Is the Freedom of the High Seas under Threat from Marine Protected Areas?: Environmental Protection versus Security Interests under International Law

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Abstract

Some states tend to use environmental treaty frameworks to address environmental issues in the oceans against the background of environmental movements. Among the most notorious institutions of this kind is the establishment of the Marine Protected Areas (MPAs) on the high seas and the exclusive economic zone (EEZ) area outside of the territorial seas of coastal states. These relatively new measures may ignite or even worsen tensions between coastal states and maritime powers such as the United States. The naval powers that need to retain their naval mobility stress the traditional idea of the freedom of the seas, particularly on the high seas. Moreover, these naval states’ interests run counter to those of coastal states, whose creeping jurisdiction is expanding through excessive maritime claims. However, whether these two apparently conflicting interests are irreconcilable is yet to be seen, and there are doubts about the existence of the risk and threat allegedly being caused by the excessive maritime claim made by the coastal states. The purpose of this essay is to clarify the relations between the MPAs established on the high seas area by the coastal states and the freedom of the high seas enjoyed by the maritime powers. As is demonstrated by some typical cases, the risk and impact of the MPAs on the high seas area may not be as grave as they seem, due to the legal framework imposed by contemporary international law, including the law of the sea.

Key words: international environmental law, law of the sea, EEZ, MPA, LOSC

1. Introduction

It is often observed that one of the most characteristic features of the modern law of the sea is the unilateral institutionalisation and expansion of
the exclusive economic zone (EEZ) by coastal states as ways of exercising jurisdiction and control over what occurs in the zones.\(^1\) After the United Nations Convention on the Law of the Sea (LOSC), by which the EEZ institution was enshrined, entered into force in 1994, coastal states’ jurisdiction and control over their maritime matters have intensified along with the enhancement of marine environmental protection and the conservation and development of living and non-living resources. A typical example is the establishment of marine protected areas (MPAs) independently or jointly with eligible organisations by the coastal states in the EEZ and, sometimes, on the high seas.\(^2\)

This creeping jurisdiction enacted by coastal states has brought double-faceted impacts upon the global maritime legal order. On one hand, the wider maritime zone of jurisdiction and control benefits coastal states in facilitating their access to the space and resources therein. On the other hand, their creeping jurisdiction negatively impacts the maritime and security interests of naval powers such as the United States, since their mobility and high seas freedom have been come increasingly under the control and influence of the coastal states.\(^3\) Thus, for some writers, naval powers such as the US would regard creeping jurisdiction as the product of excessive maritime claims on the part of coastal states, as this phenomenon appears excessive indeed relative to the maritime interests of the naval powers.\(^4\)

However, creeping jurisdiction\(^5\) does not seem to have brought only negative impacts upon the maritime order, particularly in terms of environmental protection. Since there is, at the moment, no universal maritime management organisation governing or controlling the protection, conservation, and development of resources in the oceans, the role played by the coastal states in this respect may be, besides the concept of flag state responsibility,\(^6\) regarded as an efficient replacement for an absent universal order.\(^7\) This is why the LOSC vested them with not only the sovereign rights over resources and space in the zones but also the corresponding obligations and responsibilities.\(^8\) In this sense, the negative and pessimistic perspective on the phenomenon of creeping jurisdiction should not be exaggerated, particularly by the naval powers.

Proponents of the naval powers’ traditional mobility on and security control over the high seas may have already been reconsidering during the post-Cold War era.\(^9\) Of course, there are still some threats of piracy, terrorism,
and other modern security related issues on the high seas, for which the flag state doctrine is the most prevalent and effective solution. Many of the so-called newly ascendant industrialised states, such as Brazil, Russia, India, and China (BRICs), having awoken to a sense of their own maritime security, are quite keen about not only resources but also security matters in their maritime areas, the EEZ in particular, and are eager and prone to check and regulate military activities in their EEZ, such as naval operations and navigation by naval powers. However, the LOSC does not introduce a new approach to or method for security matters, though the idea of the peaceful use of the sea was explicitly mentioned and some other new security-related points were inserted in tandem with the practical limits of the United Nations Charter. These aspects need more comprehensive and practical discussion, something beyond the scope of this study.

Therefore, the purposes of this article are first, to consider the significance of the establishment of marine protected areas by coastal states on the high seas and, second, to discuss the relationship between the interests of coastal states and those of the naval powers. By exploring these points, this paper will provide a new and more accurate perspective on the modern law of the sea, including the LOSC.

