- Research Article -

[H] THE LEGAL FRAMEWORK RELATED TO THE SUI GENERIS PROTECTED AREAS UNDER INTERNATIONAL LAW OF THE SEA[*]

ULUSLARARASI DENİZ HUKUKU ÇERÇEVESİNDE SUI GENERIS KORUNAN ALANLARA İLİŞKİN HUKUKİ REJİM

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ABSTRACT

Despite the dependency between humanity and the marine resources, human activities have been the major threats to the sustainability of marine biodiversity and marine environment protection such as overfishing, over-exploitation, shipping and land base pollution which have induced the loss of ecosystems and the climate change eventually.

The establishment of designated areas in the oceans and seas to restrict human activities is one of the most viable solutions to the successful protection of the marine environment. Marine protected areas (MPAs) along with various protected zones appear as useful and efficient area-based management tools not only for the national jurisdiction areas, but also for the areas beyond national jurisdiction. Today, there are 18.448 MPAs in the world. Also, there are different types and reasons for the establishment of those protected areas. The benefits of establishing well-designed and enforced fully protected areas in seas and oceans are well-documented by intergovernmental and non-governmental organizations several times. However, there is no international legal framework which defines the legal regime of those protected areas contemporarily. The lack of any international legal framework related to *sui generis* protected areas, opens up a wide space for interpreting the existing rights and obligations of States under various regional agreements and arrangements.

In this article, the legal competence and jurisdiction of the States to establish *sui generis* protected areas and to regulate and restrict human activities within them, both within national jurisdiction and on the high

seas**,** have been examined in respect of international law. Within this perspective, few conventional regimes related to the MPAs have been reviewed in respect of their functionalities and some conclusions have been derived from current difficulties.

Keywords: *Sui generis*, Marine Protected Areas, Legal Regime, International Law of Sea

ÖZ

İnsanlık ve denizel kaynaklar arasındaki bağımlılığa rağmen, ekosistemlerin kaybını ve neticede iklim değişikliğini getiren, aşırı avlanma, aşırı kullanım, seyrüsefer, kara kaynaklı kirlilik gibi unsurları içeren insan faaliyetleri, denizel biyoçeşitliliğin sürdürülmesi ve deniz çevresinin korunmasına ilişkin en büyük tehdittir.

Deniz çevresinin korunabilmesi için en hayati çözümlerden biri, deniz ve okyanuslardaki insan faaliyetlerini sınırlamak için belirli alanların ihdas edilmesidir. Muhtelif korunan alanların yanısıra, deniz koruma alanları (DKA'lar), sadece ulusal yetki alanları için değil, ulusal yetkinin ötesindeki alanlar için de kullanışlı ve etkili bir alan bazlı yönetim aracı olarak görünmektedir. Günümüzde dünyada 18.448 DKA bulunmaktadır. Ayrıca bu korunan alanların tahsisi için pek çok farklı gerekçe ve farklı usuller bulunmaktadır. İyi tasarlanmış ve tam olarak uygulanabilen korunan alanların deniz ve okyanuslar açısından faydaları, hükumetlerarası ve hükumet-dışı örgütler tarafından defalarca belgelendirilmiştir. Ancak günümüzde bu korunan alanlarına ilişkin hukuki rejimi tanımlayan bir uluslararası hukuk çerçevesi bulunmamaktadır. Sui gene-

ris korunan alanlara ilişkin uluslararası hukuk rejimin bulunmaması, Devletlerin bölgesel andlaşmalar ve çeşitli düzenlemeler çerçevesindeki mevcut hak ve yükümlülüklerinin yorumlanmasında geniş bir alan yaratmaktadır.

Bu çalışmada, Devletlerin sui generis korunan alanların kurulmasına ve bu alanlardaki insan faaliyetlerinin düzenlenmesine ve sınırlanmasına ilişkin, hem ulusal yetkileri içindeki deniz alanları hem de açık denizlerdeki hukuki ehliyetleri ve yetkileri uluslararası hukuk bakımından incelenmiştir. Bu perspektif içerisinde, DKA'lara ilişkin bazı andlaşma rejimleri işlevsellikleri bakımından gözden geçirilmiş ve mevcut zorluklardan birtakım sonuçlara varılmıştır.

Anahtar Kelimeler: *Sui Generis*, Deniz Koruma Alanları, Hukuki Rejim, Uluslararası Deniz Hukuku

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ABBREVIATIONS

ABMTs : Area-Based Management Tools

ABNJ : Areas Beyond National Jurisdiction

ASMA : Antarctic Specially Managed Areas

ASPA : Antarctic Specially Protected Areas

ATCM : Antarctic Treaty Consultative Meeting

ATS : Antarctic Treaty System

BBNJ : Biodiversity Beyond National Jurisdiction

CCAMLR : Convention for the Conservation of Antarctic Marine Living Resources

CBD : Convention on Biological Diversity

COP : Conference of Parties

EBSA : Ecologically or Biologically Significant Marine Areas

EEZ : Exclusive Economic Zone

ESIL : European Society of International Law

FAO : Food and Agricultural Organization

IMPAC : Marine Protected Area Congress

IUCN : International Union for Conservation of Nature

MPA : Marine Protected Areas

MSP : Marine Spatial Planning

OSPAR : Convention for the Protection of the Marine Environment of the North-East Atlantic

PSIDS : Pacific Small Island Developing States

SPA/BD : Protocol Concerning Specially. Protected Areas and Biological Diversity in the Mediterranean

SPAMI : Specially Protected Areas of Mediterranean Importance

UNCLOS : United Nations Convention on Law of Sea, 1982

UNEP : United Nations Environment Programme

UNGA : United Nations' General Assembly

UNTS : United Nations' Treaty Series

USA : United States of America

VCLT : Vienna Convention on the Law of Treaties

I. INTRODUCTION

The oceans and seas cover about 71 per cent of the Earth's surface and are essential in climate cycles such as the other global processes that sustain life. They function as the blue source of our planet, act as a regulator of the climate and ensure to absorb carbon dioxide and heat, while at the same time producing oxygen from phytoplankton. They are also an inevitable part of the culture for all humanity particularly for the development of the coastal people. In other saying, the oceans and seas are a vital part of the natural and cultural heritage of the world.

