

# Maritime Spatial Planning and Protection of the Marine Environment

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## Abstract

Protection and preservation of the marine environment is a priority under international law, as codified and further developed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Nonetheless, the current state of the marine environment questions whether the approach adopted in the UNCLOS and other legal instruments, whereby each type of pollution is addressed separately, really suffices to ensure good environmental status. For this reason, new tools have been developed, including marine (or maritime) spatial planning (MSP) and integrated coastal zone management (ICZM). This article discusses MSP and its role in ensuring protection of the marine environment, both within and beyond areas under national jurisdiction.

## Keywords

law of the sea – maritime spatial planning (MSP) – integrated coastal zone management (ICZM) – environmental protection

## 1 Environmental Protection and the Law of the Sea

The seas and oceans are a significant part of our planet. They not only cover more than 70% of its surface, but they also play a crucial role in many processes necessary for life on earth, including oxygen production and carbon storage. Furthermore, they provide enormous benefits for humanity in the form of ecosystem services and benefits, which range from the harvesting of

living resources, to coastal protection, cultural and amenity services.<sup>1</sup> They are therefore of great value for humankind. Nonetheless, seas and oceans today face numerous threats, many of which are human-driven. Climate change affects the oceans in different ways;<sup>2</sup> depletion of marine living resources is ongoing;<sup>3</sup> pollution of the marine environment, including plastic pollution<sup>4</sup> and noise pollution,<sup>5</sup> is increasing.

This situation might imply that there are no legal rules obliging States to protect the marine environment and prevent its pollution. However, this is not the case. Part XII of the 1982 United Nations Convention on the Law of the Sea (UNCLOS or Convention)<sup>6</sup> is actually entirely devoted to the protection of the marine environment, and further provisions, to be found in other Parts of the Convention, also address protection of the marine environment.<sup>7</sup> Part XII UNCLOS begins with what is probably the broadest rule of international law concerning protection of the natural environment to be found in a binding international legal instrument. Article 192 UNCLOS is indeed entitled “General obligation” and provides that “States have the obligation to protect and preserve the marine environment.” Furthermore, this Part includes numerous provisions dealing with the duties of states to address different forms of pollution and to adopt other actions with a view towards protecting the marine environment, including enforcement action. In addition to the UNCLOS, there

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- 1 United Nations, *The Second World Ocean Assessment* (2021), available at <https://www.un.org/regularprocess>.
  - 2 D. Laffoley and J. M. Baxter (Eds.), *Explaining Ocean Warming: Causes, Scale, Effects and Consequences* (IUCN, Gland, 2016).
  - 3 According to FAO, *The State of World Fisheries and Aquaculture* (FAO, Rome, 2020), 47, “the fraction of fish stocks that are within biologically sustainable levels decreased from 90 percent in 1974 to 65.8 percent in 2017 [...]. In contrast, the percentage of stocks fished at biologically unsustainable levels increased, especially in the late 1970s and 1980s, from 10 percent in 1974 to 34.2 percent in 2017.”
  - 4 Plastic pollution has been addressed in four United Nations Environment Assembly resolutions of 2014, 2016, 2017, and 2019, collected in UN Doc UNEP/AHEG/2019/3/INF/2 of 25 October 2019. For background information see the report *Breaking the Plastic Wave*, available at [breakingtheplasticwave\\_report.pdf](https://breakingtheplasticwave_report.pdf) (oneplanetnetwork.org).
  - 5 C. McKenna, and International Fund for Animal Welfare (2008). *Ocean Noise: Turn It Down-A Report On Ocean Noise Pollution*, available at <https://tethys.pnnl.gov/sites/default/files/publications/McKenna-et-al-2008.pdf>.
  - 6 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.
  - 7 E.g. Art. 21(1)(f) UNCLOS and Art. 56(1)(b)(iii) UNCLOS.

are numerous other global and regional treaties concerned with the protection of the marine environment.<sup>8</sup>

The fact that seas and oceans currently face many threats, read together with the existence of legal rules that bind States to protect and preserve the marine environment, point towards the conclusion that the current regulation is unable to stop degradation of the marine environment. Reasons are manifold, yet one of them is the fact that, until recently, maritime issues, including protection of the marine environment, were dealt with separately. The UNCLOS is a significant example, as it contains duties concerning specific forms of pollution, for example pollution from seabed activities or pollution from vessels.<sup>9</sup> It might therefore seem that pollution occurs only in isolation, and that States have to face one issue at a time. However, this is not the case. On the one hand, the same activity may produce different types of pollution; for example, shipping may produce noise, fumes, and oil pollution, all at the same time. On the other hand, quite often multiple activities occur at the same place, all having an impact on the marine environment. The separate treatment or different sources of pollution and degradation of the marine environment in legal instruments has led to ignore or not address sufficiently cumulative impacts, as well as the interactions between different human activities and natural processes.

The urgent need to protect and restore the oceans has been recognised in different political commitments adopted by states since the end of the twentieth century.<sup>10</sup> Today, the 2030 Agenda for Sustainable Development<sup>11</sup> includes Sustainable Development Goal (SDG) 14, which mandates to ‘conserve and sustainably use the oceans, seas and marine resources for sustainable development’. SDG 14 requests States to ‘prevent and significantly reduce marine pollution of all kinds, in particular from land-based activities, including marine debris and nutrient pollution’ by 2025,<sup>12</sup> and to ‘sustainably manage and protect marine and coastal ecosystems to avoid significant adverse

8 For a general overview, see P. Birnie, A. Boyle, and C. Redgwell, *International Law and the Environment*, 3rd ed. (OUP, 2009), 383. More in detail J. Harrison, *Saving the Oceans through Law: The International Legal Framework for the Protection of the Marine Environment* (OUP, 2017).

9 Respectively, Art. 208 UNCLOS and Art. 211 UNCLOS.

10 See, for example, the 1992 ‘Agenda 21’, UN doc. A/CONF.151/26, Chapter 17, concerning ‘Protection of the oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their living resources’ and the 2017 United Nations General Assembly, ‘Our Ocean, Our Future: Call for Action’, Res. 71/312 of 6 July 2017, UN doc. A/RES/71/312 (‘Our Ocean, Our Future’).

11 United Nations General Assembly, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, Res. 70/1 of 25 September 2015, UN doc. A/RES/70/1.

12 SDG 14, Target 14.1.

impacts, including by strengthening their resilience, and take action for their restoration in order to achieve healthy and productive oceans' by 2020.<sup>13</sup>

In order to address the shortcomings deriving from the fragmented approach to conservation of the marine environment in legal instruments, including the UNCLOS, and to meet the ambitious targets set by SDG 14, innovative concepts and tools have been developed in recent years, including maritime (or marine) spatial planning (MSP). This article sets out to discuss the potential and shortcomings of MSP as a tool for ensuring a better protection of the marine environment, including prevention of pollution. In order to do so, it will first provide some background information on the content of the duty to prevent pollution in the UNCLOS (Section 2) and the concept of MSP (Section 3). It will then turn to the practical application of MSP by examining the use of this concept in European Union (EU) instruments (Section 4). Based on this analysis, it will identify the advantages and disadvantages of using MSP in areas within national jurisdiction (Section 5) and will discuss its potential application in areas beyond national jurisdiction (Section 5), closing with some conclusions (Section 6).

