Marine Protected Areas on the High Seas: Some Legal and Policy Considerations

Tullio Scovazzi,
Professor of International Law, Faculty of Law, University of Milano-Bicocca, Milan, Italy. Electronic address: tullio.scovazzi@unimib.it

Paper Presented at the World Parks Congress, Governance Session
"Protecting Marine Biodiversity beyond National Jurisdiction"
(Durban, South Africa, 11 September 2003)

Table of Contents

1. Introduction

Vulnerable marine ecosystems present various characteristics and are found in areas which have different legal conditions. While wetlands, lagoons or estuaries are located along the coastal belt, other kinds of ecosystems, such as seamounts, hydrothermal vents or submarine canyons are likely to be found at a certain distance from the coast, in areas located beyond the limit of national jurisdiction (that is the 200-mile limit of the exclusive economic zone).

This paper aims at discussing the policy and legal questions related to the establishment of marine protected areas (MPAs) as a means to protect vulnerable marine ecosystems on the high seas[1]. For the purpose of this paper, a MPA can be broadly defined as an area of marine waters which is granted a special protection regime because of their significance for a number of reasons (ecological, biological, scientific, historical, educational, recreational, etc.).

2. The Rio and Johannesburg Instruments and the 2003 UNICPOLOS

The protection of the marine environment and the consequent establishment of MSPAs are linked to the concept of sustainable development, which is one of the most important aspects of present international environmental law.

According to Agenda 21, the Action programme adopted in Rio de Janeiro by the 1992 United Nations Conference on Environment and Development (UNCED), States, acting individually, bilaterally, regionally or multilaterally and within the framework of the International Maritime Organization (IMO) and other relevant international organizations, should assess the need for additional measures to address degradation of the marine environment. Agenda 21 stresses the importance of protecting and restoring endangered marine species, as well as preserving habitats and other ecologically sensitive areas, both on the high seas[2] and in the zones under national jurisdiction[3]. In particular, "States should identify marine ecosystems exhibiting high levels of biodiversity and productivity and other critical habitat areas and provide necessary limitations on use in these areas, through, inter alia, designation of protected areas" (para. 17.86).

[1] The high seas cover about 64% of the ocean's total surface.

[2] "States commit themselves to the conservation and the sustainable use of marine living resources on the high seas. To this end, it is necessary to: (...) e) Protect and restore marine species; f) Preserve habitats and other ecologically sensitive areas" (Para. 17.46, e, f).

[3] Cf. Para. 17.75, e, f. Agenda 21 includes the exclusive economic zone among the "coastal areas" (Para. 17.1).

The Plan of Implementation of the World Summit on Sustainable Development (Johannesburg, 2002) confirms the need to promote the conservation and management of the ocean and "maintain the productivity and biodiversity of important and vulnerable marine and coastal areas, including in areas within and beyond national jurisdiction" (para. 32, a). To achieve this aim, States are invited to "develop and facilitate the use of diverse approaches and tools, including (...) the establishment of marine protected areas consistent with international law and based on scientific information, including representative networks by 2012 and time/area closures for the protection of nursery grounds and periods (...)" (para. 32, c).

The report of the last (2003) meeting of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea (UNICPOLOS) proposes to the U.N. General Assembly to

«invite the relevant international bodies at all levels, in accordance with their mandate, to consider urgently how to better address, in a scientific and precautionary basis, the threats and risks to vulnerable and threatened marine ecosystems and biodiversity beyond national jurisdiction; how existing treaties and other relevant instruments can be used in this process consistent with international law, in particular with UNCLOS, and consistent with the principles of integrated ecosystem-based approach to management, including the identification of those marine ecosystem types which warrant priority attention; and to explore a range of potentional approaches and tools for their protection and management»[4].

During the debate held at the 2003 UNICPOLOS, the great majority of delegations shared the view that integrated marine and coastal area management is an effective management approach for protecting vulnerable marine ecosystems. As stated in the summary of the co-chairpersons, such an approach "was intended to encompass a range of different tools to be applied in a variety of different situations, including the establishment of marine protected areas"[5]. In particular,

«Many delegations expressed support for the establishment of MPAs as a management tool for integrated ocean management in areas within and beyond national jurisdiction. A number reported on the management of MPAs in areas under their national jurisdiction. Some delegations expressed preference for a zonal approach in the management of MPAs. One delegation drew attention to the establishment of an MPA on the high seas in the Mediterranean Sea, in accordance with article 194 of the UNCLOS. Another delegation expressed concern over the possible loss of revenues from access agreements by developing countries in the event of the establishment of MPAs in areas under national jurisdiction. With regard to the establishment of MPAs on the high seas, some delegations stressed that such MPAs had to be: (i) based on scientific evidence; (ii) enforceable; (iii) specific for each marine area and objective; (iv) consistent with the ecosystem approach; and (v) in conformity with international law. One delegation proposed that the issue of MPAs be recommended to the General Assembly for future consideration at the Consultative Process»[6].

