Protected Areas and Biological Diversity Protocol are available to allow for the declaration of HSMPAs. The legal review also highlighted certain aspects in this Protocol that might leave space to some degree of different interpretations.

Noting that this study focuses on Malta, relevant Maltese law, as well as EU law, was also analysed. It transpired that Malta also owns a mature legal setup that is relevant to MPAs for areas within its jurisdiction. Malta has enacted various laws some of which call for the creation of MPAs whereas others allow to establish measures to control activities occurring within the designated MPAs. Noting that Malta has not declared an EEZ it still managed to legislate to allow for the creation of MPAs beyond its Territorial Sea. The research has brought together all of the relevant Maltese legal materials applicable to MPAs for the first time, and has enabled the author to observe areas where improvements in implementation or gaps in provision exist.

In the course of acquiring information about the existing situation from States and various stakeholders it was reckoned that States, in particular, may treat such information as confidential. This is based on the fact that the number of replies received in response to the questionnaires sent to States were only two. However, this result did not block the research since alternative reliable sources were identified and used as explained in chapter 4 and chapter 5.
Through these alternative sources it was seen that notwithstanding the provisions and action taken by RAC/SPA to conduct a study to identify HSMPAs, to date none have been declared through the SPA/BD Protocol. This situation should lead to number of questions pertaining to different sectors, including but not limited to legal, political and socio-economic aspects. The analysis also branched into alleged reasons as to why this lack of progress was recorded. It was noted that the procedure for declaration needs to be better elaborated so that Parties are re-assured of the consequences and commitment concerns. While currently work is on-going at a global level to address the issue of HSMPAs, it was argued, that the fact that the SPA/BD Protocol has been ratified by almost all States bordering the Mediterranean Sea and the fact that this Protocol also addresses HSMPAs, it was considered to be more effective and efficient, if the Protocol is amended rather than presenting a new legal instrument, to declare HSMPAs in the Mediterranean Sea. This also noting, as above, the complex political situation in this regional Sea.

This research also presented the scope to suggest a number of recommendations to address issues identified following the analysis and also to counteract certain discussions that were brought with regard to relevant regional Treaties, including Malta. Some of these recommendations address various gaps and aspects related to policy fragmentation, among others, and involvement of various institutional stakeholders. There exists opportunity for additional research as to the potential impact and possibility of realising the recommendations, particularly those calling for increased state cooperation on matters such as enforcement.
This research sought to create an understanding of a more holistic picture of the Mediterranean situation. This, among others, had the objective to address any contestation issues whether or not SPA/BD Protocol provides provisions strong enough to create HSMPAs. The FAO regional organisation, RAC/SPA, insists that the Protocol is a valid tool. Through this research, some possible ways forward have been identified, and the apparent obstacles identified. It is noted that in many publications the emphasis has been placed on developing a new agreement and there does not seem any innovative approaches towards improving an existing legal instrument that is being already partially implemented. The fact that positive outcomes have been observed to emerge from the regular meeting of the Parties to the SPA/BD Protocol on many occasions, may pave the way to suggest improving this Protocol, noting that cooperation among States is a crucial step. Of course, the research here has been drawn from the commitments stated by the parties at the relevant meetings and as such is limited to an understanding of that public commitment. An attempt to obtain an understanding of the in-country drivers that may inform the Parties to the Protocol’s approaches was unable to be obtained under the revised methodology. This limitation is acknowledged.

This study also identified that while the legal instruments and the provisions therein may need to be addressed, it also emerged, that from a practical point of view, enforcement can prove to be both complex from a legal point of view and from a more practical focus, an expensive exercise. Hence, while some Parties might argue that the Protocol might not be strong enough to ensure declaration of HSMPAs, it may be that they are considering other practical
aspects and are unwilling to commit resource. In order to solve enforcement on the High Sea, good experiences from the application of other Treaties on the High Sea, such as the ICCAT may need to be mirrored in the SPA/BD Protocol apart from also trying to create other innovative solutions to tackle enforcement. Once again, beyond the scope of this thesis, the potential for taking working practices from existing enforcement processes as a means to promote HSMPA regulation is another potential area of research this study has identified the need for.

To date it does not transpire that there has ever been a study on how relevant provisions within this Protocol can be ameliorated so as to attempt to address any concerns of the Parties to this Protocol. The study provided an in-depth analysis of this Protocol and also identified specific provisions where there might be change. Suggested amendments in principle were provided. Hence while this study presented the SPA/BD Protocol as having robust provisions, it was also identified that the same Protocol might need to be amended to facilitate the designation of HSMPAs. Such amendments can only be done if Parties to the Protocol might consider this approach and they would propose any changes. The Protocol was drafted in the nineties and noting that after twenty-five years there has been no progress, then amending it might be the only way forward. Apart from analyses regarding the law, the study also highlighted the political aspects. As noted above, politics have an important role when it comes to collaboration between Parties. Thus, the complex political situation in the Mediterranean Sea needs to be taken into consideration when
suggesting and amendments, although the complexity of geo-political analysis here was not able to be included.