## 2 The Duty to Prevent Pollution in the UNCLOS

The general duty to protect the marine environment, enshrined in Article 192 UNCLOS, implies both “the positive obligation to take active measures to protect and preserve the marine environment, and by logical implication, entails the negative obligation not to degrade the marine environment”.<sup>14</sup> This is an actual legal duty,<sup>15</sup> which is further clarified and rendered more precise by the other environmental provisions of the UNCLOS and those of other treaties. This is also a general duty that concerns not only pollution of the marine environment, but also other forms of degradation and, more generally, the need to protect and preserve the marine environment in all its aspects and components. The Arbitral Tribunal in the *Chagos* case has expressly rejected “the suggestion that [...] Part XII of the Convention [is] limited to measures aimed at controlling marine pollution”.<sup>16</sup>

13 SDG 14, Target 14.2.

14 M/V “Louisa”, para. 76; South China Sea, para. 941.

15 South China Sea, para. 941.

16 Chagos, para. 320.

All the same, it is a fact that the UNCLOS is drafted having in mind principally the need to prevent and control pollution.<sup>17</sup> The general duty to prevent pollution of the marine environment is provided for in Article 194(1) UNCLOS, which is worth repeating in its entirety:

States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonize their policies in this connection.

This provision includes a number of obligations, which, taken together, aim at eliminating or at least reducing pollution of the marine environment. In the first place, States have the general duty to prevent, reduce and control pollution of the marine environment. As has been authoritatively affirmed, “pollution can no longer be regarded as an implicit freedom of the seas”.<sup>18</sup> Preventive action, indeed, should in theory preclude the verification of incidents of pollution. However, as this is often not the case, both due to unexpected incidents and wilful acts, States have the complementary duty, in case pollution actually occurs, to reduce and control both the pollution and its effects.

Second, as Article 194(3) clarifies, the duty to prevent pollution of the marine environment concerns all sources of pollution. Section 5 of Part XII UNCLOS contains a list of activities that, at the time when the Convention was negotiated and adopted, were of concerns to the international community. These include pollution from land-based sources,<sup>19</sup> pollution from seabed activities subject to national jurisdiction,<sup>20</sup> pollution from activities in the Area,<sup>21</sup> pollution by dumping,<sup>22</sup> pollution from vessels,<sup>23</sup> and pollution from or through the atmosphere.<sup>24</sup> Nonetheless, states have the duty to address also other sources of pollution which are not expressly mentioned in the UNCLOS, should they become aware of their existence. This is clear from the language of Article

17 Czybulka, “Article 192” in Proelss (Ed.), *United Nations Convention on the Law of the Sea. A Commentary* (Beck/Hart/Nomos, 2017), 1277, 1278.

18 Birnie, Boyle & Redgwell, *supra* note 8, at 383.

19 Art. 207 UNCLOS.

20 Art. 208 UNCLOS.

21 Art. 209 UNCLOS.

22 Art. 210 UNCLOS.

23 Art. 211 UNCLOS.

24 Art. 212 UNCLOS.

194(3), which refers to “all sources of pollution of the marine environment” and uses the words “inter alia” to introduce an illustrative list with four items. The attention drawn by noise pollution<sup>25</sup> and plastic pollution<sup>26</sup> in recent years, and the discussions that have developed, confirm this point.

Third, in order to achieve these aims, States must take both individual and joint measures. Individual measures include the duty to prevent transboundary pollution of the marine environment,<sup>27</sup> the duty 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”,<sup>28</sup> and the duty not to transfer damage or hazards or transform one type of pollution into another.<sup>29</sup> Individual measures, however, may not be sufficient, especially in an environment like the maritime one, which is by its very nature fluid and unitary. In cases in which unilateral action is not sufficient to address a certain source of pollution, or in those instances where joint action could optimise efforts and reduce costs, states may have an obligation to cooperate, as further detailed in Article 197 UNCLOS. The duty to cooperate may take the form of a duty to notify all potentially affected states of the fact that “the marine environment is in imminent danger of being damaged or has been damaged by pollution”,<sup>30</sup> to adopt joint contingency plans,<sup>31</sup> or to develop international rules and standards, as requested by the provisions contained in Section 5 of Part XII UNCLOS.

Fourth, as the language of Article 194(1) hints, the duty to prevent pollution is not an absolute duty. Rather, it may be considered as a “due diligence” obligation, in accordance with the conception elaborated upon by the Seabed

25 H. M. Dotinga & A. G. Oude Elferink, *Acoustic Pollution in the Oceans: The Search for Legal Standards*, 31 *Ocean Development and International Law* 151 (2000); E. M. McCarthy, *International Regulation of Transboundary Pollutants: The Emerging Challenge of Ocean Noise*, 6 *Ocean and Coastal Law Journal* 257 (2001); A. Gillespie, *The Precautionary Principle in the Twenty-First Century: a Case Study of Noise Pollution in the Ocean*, 22 *The International Journal of Marine And Coastal Law* 61 (2007); I. Papanicolopulu, “The European Union and the Regulation of Underwater Noise Pollution” in D. Vidas & P. J. Schei (Eds.), *The World Ocean In Globalisation : Climate Change, Sustainable Fisheries, Biodiversity, Shipping, Regional Issues* (Martinus Nijhoff, 2011), 457.

26 J. C. Prata, *Plastic Litter in Our Oceans: A Case for Government Action*, 32 *Ocean Yearbook* 283 (2018); K. Schmalenbach & J. Pleiel, *An Ocean of Plastic : What can a Future “Treaty on Biodiversity in Areas Beyond National Jurisdiction” Contribute to Solving a Global Problem*, 57 *Archiv des Völkerrechts* 1 (2019).

27 Art. 194(2) UNCLOS.

28 Art. 194(5) UNCLOS.

29 Art. 195 UNCLOS.

30 Art. 198 UNCLOS.

31 Art. 199 UNCLOS.

Disputes Chamber (SDC) of the International Tribunal for the Law of the Sea (ITLOS). According to the SDC, a due diligence obligation 'is not an obligation to achieve, in each and every case, the result [envisaged by the norm]. Rather, it is an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.<sup>32</sup>

The classification of Article 194(1) UNCLOS as a due diligence obligation carries two principal consequences. In the first place, a State may free itself of the duty to prevent, reduce and control pollution of the marine environment by proving that it has done its utmost. While this might sound like a weakening of the content of the obligation, one has to consider the duty under Article 194(1) UNCLOS within its broader context. As already mentioned, there are numerous provisions in the UNCLOS which specify and flesh out the content of states' duties with respect to prevention of pollution of the marine environment. Furthermore, additional guidance may be found in a number of other treaties, ranging from the International Convention for the Prevention of Pollution from Ships (MARPOL) to the regional seas convention. In light of these specifications, it is hard to claim that the duty under Article 194 is vague or empty.<sup>33</sup>

In the second place, the fact that Article 194(1) UNCLOS is a due diligence obligation means that States may be required to take measures not only when pollution is due to their own activities, but also when pollution is due to the activities of other – often private – actors. The SDC has in fact noted that due diligence obligations arise out of the necessity to control activities carried out by non-state actors,<sup>34</sup> and that they are distinct from 'direct' obligations

32 SDC Opinion, para. 110. See also 2015 opinion paras. 126–129. On due diligence obligations, generally see T. Koivurova, *Due Diligence*, 2010, available at <http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=EPIL>; Société Française pour le Droit International (Ed.), *Le standard de due diligence et la responsabilité internationale*, (Pedone, Paris, 2018); A. Ollino, *Due Diligence Obligations in International Law: A Theoretical Study* (CUP, 2021).

