
Marine Protected Areas in the Exclusive Economic Zone: the European Union between a Rock and Hard Place?

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Abstract

The Habitats Directive obligates Member States to designate protected areas. Where Member States are entitled by international law, i.e. mainly the 1982 UN Convention on the Law of the Sea, to establish such areas in the EEZ, they face a conflict with the EC's competence in respect of fishing activities. Protected areas in the EEZ are a thorny issue as they affect third states rights predominantly in respect of fishing and navigation. The questions raised are accordingly: is there a possibility or even obligation under international law to establish marine protected areas in the EEZ; does the Habitats Directive apply in the EEZ; are the aims and tools of the EC fisheries policy concurrent with the objectives of the Habitats Directive; and by what procedure may a possible conflict be remedied.

1. Introduction

In a judgement from 5 November 1999 the High Court of Justice, Queen's Bench Division, ruled that the Habitats Directive¹ is applicable beyond the 12nm Territorial Sea limit.² This is a remarkable ruling, both in respect of international as well as European law: internationally because the Habitats Directive may prove to be a far reaching implementation measure of environmental jurisdiction; in the European context because it adds a facet to the conflict between Member States' laws and Community law. On the face, the Habitats Directive puts Member States under the obligation to designate protection areas on the sea. Yet, applying the Directive in the suggested manner might bring Member States in conflict with the European Community's fisheries policy: By virtue of Article 40 of the Treaty establishing the European Community (Treaty)³ the European Community (Community)

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¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Official Journal 1992 L 206/750 URL: <http://europa.eu.int/eur-lex/>; visited on 06 September 2002.

² See *The Queen v The Secretary of State for Trade and Industry ex parte Greenpeace Ltd.*, The Times, 19 January 2000, CO/1336/99; in that case the question was only if the Habitat Directive would be applicable on the Continental Shelf, as the UK has not claimed an EEZ.

³ Abbreviated EC, ECT denotes the Treaty text before the revision of Amsterdam.

has exclusive competence in the field of fisheries, and the Common Fisheries Policy applies in an area between the 12nm and the 200nm limit. To the extent that the designation of habitats in accordance with the Habitats Directive requires the exclusion of certain fishing methods or other management or conservation measures the Member State faces a conflict of competence: it either encroaches on the established competence of the Community or it infringes its own obligation under the Directive.

The objective of this article is twofold. First it undertakes to present an overview of the international legal ramifications within which the conflict arises. Since the Exclusive Economic Zone (EEZ) is a concept of international law, it is international law that determines the extent of Member States' and the EC's competence in that area. Secondly, against this background it examines the different aspects of the conflict on the European and national level and aims to provide a guideline as to how to solve the conflict with particular regard to the Green Paper on the Future of the Common Fisheries Policy presented in 2001.⁴

2. The Marine Environment and Protected Areas

The marine environment encompasses 71% of the globe's surface. Still widely underestimated in their importance, the oceans and their intricate interconnectedness with the land will continue to determine humanity's future. They provide a vast albeit finite food resource, a living basis for coastal communities, transportation routes and trade links, and, last not least, they satisfy recreational needs; and they are endangered by environmental degradation. Just recently a group of 19 marine biologists published an international study on the long-term changes in the world's oceans.⁵ The study identifies over-fishing as the main cause for today's state of environmental destruction and concludes that an expanded global network of marine reserves (or protected areas), in which all fishing and extractive activities are banned, could provide the nucleus of recovery. According to another study on existing reserves completed by the beginning of 2001 and endorsed by 150 marine scientists, "there is now compelling evidence that marine reserves conserve both bio-diversity and fisheries and could help replenish the seas."⁶ The two studies suggest that the designation of areas of no or only limited access may prove to be an increasingly important tool of environmental policy in the future.

⁴ Green Paper on the Future of the Common Fisheries Policy, COM(2001) 135 final, 20.03.2001 URL: http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0135en0.pdf; visited on 06 September 2002.