2. Naval Powers’ Interests in the Freedom of the High Seas

(1) Naval powers’ point of view

Some writers assert that the current maritime order needs the freedom of the seas while the reality is that the creeping jurisdiction of the coastal states (or the excessive maritime claims made by them) is threatening naval powers’ maritime interests as well as the freedom of the seas. Naval powers generally wish to maximize the mobility of their naval vessels and thus prefer the high seas area to be as wide as possible. Though the legality of the EEZ has been subject to controversial academic debate, its sui generis nature, being neither the high seas nor the territorial sea, may be said to have been settled under the LOSC. For the naval powers, the EEZs of other states should be dealt with as high seas, and their operations should not be hampered or interrupted by coastal states’ checks and control within their EEZs. For them, accordingly, navigation of the naval vessels and naval operations within the EEZ and the
high seas belong to the traditional use of the sea.\textsuperscript{17}

In the era of enhanced marine environmental protection,\textsuperscript{18} an MPA (the so-called ‘marine sanctuary’) for instance, is an example of the kind of outstanding measures being taken by coastal states that are regarded by the naval powers as territoriality and entitlement over the EEZ.\textsuperscript{19} This trend of creating a maritime zone for a particular (environmental) purpose may occur through the creation of various types of maritime areas, such as the Particularly Sensitive Sea Area (PSSA),\textsuperscript{20} the High Seas Marine Protected Area (HSMPA), and the high seas large marine ecosystem (LME).\textsuperscript{21} The PSSAs, for example, are adopted through a declaration by the International Maritime Organisation (IMO)\textsuperscript{22} and are not necessarily the same as the maritime areas created through international agreements or domestic legislative measures. By creating these kinds of maritime zones along the coasts, freedom of navigation may be regulated and even impaired by requirements imposed upon the navigation of naval vessels or maritime powers and upon naval operations or manoeuvres conducted by a group of naval powers and their associates.\textsuperscript{23}

It may be even argued, moreover, that strict rules on marine environmental protection, in particular, are becoming ‘a deterrent to long-distance trade’.\textsuperscript{24} This argument is open to further debate and has no direct bearing upon our present discussion. American interests, for example, in the freedom of navigation are based on the traditional definition of navigational freedom as ‘secure and unfettered access to the maritime domain’, which consequently leads to the idea that the freedom of the seas includes ‘freedom from attack and harassment at sea in peacetime or war’.\textsuperscript{25}

(2) Some relevant rules in the LOSC

It is important to take a brief look at the positive rules and norms enshrined in the LOSC, the core source for the contemporary law of the sea. With respect to high seas freedom,\textsuperscript{26} Article 87 of the LOSC reads as follows:

\begin{quote}
Article 87 Freedom of the high seas
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, \textit{inter alia}, both for coastal and land-locked States:
(a) freedom of navigation;
\end{quote}
(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.

The list of freedoms indicated in paragraph 1 of this Article is not exhaustive but illustrative, and it is based on customary norms. The freedoms indicated in sub paragraphs (a), (b), (c), and (e) are also listed in the 1958 Geneva Convention on the High Seas, regarded as the codification of customary international law. Therefore, it is no wonder that some naval powers are sensitive about the significance of the freedom of navigation, listed at the top of the list and one of the most traditionally well-established rights of maritime states.

At the same time, one should not forget the second paragraph of this Article, which prescribes an obligation upon all states to exercise the freedom of the seas indicated therein with ‘due regard’ for other states’ interests: one state’s freedom ends where another state’s freedom begins. The second paragraph is no less important than the first, even though the second is quite often neglected or underestimated.

On the other hand, the relevant provisions of the LOSC with respect to the EEZ command our attention. Article 56 reads as follows:

Article 56 Rights, jurisdiction and duties of the coastal State in the exclusive economic zone
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, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
(i) the establishment and use of artificial islands, installations and structures;
(ii) marine scientific research;
(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 under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

As is well known, the term ‘sovereign rights’ was coined and enshrined in this Article to refer to the coastal states’ rights with respect to the EEZ. From the coastal states’ point of view, paragraph 1 (b) refers to their capacity and entitlement to exercise jurisdiction with respect to maritime matters such as the protection and preservation of the marine environment; the establishment of MPAs is based on coastal states’ enjoyment of this jurisdiction. At the same time, however, the LOSC contains a provision dealing with the rights and duties of other states in the EEZ, as follows:

Article 58 Rights and duties of other States in the exclusive economic zone
1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.

2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.