33 Papanicolopulu, 'Due Diligence in the Law of the Sea', in Krieger, Peters, Kreuzer (Eds.), *Due Diligence in the International Legal Order* (OUP, 2020), 147; D. König, 'The elaboration of Due Diligence Obligations as a mechanism to Ensure Compliance with International Legal Obligations by Private Actors', in International Tribunal for the Law of the Sea (Ed.), *The Contribution of the International Tribunal for the Law of the Sea to the Rule of Law: 1996–2016 / La contribution du Tribunal international du droit de la mer à l'état de droit: 1996–2016*, (Brill, Leiden, 2018), 83–95; I. Caracciolo, 'Due diligence et le droit du mer', in Société Française pour le Droit International (Ed.), *Le standard de due diligence et la responsabilité internationale* (Pedone, Paris, 2018), 163–185.

34 SDC Opinion, para. 112.

of states.<sup>35</sup> These findings have been confirmed by other courts and tribunals adjudicating law of the sea disputes.<sup>36</sup>

From a substantial point of view, due diligence obligations, including Article 194(1) UNCLOS, are quite flexible. Flexibility is evidenced by the fact that there is not a predefined list of actions that would allow the state to comply with its due diligence obligation. All the same, judges have identified a certain number of actions that are relevant in assessing compliance with a due diligence obligation: the adoption of laws and regulations;<sup>37</sup> the taking of administrative measures;<sup>38</sup> the exercise of a 'certain level of vigilance in their enforcement and the exercise of administrative control';<sup>39</sup> the enactment of enforcement measures, including 'boarding, inspection, arrest and judicial proceedings';<sup>40</sup> the proper marking of vessels;<sup>41</sup> the creation of monitoring mechanisms;<sup>42</sup> the investigation of any alleged violation and the duty to inform the affected state of the results;<sup>43</sup> the provision for sanctions 'sufficient to deter violations and to deprive offenders of the benefits accruing from their' illegal activities.<sup>44</sup> From a substantial perspective, the SDC underlined the link between due diligence obligations and the precautionary principle/approach,<sup>45</sup> as well as with the duty to conduct an EIA.<sup>46</sup> All these specific obligations must be kept in mind in approaching the ways in which states must act in order to comply with their obligations deriving from Article 194 UNCLOS and the other provisions of the Convention.

A final point worth making with respect to the limitations encountered in article 194(1) UNCLOS concerns the possibility to diversify the duties concretely required from specific states. As a general matter, the content of a due diligence obligation does not depend on the specific state that must comply with what is required by the norm at a specific moment in time. In its 2011 Advisory Opinion, the SDC took a firm position by stating that no difference

35 *Ibid.*, para. 121.

36 2015 Opinion, para. 128; South China Sea, para. 944.

37 SDC Opinion, para. 119.

38 *Ibid.*, para. 119; 2015 opinion, para. 119.

39 SDC Opinion, para. 115, citing Pulp Mills, para. 197.

40 2015 Opinion, paras. 104–105.

41 *Ibid.*, para. 137.

42 *Ibid.*, para. 138.

43 *Ibid.*, para. 139.

44 *Ibid.*, para. 138.

45 SDC Opinion, para. 131.

46 *Ibid.*, paras. 145 and 150. See also South China Sea arbitral award, para. 988.

in treatment is admitted, unless it is provided by a specific norm.<sup>47</sup> However, Article 194(1) is precisely one of these exceptions, in that it allows states to take measures using “the best practicable means at their disposal and in accordance with their capabilities”. In evaluating the extent to which states must act to comply with their duties to prevent and combat pollution of the marine environment, therefore, it is necessary also to consider the specific circumstances in which the state finds itself, as well as the means at its disposal.

### 3 Maritime Spatial Planning (MSP) and Integrated Coastal Zone Management (ICZM) as Tools for Addressing Cumulative Effects

The need to accommodate different sea uses, so as to ensure their compatibility while at the same time ensuring protection of the maritime environment, is at the basis of two concepts that have entered into the international legal language in the last decades. They are the concept of maritime (or marine) spatial planning (MSP) and the concept of integrated coastal zone management (ICZM).

According to the UNESCO Intergovernmental Oceanographic Commission (IOC),

marine spatial planning (MSP) is a process of analyzing and allocating parts of three-dimensional marine spaces (or ecosystems) to specific uses or objectives, to achieve ecological, economic, and social objectives that are usually specified through a political process.<sup>48</sup>

as appears from this definition, MSP is not a general principle or abstract norm, but is rather a tool that has been developed to take into account and accommodate the different uses of the sea. In fact, human activities at sea do

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47 SDC opinion, para. 158. This conclusion of the SDC may be due to the factual circumstances of the case under examination and the wish of the SDC to avoid bringing into the field of the exploitation of the resources of the Area the pressing issues faced in the field of navigation due to the expanding presence of vessels flying flags of convenience. The SDC in fact noted that “[e]quality of treatment between developing and developed sponsoring States is consistent with the need to prevent commercial enterprises based in developed States from setting up companies in developing States, acquiring their nationality and obtaining their sponsorship in the hope of being subjected to less burdensome regulations and controls” (SDC opinion, para. 159).

48 C. Ehler and F. Douvère, *Visions for a Sea change. Report of the First International Workshop on Marine Spatial Planning. Intergovernmental Oceanographic Commission and Man and the Biosphere Programme* (UNESCO, Paris, 2007) at 13.

not happen in isolation, but may overlap, both spatially and temporarily. The main purpose of MSP is to ensure that activities taking place at sea in the same space or at the same time are harmonized and may coexist, through a spatial and temporal allocation of uses and activities. In the case of incompatibility between different activities and uses, MSP will aim at prioritizing them, so as to achieve the objectives set by the organization responsible for that part of the sea.

The definition of MSP provided above underlines some key elements of MSP. First, MSP is not a single operation, but is rather a process. This means that MSP does not end with a single plan, however complex and extended. MSP is a continuous process, which usually consist in different phases, which follow one another in a circular process. At first, it is necessary to identify the area of concern and collect information concerning the different activities and sea uses taking place therein. At an initial moment of the process, it is also necessary to establish the principles and criteria on the basis of which conflicting uses of the sea and activities will be prioritized. On the basis of the information collected and using the relevant principles, the combination of different activities will be assessed, in order to identify whether two activities may coexist or whether they are incompatible. In the latter case, the activities will be prioritized for every part of the area under consideration, so as to maximize sea uses while at the same time achieving maximum protection for the environment. Following this first cycle, successive cycles will consist in the updating of the information, the reassessment of the compatibility between different uses, and, if need be, the adjustment of the plan.