[4] U.N., Report on the Work of the United Nations Open-Ended Informal Consultative Process on Oceans and the Law of the Sea, Advance text, 6 June 2003, Para. 20, c.

[5] Ibidem, para. 103.

[6] Ibidem, Para. 104.

A summary prepared by an unofficial source provides more information on the positions taken by some States and other entities participating to UNICPOLOS:

«Greenpeace also urged consideration of the decision taken at the Eight Meeting of the CBD's Subsidiary Body on Scientific Technical and Technological Advice (SBSTTA-8) calling for the establishment of MPAs beyond national jurisdiction, and the World Wide Fund for Nature (WWF) requested the Consultative Process to facilitate the establishment of a pilot MPA in the high seas. Norway said creating MPAs in the high seas contradicts UNCLOS.

Japan stressed that establishment of MPAs in the high seas must be based on best scientific evidence and be consistent with international law. The Netherlands said no treaty exists to identify and protect all vulnerable ecosystems beyond national jurisdiction in an integrated manner and, supported by several States, suggested the meeting to consider how: the protection of vulnerable ecosystems can be addressed within the UN framework; existing relevant instruments can be used to protect vulnerable areas beyond national jurisdiction; and an ecosystem approach can be made operational for such areas.

The US outlined criteria for MPAs and MPA networks, noting that they should be science-based, effective and enforceable, and consistent with the ecosystem approach and international law»[7].

Almost all the interventions made by States and other entities show, despite their differences, a common willingness to cooperate in discussing the best ways to face the common concern of the protection of vulnerable areas of the high seas. The only notable exception is the surprising position taken by Norway, namely that creating MPAs in the high seas contradicts the United Nations Convention on the Law of the Sea (Montego Bay, 1982; UNCLOS). This position seems very far from being convincing, to say the least.

In fact, the establishment of MPAs on the high seas not only fully complies with customary international law, but is also the subject-matter of specific obligations arising under a number of international treaties and, first of all, under the UNCLOS. This point needs some elaboration.

[7] International Institute for Sustainable Development, Earth Negotiations Bulletin, No. 6, 9 June 2003, p. 5. The author of this paper has been informed by the Italian delegate that Italy stated that nothing prevents the States concerned to establish marine protected areas around vulnerable ecosystems located beyond the limit of the territorial sea, relying on the instance of the network of marine protected areas established by the Mediterranean coastal States (infra, Para. 4).

3. The Legal Basis for MPAs on the High Seas:

a) Customary International Law

From an international law perspective, the regime of MPAs depends on the degree of powers that the interested States can exercise over the marine spaces where they are established. On land, the State to which the territory belongs where a specially protected area is located is entitled to exercise full sovereign powers on it. The situation is different in the sea, as the content of coastal State's rights with respect to those of third States varies in relation to the legal condition of the waters in question.

Even in the territorial sea, a space where the coastal State is granted sovereignty, the ships of all other States enjoy the right of innocent passage. In the exclusive economic zone, where the coastal State has jurisdiction with regard to the protection and preservation of the marine environment, third States enjoy freedom of navigation, overflight, laying of submarine cables and pipelines and other internationally lawful uses of the sea. This is something more than a mere right of passage and, according to the position of some countries, goes as far as to include a right to engage in military manoeuvres in the exclusive economic zones of the others.

On the high seas there is no coastal State by definition. While all States are under a general obligation to cooperate for the protection and preservation of the marine environment, no State can impose its own legislation on the others. No State can, for instance, unilaterally establish an MPA and claim that ships flying a foreign flag abide by the relevant provisions. In short, the further an MSPA is located away from the coast the more questions of international law of the sea come into consideration and the need for international cooperation and agreement increases.

It would however be a mistake to think that customary international law, and in particular the traditional principle of freedom of the sea, are unsurmountable obstacles against the establishment and sound management of MPAs on the high seas. This for two main reasons.