3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

What is stressed in this context is the fact that the first paragraph of this Article confirms all states’ freedom of the high seas in all other states’ EEZs. One easily notices that the traditional freedom of fishing is not described in
this paragraph as being part of the freedoms permitted in the EEZs of other states. The freedom of constructing artificial islands and other installations and of scientific research is not mentioned in the first paragraph either. Rather, a question arises as to the relationship between Article 58 and Part VII, Section 1 of the LOSC, which covers the general provisions concerning the high seas, including Article 87. In other words, one may wonder if the freedoms that enjoyed in the EEZ by other states are different from those of the high seas except for the freedom of constructing artificial islands and other installations, of fishing, and of scientific research. It may not be entirely wrong to say that the wording of the LOSC does not directly place the freedom of the high seas in danger due to any excessive maritime claims or creeping jurisdiction pursued by coastal states.

The arguments this chapter considered were mainly those of proponents of naval powers’ freedom of the high seas, with a brief consideration of the relevant provisions of the LOSC. Now, a more specific consideration of the recent concrete measures of the MPAs established on the high seas needs to be made.

3. Marine Protected Areas Claimed by the Coastal States

(1) Marine Protected Areas (MPAs)

Marine protected areas (MPAs) are occasionally established by coastal states in order to protect a particular maritime area off their coasts. What is probably one of the most frequently quoted definitions of the MPA can be read in the Resolution of the 17th General Assembly of 1988 on the International Union for the Conservation of Nature (IUCN):

‘Any area of intertidal or subtidal terrain, together with its overwhelming waters and associated flora, fauna, historical and cultural features, which has been reserved by legislation to protect part or all of the enclosed environment’.

The LOSC does not particularly prescribe the institution of the MPA. The foundation on which a coastal state may establish one within its own maritime area can be found in some of the provisions in the LOSC. Part XII of the LOSC sets a framework for the protection and preservation of the
marine environment. First, Article 192 stipulates the general obligation of state parties to the LOSC ‘to protect and preserve the marine environment’, while Article 193 guarantees states ‘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’. With respect to the marine protected areas, this general obligation must be placed beside other, more concrete provisions, such as the following two: first, Article 194 (5), which stipulates the measures ‘to 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’, and, second, Article 197, which provides for the obligation to cooperate on a global and, where appropriate, regional basis ‘in formulating and elaborating international rules, standards and recommended practices and procedures consistent with’ the LOSC.

Apart from these provisions which seem to be in favour of the establishment of MPAs, the LOSC establishes other fundamental rules governing the status of the high seas. As was mentioned above, the nature of the EEZ is sui generis and is neither territorial sea nor high seas per se. In other words, as is stated in Article 89 of the LOSC, no state may validly claim state sovereignty over any part of the high seas. In some cases, however, coastal states have taken measures to establish MPAs on the high seas.

(2) The OSPAR Convention
The first example of this is the OSPAR Convention. The OSPAR Convention has five Annexes and three Appendices. Annexes I through IV were adopted at the same time and contain rules concerning the assessment of marine environment quality, the prevention and elimination of pollution from land-based sources, of pollution by dumping or incineration, and of pollution from offshore sources. Annex V, which was adopted in 1998 with Appendix 3 to prescribe the criteria for identifying human activities for the purpose of this annex, provides for the protection and conservation of the ecosystems and biological diversity of the marine area. Through the provisions of Article 1 of the OSPAR Convention, its geographical scope even covers some of the high seas that stretch off the western coast of Europe.

The Convention mandates that states take all possible steps to prevent
and eliminate pollution and shall take all necessary measures to protect the marine area against the adverse effects of human activities so as to safeguard human health, conserve marine ecosystems, and restore marine areas which have been adversely affected. To achieve this end, the Parties are to individually and jointly adopt programmes and measures and shall harmonise their policies and strategies.

Moreover, the relationship between this Convention and other agreements needs to be mentioned.

Article 2 GENERAL OBLIGATIONS
5. No provision of the Convention shall be interpreted as preventing the Contracting Parties from taking, individually or jointly, more stringent measures with respect to the prevention and elimination of pollution of the maritime area or with respect to the protection of the maritime area against the adverse effects of human activities.

Therefore, no state Parties are prohibited from entering into an agreement under which more stringent measures can be taken. More stringent measures, in this case, may be interpreted to cover both the quality and quantity of the measures to be taken. However, judging from the wording of the provision, it is not necessarily clear that the scope of the Convention covers the high seas area.
without encroaching upon the freedom of the seas.