Malta does not seem to be at any different point than that of the other Parties to the SPA/BD Protocol. That is, Malta does not seem to be gearing towards any declaration of HSMPA, and has been demonstrated that it has legal obstacles in its own system to be able to do so. Malta, though has been supportive of the resolutions and declarations of the RAC/SPA meetings. To date Malta has declared various MPAs within waters under its sole jurisdiction. This may imply that Malta does have an impetus to conserve marine biodiversity through the declaration of MPAs, but that there is a reluctance, or a lack of ability, to propose them elsewhere. Consequently, the position as to why Malta has not yet agreed to the identified HSMPA located in the central Mediterranean Sea needs to be further analysed. The same comment is also valid for the other Parties to the SPA/BD Protocol, and, as above, there is the need for further in-country research to provide a fuller picture.

This research also faced various limitations, some related to the time and resources available, while others relate to the fact that the researcher did not represent an official regional institution and hence participation by the States was severely limited. However, as the responses to RAC/SPA’s own survey showed, even this would not have guaranteed obtaining representative information. It was noted that both the analysis and the SPA/BD Protocol review in particular, identified various gaps and room for the creation of clearer provisions and procedures to propose and declare HSMPAs. Each of these, as
such may be a study on its own since when they are dealt with in depth, it is expected that they can lead to complex issues that would need time, resources and a word limit beyond this thesis in order to be adequately addressed.

Further, research focusing on specific aspects of the Protocol and possibly on accessing the reasoning behind each Party’s position are suggested. These studies might eventually lead to a set of suggested amendments unless alternative solutions can be found applying the same Protocol or through the enactment of a new regional Treaty. The output from such studies can then be consulted on a bilateral basis so as to eventually lead to an official meeting of the Parties.

MPAs in coastal jurisdictions have proved to be an effective tool for conservation and the management of fish stocks and other marine biodiversity, if appropriately implemented and well managed. MPAs if inadequately implemented, can lead to a distrust among stakeholders from various sectors. The research has provided an analysis of the extensive literature on MPAs, more generally, on the High Seas and in the Mediterranean: what constitutes a measure of success and what makes the process less effective than hoped for. It has sought to understand why there remains a gap between the available measures to establish Mediterranean HSMPAs and their actual creation. Finally, it has sought to examine these factors from the perspective of one of the states, parties namely, Malta.
It is hoped that at least this research, with its identified limitations and avenues for further investigation, represents a furthering of the discourse in helping to shape the protection of the Mediterranean marine environment, since this is not just the responsibility of politicians but also of scholars.\textsuperscript{1056} This also noting that “the Maltese Islands are located in the Mediterranean Basin, which in itself is already considered as a biodiversity hotspot, and present a case study of intense anthropogenic impacts on a rich biodiversity.”\textsuperscript{1057}

\textsuperscript{1056} Beyerlin and Marauhn, \textit{International Environmental Law}, 376
Appendix – Consent Form for Recording / Interviewing

Governance of Mediterranean marine protected areas beyond the territorial sea with a focus on the Republic of Malta

Harassment Advisor Participant Information Sheet

Principle Researcher Contact Details:
Christopher Cousin, 117 Two Gates Str, Senglea, Malta, ISL 1202.
Christopher.cousin@plymouth.ac.uk

What is this Study About?
This study is about the legal issues concerning the designation and management of marine protected areas (MPAs) beyond the territorial seas. The main aims of this research are to identify and analyse issues with regards to the governance of MPAs beyond the territorial sea of existing legal instruments and also to put forward a number of recommendations, with the possibility that it might serve as instigation so that specific studies are carried out on issues highlighted through this research. As expected, various, legal instruments will be included but also relevant published articles and other documentation.

Will you benefit from the study?
No direct benefit is foreseen. However, depending on the nature of the organisation or profession that is represented, the results of this study might be of interest. Furthermore, States' representatives may be able to explore, in a non-formal setting, the general perspectives of States at a regional level which might lead to a more open dialogue on the subject in formal settings.

What are you being asked to do?
The researcher will present a number of questions in the form of an interview or questionnaire. The interview, conducted face-to-face or other media communications such as services over the internet, will take between 15 to 45 minutes to complete. The questions focus to gather one’s opinion, a State’s or organisation’s perspective, depending on the entity being represented by the interviewee. In the case of a questionnaire, you will be asked to provide either written or verbal replies to a number of questions.

Are there any risks?
While no risks have been identified during the planning phase of this research, if any risks emerge during this exercise the interviewee will be alerted and the option to halt the interview given.