First, all States are under a general obligation, arising from customary international law and restated in Art. 192 of the UNCLOS, "to protect and preserve the marine environment". This obligation applies everywhere in the sea, including the high seas. Under another customary obligation, reflected in Art. 194, para. 5, of the UNCLOS, the measures taken to protect and preserve the marine environment "shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life". Also this obligation has a general scope of application. It covers any kind of vulnerable marine ecosystems and species, wherever they are located.

States are also bound by an obligation to cooperate for both the protection of the marine environment (as confirmed by Art. 197 of the UNCLOS) and the conservation and the management of high seas living resources (as confirmed by Arts. 117 and 118 of the UNCLOS). The concept of an obligation to cooperate, which is typical of the high seas where no national jurisdiction can be established, is not devoid of legal meaning. It implies a duty to act in good faith in entering into negotiations with a view to arriving at an agreement and in taking into account the positions of the other interested States. As remarked by the International Court of Justice in the judgements of 20 February 1969 on the North Sea Continental Shelf cases, States "are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it"[8]. According to the order rendered on 3 December 2001 by the International Tribunal for the Law of the Sea in the MOX Plant case, "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law"[9].

It can thus be concluded that acting in good faith in discussions and negotiations on how to address the threats and risks to vulnerable marine ecosystems and biodiversity beyond national jurisdiction is the content of a true legal obligation incumbent upon all States[10].

Second, any principle, including the apparently sacrosanct principle of freedom of the sea, is to be understood in relation to the evolution of legal systems and in the light of the peculiar circumstances under which it should apply. The principle of freedom of the sea was developed by the Dutch scholar Hugo Grotius at the beginning of the XVIIth century[11]. At that time, the stake was the right to occupy the newly discovered territories in Asia and the Americas. When they engaged in their learned elaborations, neither Grotius and his followers nor their opponents who pleaded for the sovereignty of the sea[12] had in mind the questions posed by supertankers, ships carrying hazardous substances, off-shore drilling, mining for polymetallic nodules, fishing with driftnets and many other activities and means which can today harm the marine environment. This obvious remark leads to an equally obvious consequence. We cannot today use the same concepts that

---

[8] I.C.J., Reports of Judgments, Advisory Opinions and Orders, 1969, Para. 85 of the judgment.

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

[10] Including the State which believes that "creating MPAs in the high seas contradicts UNCLOS" (supra, Para. 2).

[11] GROTIUS, Mare liberum sive de jure, quod Batavis competit ad Indicana commercia dissertatio, 1609. At that time, freedom of navigation through the oceans was put in question by the claims of Portugal and Spain which dated back to the papal bull Inter caetera of 1493 and the Treaty signed by Portugal and Spain in Tordesillas on 7 June 1494.

[12] Among the works of the opponents of Grotius, who also deserve consideration, see: WELWOD, De dominio maris, juribusque ad dominium praecipue spectantibus, assertio brevis ac methodica, 1615; SARPI, Dominio del mar Adriatico della Serenissima Republica di Venetia, 1616; FREITAS, De justo imperio Lusitanorum Asiatico, 1625; SELDEN, Mare clausum seu de dominio maris libri duo, 1635.

Grotius used four centuries ago and give them the same intellectual and legal strength that Grotius gave them.

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

The trend towards the weakening of the traditional (but also outdated if absolutely understood) principle of freedom of the sea is supported by several instances in the present evolutionary stage of international law of the sea. To give only one example, encroachments on the freedom of the high seas can be easily found in the Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 1995).

This treaty has one evident defect (that is the unbearable length of its name) and many merits. It provides, inter alia, that all States having a real interest in high seas fisheries have the right to become members of a subregional or regional fisheries management organization or participants in such an arrangement (Art. 8, para. 3). But only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such an organization or arrangement, have access to the fishery resources of the high seas to which those measures apply (Art. 8, para. 4). The idea underlying this kind of provisions is that the high seas is no longer the province of laissez-faire, governed by a practically indiscriminate regime of freedom. Instead, also the high seas is an area where the concept of sustainable development applies, which can lead to the exclusion of those States which undermine the conservation and management measures agreed upon by the others. In this regard, the 1995 Agreement brings an evident "encroachment" on the traditional principle of freedom of the high seas. But this was considered a necessary tool to promote the conservation and sound management of living marine resources and, as such, was found reasonable and acceptable by the great majority of States.

b) Treaty Law

i) Global Instruments

The importance of MPAs, as a means for the protection of the marine environment, is confirmed by the multilateral treaties which, besides the already mentioned UNCLOS[13], encourage the parties to create such zones. Such treaties have either a global or a regional sphere of application. A few examples are hereunder given.