Additionally, this wide range of obligation in the legal framework contains one major exception concerning questions relating to the management of fisheries, which ‘are appropriately regulated under international and regional agreements dealing specifically with such questions’. This is also asserted in Article 4 (1) of Annex V, which reads ‘no programme or measures concerning a question relating to the management of fisheries shall be adopted under this Annex’.

As regards MPAs, Annex V is noteworthy, since its special relation with the Convention on Biological Diversity of 1992 enhances the comprehensive framework for the protection and conservation of the ecosystems and biological diversity of the maritime area. In order to implement these objectives, the OSPAR Convention establishes a Commission to govern the regime covering the protection and conservation of the ecosystems and biological diversity of the relevant area. For these purposes, the Commission may adopt decisions and recommendations that shall be, in principle, adopted by unanimous vote of the Contracting Parties. Then, decisions concerning the Annex and Appendix shall be taken only by those Contracting Parties bound by the Annex or Appendix concerned, as is normally the case under the Vienna Convention on the Law of Treaties.

However, the OSPAR Convention does not specifically and clearly limit its scope of application within the circle of the State Parties, though the geographical scope of its reach seems to include the high seas and be applicable to vessels on the high seas in the OSPAR Convention area. Normally, the decision taken by the Contracting Parties does not affect the rights and obligations of third parties. Here arises a question about the validity of any measure taken under the OSPAR Convention against the vessel of a third party that is on the high seas in the OSPAR Convention area.

The proponents of pro-environmental protection using this kind of positive approach argue for the validity of such measures. Their grounds may be described in the following way. First, as Article 237 (1) of the LOSC admits, Part XII is without prejudice to ‘agreements which may be concluded in furtherance of the general principles set forth in’ the LOSC. Article 311 reiterates this position by stressing the fundamental rules concerning the effects of a treaty on a third party and by confirming their compatibility with the
effective execution of the object and purpose of the LOSC, among others.

Moreover, agreements on legally binding instruments providing for the designation and management of MPAs in areas beyond national jurisdiction may be allowed under the following conditions: first, the so-called compatibility test shall be met; second, Article 197 of the LOSC lends support to the application of the OSPAR Convention framework; third, the lack of any contrary rule of international law justifies the object and purpose of the MPA. It is maintained that complementary action at the global and regional levels would enable a more effective and coordinated regime of MPAs and of other measures as well.

The OSPAR Decision 2010/1 was recently adopted, and the definition of MPA in this Convention framework was given at the outset of the decision:

OSPAR Decision 2010/1 Preamble (OSPAR 10/23/1-E, Annex 34)

“Marine Protected Area (MPA)” means an area within the maritime area for which protective, conservation, restorative or precautionary measures, consistent with international law, have been instituted for the purpose of protecting and conserving species, habitats, ecosystems or ecological processes of the marine environment.

One should note the phrase ‘consistent with international law’. This may imply that the measures to be taken under the Convention regime shall not be inconsistent with international law and that, more specifically, the MPA institution shall be established within the framework of the existing law of the sea, so that it will not encroach upon the freedom of the high seas. This is reconfirmed when one sees the following statement inserted in its preamble:

OSPAR Decision 2010/1 Preamble (OSPAR 10/23/1-E, Annex 34)

‘RECOGNISING further that the establishment of this MPA does not prejudice the sovereign rights and obligations of coastal States to the continental shelf, including their inherent right to delineate outer limits of the continental shelf in accordance with UNCLOS,’

... ‘This Decision shall apply without prejudice to the rights and obligations of coastal States, other States and international organisations in accordance with UNCLOS and customary international law.’

Therefore, it may not be wrong to assume that, from the beginning,
neither the OSPAR Commission nor the OSPAR Convention had any intention of running counter to the traditional freedom of the high seas. This point should be stressed for the argument below.

(3) The Barcelona System

Another major example is the so-called Barcelona system of the Mediterranean Sea, which consists of a framework treaty and seven protocols. The 1976 Convention for the Protection of the Mediterranean Sea was amended in 1995 and extended its scope of application to include all maritime areas regardless of their legal status. With respect to its geographical coverage, Article 2 of the 1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean is worth quoting here:

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

This provision confirms that ‘[n]othing in this Protocol nor any act adopted on the basis of this Protocol shall prejudice the rights, the present and future claims or legal views of any state relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between states with opposite or adjacent coasts, freedom of navigation on the high seas, the right and the modalities of passage through straits used for international navigation and the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of the coastal state, the flag state and the port state’. Additionally, this 1995 Protocol is strongly influenced by the instruments adopted by the 1992 United Nations Conference
on Environment and Development (UNCED) and, particularly, by the Convention on Biological Diversity (CBD), under which each Contracting Party is obliged to establish ‘a system of protected areas or areas where special measures need to be taken to conserve biological diversity’.