⁵ See *Jackson et al.*, 'Historical Overfishing and the Recent Collapse of Coastal Ecosystems' in 293 *Science Magazine* 629(636); for a summary report see *Cookson*, 'In deep water', *Financial Times* from 27.07.2001; and also Joint Group of Experts on the Scientific Aspects of the Marine Environment Protection (GESAMP), *A Sea of Troubles*, 70(2001) Rep. Stud. 2f., which identifies the following threats as the most serious ones to the marine environment world-wide:

- The destruction and alteration of habitats;
- Over-fishing and the effects of fishing on the environment;
- Effects of sewage and chemicals on human health and the environment;
- Increasing eutrophication;
- Changes to hydrology and the flow of sediments.

⁶ Cited from *Cookson*, *ibid.*

For the sake of argument it is accepted that environmental protection areas are in some instances the best means to address the problem of progressing degradation. It is also assumed, that - as a starting point - closed areas and protected areas can denote the same protection level. Furthermore, it is assumed that fishing and shipping activities are the most critical activities in respect of environmental protection both in the international and the European context.

3. International Law Framework from a European Perspective

Any protected area must conform to the legal ramifications under which it is drawn up. What complicates the case of marine protected areas is the fact that they may affect the internationally recognised rights of other states. Outside the land-territory, rights of other states, like the right of innocent passage or access to natural resources, may limit the possibility of a state to pursue its (environmental) objectives.⁷ In the context of the European Union matters are even more complicated as there is a division of competence between the Community and the Member States. And both the European Union as such and its single Member States are parties to international agreements, which may affect the obligations in the European context.

3.1 International Agreements in the EU

According to Article 300 (7) EC international agreements concluded by the Community are legally binding for the Community institutions and the Member States. Yet, only if the Community acts within its competence conferred upon it by the Treaty the international agreement entered into by the Community may become legally binding for the Member States. The case is not a clear-cut one. The Treaty does not spell out in detail and in every instance whether or not the Community actually has the competence to enter into an international agreement.⁸ Clearly, only in certain areas - albeit expanded and complemented by the ECJ in the course of its jurisdiction - the Member States bestowed sovereign rights in the Community. And it is only within these areas that the Community can conclude international agreements with binding effect for the Member States.

⁷ While international law also recognises rights of other states in respect of activities within one state's territory, on the sea the rights of other states seem to go further, thus, for example, the right of innocent passage in the Territorial Sea is not accorded on land.

⁸ *Hession and Macroy* identify four categories in Community law for the division of competence between the Community and the Member States in the context of international agreements: The first two are that of exclusive competence either by the EC or by the Member States. Cases of these two categories are rare, fairly straight forward and pose not much difficulties: either the Treaty confers exclusive competence or it does not. The third category comprises cases of external competence for areas even before the Community has considered the internal competence of that area. The fourth category includes all cases in which the respective competencies cannot be easily assigned because of little agreement as to the functions of the Member States and the Community. The latter two are generally referred to as areas of mixed or shared competencies. *Hession/Macroy*, 'The Legal Framework of European Community Participation in International Environmental Agreements', 1994 *New Europe Law Review* 59 (83).

As a result of the division of competencies within the Community and because of the fact that many international agreements cannot be broken down according to any strict division, international agreements entered into by the Community are usually mixed agreements involving a mixture of member states' and Community competencies.⁹ Accordingly, most of the international agreements - at least as they are relevant in the context of environmental protection here - are entered into by the Member States and the Community at the same time.¹⁰

Finally, the adoption of an international agreement becomes only relevant *vis-a-vis* the member states if the Community transforms the content into secondary legislation; or member states are contracting parties to an international agreement themselves and therefore have incurred the same obligation under international law themselves. A mere Council decision to adhere to an international convention has in practice no legal significance speaking from a Community law perspective.¹¹

3.2 The 1982 United Nations Convention on the Law of the Sea

The 1982 UN Convention on the law of the Sea¹² features prominently among international legal instruments relating to the oceans since it broadly covers virtually all matters that may arise in the marine environs. The Convention provides a legal framework for subsequent instruments relating to the oceans¹³ and may very well be called the constitution of the oceans. Even though Article 311(3) of the Convention specifically provides for agreements that modify or even suspend the Convention's provisions, development of international law at large is delineated by the text of this instrument. Both, the Community and the Member States¹⁴ are parties to it.

⁹ See also *Krämer*, E.C. Environmental Law, 4th ed., 2000, 5.