- Under the Convention for the Regulation of Whaling (Washington, 1946), the International Whaling Commission (IWC) may adopt regulations with respect to the conservation and utilization of whale resources, fixing, inter alia, "open and closed waters, including the designation of sanctuary areas" (Art. V, para. 1). Sanctuaries where commercial whaling is prohibited were established by the IWC in the Indian Ocean (1979) and the Southern Ocean (1994). They comprise extremely large extents of high seas waters, where commercial whaling is prohibited[14].

- The International Convention for the Prevention of Pollution from Ships, called MARPOL (London, 1973, as amended in 1978) provides for the establishment of special areas where particularly strict standards are applied to discharges from ships. Special areas provisions are contained in Annexes I (Regulations for the Prevention of Pollution by Oil), II (Regulations for the Control of Pollution by Noxious Substances in Bulk) and V (Regulations for the Prevention of Pollution by Garbage from Ships) to the MARPOL[15]. Special areas, which are listed in the relevant annexes, may include also the high seas. For example, the whole Mediterranean Sea area is a special area for the purposes of Annexes I and V.

- A set of Guidelines for the Identification of Particularly Sensitive Sea Areas (PSSAs) were adopted on 6 November 1991 by the Assembly of IMO (International Maritime Organization) under Resolution A.720(17)[16]. Detailed procedures for the identification of PSSAs and the adoption of associated protective measures were set forth under IMO Assembly Resolution A.885(21) of 25 November 1999[17]. A PSSA is defined "as an area that needs special protection through action by IMO because of its significance for recognized ecological or socio-economic or scientific reasons and which may be

[13] Supra, para. 3 A.

[14] It is however regrettable that the prohibition is limited to commercial whaling and does not cover the so-called scientific whaling.

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

[16] Of course, a resolution adopted by IMO is not a treaty and cannot have the legal effects of treaty provisions. But, for the purposes of this paper, also a resolution of IMO, which is an international organization established under a treaty opened to signature on 6 March 1948, can be broadly considered as belonging to the body of "treaty law"

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

vulnerable to damage by international maritime activities". Such areas can by identified by the Marine Environment Protection Committee of IMO on proposal by one or more member States and under a procedure which takes place at the multilateral level. PSSAs can apparently be located in any marine spaces, irrespective of their legal condition, including the high seas. However, the specific measures applying to PSSAs, such as ships' routeing measures, discharge restrictions, operational criteria, must fall within the field of specific competence of IMO (shipping and prevention of pollution from ships) and cannot be extended to other fields (for example, fishing or mining). Furthermore, the protective measures adopted under the IMO PSSA scheme have no mandatory character, as the use of the conditional mood ("should") clearly discloses:

> *«Member Governments should take all appropriate steps to ensure that ships flying their flag comply with the Associated Protective Measures adopted to protect the area identified as a PSSA. Those Member Governments which have received information of an alleged violation of an Associated Protective Measure by a ship flying their flag should provide the Government which has reported the offence with the details of any appropriate action taken» (para. 5.3 of the Procedures).*

- Annex V to the Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 1991) provides for the designation of Antarctic Specially Protected Areas or Antarctic Specially Managed Areas. Such areas can be established in the "Antarctic Treaty Area", which includes waters having the legal condition of high seas.

- The United Nations Convention on Biological Diversity (Rio de Janeiro, 1992; CBD) provides that the parties shall "establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity" (Art. 8, a)[18]. The CBD applies also to the marine environment, irrespective of the legal condition of the waters and seabed concerned[19]. In 2003, the CBD's Subsidiary Body for Scientific, Technical and Technological Advice (SBSTTA) recommended acceptance of the goal of representative networks of marine and coastal protected areas and development of a strategy to meet the target date of 2012. SBSTTA recognized the urgent need to establish marine protected beyond national jurisdiction, consistent with international law and based on scientific information, and recommended that the next Conference of Parties to the CBD call to work with other international and regional bodies with the specific aim of identifying appropriate mechanisms for the establishment and effective management of marine and protected areas beyond national jurisdiction.