It is noteworthy here that Article 22 (2) of the CBD refers to the obligation of state parties to implement the CBD so that, with respect to marine environment, the implementation will be compatible with the rights and obligations of states under the law of the sea. In other words, the interpretation and application of the CBD must not be contrary to the law of the sea.

Under this Protocol, the Parties shall establish a ‘List of specially protected areas of Mediterranean importance’ (the SPAMI list) in order to promote cooperation in the management and conservation of natural areas and in the protection of threatened species and their habitats. This SPAMI list may include sites that are important in conserving the components of biological diversity, including specific ecosystems and the habitats of endangered species, or are of special interest on scientific, aesthetic, cultural, or educational levels, in the Mediterranean. However, since the Parties are 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’, there may arise a question about whether these measures are applicable to and/or enforceable upon the vessels of non-Party states that are on the high seas areas of SPAMI sites.

National measures for the protection and conservation of species may be taken by the Parties under Article 11, which refers also to the concerned Parties’ obligation to coordinate their efforts not only through bilateral or multilateral action but also through agreements for the protection and recovery of migratory species whose range extends into the area to which this Protocol applies, including the areas beyond national jurisdiction. Moreover, the Parties are obliged to ‘endeavour to consult with States that are not Parties to this Protocol, with a view to coordinating their efforts to manage and protect endangered or threatened species’.

Furthermore, the relationship of this Protocol with third parties is specifically mentioned, since the drafters of the Protocol had prepared for the possibility of conflict and the need to solve it.
Article 28 Relationship with third parties
1. The Parties shall invite states that are not parties to the Protocol and international organisations to cooperate in the implementation of this Protocol.
2. The Parties undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles or purposes of this Protocol.

Thus, it is noteworthy in this respect that this Article sets two steps for the Parties to take. First, the Parties are required to ‘invite’ non-Parties (third states and international organisations) to ‘cooperate in the implementation of this Protocol’. All the Parties to the Protocol can do is to ask or request third parties to meet its requirements. Second, the Protocol provides for the Parties obligation to ‘undertake to adopt appropriate measures, consistent with international law, to ensure that no one engages in any activity contrary to the principles or purposes of this Protocol’. Needless to say, this provision is not addressed to third parties but to the contracting Parties of this Protocol.

(4) The Pelagos Sanctuary
A more relevant instrument within this Protocol framework is the so-called Pelagos Sanctuary for Marine Mammals in the Mediterranean. This sanctuary was established through a tripartite agreement signed by France, Italy and Monaco in 1999 and entered into force in 2002. It covers an area of 87,500 square kilometres and is supposed to be ‘the first international High

Figure 2: http://iwcoffice.org/_documents/commission/IWC59docs/59-CC8.pdf
Seas Marine Protected Area. The Pelagos Sanctuary was included in the SPAMI list in 2001.

Since the EEZ has not yet been fully delimited in the maritime area of the Mediterranean, the legal nature of its sea space beyond the territorial sea of the coastal states in this region theoretically remains that of the high seas. This is mainly because the distance between the opposite coasts in the Mediterranean, which is in most cases within 400 nautical miles, does not allow for a separate and distinct EEZ for most of the coastal states in this region but, rather, invites difficult cases of overlapping EEZ delimitations between the coastal states concerned. This was quite apparent from the time discussion on the establishment and delimitation of the EEZ in the Mediterranean started in the law-making process during the Third United Nations Conference on the Law of the Sea. In other words, the coastal states of this maritime area have, in effect, avoided the issue and have treated the maritime area outside of the territorial seas of coastal states as being practically the high seas.

Therefore, the issue of exercising coastal jurisdiction over the part of the Mediterranean that does not fall under any of the Parties’ sovereignty or jurisdiction arises with respect to the interpretation and application of Article 14 of the Agreement:

Article 14
1. Dans la partie du sanctuaire située dans les eaux placées sous sa souveraineté ou juridiction, chacun des États Parties au présent accord est compétent pour assurer l’application des dispositions y prévues.
2. Dans les autres parties du sanctuaire, chacun des États 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’États tiers.