Second, MSP concerns all activities and sea uses that may take place in a certain area. It is therefore of key importance to identify all sea uses, as well as all sea users, so as to ensure that the plan that will come out from this exercise is truly comprehensive and addresses all activities. In this regards, the role of stakeholders becomes crucial and their involvement becomes necessary to ensure that all relevant information feeds into the planning. Identification and involvement of stakeholders is thus a necessary part of MSP.<sup>49</sup>

Last but not least, MSP is not a “neutral” or “objective” tool; rather, it is driven by the values of the community putting it into place. In this respect, two moments should be distinguished. On one hand, the collection of the relevant information and their comparison, in order to assess the level of compatibility between different activities, could be considered as a rather objective exercise, since it is based on a factual assessment. In practical terms, however, some

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49 R. Pomeroy & F. Douvere, *The Engagement of Stakeholders in the Marine Spatial Planning Process*, 32 *Marine Policy* 816 (2008).

activities might escape or might not be considered in all their aspects, due to lack of information or for other reasons. On the other hand, the process through which activities are prioritized and a certain space is allocated to a certain activity or activities is a process that is not neutral but is premised on a specific understanding of economic, social and environmental priorities. There is no predetermined priority between, for example, fishing and offshore oil extraction, or between shipping and leisure swimming. These priorities are reflected in the principles and rules that guide allocation of space and solution of conflicts.

MSP was initially developed at the national level and only recently has started being incorporated into international legal and policy instruments. The concept of maritime (or marine) spatial planning (MSP) is therefore absent from most treaties and other legal instruments dealing with the law of the sea and the protection of the marine environment, including the UNCLOS. In fact, it took some time to move from the general principle enshrined in the Preamble to the UNCLOS that “the problems of ocean space are closely inter-related and need to be considered as a whole” to the development of tools, such as MSP, which actually apply this principle and consider the interactions between different sea uses.<sup>50</sup> The most prominent elaboration of the concept of MSP has taken place at the European Union level, to which the next section will be devoted.

While MSP is entirely about sea areas, integrated coastal zone management (ICZM) is a tool that aims at integrating the management of land and coastal areas, so as to take into account the intersection between land and maritime activities and issues, ensuring a holistic approach to the important but fragile environment of coastal areas. ICZM has been transformed into legally binding norms for Mediterranean States through the adoption of the Protocol on Integrated Coastal Zone Management in the Mediterranean (ICZM Protocol).<sup>51</sup> The ICZM Protocol aims at leading Mediterranean States and the EU to better managing their coastal zones, as well as dealing with the emerging coastal environmental challenges, such as climate change.

According to the definition provided in the ICZM Protocol, ICZM refers to

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50 F. Maes, *The International Legal Framework for Marine Spatial Planning*, 32 *Marine Policy* 797 (2008).

51 The ICZM Protocol was adopted in 2008 and entered into force in 2011. T. Scovazzi, *The 2008 Mediterranean Protocol on Integrated Coastal Zone Management and the European Community*, in D. Vecchio (Ed.), *La politica marittima comunitaria* (Rome, 2009), 159.

a dynamic process for the sustainable management and use of coastal zones, taking into account at the same time the fragility of coastal ecosystems and landscapes, the diversity of activities and uses, their interactions, the maritime orientation of certain activities and uses and their impact on both the marine and land parts.<sup>52</sup>

Through the ICZM Protocol, Contracting Parties have undertaken the legal obligation to “establish a common framework for the integrated management of the Mediterranean coastal zone and take the necessary measures to strengthen regional cooperation for this purpose”.<sup>53</sup>

The main objective of ICZM is to facilitate, through the rational planning of activities, the sustainable development of coastal zones by ensuring that the environment and landscapes are taken into account in harmony with economic, social and cultural development. In order to achieve this aim, States must preserve coastal zones for the benefit of current and future generations; must ensure the sustainable use of natural resources, particularly with regard to water use; and must ensure preservation of the integrity of coastal ecosystems, landscapes and geomorphology. In addition, States must prevent and/or reduce the effects of natural hazards and in particular of climate change, which can be induced by natural or human activities. Finally, States must achieve coherence between public and private initiatives and between all decisions by the public authorities, at the national, regional and local levels, which affect the use of the coastal zone.

The Protocol furthermore provides for the principles that should guide State action in this field. among others, States must apply the ecosystem approach,<sup>54</sup> must enhance vertical and horizontal coordination among institutions,<sup>55</sup> and must ensure ICZM Protocol public participation in a transparent decision making process.<sup>56</sup>

In its territorial scope, the ICZM Protocol uses the concept of the ‘coastal zone’, defined as ‘the geomorphologic area either side of the seashore in which the interaction between the marine and land parts occurs in the form of complex ecological and resource systems made up of biotic and abiotic components coexisting and interacting with human communities and relevant socio-economic activities’.<sup>57</sup> The coastal zone is delimited by the seawards

52 Art. 2(f) ICZM Protocol.

53 Art.1 ICZM Protocol.

54 Art. 6(c) ICZM Protocol.

55 Art. 6(e) ICZM Protocol.

56 Art. 6(d) ICZM Protocol.

57 Art. 2(e) ICZM Protocol.

and the landwards limits, which refer to the external limit of the territorial sea and the limit of the competent coastal units, respectively.<sup>58</sup>

#### 4 MSP in the European Union

The EU has been one of the early promoters, at the international level, of the integrated approach to maritime activities. In the last three decades, the EU has accordingly adopted a number of legal and policy instruments towards this aim. In the period 1996–1999, the then European Community had operated a Demonstration Programme on ICZM, designed around 35 demonstration projects and 6 thematic studies. Based on the experiences and outputs of this Programme, in 2002 the Council and Parliament adopted the Recommendation concerning the implementation of ICZM, proposed by the Commission.<sup>59</sup> The 2007 Blue Book on Maritime Policy introduced the concept of MSP, and the following year saw the adoption of the “Roadmap for MSP”.<sup>60</sup> In 2010, the EU approved the Protocol on Integrated Coastal Zone Management to the Barcelona Convention,<sup>61</sup> while at the same time calling upon States to report progress on ICSM in the period 2006–2010. This process culminated in 2014 with the adoption of the MSP Directive,<sup>62</sup> according to which EU States are now requested to adopt legislation concerning maritime spatial planning, on the basis of which plans will be adopted.

The MSP Directive is the first legal instrument to provide for mandatory maritime spatial planning. The Directive sets the timeframe for MSP focusing on the two necessary steps, the adoption of relevant legislation and the adoption of the plans themselves. According to this timeframe, Member States must adopt legislation to establish and implement maritime spatial planning

58 Art. 3 ICZM Protocol.

59 Recommendation of the European Parliament and of the Council of 30 May 2002 concerning the implementation of Integrated Coastal Zone Management in Europe (2002/413/EC), OJ L 148/24, 6.6.2002. Communication from the Commission, “Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU”, COM (2008) 791, Brussels, 25.11.2008.

60 Communication from the Commission, “Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU”, COM (2008) 791, Brussels, 25.11.2008.

61 Council Decision of 13 September 2010 concerning the conclusion, on behalf of the European Union, of the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (2010/631/EU), OJ L 279/1, 23.10.2010.