However, with the important exception of the CBD, the scope of MPAs established under the above mentioned treaties or instruments is limited to the specific purposes of each individual treaty or instrument. It does not encompass the broader concept of protection of vulnerable marine areas per se that should characterize a network of MPAs as such.

[18] "Biological diversity" is defined as "the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems" (Art. 2).

[19] Under Art. 22, Para. 2, of the CBD, "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".

ii) Regional Instruments

Other treaties are specially devoted to the establishment of MPAs in certain regional seas. Some of these regional instruments apply within the areas falling under the national jurisdiction of the parties, that is within the limits of the exclusive economic zone or the continental shelf. This is, for instance, the case of the Protocol Concerning Protected Areas and Wild Fauna and Flora in the Eastern African Region (Nairobi, 1985)[20], the Protocol for the Conservation and Management of Protected Marine and Coastal Areas of the South-East Pacific (Paipa, 1989)[21], the Protocol Concerning Specially Protected Areas and Wildlife in the Wider Caribbean Region (Kingston, 1990)[22].

Other regional treaties apply also to the high seas. For onstance, in 1998 a new Annex V concerning the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area was added to the Convention for the Protection of the Marine Environment of the North East Atlantic (Paris, 1992; so called OSPAR Convention). The maritime areas falling under the scope of the OSPAR Convention, which are defined as those parts of the Atlantic Ocean which lie north of the 36° north latitude and between 42° west longitude and 51° east longitude, include also high seas waters. The Parties to Annex V commit themselves to take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area and to restore, when practicable, marine areas which have been adversely affected.

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

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

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

4. The Special Case of the Mediterranean Network

a) The Mediterranean Specially Protected Areas Protocol

A notable instrument on MPAs in a regional context is the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, signed in Barcelona, on 10 June 1995 and entered into force on 12 December 1999)[23].

The Protocol applies to all the maritime waters of the Mediterranean, irrespective of their legal condition (be they maritime internal waters, historical waters, territorial seas, exclusive economic zones, fishing zones, ecological zones[24], high seas), to the seabed and its subsoil and to the terrestrial coastal areas designated by each of the Parties. The extension of the application of the Protocol to the high seas areas that still exist in the Mediterranean[25] was seen by the Parties necessary to protect those highly migratory marine species (such as marine mammals) which, because of their natural behaviour, do not respect the artificial boundaries drawn by man on the sea.

To overcome the difficulties arising from the fact that many maritime boundaries have yet to be agreed upon by the Mediterranean States concerned[26], the Protocol includes two very elaborate disclaimer provisions (Art. 2, paras. 2 and 3)[27]. The idea behind such a display of juridical devices is simple. On the one hand, the establishment of intergovernmental cooperation in the field of the marine environment shall not prejudice all the legal questions which have a different nature; but, on the other hand, the very existence of such legal questions (whose settlement is not likely to be achieved in the short term) should not jeopardize or delay the adoption of measures necessary for the preservation of the ecological balance of the Mediterranean.

The Protocol provides for the establishment of a List of Specially Protected Areas

---

[23] Hereinafter: the Protocol. It was concluded within the framework of the Convention for the Protection of the Marine Environment and the Coastal Region in the Mediterranean (Barcelona, 1976; amended in 1995). The Protocol replaces the previous Protocol Concerning Mediterranean Specially Protected Areas (Geneva, 1982).

[24] All these instances and nuances of coastal State jurisdiction presently exist (or, at least, have been claimed) in the Mediterranean.

[25] The sphere of application of the previous 1982 Protocol (supra, note 23) did not cover the high seas. The Mediterranean high seas will however disappear when the coastal States establish an exclusive economic zone.

[26] Including a number of cases where maritime delimitations are particularly difficult because of the local geographic characteristics.

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

of Mediterranean Interest (SPAMI List)[28]. The SPAMI List may include sites which "are of importance for conserving the components of biological diversity in the Mediterranean; contain ecosystems specific to the Mediterranean area or the habitats of endangered species; are of special interest at the scientific, aesthetic, cultural or educational levels" (Art. 8, para. 2). The existence of the SPAMI List does not exclude the right of each Party to create and manage protected areas which are not intended to be listed as SPAMIs but deserve to be nevertheless protected under its domestic legislation.

The procedures for the listing of SPAMIs are specified in detail in the Protocol (Art. 9). For example, as regards the areas located partly or wholly on the high seas, the proposal must be made "by two or more neighbouring parties concerned" and the decision to include the area in the SPAMI List is taken by consensus by the contracting parties during their periodical meetings.