There are many results of natural and anthropogenic pressures identified at the national and international level such as the overexploited fish resources, pollution by pesticides, fertilizers and waste washed from land and overdeveloped coasts, the increasing adverse effects of climate change on ocean temperature and currents, food chains and natural events. These negative outcomes have led policy makers to make effort for protecting special places to sustain wildlife and nurture natural pro-

cesses. Those efforts have expanded under various management regimes as of the second half of the 20th century, mostly relying upon the bilateral or multilateral cooperation[1]. However, the environmental protection in the seas focused primarily on species in the 90's[2]. The formal designation of protected areas, for the integral protection and conservation of marine areas has been a relatively recent initiative. Today, it has been recognized that effective protection of marine biodiversity requires protection of a wide range of marine and coastal habitats, not just particular species or special areas.

The designation of the areas where human activities are restricted is a vital tool for protecting and conserving the ocean's ecosystem as whole, which means that various types of protected areas can allow damaged ecosystems to recover and restore their functioning through by enhancing the protection of vulnerable habitats. Designation of different protected zones is one of the important conservation tools not only for the national jurisdiction areas, but also for the marine areas beyond national jurisdiction.

Today, there are 18.448 MPAs in the world which means 8,16% of the world oceans covered by different national, regional, international protection regimes[3]. Due to the unclarity and complexity of the international

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1 Graeme Kelleher, *Guidelines for Marine Protected Areas* (IUCN-The World Conservation Union 2009) 3.

2 Ingvild Ulrikke Jakobsen, 'From a Functional to a Holistic Approach', *Marine Protected Areas in International Law in Arctic Perpective* (Brill/Nijhoff 2016) 63–67.

3 The data is provided by Protected Planet Initiative which is a global platform for knowledge and data on the status and trends of protected and conserved areas As part of a collaboration between the United Nations Environment Programme (UN-

legal framework to establish MPAs in ABNJ the percentage of protected areas within national waters is higher than that for ABNJ. 17.86% of the national waters are designated as protected areas by governments. However, only 1.18% of ABNJ could be designated as protected areas under different treaty regimes[4].

The fact that many components of biodiversity do not have a certain address and do not need a permission to change their location, is not ignored in this article. Naturally the need for protecting ecosystems does not recognize the administrative boundaries. So, the environmental considerations underlying the need for establishment of protected areas in the oceans are not debatably and are beyond the scope of this paper. However, currently, there is no global legal framework which defines either:(a) the legal regime of those protected areas (e.g., MPA's) under public international law; or (b) the international rights and responsibilities of States during their establishment and maintenance beyond national jurisdiction. Therefore, the *"sui generis*" term has been preferred to characterize mentioned areas that any of them are not classified under the customary international law of sea and UNCLOS as a legal protection regime[5].

EP) and the International Union for Conservation of Nature (IUCN) <https://www.protectedplanet.net/en/thematic-areas/marine-protected-areas> accessed 20 November 2022.

[4] For the distribution of marine protected areas please see <https://www.protectedplanet.net/en/search-areas?filters%5Bis_type%5D%5B%5D=marine> accessed 20 November 2022.

[5] The term "sui generis" to characterize protection zones in oceans is originally used by Andreone and Cataldi in 2014 in Gemma Andreone and Giuseppe Cataldi, 'Sui

Additionally, the establishment of a protected zone brings unanswered questions related to the competence and rights of the coastal States over that zone. The lack of any international legal framework related to *sui generis* protected areas, opens up a wide space for interpreting the existing rights and obligations of States under international law, particularly the regional conventions. It raises questions with regard to the authority, scope of permissible regimes, compliance and enforcement issues.

Accordingly, the aim of this article is to address those questions by reviewing the existing and the developing legal arguments and to analyze the sources of international law in respect of the marine protection mechanisms under some of the regional and specific conventions.

The first step in this analyze is the investigation of any possible definition of marine protected areas. The next step is to explore whether international law of sea allows coastal States to apply administrative measures in and beyond national jurisdiction. In this context, the legal competence and jurisdiction of States to establish marine protected areas and to regulate and restrict human activities within them, both within national jurisdiction and beyond national jurisdiction have been examined.

While examining the legal framework of the *sui generis* protected areas in the oceans, the competences, rights and the duties of States are considered per maritime zone in respect of establishment and management of various protected areas. Since the most controversial issue here is the

Generis Zones' in David Attard and others (eds), *The IMLI Manuel on International Maritime* Law, Vol. I (Oxford 2014) 217-238.

legal regime of *sui generis* protected areas in the marine areas beyond national jurisdiction (ABNJ), regional and specific mechanisms have been reviewed from the point of establishment and management of those protected areas when they are located beyond national jurisdiction.

II. MATERIALS

As research methodology, the literature of public international law, related provisions of UNCLOS as the reflection of customary international law of sea and the implementations of four regional treaties which are notable representatives of the regional regimes have been reviewed. These are:

a) The Protocol Concerning Special Protected Areas and Biodiversity (SPA/BD Protocol) to the Barcelona Convention;

b) The Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention);

c) The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR Convention);

d) Madrid Protocol to the Antarctic Treaty; and

e) The Convention on Biological Diversity (CBD Convention).