62 Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 establishing a framework for maritime spatial planning (OJ L257/135 of 28 August 2014).

by 18 September 2016<sup>63</sup> and must establish plans, on the basis of this legislation, as soon as possible and at the latest by 31 March 2021.<sup>64</sup>

As to its purpose, the Directive concerns MSP, that is “a process by which the relevant Member State’s authorities analyse and organise human activities in marine areas to achieve ecological, economic and social objectives”.<sup>65</sup> As to its scope, the MSP Directive applies to all waters under the jurisdiction of EU States, unless States have included portions of marine waters (e.g. ports or coastal waters) within town and country planning.<sup>66</sup> It thus applies to internal waters, territorial waters, exclusive economic zones, continental shelves and other *sui generis* maritime zones which may have been proclaimed by States.<sup>67</sup> As to its content, the MSP directive sets the objectives, minimum requirements, basic principles and procedural requirements for maritime spatial planning.

According to the MSP Directive, MSP should promote four fundamental objectives, through the application of an ecosystem-based approach, namely the sustainable growth of maritime economies, the sustainable development of marine areas, the sustainable use of marine resources, and the coexistence of relevant activities and uses.<sup>68</sup> In particular, States should pursue two sets of objectives. On one hand, economic development, through the development of energy sectors at sea, of maritime transport, and of the fisheries and aquaculture sectors. On the other hand, preservation, protection and improvement of the environment, including resilience to climate change impacts. Furthermore, states may pursue other objectives, such as the promotion of sustainable tourism and the sustainable extraction of raw materials.<sup>69</sup>

Notably, it is up to States to decide how to balance these objective and how to prioritize activities within this broad framework. The MSP Directive, in fact, provides that it is “without prejudice to the competence of Member States to determine how the different objectives are reflected and weighted in their maritime spatial plan or plans”.<sup>70</sup> This means that States in different regions may attribute different weight to the objectives, taking into account the peculiarities of the region and their relevance for all stakeholders.

63 Art. 4 and Art. 15 MSP Directive.

64 Art. 15 MSP Directive.

65 Art. 3(2) MSP Directive.

66 Art. 2 MSP Directive.

67 For example, Italy currently does not have an exclusive economic zone, but has claimed an Ecological Protection Zone in parts of the Tyrrhenian Sea.

68 Art. 5(1) MSP Directive.

69 Art. 5(2) MSP Directive.

70 Art. 5(3) MSP Directive.

In setting up their plans, Member States have to “identify the spatial and temporal distribution of relevant existing and future activities and uses in their marine waters” and “take into consideration relevant interactions of activities and uses”.<sup>71</sup> In order to help States identify relevant activities, the MSP Directive provides a list of activities and uses that may be taken into consideration in the drafting of legislation and the establishment of plans. These include aquaculture areas; fishing areas; installations and infrastructures for the exploration, exploitation and extraction of oil, of gas and other energy resources, of minerals and aggregates, and for the production of energy from renewable sources; maritime transport routes and traffic flows; military training areas; nature and species conservation sites and protected areas; raw material extraction areas; scientific research; submarine cable and pipeline routes; tourism; underwater cultural heritage.<sup>72</sup> This list is non exhaustive and States may consider other activities, if relevant for the setting up of plans. However, the MSP Directive does not apply to activities the sole purpose of which is defence or national security.<sup>73</sup>

In drafting their legislation and setting up their plans, Member States must comply with the minimum requirements for maritime spatial planning identified in the MSP Directive.<sup>74</sup> These include, in the first place, the need to take into account land-sea interactions, also applying the ICZM approach,<sup>75</sup> and to promote coherence between MSP and the resulting plan or plans and other processes, such as integrated coastal management or equivalent formal or informal practices. States must also take into account environmental, economic and social aspects, as well as safety aspects, in developing their plans. They must ensure the involvement of stakeholders<sup>76</sup> and organise the use of the best available data.<sup>77</sup> Finally, they must ensure trans-boundary cooperation between Member States,<sup>78</sup> as well as promote cooperation with third countries.<sup>79</sup>

The MSP Directive represents a novel and innovative legal instrument and one of the first instruments to render MSP mandatory at the inter-State level. With respect to earlier instruments concerning the need to render compatible

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71 Art. 8 MSP Directive.

72 Art. 8(2) MSP Directive.

73 Art. 2 MSP Directive.

74 Art. 6 MSP Directive.

75 Art. 7 MSP Directive.

76 Art. 9 MSP Directive.

77 Art. 10 MSP Directive.

78 Art. 11 MSP Directive.

79 Art. 12 MSP Directive.

uses of the seas, such as the ICZM Protocol, its focus is however broader. Environmental protection continues to be one of the guiding objectives, but not the exclusive one. It is joined by other objectives linked to the concept of sustainable development and its three pillars, namely the environmental, the economic and the social pillars.<sup>80</sup> Furthermore, and as already highlighted, the MSP Directive does not actually rank the three pillars, thus apparently leaving States an ample margin of appreciation in deciding which activities should be prioritised.

However, this margin of appreciation is not as broad as might seem. In the first place, the Directive itself refers to “ecological, economic and social objectives”.<sup>81</sup> The use of the conjunction “and” signifies that the three objectives are not alternative, but cumulative. States cannot therefore pursue one to the exclusion of the other, but must adopt rules and policies that allow for the attainment of all three objectives.

In the second place, the MSP Directive has to be seen in context. This is only one of a number of EU legal instruments which concern the marine environment and the activities carried out therein. A significant number of EU legal instruments, including the 2013 Marine Strategy Framework Directive (MSFD),<sup>82</sup> provide stringent rules concerning protection of the maritime environment and prevention of pollution. These instruments have to be read and applied alongside the MSP Directive and may *de facto* limit the options available to States when they operate policy choices concerning the prioritization of activities within plans.

So far, reception of the MSP Directive has been quite diverse. While some Member States have adopted (or updated) plans quite in advance of the deadline, others are still lagging behind.<sup>83</sup> Reasons are manifold and relate both

80 Report of the World Commission on Environment and Development, UN doc. A/42/427 of 4 August 1987, 24–25.

81 Art. 3(2) MSP Directive. *See also* Art. 5(1) MSP Directive.

82 Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 Establishing a Framework For Community Action in the Field of Marine Environmental Policy, OJ L 164/19 of 25.6.2008. The objective of the MSFD is to achieve, by the year 2020, ‘good environmental status’ (Art. 1(1) MSFD) in the marine waters, including the seabed and subsoil, of member states (Arts. 2(1) and 3(1) MSFD). To achieve this aim, states have to develop marine strategies based on the ecosystem approach, according to the detailed procedure and timetable set by the directive.