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

As regards the relationship with third countries, the parties shall "invite States that are not Parties to the Protocol and international organizations to cooperate in the implementation" of the Protocol (Art. 28, para. 1). They also "undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles and purposes" of the Protocol (Art. 28, para. 2)[29]. This provision aims at facing the potential problems arising from the fact that treaties, including the Protocol itself, can produce rights and obligations only among parties.

The Protocol is completed by three annexes, which were adopted in 1996 in Monaco, namely the Common criteria for the choice of protected marine and coastal areas that could be included in the SPAMI List (Annex I), the List of endangered or threatened species (Annex II), the List of species whose exploitation is regulated (Annex III)[30].

---

[28] The idea of a "list of landscapes and habitats of Black Sea importance" has been retained in Art. 4, Para. 5, of the Black Sea Biodiversity and Landscape Protection Protocol (Sofia, 2002) to the Convention on the Protection of the Black Sea against Pollution (Bucharest, 1992).

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

[30] Important tasks for the implementation of the Protocol, such as assisting the Parties in establishing and managing specially protected areas, conducting programmes of technical and scientific research, preparing management plans for protected areas and species, formulating recommendations and guidelines and common criteria, are entrusted with the UNEP (United Nations Environment Programme) MAP (Mediterranean Action Plan) Regional Activity Centre for Specially Protected Areas, located in Tunis.

A great achievement was made at the XIIth Meeting of the Parties to the Barcelona Convention and its protocols (Monaco, 2001) when the first twelve SPAMIs were inscribed in the List: the island of Alborán, the sea bottom of the Levante de Almería, cape of Gata-Nijar, Mar Menor and the oriental coast of Murcia, cape of Cresus, the Medas islands, the Coulembretes islands (all proposed by Spain), Port-Cros (proposed by France), the Kneiss islands, La Galite, Zembra and Zembretta (all proposed by Tunisia), and the French-Italian-Monegasque Sanctuary for marine mammals (jointly proposed by the three States concerned).

b) The Mediterranean Marine Mammals Sanctuary

One of the SPAMIs is particularly relevant because it covers also a large extent of high seas waters. This is the sanctuary for marine mammals, which was established under an Agreement signed in Rome in 1999 by France, Italy and Monaco[31]. It extends for about 96,000 km² located between the continental coasts of the three countries and the islands of Corsica (France) and Sardinia (Italy). These waters are inhabited by the eight cetacean species regularly found in the Mediterranean, namely the fin whale (Balaenoptera physalus), the sperm whale (Physeter catodon), Cuvier's beaked whale (Ziphius cavirostris), the long-finned pilot whale (Globicephala melas), the striped dolphin (Stenella coeruleoalba), the common dolphin (Delphinus delphis), the bottlenose dolphin (Tursiops truncatus) and Risso's dolphin (Grampus griseus). In this area, the water currents create conditions favouring phytoplankton growth and abundance of krill (Meganyctiphanes norvegica), a small shrimp that is preyed upon by pelagic vertebrates.

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

As regards the crucial question of driftnet fishing, the parties undertake to comply with the relevant international and European Community regimes (Art. 7, b). This seems to be an implicit reference to European Community Regulation No. 345/92 of 22 January 1992, laying down technical measures for the conservation of fishery resources[32], which prohibits the use of driftnets longer than 2.5 km. This also seems to be an implicit reference to the subsequent European Council Regulation No. 1239/98 of 8 June 1998[33] which prohibits as from 1st January 2002 the keeping on

[31] The Sanctuary Agreement is the first treaty ever concluded with the specific objective to establish a sanctuary for marine mammals. It entered into force on 21 February 2002.

[32] Official Journal of the European Communities No. L 42 of 18 February 1992.

[33] Official Journal of the European Communities No. L 171 of 17 June 1998.

board, or the use for fishing, of one or more driftnets used for the catching of the species listed in an annex.

The parties to the Sanctuary Agreement undertake to exchange their views, if appropriate, in order to promote, in the competent fora and after scientific evaluation, the adoption of regulations concerning the use of new fishing methods that could involve the incidental catch of marine mammals or endanger their food resources, taking into account the risk of loss or discard of fishing instruments at sea (Art. 7 c).