III. THE DEFINITION OF *SUI GENERIS* PROTECTED AREAS

Currently the definition of *sui generis* protected areas cover all kinds of the MPAs such as fisheries protected zones, ecological protected areas, no-take/ no entry zones and any other protected areas established by

States without a formal proclamation of a full exclusive economic zone (EEZ) or any of them are not prescribed by UNCLOS[6]. However, various regional and international institutions have more specific definition which are more or less along the same line:

a) IUCN defines Marine Protected Areas (MPAs) as an umbrella term as "…any area of intertidal or subtidal terrain, together with its overlying water and associated flora, fauna, historical and cultural features, which has been reserved by law or other effective means to protect part or all of the enclosed environment"[7].

b) CBD defines the term "protected area" as a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives."8 According to definition of the Ad Hoc Technical Expert Group of CBD, marine and coastal protected areas are "any defined area within or adjacent to the marine environment, together with its overlying waters and associated flora, fauna and historical and cultural features, which has been reserved by legislation or other effective means, including custom, with the effect that its marine and/or coastal biodiversity enjoys a higher level of

6 Andreone and Cataldi (n 5) 217.

7 Kelleher (n 1) XI.

8 Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD Convention) art 2.

protection that is surroundings" that was adopted in the Conference of Parties in 2004 as a decision[9].

c) And lastly, the FAO describes MPAs, as "temporally and geographically defined areas that afford natural resources greater protection than is afforded in the rest of an area as defined in relation to fisheries management"[10].

Considering those definition efforts, the designation of a particular area, the aim of protection of the marine environment and a management regime including measures are the prominent factors of those efforts. The requirement of a legal framework underlying the protection regime is included in the definition of IUCN comparing with the others.

IV. THE LEGAL FRAMEWORK RELATED TO THE *SUI GENERIS* PROTECTED AREAS

The practice of *sui generis* zones can indeed provoke confusion and uncertainty regarding the extent to which existing international and national rules are applicable. The way coastal States define the "zone" and what they are able to demand legally are questionable. Even the establishment of the protected areas rely on the regional conventions, the proclamation of a protection is based on a unilateral national act of the coastal State. However, just as Wolfrum indicated, a law-making process

[9] Conference of the Parties to the Convention on Biological Diversity, 7th Meeting at Kuala Lumpur, 9-20 and 27 February 2004, Agenda item 18.2 (UNEP/CBD/COP/7/L.31).

[10] Food and Agriculture Organization of the United Nations (FAO), 'MPAs as a Tool for Fisheries Management' <*http://www.fao.org/fishery/topic/4400/en*> accessed 26 May 2022.

under national law does not exist in international law *ipso facto*[11]. For example, when looking over the practice of coastal States in Mediterranean Sea, names given to the zones are the only indicative of the rights and competence of those States[12]. States apply the powers of protection for the areas under the name of "ecological protected zone", "marine protected areas", "no-entry/no-take zone" or "exclusive fisheries zone" etc[13].

The governmental environmental protection measures under the national legislation can extend to all marine areas falling into the territorial sea. On the other hand, the rights and competence of a coastal State claiming power to protect a *sui generis* zone beyond its territorial sea would be subjected to the limitations of the respective maritime zones[14]. For example, the obligation to protect and preserve the marine environment extends beyond the territorial sea, towards the EEZ where the coastal State enjoys sovereign rights for the exploration, exploitation, conservation and management of its natural resources and exercises jurisdiction, inter alia, for the protection and preservation of the marine environment[15]. Jurisdictional limitations of the EEZ draw the limitations of the

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[11] Rüdiger Wolfrum, 'Sources of International Law', *Max Planck Encyclopedia of Public International Law* (2011) para 16; Samantha Besson, 'Theorizing the Sources of International Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (OUP Oxford 2010) 163–185.

[12] Andreone and Cataldi (n 5) 219.

[13] Shalva Kvinikhidze, 'Contemporary Exclusive Fishery Zones or Why Some States Still Claim an EFZ' (2008) 23 The International Journal of Marine and Coastal Law 271.

[14] Ingvild Ulrikke Jakobsen, 'Legal Competence to Establish MPAs within National Jurisdiction and on the High Seas', *Marine Protected Areas in International Law in Arctic Perspective* (Brill/Nijhoff 2016) 19.

[15] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 1 November 1994) 1833 U.N.T.S. 397 (UNCLOS) art 56/1.

rights and competences of the States related to the area-based management tools in their EEZ. In the same perspective, the protection regimes under UNCLOS and some of the regional and specific conventional mechanisms related to the protected areas have been summarized below.

A) GENERAL OBLIGATION OF THE PROTECTION AND PRESERVATION OF THE MARINE ENVIRONMENT UNDER UNCLOS

The jurisdictional rights of the coastal State over a foreign flag vessel who breach the obligation to protect and preserve the marine environment can only rely on the Articles 192-196 of UNCLOS. This obligation will be applied for the areas in and beyond national jurisdiction. According to the general rule of interpretation of the Vienna Convention on the Law of Treaties (VCLT), treaties shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of them in their context and in the light of their object and purpose[16]. The ordinary meaning of Article 192 of UNCLOS namely that, "States have the obligation to protect and preserve the marine environment", might be interpreted as to encompass the protection and preservation obligation of the fragile ecosystems and species in or beyond national jurisdiction. However, interpreting this article as to impose a specific action such as the establishment of a certain protected zone and implementing administrative measures beyond national jurisdiction would exceed its ordinary meaning.

[16] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VAHS) art 31.