83 For an updated picture of the MSP Directive implementation, *see* the table “MSP Processes Overview”, available at <https://www.msp-platform.eu/countries-overview>. With the final deadline for the preparation of national plans (31 March 2021) just expired, it will soon be possible to make a more comprehensive evaluation of the practical impact of MSP in the different Member States.

to internal and external aspects. On the one hand, upon adoption of the MSP Directive Member States had a different level of development of national legislation concerning MSP. While a few States had already in place legislation concerning MSP and, in a few instances, had already elaborated plans to this effect, others did not have any dedicated legal instrument. The absence of dedicated legislation, as can be easily imagined, lengthens significantly any process concerning the actual adoption of plans, as the latter imply and depend upon the former, with respect to the guiding principles and their practical application, including administrative aspects. On the other hand, the different geopolitical situation that characterises the different seas bordering Europe has affected the capacity to fully implement MSP. Southern European States, in particular, have been faced with difficulties in pursuing cooperation with non-EU neighbours in the Mediterranean Sea.<sup>84</sup>

In conclusion, the MSP Directive represents the first effort at the interstate level to render mandatory the use of MSP, also in combination with ICZM. While it allows States a rather broad margin of appreciation with respect to the methodology to adopt in order to elaborate the plans, as well as with respect to the balancing of competing uses and activities, it sets some guiding principles which should reduce the choices available to States and should ensure that all three pillars of sustainable development, including the environmental pillar, are actually taken into consideration. Notwithstanding its uneven implementation, it is a fact that this piece of EU legislation has prompted changes both within and outside the EU. Within the EU, Member States, including those which had not undertaken the exercise before, have had to develop plans for accommodating conflicting uses of the sea. At the world level, the EU has promoted the concept of MSP both in its relations with its water neighbours, and also in other fora, including the United Nations.

## 5 Benefits and Challenges

Faced with the worsening condition of seas and oceans, in recent years states have adopted tools and instruments that aim at superseding the fragmented approach to environmental protection mostly followed by earlier treaties, including the UNCLOS, and promoting an integrated approach to ocean conservation. Area-based management tools, including MSP and ICZM, are particularly significant in this respect. Their relevance has been recognised by the

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84 A. Zervaki, *The Legalization of Maritime Spatial Planning in the European Union and Its Implications for Maritime Governance*, 30 *Ocean Yearbook* 32 (2016), at 37.

UN General Assembly, which has called upon all stakeholders to '[s]upport the use of effective and appropriate area-based management tools, including marine protected areas and other integrated, cross-sectoral approaches, including marine spatial planning and integrated coastal zone management'.<sup>85</sup>

As emerges from the examination of the concept and its application in the EU legal framework, notably with the adoption of the MSP Directive, the main advantage of MSP is that it allows for a holistic approach to maritime issues. The approach is holistic from a dual perspective. On one hand, it takes into account all the diverse uses of the seas, as well as all the activities that take place therein. It therefore allows for an evaluation of the effects of human activities on the maritime environment that takes into account not only the single effects of each activity on the maritime environment, but also their combined and cumulative effects. Furthermore, it also allows to better understand the relationship between different activities, and the degree to which two or more activities or sea uses are compatible. On the other hand, it allows for a holistic approach to maritime issues that takes into account all three dimensions of sustainable development, namely the environmental, economic and social dimensions. In this way, it should encourage measures that are not only environmentally sound, but also economically and socially sustainable.

As a consequence, MSP has the potential to reduce conflicts between sectors and create synergies between different activities. Reduction of conflicts may also encourage investments in the maritime sector by creating predictability, transparency and clearer rules. The benefits of MSP are felt both at the national level and at the international level. MSP in fact may increase cross-border cooperation between different States, for example to develop energy grids, shipping lanes, pipelines, submarine cables and other activities, but also to develop coherent networks of protected areas. Finally, coherent plans may better protect and preserve the marine environment through early identification of impact and opportunities for multiple use of space.

Alongside these advantages, MSP however presents also some issues that need to be addressed, lest its potential benefits be lost. From a legal perspective, the existence of different legal frameworks creates fragmentation and may frustrate the aspiration to a holistic management of maritime space to which MSP aims. Fragmentation may occur at two levels: the intrasystemic level and the intersystemic level.

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85 'Our Ocean, Our Future', *supra* note 10, para. 13(j).

From the perspective of intrasystemic relationships,<sup>86</sup> there is at once too much and too little regulation on MSP. Too little, because there is actually no international treaty dedicated to MSP, and there is only a regional treaty dedicated to ICZM. Too much, because a wide variety of international legally binding instruments is referred to in order to substantiate the duty to adopt plans and the determination of the procedure to be followed and the content they should have. These instruments range from global treaties dedicated to marine spaces and their protection, such as the UNCLOS, the MARPOL,<sup>87</sup> and the Convention on Biological Diversity,<sup>88</sup> to regional treaties concerning protection of the marine environment<sup>89</sup> and the management of fisheries.<sup>90</sup> As a consequence, there are many norms that have a bearing upon MSP, which often have a different spatial and geographical scope and a different objective. From the point of view of their addressees, treaties are generally binding only for states, yet there is no uniform ratification and even global treaties such as the UNCLOS and the MARPOL have not yet been ratified by all states. Furthermore, different treaties apply to different geographical areas, but also to different maritime zones. As a rule, most regional treaties in the field of environmental protection apply only within the maritime zones of coastal states, thus excluding the high seas from their spatial scope.<sup>91</sup> Treaties relating to fisheries may apply also to the high seas, but their limited scope does not allow taking into account matters beyond fisheries. The absence of a single, dedicated treaty and the presence of multiple relevant instruments creates a highly fragmented

86 The discussion is based on a systemic understating of international law (including international environmental law and the law of the sea), whereby all instruments and norms are part of a unique legal system. As a consequence, their relationship needs to be solved within that specific system, making use of the available tools. See International Law Commission, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', UN doc. A/61/10, para. 251.

87 International Convention for the prevention of pollution from ships, 1973, as amended by the 1978 Protocol thereof, adopted 17 February 1978 and entered into force 2 October 1983, 1340 UNTS 61, as amended.

88 Convention on Biological Diversity, adopted 5 June 1992 and entered into force 29 December 1993, 1760 UNTS 79.

89 See information in the UNEP's Regional Seas Programme website, available at <https://www.unep.org/explore-topics/oceans-seas/what-we-do/regional-seas-programme>.

90 In particular in the context of the different fisheries management bodies established under regional treaties; see information in the FAO website, available at <http://www.fao.org/fishery/rfb/en>.

91 See for example Art. 1, para. 2, of the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, adopted 24 March 1983 and entered into force 11 October 1986, 1506 UNTS 157.

legal framework, which not only renders it more difficult for single states to establish plans that comply with all their international obligations, but also to pursue transboundary cooperation and the adoption of transboundary plans.

Turning to the intersystemic level, it should be recalled that, absent a global treaty on MSP, binding guidance concerning the adoption and implementation of plans is mostly mandated under national legislation, adding a further layer of fragmentation. The legislation of different states may go in different directions both with respect to its guiding principles and with respect to their practical application and may be at variance with international standards. This is illustrated by the current presence of different substantive standards at the national, regional and global levels. Even at the regional level it is hard to adopt a unique system, as the regulatory efforts of the EU show. The choice of a directive as the legal instrument to render MSP mandatory, as opposed to a regulation, allows more flexibility to States for accommodating their own, diverse, interests.<sup>92</sup>

The existing fragmented legal framework concerning MSP is not likely to be dispelled in the near future. There is currently no plan to adopt a global treaty concerning MSP or to amend existing instruments to provide general guidance on MSP. The pursuit of a more uniform international legal regime relating to MSP, therefore, needs necessarily rely on a systemic interpretation of existing rules that privileges the principle of harmonisation and tries to avoid, as much as possible, conflicts. As the International Law Commission has indicated, 'when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.<sup>93</sup> While not properly legal instruments, policy and technical initiatives, such as the MSPglobal initiative,<sup>94</sup> may be of use both in promoting knowledge of different norms and therefore encouraging uniformization and in offering uniform guidelines which may inspire state action.