¹⁰ In practice, it may be said that the Community, represented by the Commission, seeks to corroborate with the Member States whenever possible so that the Community - even where it as such is not a party - acts with one single voice. Thus, in the context of the UN, the Member States and the Commission co-ordinate their positions in order to present one common statement; by way of such co-ordination the Commission can influence the final statement informally and may in fact shape the external policies of the Community as a whole.

¹¹ See *Krämer*, *supra* note 9, 5; however, from a public international law perspective a Council decision may be viewed as an expression of *opinio juris* of the respective states depending on the circumstances.

¹² Third United Nations Convention on the Law of the Sea, adopted 10 December 1982, entry into force 16 November 1994, 1833 U.N.T.S. 397, hereinafter the Convention.

¹³ For example, earlier Regional Fisheries Organisations were changed in order to bring them in line with the Convention, see *de Klemm*, Fisheries Conservation and Management and the Conservation of Marine Biological Diversity, in: *Hey* (ed.), *Developments in International Fisheries Law*, 1999, 423 (434).

¹⁴ Except for Denmark; however, by virtue of Article 300(7) EC, the Convention is binding for Denmark also, even where its provisions do not constitute customary international law.

3.2.1 EEZ Jurisdiction for Conservation and Preservation

Part V of the Convention is central to the present analysis. It introduces the regime of the EEZ, a regime *sui generis*, which covers an area beyond the Territorial Sea (12nm) up to a limit of 200nm. In this area the coastal States - to the extent that they have claimed an EEZ^{15,16} - have sovereign rights over living and non-living resources as well as jurisdiction in respect of - among other things - environmental protection.¹⁷

The area up to the 200nm limit is the focus of most economic activities such as fishing and off-shore gas and oil drilling, and at the same time provides the essential habitats for a variety of flora and fauna, which is of central interest to environmental protection. As a consequence of its economic significance, the EEZ is subject to a number of different, and at times conflicting, uses. The balance of environmental protection and economic activities is one of these multiple use conflicts. To address this conflict on the basis of the Convention two strands of environmental concern must be distinguished: the living resources and pollution.

i) Living Resources

Living resources in the Convention are predominantly considered a source of food supply for humans. "Living resource" is a sub-category of marine life, as it is only that part of the living marine environment, which is exploited.¹⁸ Over-exploitation is accordingly one of the main threats to the marine environment addressed within the Convention. Hence, what later developed into the more general concept of the EEZ, started out as a movement to

¹⁵ *Brownlie*, Principles of Public International Law, 5th ed., 1998, 207; no coastal State has an EEZ automatically, it must be specifically declared - unlike the Territorial Sea or the Continental Shelf, which are deemed to be a mere extension of the land territory.

¹⁶ Within the European Community only the United Kingdom has not declared an EEZ but only an Exclusive Fisheries Zone (EFZ). The concept of the EEZ is broader than the one of an EFZ. Other matters, than those related to fisheries, may not be regulated in an EFZ. It would seem that jurisdiction can only be claimed inasmuch as under international law acceptable. If a coastal State desires not to claim jurisdiction to the extent international law provides for, jurisdiction remains limited. Declarations in this regard must be considered constitutive, i.e. the coastal State may not go beyond the content of its declaration without officially declaring so. Denmark is not a party to the Convention but was nevertheless able to claim an EEZ on the basis that the provisions of the Convention on the EEZ only reflect what is otherwise customary international law.

¹⁷ Article 56(1)(a) reads: "...sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living..." and Article 56(1)(b): "jurisdiction as provided for in the relevant provisions of this Convention with regard to: [...] (iii) the protection and preservation of the marine environment..."

¹⁸ Compare *Owen*, The Application of the Wild Birds Directive Beyond the Territorial Sea of European Community Member States, 2001, *Journal of Environmental Law* 39 (50/51).

reserve and protect fisheries for the nationals of the coastal State.¹⁹ The wording of the first regional agreements establishing exclusive fishing zones is fairly straightforward in this respect.²⁰ Similarly, the drafts on an ocean space treaty discussed by the Committee on the Peaceful Uses of the Seabed and the Ocean Floor beyond the Limits of National Jurisdiction emphasised the economic importance of the living resources for the coastal communities.²¹