On the other hand, Article 197 of UNCLOS elaborates the cooperation obligation that:

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

This provision might be interpreted in a way to constitute a customary law obligation for States to adopt measures to protect the ecosystems and species in high seas[17]. However, a clearer treaty basement is needed to justify certain strict measures like banning the navigation /fisheries in "no-take zones" or preventing marine scientific researches against *mare liberium.* Instead of exceeding the ordinary meaning of the provision, a new implementing agreement could establish a cooperation regime towards adjacent coastal States in the management, conservation and conduct of activities in ABNJ, which is to be expected to encompass regional characteristics of cooperation for the protection and preservation of the marine environment in conformity with Article 197 of UNCLOS[18].

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[17] UNEP-MAP-RAC/SPA (2011), Note on the establishment of marine protected areas beyond national jurisdiction or in areas where the limits of national sovereignty or jurisdiction have not yet been defined in the Mediterranean Sea, by Scovazzi, T. Ed. RAC/SPA, 17.

[18] Same topic was raised by The Pacific Small Island Developing States (PSIDS) as a Submission to the Second Meeting of the Preparatory Committee for the Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (BBNJ PrepCom) August 2016.

Indeed, the international community has made effort towards this goal under the preparatory works of an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity of ABNJ recently[19]. However, serious difficulties including extended continental shelf claims bring those efforts to a halt since the most controversial issues in the negotiations is the creation of MPAs in areas situated above or adjacent to States' continental shelf[20]. For example some States reduced the size of their MPAs in order not to overlap its potential sovereign rights over its extended continental shelf[21].

B) THE LEGAL REGIME OF THE PROTECTED ZONES IN THE TERRITORIAL SEA

Under the customary rules of the law of sea, as codified by paragraph 1 of Article 2 of UNCLOS, the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea. Coastal States hold power to regulate all the human activities which may cause damage or threaten ecosystems in their terri-

[19] International Legally Binding Instrument Under the United Nations Convention on The Law of The Sea on The Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, UNGA Res 72/249 (24 December 2017) UN Doc A/RES/72/249.

[20] Pascale Ricard, 'Sovereignty and Challenges of The Future International Legally Binding Instrument on Marine Biodiversity Beyond National Jurisdiction: How to Reconcile the Individual Interests of States at Sea and the "Common Interest of Mankind"?' (2019 ESIL Annual Conference, Athens, 12-14 September 2019) 4.

[21] Elizabeth M. De Santo, 'Implementation Challenges of Area-Based Management Tools (ABMTS) For Biodiversity Beyond National Jurisdiction (BBNJ)' (2018) 97 Marine Policy 34, 37.

torial seas including the establishment of a protected zone. The only limitation of the coastal States' sovereignty in the territorial water is the right of innocent passage of third States. However, one of the most important restrictions of the right of innocent passage is the obligation of third States to abide by the regulations of coastal States and avoiding any act of willful and serious pollution[22]. The interpretation of the terms "willful and serious" in the light of precautionary principle may lead to coastal States widening acceptance of their competence to protect the marine environment including implementation of strict rules for the passage of third States in a certain protected area[23]. This might be understandable with the implementation of the Article 21 and Article 22 at the same time. If the national regulations of a coastal State comply with international rules or standards, then the coastal State should have competence to adopt unilaterally sea lanes and traffic separation schemes for the regulation of the passages of the ships carrying nuclear or dangerous substances through protect related marine areas[24].

C) LEGAL REGIME OF THE PROTECTED ZONES IN THE EEZ

As acknowledged, the farther from the coast, the more the State's authority and the enforcement jurisdiction of the State is reduced. Part V of UNCLOS reflects a balance between the need to protect the marine environment and exploiting resources in respect of coastal State in its EEZ. It also prescribes the high seas' freedoms of third States and sovereignty of

[22] UNCLOS, art 19/2.

[23] Benedicte Sage-Fuller, The Precautionary Principle in Marine Environmental Law: With Special References to High Risk Vessels (Routledge 2013), 136.

[24] Jakobsen (n 14) 34.

the coastal State without prioritizing any of them[25]. Under Article 56, coastal States possess sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources in their exclusive economic zone. Thus, Article 73 should be interpreted as the legal bases of coastal States' jurisdictional powers that:

> "The coastal State may, in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the exclusive economic zone, take such measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention".

This passage might be one of the answers to the question as to what kind of conservation measures can be taken by coastal States against foreign vessels in the name of a *sui generis* protected zone in the EEZ and what the legal bases of those measures are. Also, according to several authors, Article 192, 193 and particularly the paragraph 5 of Article 194 provide a basis for establishing MPAs for the purpose of conservation of biodiversity that creates an obligation to take all measures to protect the fragile ecosystems, habitats, and endangered species in the EEZ[26]. This approach is understandable when also considering Article 56 which grants sovereign rights to coastal States over living resources and jurisdiction to

[25] UNCLOS, art 55.

[26] Jakobsen (n 14) 40; Veronica Frank, T*he European Community and Marine Environmental Protection in the International Law of Sea: Implementing Global Obligations at the Regional Level* (Martinus Nijhoff 2007) 334-336; Detlef Czybulka and Thomas Bosecke, 'Marine Protected Areas in the EEZ in light of International and European Community Law' in von Nordheim, H., Boedeker, D., Krause, J.C. (eds) *Progress in Marine Conservation in Europe* (Springer 2006) 29.

protect the marine environment. However, the degree of restriction measures towards third States' activities within the protected areas should be determined pursuant to the freedom of navigation of foreign vessels. Because coastal States do not have full sovereignty over the EEZ, they have only sovereign rights to regulate human activities in their EEZs in order to guarantee the preservation of the ecosystems[27]. In this respect, the main legal basis of the powers and the obligations of the coastal State related to environmental protection of the EEZ and the continental shelf should be sought in Part XII of the UNCLOS as discussed above[28].