(Unofficial translation)
with respect to ships flying the flag of third States.

Paragraph 1 of this Article refers to the case where each of the state Parties is responsible for the application of the Agreement in exercising its own jurisdiction within its own maritime area. A problem may arise with paragraph 2 of the same Article, since it enables each state Party to exercise its jurisdiction not only over vessels flying its own flag but also over vessels flying the flags of third states within the limits provided for by the rules of international law. This phrase in the provision contains confusing ambiguities.

In a situation where none of the three parties has yet established an EEZ in the Sanctuary region, what lies outside of the territorial seas of the Parties to this Agreement is the high seas. Thus, according to one writer,\(^6\) who stresses the specific situation of the Mediterranean ‘in the current and probably transitory context of absence’ of the EEZ, the wording of Article 14, paragraph 2, allows two different readings. According to the first, the parties cannot enforce the provisions of the Agreement, since this would encroach upon the freedom of the high seas. According to the second, since all the waters included in the sanctuary would fall within the EEZ of one or other of the three parties if they decided to establish such zones, the parties, by creating of the sanctuary, have limited themselves to the exercise of only one of the rights included in the broad concept of the EEZ. Accordingly, for him, ‘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 also entitled to enforce the rules applying in the sanctuary in respect of foreign ships which are found within its boundary’.\(^7\)

The solution indicated above may not offer a very convincing interpretation of this clause, but it may not be wrong to assume that the intention of the drafters was only to reserve a future possible situation in which the three parties would individually establish their own EEZs. In other words, one may again conceive of a normal situation in which a state may exercise its own jurisdiction within the relevant rules of international law, even when implementing its maritime policy to establish a particular type of MPA on the high seas. This may lead us to ask whether a country may exercise prescriptive jurisdiction to enact a domestic law or regulation concerning a given activity (as well as any enforcement measures) only within its own MPA. Certainly,
this question principally depends on a country’s policy posture and political situation. Theoretically, prescriptive jurisdiction may be differentiated from enforcement jurisdiction: a country may enact a law while also deciding not to exercise its enforcement jurisdiction in order to avoid causing conflict with other states.

(5) Legal Grounds for MPAs on the High Seas

It may be interesting here to consider the argument for the establishment of MPAs on the high seas. Some states support this measure appealing to provisions in the LOSC and relevant precedents. Frequently quoted provisions include Article 192, which sets the general obligation of states to protect and preserve the marine environment, Article 194 (5), which refers to the measures taken to protect and conserve endangered species and the habitats of other species, Article 197, which requires states to cooperate at the global and regional levels in environmental protection, Article 117, which deals with the duty of states to adopt measures for the conservation of the living resources of the high seas, and Article 118, which mandates the cooperation of states in the conservation and management of living resources. Those who advocate the legality of the establishment of MPAs on the high seas argue that, when these provisions are read together, the current tendency of the ecosystem approach, among other measures, may be seen to be compatible with international law.68

On the other hand, some proponents of this argument also note the obligation of states to act and cooperate on the basis of the principle of good faith in negotiation and consultation. The judgment rendered by the International Court of Justice (ICJ) in the North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) in 1969 pronounced on the obligation of states to conduct themselves in ways conducive to meaningful negotiation:69 this kind of obligation was also adduced as the fundamental principle in the judgement given by the International Tribunal on the Law of the Sea (ITLOS) in the MOX Plant Case (Provisional Measures).70

Other relevant precedents concerning international agreements could be mentioned here to support the argument for more effective environmental measures like the MPAs. The Antarctic Treaty of 1959,71 for example, contains provisions referring to relations with third-party states. One of the most
relevant is the following:

Article X
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.

This provision, of course, requires each of the Contracting Parties to ensure the objective and purpose of the Treaty, but it does not address any third party. However, the consequences of the efforts made by each of the Contracting Parties will by all means have a bearing upon third states. Only the methods or measures taken will be at issue, since these are not explicitly mentioned in the provision. One may note the phrase ‘consistent with the Charter of the United Nations’, which seems to imply that the Treaty itself is within the framework of the UN system. Still, the scope of what this Article provides is within the realm of international legal norms.