Your Rights as a Participant:
- You can decide to stop answering the questions at any time.
- You can decide to withdraw the answers provided within 30 days from replying to the questions and all replies will be destroyed. After this period it would not be possible to remove this data as it would have been analysed.
• All information will be treated as confidential and stored on a password-protected computer for a period no less than ten years. In any publication of the findings there will be no reference to the replies which would provide an indication of the respondent.

• At any time you have the right to contact the University of Plymouth to check on the project or to make relevant complaints.

University of Plymouth
PhD. Marine Environmental Law
Christopher Cousin
CONSENT FORM FOR RECORDING / INTERVIEWING

“Legal Issues in the Governance of Mediterranean Marine Protected Areas beyond the Territorial Sea”

Introduction and Purpose: I am researching at doctorate level, with the University of Plymouth, legal issues in the governance of marine protected areas (MPAs) beyond the Territorial Sea in the Mediterranean Sea.

Procedures: If you agree to participate in my research, I will conduct a 15 to 30 minute interview with you surrounding the research’s topic. With your permission, I will record and take notes during the interview. The recording will be used for transcription purposes only. If you choose not to be recorded, I shall take notes instead.

Benefits: There is no direct benefit to you from taking part in this study. However, it is hoped that the research will contribute to knowledge surrounding MPAs beyond the territorial sea.

Confidentiality: Any information provided will be confidential and will not be shared and will be stored in a password protected computer. If results of this study are published or presented, individual names and other personally identifiable information will not be used.

Compensation: There is no financial compensation for taking part in this study but your participation is sincerely appreciated.

Rights: Participation in the research is completely voluntary. You are free to decline to take part in the research at any point and can decline to answer any questions.

Questions: If you have any questions about this research, please feel free to contact me at: christopher.cousin@plymouth.ac.uk

CONSENT
You will be given a copy of this consent form to keep for your own records. If you wish to participate in this study, please sign and date below.

Participant’s Name (please print) ___________________ Participant’s Signature ___________________ Date ___________________

Organisation

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First Attempt

Questions:
1. Do you think that Mediterranean marine protected areas (MPAs) in areas beyond national jurisdiction (ABNJ) are necessary?

☐ No
☐ Yes. Why?

2. Which main factors are keeping countries from establishing Mediterranean MPAs in areas beyond national jurisdiction (ABNJ) and ensure proper management?

Reply: 1 = very important, 2 = important, 3 = less important, empty = no effect

☐ Lack of scientific knowledge on biodiversity in ABNJ
☐ Lack of a clear legal instrument to create and govern MPAs in ABNJ
☐ Higher awareness by governments of impacts from human activities on biodiversity
☐ Countries are afraid of possible threats on future jurisdiction maritime claims
☐ Countries are afraid they would lose their rights to extract natural resources
☐ Countries are not ready to share governance with other countries in these areas
☐ National jurisdiction border issues with neighbouring countries
☐ Other:

3. Which activities do you foresee would need to be specifically regulated in Mediterranean MPAs in ABNJ?

Reply: 1 = very important, 2 = important, 3 = less important, empty = no effect

☐ Fishing
☐ Navigation routes
☐ Navigation speed
☐ Other: ☐ Oil extraction
☐ War exercises activities
☐ Research

4. Do you think that other mechanisms can be used instead of MPAs in the Mediterranean Sea?

☐ No
☐ Yes. Please provide some more information:

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5. Do you think that countries that have no coastline and other distant countries from other regions should be involved in the governance of MPAs on the Mediterranean high sea?

- No
- Yes. You may wish to provide more information:

6. What are your views with regard to enforcement mechanisms in Mediterranean MPAs in ABNJ?

Reply: 1 = first preference, 2 = second preference. etc, empty = disagree

- Countries should each perform enforcement on its own citizens only.
- Countries involved in MPA in ABNJ should share jurisdiction by allowing reporting of alleged suspicious activities to the country of the person carrying out such activities.
- Countries involved in the MPA in ABNJ should share jurisdiction by allowing arrest within the high sea MPA, of alleged person causing illegal activity (from one of the involved countries) and deportation to the country of origin for prosecution.
- Countries involved in the MPA in ABNJ should share jurisdiction by allowing arrest within the high sea MPA or beyond and prosecution of alleged person causing illegal activity (from one of the involved countries) in the country making the arrest.
- Countries should share resources for monitoring for enforcement purposes of MPAs on the high seas.
- A special enforcement group should be created among the countries involved and this group would have the power to arrest and prosecute in any country.
- Alleged nationals, making illicit activities, from countries not involved in the governance of the high sea MPA are only to be reported to their country for prosecution.
- Other:

7. Do you have any other comments?

- No
- Yes. Please provide some more information:
Questions:

1. What is your country’s position with regards to the establishment of marine protected areas on the high sea?

2. Does your country have the necessary laws to allow it to establish MPAs on the high sea?

3. How would management be effected including enforcement?

4. Do you have any other comments?
   - [ ] No
   - [x] Yes. Please provide some more information:
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