Because the scope of the jurisdictional powers over the marine environment in Article 56 are limited by the rights and duties of other States over: navigation; overflight; the laying of submarine cables and pipelines; and the other internationally lawful uses of the sea related to these freedoms. However, in the exercise of those rights, third States should comply with the national regulations of the coastal State in accordance with the provisions of the UNCLOS and other rules of international law[29]. Accordingly, the UNCLOS and other rules of international law are the only important limitations of the jurisdiction of the coastal State.

Different types of pollution require different applicable regulations and individual or joint measures under Section 5 of Part XII of the UNCLOS,

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[27] Michael W.Lodge, 'Environmental Regulation of Deep Seabed Mining' in Daniel Bodansky and David Freestone (eds) *International Marine Environmental Law* (Kluwer International Law, 2003) 52; Maria Gavouneli, *The Functional Jurisdiction in the Law of Sea* (Martinus Nijhoff 2007) 64.

[28] Andreone and Cataldi (n 5) 223; Jakobsen (n 14) 44.

[29] UNCLOS, art 58/3.

such as pollution from land-based sources, pollution from seabed activities, pollution by dumping, and pollution from vessels that are subjected to different regimes. For example, Article 211 and Article 220 recognize the authority of the coastal State to issue legal regulations and grant the right to a physical inspection on justified grounds for believing that a vessel navigating in EEZ committed a violation of applicable international rules and standards for the prevention, reduction and control of pollution from vessels or laws or committed a violation resulting in a substantial discharge causing or threatening significant pollution of the marine environment.

In principle, it remains just a request for information about the vessel and examination of documents, mostly on its identity**,** port of registry, its last and next port of call, so as to establish whether a violation has actually occurred[30]. On the other hand, physical inspection depends on the situation if there are 'clear grounds for believing' that there has been a violation in the EEZ 'resulting in a substantial discharge causing or threatening significant pollution of the marine environment'[31]. The coastal State may institute proceedings and detain the vessel only when there is 'clear objective evidence' that the violation committed in the EEZ has resulted 'in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State or to any resources'[32].

30 UNCLOS, art 220/3.

31 UNCLOS, art 220/5 and 220/6.

32 UNCLOS, art 220/6.

However, Article 228 provides a preferential right to a flag State to judge and sanction its own vessels for their violation of applicable laws and regulations or international rules and standards relating to the prevention, reduction and control of pollution in the coastal State's EEZ.

D) LEGAL REGIME OF THE PROTECTED ZONES IN THE CONTINENTAL SHELF

Since the continental shelf regime overlaps geographically with the legal regime of the EEZ, the establishment of *sui generis* protected areas in the continental shelf and the legal regime of those areas are not examined as a separate topic in this article. But apart from the existence of an EEZ, coastal States have sovereign rights on their continental shelf for the purpose of exploring and exploiting its natural resources under the Article 77(1) of UNCLOS. If a coastal State has right to exploit its minerals, non-living resources and living organisms belonging to sedentary species,[33] she should have the right to establish a protected area. Following that, coastal States should have the right to adopt measures for the protection and management of living resources[34]. However, those measures taken by the coastal State should not prejudice the navigation and other rights of other States[35]. However, this raises two questions: namely, what kind of national measure would prejudice the rights of third States under the paragraph 2 of Article 78 (primarily freedom of navigation) and whether the coastal State has the competence to estab-

[33] UNCLOS, art 77/4.

[34] Jakobsen (n 14) 49.

[35] UNCLOS, art 78/2.

lish *sui generis* protected areas and implement particular measures in its extended continental shelf. Coastal States have rights to protect their interests related to the exploration and exploitation of their natural resources in the shelf against other users.

Also, coastal States have right to regulate their own national's actions in extended the continental shelf. Interests of coastal States and third State freedoms of navigation and related freedoms should be balanced, just like UNCLOS indented to do. Mossop suggests applying some factors to be considered while testing "what would be a 'justifiable' interference with high seas freedoms"[36]. Those factors eventually imply precautionary principle to appreciate the impact of a third State's particular activity on the coastal State's interest in a resource before restricting third State's activity. Occasionally, such a consideration might require a consultation particularly in semi-enclosed seas between the actors who would be affected by the restrictive measures. One more factor suggested by Mossop is comparing the proposed interference with the high seas' rights-whether it is as minimal as possible for the protection goal of coastal State. If the coastal State can use a less restrictive option, then interference constitutes a violation of freedom of navigation, the proportionality principle in other saying[37]. For example marine scientific research being conducted in the water part of continental shelf by third States should

[36] Joanna Mossop, 'Reconciling Activities on the Extended Continental Shelf' in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2015) 183.

[37] *ibid* 184.

not be restricted by coastal State if there is no EEZ in the same maritime area since it is a high seas' freedom[38].

E) LEGAL REGIME OF PROTECTED ZONES LOCATED IN THE HIGH SEAS OR UNDELIMITED MARITIME AREAS AND SOME GUIDING IMPLEMENTATIONS

High seas are "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State" under the Article 86 of UNCLOS. According to the Article 87, high seas are open to all States and freedom of the high seas includes freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, freedom to construct artificial islands and other installations, freedom of fishing, freedom of scientific research. Enjoyment of the freedoms of the high seas are subjected to rights of the coastal States and the conditions laid down by UNCLOS itself. However, apart from the very general obligation of States to protect the marine environment under Article 192, the principle of freedom of high seas does not ensure a particular legal basis for the establishment of *sui generis* protected areas. Intergovernmental negotiations on an international legally binding instrument under UNCLOS on the conservation and sustainable use of marine biological diversity in ABNJ have achieved an important progress[39]. However,

[38] UNCLOS, art 87 and art 246/1.