The Convention undertakes to meet the threat of over-exploitation with a duty to conserve. "Conservation" in general denotes utilisation. In the Convention the term is used in the context of the exploitation of the natural resources. Conservation is understood as a prerequisite for utilisation of the living resources. It is linked to the term maximum sustainable yield and similar concepts now generally associated with sustainable development; most importantly it is also linked to the coastal State's sovereign rights.

ii) Pollution

Pollution is defined in Article 1(1)(4).²² The answers of the Convention to this threat are manifold and not clearly defined. Some of them are the prevention, reduction and control of pollution (Article 194), the duty not to transfer damage or hazards, nor to transform one type of pollution into another (Article 195). While Part XII (e.g. Article 192–194) lays down the general obligations in respect of the environment, Part V delineates the legal frame within which the coastal State may take legislative measures in the EEZ to fulfil its obligations under Part XII, in other words: Part V provides the bones and Part XII the flesh. In contrast to living resources, pollution in the EEZ is linked to jurisdiction.

¹⁹ See Presidential Proclamation No. 2668, US Statutes at Large, vol. 59 (1945), 885; text reproduced in UN Legislative Series, Laws and Regulations on the Regime of the High Seas, vol. I (ST/LEG/SER.B/1) 112-113.

²⁰ See for example the "Santiago Declaration", adopted by Chile, Ecuador and Peru at the First Conference on the Exploitation and Conservation of the Maritime Resources of the South Pacific on 18 August 1952, UN Legislative Series, Laws and Regulations on the Regime of the Territorial Sea (ST/LEG/SER.B/6), 723-724: "1. Governments are bound to ensure for their peoples access to necessary food supplies and to furnish them with the means of developing their economy. 2. It is therefore the duty of each Government to ensure the conservation and protection of its natural resources and to regulate the use thereof to the greatest possible advantage of its country. [...] For the foregoing reasons the Governments ... being resolved to preserve for and make available to their respective peoples the natural resources of the areas of sea adjacent to their coasts declare as follows: [it follows the declaration of a 200nm sovereignty/sole jurisdiction zone]".

²¹ See UN Publ. by DOALOS: Conservation and Utilization of the Living Resources of the Exclusive Economic Zone, 13 ff.

²² "[T]he introduction by man, directly or indirectly, of substances or energy into the marine environment..., which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."

Article 56(1)(b)(iii) refers to jurisdiction in respect of the protection and preservation of the environment as “provided for in this Convention”. The relevant provisions are Articles 192–194 in Part XII “Protection and Preservation of the Marine Environment”. Article 192 spells out the obligation of states to protect and preserve the marine environment. Generally, the environment can be preserved and protected by overarching regulations such as general emission caps. This approach is envisaged in the provisions on prevention, reduction and control of vessel source pollution. Alternatively, certain areas or features may be protected directly and individually, which can be done by protection areas. It is important to note that the obligation under Article 192 is subject to other rights and obligations conferred upon states elsewhere in the Convention.²³ Article 193 reiterates the sovereign rights established by Article 56 and links them directly to the duty created by Article 192.²⁴ Article 194 outlines the measures, by which protection and preservation may be realised, paragraph 5 refers specifically to rare and fragile ecosystems and habitats. Yet, Article 194(5) only gives guidance as to the objective of such measures. The way, by which the objective may be achieved, is not determined. Two possibilities of legislative activity must be distinguished in this context. One is the conservation of natural resources, which conceptualises the sustainable exploitation by the coastal State (s. a.). The other is the preservation of the marine environment without any reference to economic needs as such.²⁵

Preservation generally denotes the maintenance of a *status quo*. In the context of the provisions on the environment in the Convention, preservation is always used in connection with protection. While the latter would appear to emphasise the future element, i.e. prevent any adverse impacts on the environment in a proactive manner, preservation would denote a stabilising element, i.e. keep the environmental status as it is. In the Convention, preservation is distinct from conservation in the sense that conservation serves the purpose of sustainable harvest, while the purpose of preservation is to keep or maintain the environment in a certain (natural) state.²⁶

Since Article 194(5) neither lists nor excludes any measures, not much can be gained from Part XII on the legality of marine protected areas within the EEZ. Yet, if a protected area is perceived as the only means to preserve the environment, Article 194 provides a sound basis for a coastal State’s obligation to designate it as long as no other uses are unduly denied. The question whether or not uses can be restricted or even prohibited can only be answered in the light of Part V and by analysing what the jurisdiction as conferred by Part V of the Convention actually comprises of.