In the so-called Antarctic Treaty Regime, the consistency of the implementation and enforcement mechanisms is maintained. The 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR: hereinafter cited as the 1980 Convention), adopted to complement the Antarctic Treaty in terms of the conservation of Antarctic marine living resources (particularly in the Antarctic Convergence line, including the high seas of the Southern Sea), established the Commission to give effect to the objective and principles of the 1980 Convention and govern matters concerning the conservation of the relevant living resources. Article X of the 1980 Convention is of particular relevance here:

Article X
1. The Commission shall draw the attention of any State which is not a Party to this Convention to any activity undertaken by its nationals or vessels which, in the opinion of the Commission, affects the implementation of the objective of this Convention.
2. The Commission shall draw the attention of all Contracting Parties to any activity which, in the opinion of the Commission, affects the implementation by a Contracting party of the objective of this Convention or the compliance by that Contracting Party with its obligations under this Convention.
The 1980 Convention does not say that it can enforce rights and obligations through measures but only that, by the function of the Commission on behalf of all the contracting Parties, the Commission may draw the attention of non-parties or third states. Drawing attention may be achieved in many ways (e.g. notification, consultation, or negotiation). However, none of these methods would have any direct or physical enforcement mechanism. In other words, this kind of mechanism is still within the limits of the peaceful settlement of international disputes.

Moreover, the 1992 Rio Conference and its outcomes also followed this line. As mentioned above, the CBD operates with the OSPAR Convention and the Barcelona system, and the later conventional regimes function in tandem with the CBD.\(^{75}\) Article 22 of the CBD, for example, refers to the relationship with other international conventions as follows:

**Article 22 Relationship with Other International Conventions**

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.

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.

Specifically, Article 22 (2) requires the Contracting Parties of the CBD to implement the Convention in a way consistent with the rights and obligations of States under the law of the sea. The ‘States’ in this phrase means all states, including non-parties and third states. With respect to the implementation of the Convention, the drafters of the CBD also paid attention to the law of the sea and coordinated both the CBD and the law of the sea so as to pre-empt any conflict between these two. It is reasonable to assume that, for the drafters, there was no intention to have the CBD encroach upon the freedom of the high seas.

After the CLOS was adopted, the 1995 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 (hereafter cited
as the 1995 Agreement\(^{76}\) was concluded to address issues arising from the conservation of some fish stocks. The 1995 Agreement also refers to non-members and non-participants in its Part IV, where Article 17 (4) deals with the measures taken against these non-members and non-participants. This Part aims at combating the so-called illegal, unreported, and unregulated fisheries (IUU fisheries),\(^{77}\) which represents one of the most troublesome issues for the high seas fisheries.\(^{78}\) Therefore, regional and subregional fisheries management organisations have been vested with the functions that will allow them to pursue more effectively and efficiently the task of conserving fish stocks and regulating and governing the regional and subregional fishery activities of contracting parties and non-contracting (or third) parties.

Article 17 (4) of the 1995 Agreement reads as follows:

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.

This Article also uses the phrase ‘consistent with this Agreement and international law’ to qualify the measures to be taken under this Agreement. The effect of the measures to be taken is to ‘deter activities’ that undermine the effectiveness of the subregional and regional conservation and management measures.\(^{79}\) Concretely speaking, however, the deterring measures mentioned in this provision are not clear and are qualified through use of the common phrase ‘consistent with ... international law’. Here again, one can see the scope of the enforcement mechanism’s framework under contemporary international law.\(^{80}\)

Therefore, as is provided for in Article 34\(^{81}\) of the Vienna Convention on the Law of Treaties, an international agreement does not affect the rights and obligations of third parties. This traditional and very well-founded rule also applies to the relations between high seas freedom and the establishment of MPAs.
4. Conclusions

This study has, at minimum, demonstrated two points.

First, in light of the cases discussed above, the environmental measures taken by some coastal states through the relevant agreements are, normally, not incompatible or directly harmful to the freedom of the high seas enjoyed by third states or parties, although measures such as the establishment of MPAs on the high seas may have, in practice, a chilling psychological effect on non-member states or third parties. It is true that some coastal states have already established MPAs in high seas areas in accordance with relevant agreements. The Contracting Parties do not necessarily intend to encroach upon the freedom of the high seas, but this kind of measure may, nonetheless, infringe upon the freedom of the seas normally enjoyed by third parties to the relevant agreements. The motivation to protect and conserve marine living resources does not, for example, always have an adverse effect on other naval states’ interests, unless the practical measures are deliberately taken by the states concerned against the third parties in the region in question. The creeping jurisdiction claimed by coastal states is, to a certain degree, a turbulent factor in current maritime politics and international life that may have been exaggerated throughout the 1970s and 1980s, particularly by maritime powers eager to maintain their traditional maritime security interests. However, almost all the naval powers are also coastal states, which may thus have an equal chance of maintaining their own interests through the same action in turn. In light of the major trend for environmental protection and the conservation of resources and marine ecosystems, naval powers are facing a crossroads, forcing them to adapt their marine policies to the contemporary trend.