Other issues concerning MSP relate to the practical application of the planning activity. Two deserve particular attention, as they may be easily overlooked. In order to make a plan liveable, it is necessary to identify not only present, but also future uses of the sea. In fact, a plan that considers only present uses of

92 This impression is further strengthened by the provision of Art. 5(3) MSP Directive; see *supra* text at footnote 70.

93 International Law Commission, 'Conclusions of the Work', *supra* note 86, p. 178, para. 4.

94 The MSPglobal initiative constitutes a partnership between UNESCO's Intergovernmental Oceanographic Commission (IOC-UNESCO) and the European Commission that promotes #OceanAction15346, aiming at covering 1/3 of the world exclusive economic zone with MSP processes by 2030; for more information see the website of the initiative, available at <https://www.mspglobal2030.org>.

the sea will have to be revised every time a new use emerges or is claimed by any public or private actor. While the need for periodic revision is inherent in MSP, it is also necessary to ensure a certain stability, which would be frustrated if plans were to change with every new use.

This leads to the second practical issue which may be easily overlooked in the planning activity: the need to ensure that all relevant stakeholders are identified and are involved in the adoption of the plan. Any plan, to be effective, needs to be enacted upon by those who actually use that part of the sea. Lack of participation of stakeholders, therefore, may easily lead to lack of involvement and therefore to poor implementation. The identification of stakeholders, however, poses additional problems relating to the distinction between legitimate and other stakeholders and involved discussion concerning the selection of appropriate criteria for good governance. Furthermore, the inclusion of stakeholders is necessarily linked to the social dimension of sustainable development and of MSP, with all the conceptual and practical challenges that its application poses.<sup>95</sup>

Finally, MSP has to be considered also in its inter-state dimension. Cross-border issues, in fact, are significant, in particular in restricted sea areas which are shared by more than one State.<sup>96</sup> In the presence of disputed areas, furthermore, it is generally impossible to enact MSP, as it presupposes the existence of one, and one only, State that has the power and the duty to prioritize activities and sea uses. The drawbacks of undelimited boundaries are particularly felt in areas such as the Mediterranean Sea, where in fact planning has been delayed and is often incomplete.

## 6 MSP in Areas beyond National Jurisdiction

National and EU legislative instruments adopted so far with respect to MSP relate solely to waters under national jurisdiction. For example, the EU MSP Directive applies only to waters that have been claimed by coastal Member

95 E. McKinley, T. Acott & T. Stojanovic, 'Socio-cultural Dimensions of Marine Spatial Planning', in J. Zaucha & K. Gee (Eds.), *Maritime Spatial Planning. Past, Present, Future*, 151–174 (Palgrave Macmillan, 2019); F. P. Saunders, M. Gilek & R. Tafon, 'Adding People to the Sea: Conceptualizing Social Sustainability in Maritime Spatial Planning', in J. Zaucha & K. Gee (Eds.), *Maritime Spatial Planning. Past, Present, Future*, 175–199 (Palgrave Macmillan, 2019); K. Grip & S. Blomqvist, *Marine Spatial Planning: Coordinating Divergent Marine Interests*, 50 *Ambio* 1172–1183 (2021).

96 D. Hassan, T. Kuokkanen & N. Soininen (Eds.), *Transboundary Marine Spatial Planning and International Law* (London/New York, Routledge, 2015).

States as part of their territorial sea or other jurisdictional zones. However, the issues that MSP aims at addressing, namely the possible incompatibility of sea uses and their cumulative effects, are present also in areas beyond national jurisdiction. MSP could in principle be a useful tool for these areas, as well.<sup>97</sup> However, its practical implementation raises a number of further issues due to the legal regime of these marine spaces.

According to customary international law, as codified in the UNCLOS, the high seas and Area are not subject to the jurisdiction of any State.<sup>98</sup> Apart from this common aspect, these two zones are subject to a different regime.

The high seas, which include the water column and, arguably, the airspace beyond national jurisdiction,<sup>99</sup> are in principle free for all States to use,<sup>100</sup> although this freedom is not absolute and has suffered significant containments in recent years, in order to protect community interests.<sup>101</sup> Freedom of the high seas implies that States may undertake any activity without the obligation to ensure the previous approval of anyone else. This approach is mirrored in the rule providing for exclusive jurisdiction of the flag State on the high seas.<sup>102</sup> This principle is generally interpreted to mean that, subject to the exceptions provided for in the UNCLOS and other rules of international law, only the flag State may exercise enforcement jurisdiction over its vessels when they are navigating or undertaking any activity on the high seas. It is on the other hand open to debate the extent to which states other than the flag state may exercise legislative jurisdiction on the high seas over vessels which do not fly their flag.<sup>103</sup>

97 J. Ardron, K. Gjerde, S. Pullen, and V. Tilot, *Marine Spatial Planning in the High Seas*, Marine Policy 832 (2008); V. Becker-Weinberg, *Preliminary Thoughts on Marine Spatial Planning in Areas beyond National Jurisdiction*, 32 *The International Journal of Marine and Coastal Law* 570 (2017); E. M. De Santo, *Implementation Challenges of Area-Based Management Tools (ABMTS) for Biodiversity Beyond National Jurisdiction (BBNJ)*, 97 *Marine Policy* 34 (2018); G. Wright, et al, *Marine Spatial Planning In Areas Beyond National Jurisdiction*, Marine Policy (2019).

98 Art. 87 UNCLOS and Art. 137 UNCLOS, respectively.

99 Art. 86 UNCLOS.

100 Art. 87(1) UNCLOS. PCIJ, *Lotus*, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10, p. 25.

101 D. Anderson, 'Freedom of the High Seas in the Modern Law of the Sea' in D. Freestone, R. Barnes and D. Ong (Eds.), *The Law of the Sea: Progress and Prospects* (OUP, 2006) 327.

102 Art. 92(1) UNCLOS.

103 In a recent decision, the ITLOS has seemed to considerably expand the scope of the exclusivity of flag State jurisdiction, stating that it "prohibits not only the exercise of enforcement jurisdiction on the high seas by States other than the flag State but also the extension of their prescriptive jurisdiction to lawful activities conducted by foreign ships on the high seas" (*The M/V "Norstar" Case (Panama v. Italy)*, Judgment of 10 April 2019, para. 225). Reference to "lawful" activities, however, could also reduce the expansion.

The freedom of the high seas renders particularly challenging the application of MSP. As a matter of fact, MSP depends upon a centralised authority. This authority will adopt the general principles guiding allocation of space and settlement of conflicting uses of the sea and will execute, or delegate the executing, of the actual planning activities. The effects that the absence of a unique centralised authority has on the successful carrying out of plans has already been mentioned with respect to border areas and non delimited areas. These negative effects are amplified on the high seas, both due to their expansion and to the fact that States are unwilling to cede parts of their exclusive jurisdiction. As has been noted, the “existing framework for the management of [areas beyond national jurisdiction] is fragmented, uneven and uncoordinated, resulting in a management regime that is less than the sum of its parts”.<sup>104</sup>

In particular, there are at least four aspects which have to be considered in elaborating any policy or rule concerning MSP on the high seas. They concern the need to identify the State or States that will be charged with the collection of information, the adoption of the relevant rules, the actual preparation of the plans and their revision, and the enforcement of these plans.