²³ See Nordquist/Rosenne/Yankov (ed.), *United Nations Convention on the Law of the Sea, 1982: A Commentary*, Articles 192 to 278, Final Act, Annex VI, Volume IV, Dordrecht, 1991, 43.

²⁴ Nordquist et al., *ibid.*, 40, point to the fact that the words “duty” and “obligation” do not bear a substantively different meaning in the context of Article 192f.

²⁵ Owen, *supra* note 18, 55 ff.

²⁶ See generally Nordquist, *supra* note 23, 11.

3.2.2 Part V - the Distinction Between Sovereign Rights and Jurisdiction

The word “sovereignty” refers to the various governmental powers of nations and states over their land territories, it denotes a broad power to control and regulate the state and the relations and functions of its population and its territory. The basic doctrine is contextualized by three corollaries: (1) jurisdiction exercised by a State over its territory and permanent population; (2) the duty not to intervene in the exclusive jurisdiction of other States; and (3) the dependence of obligations which emerge from the sources of international law.²⁷ A very important aspect of sovereign jurisdiction, as a derivative of sovereignty, is the complete exclusion of competing jurisdiction: sovereignty cannot be shared.²⁸ Sovereignty can be exercised on behalf of the sovereign, but its authority must go back to one single source.

Sovereign rights can be considered a derivative of sovereignty.²⁹ The territory of the coastal State, and thereby its sovereignty, extends according to the Convention (and international customary law) up to 12nm.³⁰ Under international law it is also recognised that a state may exercise sovereign jurisdiction over its national citizens for acts committed outside its territory.³¹ In such instances the nationality of an individual constitutes the link and the legal basis for a state to claim jurisdiction over a certain act. Prosecution of someone outside the state’s Territorial Sea requires a “jurisdictional link” such as either nationality of the offender or “hot pursuit” as defined in Article 111 of the Convention³².

²⁷ *Brownlie*, supra note 15, 289; these three principles may be expanded to comprise of seven: *Vitzthum*, in: *Vitzthum* (ed.), *Völkerrecht*, 2nd ed., 2001, 39-43.

²⁸ See *Vitzthum*, *ibid.*, 389; yet, there are a few exceptions to this rules, 387 f.

²⁹ Compare *Hafner*, *Die seerechtliche Verteilung von Nutzungsrechten*, 1987, 262 ff.

³⁰ The coastal State has sovereign rights in the EEZ and over the Continental Shelf for the purpose of exploring it and exploiting its natural resources (Articles 56 and 77), this would seem to entail sovereign jurisdiction in related matters also.

³¹ Yet, states do not have a right to exercise exclusive jurisdiction over their nationals, even in the case of official acts; when another State seeks to prosecute a State’s nationals, the latter may seek to intercede diplomatically on behalf of its citizen on the basis of comity and treaty law, but it has no legal right under international law to insist that it be the exclusive fora for such prosecution. Also, states cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter: persons may not be arrested, a summons may not be served, police investigations may not be mounted, and orders for production of documents may not be executed, *Brownlie*, supra note 14, 310, and 303-8 on the principles of jurisdiction: territorial, nationality, protective or security, and universality principle.

³² The territorial link in these cases is established “when the foreign ship or one of its boats is within the internal waters, the archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted”; in the Contiguous Zone (Article 33) the coastal State can enforce laws pertaining to its sovereignty, like “customs, fiscal, immigration and sanitary laws and regulations”. In criminal law a number of other concepts are accepted that go beyond the described “territorial links” but they also rely on some form of territorial association. To what extent the coastal State may make use of its prerogative is a question of its national laws.

Otherwise that individual is – except where either the protective or security and/or the universality³³ principle is applicable – off limits for the coastal State's authorities.