[39] For the further revised draft text of an agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction dated 20 July 2022 please visit < https://www.un.org/bbnj/> accessed 10 August 2022.

there is a need for a strong public and political pressure to complete the existing efforts.

The measures contained in Article 194 to prevent, reduce or control pollution of the marine environment should be in accord with the obligation to refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties under UNCLOS[40]. Thus, when considering the legal basis for measures taken by coastal States for the protection of marine environment, the legal regime of the maritime area where those measures are applied is need attention. This is because Article 194 is a general provision related to measures particularly against "pollution" from different sources, rather than emphasizing measures being conducted in high seas.

No State has sovereignty or sovereign rights in the high seas. Whether the international law allows coastal States to declare *sui generis* protected areas to ensure that marine environment protection for ABNJ which *ipso facto* implies administrative measures is problematic. As concluded above, UNCLOS obviously lacks the mechanisms for establishing *sui generis* protected areas in high seas[41]. Nonetheless UNCLOS is intended to strengthen the legal mandate for regional activities which induce regional organizations to support implementation of comprehensive and

[40] UNCLOS, art 196/4.

[41] De Santo (n 21) 35.

global legal framework of UNCLOS. These instruments are supposed to be the complementary to each other[42].

With regard to other regional or specific convention regimes, currently five procedures for the establishment and management of protected areas are worth mentioning, namely: the CBD Convention, SPA/BD Protocol to the Barcelona Convention, OSPAR Convention, CCAMLR Convention and the Madrid Protocol to the Antarctic Treaty.

As the first global agreement to cover all aspects of biological diversity, the CBD Convention defines "protected areas" in terms without any reference to a particular maritime area[43]. Contracting Parties adopted seven criteria to be used in the identification of ecologically or biologically significant areas (EBSAs) "in need of protection, in open ocean waters and deep sea habitats", during the ninth meeting of the Conference of the Parties to the CBD in 2008 (COP 9). Although it was originally a voluntary effort for establishing protected areas in the high seas, EBSA process overlapped with marine spatial planning (MSP) policies of regional organizations in the course of time. On the one hand, it is still relatively blurred whether MSP areas serve for the Blue Economy concept or a tool for merely protection. On the other hand, it seems difficult to catch the protection targets by COP decisions without clear highs sea provisions[44].

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42 Glen Wright, Julien Rochette and Elisabeth Druel, 'Marine Protected Areas in Areas Beyond National Jurisdiction' in Rosemary Rayfuse (ed), *Research Handbook on International Marine Environmental Law* (Edward Elgar Publishing, 2015) 288.

43 CBD Convention, art 2.

44 Summary Report of the Workshops Addressing Marine Areas Beyond National Jurisdiction at the 3rd International Marine Protected Areas Congress (IMPAC 3) (Marseille, France, October 21-25, 2013) 6 <https://globaloceanforum.com/wp-content/uploads/2014/01/summary-report-of-workshops-addressing-marine-areas-

The OSPAR Convention, as a regional and more successful instrument ratified by fifteen countries in North-East Atlantic, clearly encompasses the ABNJ in addition to national waters[45]. The Convention requires States Parties to take measures to protect, conserve and restore marine biodiversity in the Convention area. OSPAR Biodiversity Committee adopted the "Guidelines for the Management of its MPAs" in 2006 which was a lightener initiative for Contracting Parties to adapt themselves to a management plan for a pilot site[46]. Following that protection network in high seas has been broadened. Fishing policies are not included the matters encompassed by the Convention system which induces a coordination need between sectors and other regional organizations[47].

SPA/BD Protocol to the Barcelona Convention as a regional treaty under UNEP, prescribes a relatively functional mechanism established by States[48]. The List of Specially Protected Areas of Mediterranean Importance (SPAMI's List) is accepted and updated at the Conference of

beyond-national-jurisdiction-at-impac-3-marseille-france-october-21-25-20132.pdf> accessed 1 August 2022.

45 Convention for the Protection of the Marine Environment of the North-East Atlantic (adopted 22 September 1992, entered into force 25 March 1998), 2354 UNTS 67 (OSPAR Convention).

46 Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (Reference Number: 2003-18) as amended in 2006 by the OSPAR Biodiversity Committee para. 3.46 <https://www.ospar.org/work-areas/bdc/marine-protected-areas/guidance-for-the-development-and-management-of-the-ospar-network> accessed 1 August 2022.

47 Wright, Rochette and Druel (n 42) 283.

48 Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean (adopted 10 June 1995, entered into force 12 December 1999) 2102 UNTS 203 (Barcelona Convention SPA / BD Protocol).

Parties[49]. The main purpose here is the management and protection of natural areas and the protection of threatened species and their habitats by encouraging cooperation in the conservation of natural heritage which characterize the UNEP system itself. Again, the Protocol provides protection for the areas under national authority primarily and requires consultation with neighbouring states for the establishment of SPAMIs in ABNJ[50]. Thus, the high sea SPAMIs and the new protection measures for the ABNJ particularly for the eastern part of Mediterranean initiate serious discussions during the meetings, if those areas fall into the overlapping EEZ or continental shelf claims with other States[51]. The disagreements are not surprise considering the semi-enclosed feature of the Mediterranean, the potential marine energy sources and the existing maritime delimitation conflicts in the region.