The parties undertake to exchange their views with the objective to regulate and, if appropriate, prohibit high-speed offshore races in the sanctuary (Art. 9). The parties will also regulate whale watching activities for purposes of tourism (Art. 8). Whale watching for commercial purposes is already carried out in the sanctuary by a certain number of vessels. There are promising prospects for the development in the sanctuary of this kind of activities, which are a benign way of exploiting marine mammals.

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

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

> *«1. Dans la partie du sanctuaire située dans les eaux placées sous sa souveraineté ou juridiction, chacun des Etats Parties au présent accord est compétent pour assurer l'application des dispositions y prévues.*
> *2. Dans les autres parties du sanctuaire, chacun des Etats Parties est compétent pour assurer l'application des dispositions du présent accord à l'égard des navires battant son pavillon, ainsi que, dans les limites prévues par les règles de droit international, à l'égard des navires battant le pavillon d'Etats tiers»*[34].

As the Parties have so far been reluctant to establish exclusive economic zones[35], the high seas in the sanctuary area begins just beyond the 12-mile limit of the territorial sea. Had exclusive economic zones been established, the measures provided for in the Sanctuary Agreement would fall under Art. 65 of the UNCLOS, which allows coastal States to prohibit, limit or regulate the exploitation of marine mammals within their exclusive economic zones and calls them to international cooperation with a view to the conservation of the species in question.

In the present and probably transitory context of absence of exclusive economic zones[36], Art. 14, para. 2, of the Sanctuary Agreement gives the parties the right to enforce on the high seas its provisions with respect to ships flying the flag of third States "within the limits established by the rules of international law". This wording brings an element of ambiguity into the picture, as it can be intrepreted in two different ways. Under the first interpretation, the parties cannot enforce the provisions of the Sanctuary Agreement in respect of foreign ships, as such an action would be an encroachment upon the freedom of the high seas.

The second interpretation is based on the fact that all the waters included in the sanctuary would fall within the exclusive economic zones of one or another of the three parties if they decided to establish such zones. With the creation of the sanctuary the parties have limited themselves to the exercise of only one of the rights which are included in the broad concept of the exclusive economic zone. However, the simple but sound argument that those who can do more can also do less seems sufficient to reach the conclusion that the parties are already entitled to enforce the rules applying in the sanctuary also in respect of foreign ships which are found within its boundaries[37].

---

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

[35] Of the three parties to the Sanctuary Agreement, Italy and Monaco have not yet claimed an exclusive economic zone, while France has established it only for its non-Mediterranean waters.

[36] If exclusive economic zones were established in the future, Art. 14, Para. 2, of the Sanctuary Agreement would no longer be applicable and the matter of enforcement could be fully covered by Art. 14, Para. 1.

[37] To complete the regional picture of the Mediterranean, the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (Monaco, 1996; so called ACCOBAMS) should also be mentioned. ACCOBAMS, which entered into force on 1 June 2001, provides

5. Prospects for Future Steps

All the instances mentioned above confirm that time is ripe to promote an international action for the establishment at the global level of a network of MPAs on the high seas. The great majority of States are likely to cooperate in good faith for such an action, provided that it develops in a manner which is consistent with international law and takes into consideration all the lawful uses of the high seas (navigation, fishing, mining, etc.).

To facilitate the establishment of high seas marine protected areas (HSMPAs), the non-governmental experts participating to a workshop on High Seas Protected Areas, held in Malaga in January 2003 under the sponsorship of the World Conservation Union (IUCN), the World Commission on Protected Areas (WCPA) and WWF International, recommended a process that would include the following steps:

«review and policy analysis of relevant existing legal frameworks for high seas conservation and governance; recommendations to harmonize and coordinate existing international, regional and national law and policies; identification of legal gaps and the necessary action to be taken to fill those gaps; identification and options for an overall legal framework for HSMPAs including the use of existing legal instruments and the development, where necessary, of new regimes».

Some very preliminary thoughts can perhaps be added hereunder to stimulate a discussion on what could be a possible strategy to reach the aim of a network of HSMPAs.

1) The appropriate fora (such as the UN General Assembly, UNICPOLOS, UNEP, IMO, the International Seabed Authority[38], the meetings of parties to the relevant treaties in force) should be used to gain an international recognition of the concept of HSMPAs[39] and of the need for a HSMPAs network.

2) The most appropriate legal framework for the establishment at the global level of a network of HSMPAs should be identified. Such a framework should:

   i) be addressed to the subject of HSMPAs as a whole, without being restricted to sectoral activities which may have a bearing on MPAs, such as shipping, fishing or mining;

   ii) have a legally binding character (multilateral treaty) and not be limited to hortatory "should-type" instruments.