Another point that should be stressed is that suspicions, misinterpretations, and lack of communication among the states concerned would cause unexpected and tremendous damage to the maritime regime under current international law and international politics. Under these circumstances, coastal states and naval powers should both incessantly seek opportunities to communicate and exchange views with each other through diplomatic channels and other methods to avoid clashes. Actions taken by coastal states should be counterbalanced by ones taken by the naval powers. In the event of difficulties arising from the issues discussed above, both sides’ sincerity and eagerness to negotiate peacefully
will resolve any tensions. In this sense, the LOSC is an example of the kind of mechanism that may assure the peaceful settlement of international maritime disputes.

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7 As regards international governance responsible for environmental protection, see, for example, Patricia Birnie, Alan Boyle & Catherine Redgwell, International Law and the Environment, Third Edition, Oxford University Press, 2009, pp. 43-105.
This is mainly because naval powers tend to regard some high-seas freedoms such as weapons testing and naval operations as part of traditional and well-established uses of the high seas. See Churchill & Lowe, supra note 5, pp. 206-207.
Churchill & Lowe, supra note 5, p. 206.

This should be read within the context of the concept of marine living-resource management. See, for example, Rothwell & Stephens, supra note 1, pp. 298-302.

In this respect, some writers state that ‘[w]hilst in some instances the obligation upon foreign ships to comply with coastal state marine pollution provisions within the EEZ are clearly compatible with the coastal states interests in that zone, whether the coastal state can seek to obtain information about navigational movements by foreign ships within the EEZ without infringing the high seas freedom of navigation is more problematic’. See Rothwell & Stephens, supra note 1, p. 169.

See Churchill & Lowe, supra note 5, p. 220. These authors aptly state that ‘[a]ll in all, the balance struck by [the Third United Nations Conference on the Law of the Sea] between the high seas and the zones of national jurisdiction appears to be holding’.


See Guidelines for Marine Protected Areas, 1999, p. 98.

See, for example, Birnie, Boyle & Redgewell, supra note 7, pp. 714-730.

Emphasis added.

See, for example, Birnie, Boyle & Redgewell, supra note 7, pp. 458-461. See also the official website of the OSPAR Commission (http://www.ospar.org/).

Article 2 (1) (a)

Article 2 (1) (b)

Emphasis added.

Preamble

Article 2 of Annex V

Article 10

Articles 10 (3) and 13 (1)

See Article 13 (6), which reads ‘6. Decisions concerning any Annex or Appendix shall be taken only by the Contracting Parties bound by the Annex or Appendix concerned’. (emphasis added)


OSPAR Decision 2010/1 Preamble (OSPAR 10/23/1-E, Annex 34).

Id. Emphasis added.

Id. Emphasis added.


See, for example, Roberts, supra note 18, pp. 32-36; Birnie, Boyle & Redgewell, supra note 7, pp. 612-648.
Article 8 (a) of CBD
In this respect, see Lagoni, supra note 1, p. 167, where he states that ‘a protected area established pursuant to the CBD could only be designated as a PSSA if it would affect navigation’.
Article 8 (1)
Article 8 (2)
Article 11 (4)
Article 11 (7)
Article 28 (1)
Article 28 (2)

See IWC/59/CC8, p. 1.
The agreement seeks to protect and conserve several species of marine mammal such as the striped dolphin, bottlenose dolphin, long-finned pilot whale, Risso’s dolphin, fin whale, and sperm whale, by regulating all human activities and by harmonising development with conservation needs. Article 4.
Since the authentic texts in the agreement are French and Italian, an unofficial English translation is shown here.
Scovazzi, ibid.
The ICJ Judgement, 1969, paragraph 85.
The ITLOS Judgment, 2003, paragraphs 82 & 89.
This means the fundamental principles and rules of the modern international society.


See Lagoni, *supra* note 1, pp. 165-166.


With respect to effective enforcement of a treaty, better scientific knowledge of fish stocks and the marine ecosystem are also necessary. See Churchill & Lowe, *supra* note 5, p. 322.

Article 34 of the Vienna Convention on the Law of Treaties reads: ‘a treaty does not create either obligations or rights for a third State without its consent’.

It is well-known that this point also applies to almost all the global conflicts that have so far occurred.