Most of the protected zones prescribed by the above-mentioned conventional mechanisms are under national jurisdiction of the Contracting Parties. However, MPAs in the high seas established through the Commission of the Convention for the Conservation of Antarctic Marine Liv-

[49] Through by the four new protection area were included to the SPAMI List at the end of 21st ordinary meeting of the Contracting Parties to the Barcelona Convention and its Protocols (Naples, Italy, December 2019) SPAMI List consists of 39 sites recently, and one of them (the Pelagos Sanctuary for marine mammals) has been located on the high sea. For the update list of SPAMIs please see <http://www.rac-spa.org/spami>.

[50] According to art 9/2 and 9/3 of the Barcelona Convention SPA / BD Protocol, "Proposals for inclusion in the SPAMI List are to be submitted: …(b) by two or more neighbouring Parties concerned if the area is situated, partly or wholly, on the high sea; (c) by the neighbouring Parties concerned in areas where the limits of national sovereignty or jurisdiction have not yet been defined".

[51] Bayram Öztürk, 'Marine Protected Areas in The High Seas of The Aegean and Eastern Mediterranean Seas, Some Proposals' (2009) 15 Journal of Black Sea/Mediterranean Environment, 69 77.

ing Resources (CCAMLR) is an important example since the Antarctic Treaty prohibits all military and nuclear activities and particularly suspends whole sovereignty claims[52]. The CAMLR Convention is a multilateral treaty under the auspices of the Antarctic Treaty System (ATS) and aims to govern marine living resources in the Southern Ocean[53]. As the governing body of ATS, 'the Antarctic Treaty Consultative Meeting (ATCM)' can decide on measures for the 'preservation and conservation of living resources'[54]. Those measures have been completed by the Protocol on Environmental Protection to the AT (Madrid Protocol) which enables establishment of the Antarctic Specially Protected Areas (ASPA) and the Antarctic Specially Managed Areas (ASMA) for the implementation of the restriction measures according to the management plans[55]. CCAMLR participates the establishment process of the above mentioned protection areas in the Southern Ocean[56].

Designation and management regime of the marine protected areas are concluded by consensus of State Parties and conducted by CCAMLR.

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52 Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71 (AT), art 4.

53 Convention on the Conservation of Antarctic Marine Living Resources (adopted 6 May 1981, entered into force 7 April 1982) 1329 UNTS 47 (**C**CAMLR Convention). The CCAMLR Commission have 25 Member States (Argentina, Australia, Belgium, Brazil, Chile, China, France, Germany, India, Italy, Japan, South Korea, Namibia, Netherlands, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States, and Uruguay and the European Union).

54 AT, art 9/1(f).

55 Protocol on Environmental Protection to the Antarctic Treaty (adopted 4 October 1991, entered into force 14 January 1998) 2941 UNTS 3 (Madrid Protocol).

56 Final Report of the Thirty-second Antarctic Treaty Consultative Meeting (Baltimore, United States, 6–17 April 2009) Appendix 4 < https://documents.ats.aq/ATCM32/fr/ATCM32_fr002_e.pdf> accessed 1 August 2022.

The Commission is also charged with implementing conservation measures such as the opening and closing of areas, for conservation and protection or scientific research[57]. When CCAMLR adopted its first MPA, the 'South Orkney Islands Southern Shelf MPA' located entirely within the high seas, all types of commercial fishing have been prohibited. Accordingly, Secretariat was tasked to notify non-parties about the restrictions depending on some indicators[58]. This notification might be interpreted as a proof of restrictive effect of a high sea MPA in respect of third countries. 'The Ross Sea region MPA' is the following one which was originally proposed by the USA and New Zealand in 2012 and barely adopted at the end of 2017. In fact, some States still have serious doubts about the legal status of the CCAMLR for the designation and management of the protected areas[59]. The complexity of the geopolitical factors, the existing economic interests and the historical and diplomatic connections lay behind most of the consensus failures[60].

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57 CAMLR Convention, art. 9/2(g).

58 For the detailed review of actions taken by CCAMLR please see 'Halting and Reversing Biodiversity Loss in The Deep Sea', Susanna Fuller and others, October 2020 < https://www.savethehighseas.org/wp-content/uploads/2020/10/CCAMLR-DSCC-UNGA-Review-Annex_Oct2020_FINAL.pdf> accessed 20 November 2022.

59 The delegation of Ukraine made the statement that "… The UN Convention on the Law of the Sea (ratified by Ukraine) provides the opportunity for establishing MPAs only within the coastal waters in the areas of jurisdiction of those countries. Therefore, at this stage we cannot see any legal possibility for establishing MPAs in the high seas of the World Ocean containing areas for which CCAMLR is responsible". Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR-SM-II/BG/10) Report of the Second Special Meeting of the Commission (Bremerhaven, Germany 15-16 July 2013) para 3.26.

60 For more considerations on environmental politics about marine protected areas please see Nengye Liu and Cssandra M. Brooks, 'China's Changing Position Towards Marine Protected Areas in The Southern Ocean: Implications For Future Antarctic Governance' (2018) 94 Marine Policy 189–195; Cassandra M. Brooks and

V. CONCLUSIONS

It is crucial to build a common understanding of international law for the remedies towards the sensitiveness of the ecologically and biologically important ocean areas. Apart from the unclarity related to the legitimation of the establishment and management of *sui generis* protected areas in the maritime areas beyond territorial sea in respect of international law, obviously the measures to be taken to increase protection and sustainable management should be supported effectively by States and competent international and regional organizations.