3) As there is currently no single treaty that can be used to establish MPAs

---

that the Parties shall endeavour to establish and manage specially protected areas for cetaceans corresponding to the areas which serve as their habitats or provide important food resources for them (Annex 2, Art. 3).

[38] UNESCO could also be implied, if MPAs were to be established for the protection of the underwater cultural heritage found on the bed of the high seas. In this regard, see the Convention on the Protection of the Underwater Cultural Heritage, adopted in 2001 within the framework of UNESCO.

[39] In this endeavour, the support of the most committed countries and non-governmental organizations would be essential to isolate on its untenable position the only State (or the very few States if there were more than one) that still assumes that to create MPAs on the high seas per se contradicts the UNCLOS.

beyond national jurisdiction on a global basis and in an integrated manner, the drafting of such a treaty (a HSMPA Convention) could be envisaged as the most appropriate step forward.

4) To receive a broader support, a HSMPA Convention could be negotiated and drafted as an instrument linked to, or implementing, a treaty already in force and widely accepted, that is either the CBD or the UNCLOS.

5) Some elements to be included in a HSMPA Convention could be drawn, mutatis mutandis, from the "pioneer" 1995 Mediterranean Protocol[40], namely:

- the idea of a list or network of HSMPAs of world importance in the light of a number of criteria (importance for the conservation of biological diversity, ecosystems or habitats of endangered species; special interest at the scientific, aesthetic, cultural or educational level; etc.);
- a procedure for the inclusion of HSMPAs in the list or network based on a decision tahen by the contracting parties, which are the trustees of the common interest for the preservation of HSMPAs;
- the adoption of a set of protection and conservation measures on a case by case basis;
- an annex where common criteria for the choice of HSMPAs are specified.

6) The crucial question of free-rider States, which can undermine the effectiveness of the HSMPAs protection and conservation regime, should be carefully addressed. In principle, as every treaty creates rights and obligations only for its contracting parties, the protection and conservation measures agreed upon by the parties to the HSMPA Convention could not be applicable to ships flying the flag of non-parties. However it must be considered that every State is already under the obligations arising from customary international law and from the UNCLOS to protect and preserve rare or fragile ecosystems, wherever they are located, and to cooperate for this purpose. Furthermore, special provisions on the relationship with third States, shaped on the model of either the Antarctic Treaty[41] or of the 1995 Straddling Stocks Convention[42], could be included also in the HSMPA Convention.

---

[40] Of course, the HSMPA Convention should not prejudice the regime of MPAs which have already been established under a regional treaty. But also these regional MPAs could qualify to enter into the network set forth by the HSMPA Convention.

[41] Parties to the HSMPA Convention undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles and purposes (see supra, note 29).

[42] Only those States which are parties to the HSMPA Convention, or which agree to apply the conservation and management measures established under such Convention, have access to activities regulated within a specific HSMPA (see supra, Para. 3 A).

Bibliographical Note

- BOU FRANCH & BADENES CASINO,
La protección internacional de zonas y especies en la región mediterránea, in Anuario de Derecho Internacional, 1997, p. 33;

- DUPUY (P.-M.),
Les parcs marins dans le cadre international, in Revue Juridique de l'Environnement, 1980, p. 381;

- JUSTE RUIZ,
Regional Approaches to the Protection of the Marine Environment, in Thesaurus Acroasium, vol. XXXI, 2002, p. 402;

- LE HARDY,
La protection des mammifères marins en Méditerranée - L'Accord créant le sanctuaire corso-liguro-provençal, in Revue de Droit Monégasque, No. 3, 2000, p. 95;

- PEET,
Particularly Sensitive Areas - A Documentary History, in International Journal of Marine and Coastal Law, 1994, p. 469;

- RAFTOPOULOS,
Studies on the Implementation of the Barcelona Convention: The Development of an International Trust Regime, Athens, 1997;

- SCOVAZZI,
The Mediterranean Marine Mammals Sanctuary, in International Journal of Marine and Coastal Law, 2001, p. 132;

- SCOVAZZI (ed.),
Marine Specially Protected Areas - The General Aspects and the Mediterranean Regional System, The Hague, 1999 (in particular MERIALDI, Legal Restraints on Navigation in Marine Specially Protected Areas, ibidem, p. 29).