First, it is necessary to identify which State or States will be responsible for collecting all the relevant information concerning uses and activities, including by involving relevant stakeholders. Scientific research falls under the freedom of the high seas, and thus strictly environmental aspects could in principle be researched by any State. However, different States might have different information, which might be at variance, if not straightforwardly incompatible. As to other aspects, such as those relating to economic activities, the exclusive jurisdiction of flag States would mean that only the flag State could provide the necessary information. If, however, information is kept by different States, and even assuming – which might not always be the case – that these states are willing to provide it, it is necessary to identify a sort of central actor which will collect and rationalise all relevant information.

Second, it is necessary to identify the actor that will take the necessary decisions concerning MSP, including both the setting of the general principles for evaluating information and harmonising conflicts and the actual decision to adopt a certain plan. In this respect, since the high seas are open to the use by any State, in principle all States should be involved in any decision. This

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See also the strong dissent by a significant minority of judges; The M/V “Norstar” Case (Panama v. Italy), Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge *ad hoc* Treves, para. 15.

104 Wriqth, *et al*, *supra* note 83.

conclusion would hold true also in cases where the high seas were divided into separate areas – but by whom? – as in any case also States that do not border them may freely use them. The involvement of a significant number of States would require agreement on voting procedures and should be based on the understanding that all States should be obliged to follow the plan, once it were adopted, even if they voted against it.

Third, it is necessary to identify which State or States, or which State bodies, should actually carry out the planning activity. As with the collection of the relevant information, different capabilities of States might *de facto* limit the capacity of some States to contribute to this process. At the same time, this process should also involve all relevant stakeholders. Related to this point, there is the need to periodically revise existing plans. Here again it will be necessary to identify the State or states that will be involved in the revision of plans and the procedure through which this will happen.

Fourth, once the plans are adopted, it will be necessary to identify the State or States that should control compliance by diverse actors with the provisions of the plans. Control over activities is probably the aspect that is most close to regulation by already existing rules. As mentioned above, law of the sea attributes exclusive jurisdiction to the flag State with respect to activities carried out by its vessels on the high seas. In this respect, it will likely be flag States that will control activities carried out by vessels and will eventually sanction conduct which departs from what is provided for in the plan. However, also this aspect raises some issues. These include the problem of flags of convenience and the reduced capacity of some States to actually control their vessels, especially on the high seas, but also the lack of rules concerning allocation of jurisdiction with respect to activities which are not carried out by vessels. The latter include all those activities which take place on board artificial islands, installations and platforms, for which there is a gap in the UNCLOS and the law of the sea.

Turning to the Area, this comprises the seabed and subsoil beyond national jurisdiction<sup>105</sup> and is the common heritage of (hu)mankind.<sup>106</sup> Its resources, meaning the mineral resources to be found on the seabed and subsoil, can be exploited only in accordance with the provisions of Part XI UNCLOS. Notably, this part sets the frame for the institutionalised cooperation that characterises the exploitation of the resources of the Area, whereby all activities related to

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<sup>105</sup> Art. 1(1)(1) UNCLOS.

<sup>106</sup> Art. 136 UNCLOS.

this aspect are regulated and coordinated by an *ad hoc* international organization, the International Seabed Authority (ISA).<sup>107</sup>

The existence of the ISA might appear to simplify things with respect to the application of MSP in the Area. However, this is not really the case, since there are a number of issues that need to be considered. First, any plans concerning the Area that do not take into account also the superjacent waters are likely to fail in their objectives. The physical presence of the water column above the seabed and the fact that currently and for the foreseeable future activities in the Area will take place through the waters make it necessary to take them into account. Second, the mandate of the ISA does not extend beyond exploitation of resources and, to a certain extent, environmental protection.<sup>108</sup> It therefore does not include other activities which may take place in the Area, such as the laying of submarine cables and pipelines. The reluctance of some States to extend the powers of the ISA has been evident in the negotiations that have led to the convening of the Intergovernmental Conference on Marine Biodiversity of Areas Beyond National Jurisdiction,<sup>109</sup> and is likely to extend to any enlargement of its powers to include MSP.

## 7 Concluding Remarks

MSP is certainly a useful tool in ensuring a better protection of the marine environment, including by preventing and addressing pollution. If thoroughly regulated and enacted upon, MSP has the potential to “provide a firm basis for rational and consistent decisions on permit applications and to allow users of the sea to make future decision with greater knowledge and confidence”.<sup>110</sup> Furthermore, one might claim that, in the face of ever increasing and diversified uses of maritime space, it is a necessary tool. Only rational plans may allow all actors involved in maritime activities to be able to continue carrying them out, while at the same time avoiding the further degradation of the maritime environment.

Awareness that MSP is necessary seems to be increasing at both the national and the international levels. A growing number of States has adopted or is in the process of adoption legal frameworks for MSP. The adoption of the MSP

<sup>107</sup> Art. 137(2) UNCLOS.

<sup>108</sup> Art. 157 UNCLOS.

<sup>109</sup> UNGA Res. 72/249 of 24 December 2017. On the different positions of States with respect to the powers of the ISA in relation to biological diversity in areas beyond national jurisdiction.

<sup>110</sup> Maes, *supra* note 50, at 798.

Directive has certainly helped reinforce use of this tool at the European level. While before only a handful of States had actually started developed plans, now this activity is well underway in most EU Member States. At the same time, global discussions about MSP are spreading the concept in different world regions. The ongoing negotiations concerning biodiversity in areas beyond national jurisdiction could also provide a unique occasion for a global understanding of MSP, at least in areas beyond national jurisdiction.

At the same time, a number of issues are still present and might become more relevant as MSP is getting more widely known and used. The low normative density and fragmented legal framework that characterises many actions concerning MSP might undermine the efficacy of actual plans. It is certainly necessary that stakeholders be involved and that they participate in the preparation and adoption of the plan, however, voluntary commitments only might be insufficient to effectively ensure compatibility between different activities and the effective protection of the maritime environment. Lack of hard commitments, among others, may negatively impact on the capacity of States and other actors to enforce the provisions of the plan. Hard commitments, however, should go in the direction of harmonising existing legal rules, rather than creating new normative conflicts.

Furthermore, MSP poses a number of practical challenges that need to be effectively addressed in order to provide plans that are not only comprehensive, but also viable. The meaningful involvement of all relevant stakeholders is one such issue. Another, closely interrelated issue, is the need to ensure that adopted plans duly take into account not only the environmental components, but also social and economic ones. MSP thus poses the challenge of balancing ecological imperatives with social, cultural and political desires and practices.

Finally, while MSP seems particularly appropriate for maritime waters under the jurisdiction of coastal States, it presents significant challenges when applied in areas beyond national jurisdiction, namely the high seas and the Area. In these areas, it is evident that inter-state cooperation is not only useful but is also necessary. Given the current regime applicable to the high seas, in particular, it is necessary for States to develop a normative framework that will address gaps in jurisdiction and will ensure the necessary cooperation and coordination between States. It remains to be seen whether the international legally binding instruments currently under development will constitute the opportunity to provide this legal framework.