However legal complexity with the designation of protection zoned beyond territorial sea associates with the fragmentation of regional implementation and brings increasing contentions between particularly the littoral States of semi-enclosed seas. Various scientific criteria and different names labelling protection zones by regional conventions or other arrangements do not guarantee the effectiveness of those protection regimes since any of those have a global effect for prevailing the freedom of high seas prescribed in UNCLOS. Additionally, neither all the coastal States have so far agreed on their EEZ nor all of them parties to UNCLOS. Some coastal States have established *sui generis* zones under

others, 'Geopolitical Complexity At The Bottom Of The World: CCAMLR's Ongoing Challenge Of Adopting Marine Protected Areas' in Liu N., Brooks C.M. and Qin T. (eds) *Governing Marine Living Resources in the Polar Regions* (Edward Elgar Publishing, 2019) 43–65; Natasha B. Gardiner, 'Marine Protected Areas In The Southern Ocean: Is The Antarctic Treaty System Ready To Co-Exist With A New United Nations Instrument For Areas Beyond National Jurisdiction' (2020) 122 Marine Policy 1-9.

different names beyond their territorial sea, while neither of them is recognized by UNCLOS or customary law, they are not prohibited either.

Regional or specific conventions on the protection of the marine environment have importance to make effort to ensure environmental protection and conservation of marine biodiversity and ecosystems in good faith. But all lack of effect for third States, and do not constitute an objective regime[61]. States do not have territorial competence beyond their national jurisdiction since the high seas, as the common heritage of mankind, are not subjected to sovereignty of any States, unless those protection regimes turn into a customary rule for establishment and management of a particular protection regime in the high seas[62]. If any

[61] Wen Duan, 'Do the Establishment and Management of MPA s in ABNJ under Existing Treaty Regimes Have Legal Effects on Third States?' in *The International Legal Regime Relating to Marine Protected Areas in Areas beyond National Jurisdiction* (Brill/Nijhoff 2022) 161.

[62] Wen Duan exemplifies two international instruments describing MPAs in ABNJ and asserts them as objective regime, firstly the MPAs under the Antarctic Treaty System, and secondly the SPAMIs under the SPA/BD Protocol to Barcelona Convention. According to Duan the "objective regime" set by Antarctic Treaty System confers rights and obligations on States which are not Parties to ATCM since the States claiming territorial competence over Antarctica and its adjacent waters are already party to the ATCM and their territorial claims have been frozen by the AT system itself (*ibid* 164). His first argument is debated since Article 13 of Madrid Protocol is lack of jurisdictional criteria. Although State-Parties have already demonstrated the necessity of third States to act consistently with principles and objectives of the Antarctic Treaty System (Enhancing Compliance With The Protocol: Departure State Jurisdiction, XXI ATCM/WP22, April, 1997, para. 17), the jurisdictional issues related to the third parties is unanswered under the Protocol. The second exclusion related to the protected areas are described by SPA/BD Protocol to Barcelona Convention. Under the Annex to the Protocol, as considered above, "In the case of areas situated, partly or wholly, on the high sea or in a zone where the limits of national sovereignty or jurisdiction have not yet been defined, the legal status, the management plan, the applicable measures and the other elements provided for in Article 9, paragraph 3, of the Protocol will be provided by the neighbouring Parties concerned in the proposal for inclusion in the SPAMI List" (Annex I/C, 3).

protection or management measure is legally binding on third States on a particular *sui generis* protection zone in high seas, than the activities of third States violating those measures in high seas will be considered as illegal. In this situation, the question is how can any non-flag State exercise its jurisdiction and enforce any measures over vessels navigating the high seas if there is no agreement to permit this jurisdiction[63]?

The designation of *sui generis* protected zones at the end of decision-making process under relevant regional or international agreements as mentioned above provides a practical effectivity to those agreements to some extent. It is very usual that an inter-governmental organ is established by the Contracting Parties right after the signature of any international agreement which serves implementation, compliance and decision-making between parties. However, there are many unstable factors in this process such as boundary conflicts between States, the existence of energy resources in the relevant maritime area, socio-economic differences between nations, and occasionally ignorance on a particular problem by national delegates. All these factors might be an obstacle for Contracting Parties to look at the bigger picture.

When it comes to administrative implementation measures to be applied in MPAs in ABNJ, rights of third States will always be a problem. Since no territorial sovereignty exists in ABNJ or in disputed maritime areas, the jurisdiction should be exercised based on criterion of the nationality of the ship concerned. However, in the instance of "no-take zone", which State will apply its sovereign power on what kind of legal instru-

63 Duan (n 61) 179.

ment or rule of international law are questionable. A well-known customary rule of international law is that, unless otherwise agreed, no State has right to impose its own legislation on other States since flag State rule still prevails. In other words, claiming *sui generis* marine protected areas unilaterally declared in ABNJ for disputed areas would not be binding on other States.

On the other hand, there always will be a possibility that the marine areas subjected to the protection claims might be proclaimed as falling under national jurisdiction of a State in the near future. So, this should be taken into account while establishing those areas and endorsing sovereign powers. The international or regional legal instruments on protection of the marine environment aim only to provide protection of the marine environment, not to aggravate the disputes between States.

In this respect, formal declaration of the EEZ and using the sovereign rights by related coastal State might be a clearer solution for the purpose of the protection and preservation of the marine environment. States engaging in a treaty for the designation of a protected zone in the high seas would not be in breach of international law. However, they should maintain consistence high sea freedoms prescribed in UNCLOS. On this point, measures to be taken by States and the administrative authority to be applied cannot prevent the high seas' freedoms and cannot be binding on third States. Under the circumstances, States particularly bordering enclosed or semi-enclosed seas might prefer to engage in mutual cooperation agreements, programs or arrangements to get more control over the decision-making process and to avoid potential conflicts.

Unless there exists any regional or international customary rule of law allowing riparian States to use sovereign rights over other States in high seas, coastal States would not be able to regulate acts of third States which are not in conformity with the restrictions of a particular protected zone located in their offshore waters but compatible with the high seas' freedoms of customary international law. Evolving international marine environment standards will open new legal developments in future.

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