There is no question that a state based on its sovereignty may impose on its citizens obligations that go beyond internationally recognised rules. Accordingly, a state could require its own citizens to obey certain protection measures, among them marine protected areas, anywhere in the world. In environmental matters, as much as in fisheries management, it is, however, not of much use to subject only the own nationals to stricter than average rules. Because individuals not falling under that jurisdiction would invariably take advantage of their comparative freedom - and would thereby gain a comparative advantage. In this respect the problem of "illegal, unregulated and unreported fishing" is of particular concern to fisheries management,³⁴ which also has some relevance in terms of environmentally detrimental effects beyond the mere depletion of natural resources as these illegal "fishermen" have no reason to abide by any other regulations either. Only the vessels not subject to the coastal State's sovereign jurisdiction, either in terms of spatial extension or registration, cause concern in respect of environmental legislation and enforcement in an international context.

The Convention in Part V confers sovereign rights in respect of certain subject matters, for example, the sovereign rights - and thus jurisdiction as an inherent constituent of sovereignty - over the natural resources and their exploitation. These sovereign rights can be considered as an extension of sovereignty beyond the territorial limits of sovereignty and would appear to confer sovereign jurisdiction in respect of individuals who are not nationals of the coastal State. Subject to certain restrictions³⁵ the coastal State may accordingly take whatever measures it deems appropriate to conserve and manage the living resources in the EEZ, e.g. no-take zones which are in fact a fish protection area. Where sovereign rights are not conferred by the Convention, the traditional rules apply, i.e. customary or (other) treaty law.

Jurisdiction is the power to create and enforce law in respect of a certain subject matter.³⁶ Part V confers upon coastal States jurisdiction with regard to, *inter alia*, the protection and preservation of the marine environment. The jurisdiction in the EEZ is analogous but not congruent to territorial jurisdiction; it is exclusive to the extent that the EEZ is a zone of exclusive competence of the coastal State.³⁷ It is functional in the sense that it is limited

³³ I.e. crimes, which may be persecuted by any state in accordance with international law; Articles 99-109 of the Convention define certain such crimes.

³⁴ The recent attention paid to Illegal, Unregulated and Unreported Fishing is prominent evidence of the concern about this management problem. See FAO Press Release 01/08 at http://www.fao.org/WAICENT/OIS/PRESS_NE/PRESSENG/2001/pren0108.htm; and Second Technical Consultation on Illegal, Unreported and Unregulated Fishing, 22-23 February 2001 Rome, Italy, <http://www.fao.org/fi/meetings/tc-iuu/tc-iuu01/>.

³⁵ See *Hafner*, supra note 28, 263.

³⁶ *Brownlie*, supra note 14, 313; *Oxman*, Jurisdiction of States, in *Bernhardt* (ed.), Encyclopedia of Public International Law, III 1997, 55.

³⁷ *Oxman*, *ibid.*, 57.

and directed by the Convention: the coastal State has only partial jurisdiction *vis-a-vis* third states.³⁸ But this is true for both, sovereign rights and jurisdiction in the EEZ.

Assuming that the different terms denote a different legal concept, the question remains how exclusive jurisdiction is different from sovereign rights. A possible interpretation is that the coastal State in the area of its exclusive competence was intended to become the steward³⁹ of the world community in environmental matters: Jurisdiction over matters, which are, in the sense of the concept of the common heritage of mankind, universal; sovereign rights in subject matters, which are attributable to an individual state. This interpretation, however, meets with difficulties as the provisions of the Convention do not provide an express list of possible enforcement measures *vis-a-vis* third states. In addition, the concept of stewardship would not necessarily call for a distinction between sovereign rights and exclusive jurisdiction in the way it was done in the Convention, as other instruments with this intention, yet without the same distinction, exist.⁴⁰

Another interpretation is that, unlike the subject matter falling under sovereign rights, the protection and preservation of the environment cannot be appropriated by states.⁴¹ Environmental protection is a concept but not a tangible item, like fish or fossil fuels. Similarly, marine scientific research, which is subject to exclusive jurisdiction, too, is a process with certain perceived implications for the coastal State which make the usage of methods and facilities - that otherwise go unregulated - a suspicious activity. Based on this interpretation one could advance the argument that the jurisdictional competencies of the coastal State are the same under sovereign rights and exclusive jurisdiction; the different terms are used only because of the different implications of the subject matter.

Finally, Article 77(2)⁴² suggests a further distinction: sovereign rights are exclusive in the sense that even in the absence of coastal State activity no other state may take action. Conversely, where the coastal State has mere exclusive jurisdiction the flag state, for example, has a residual competence. Indeed, the flag state and the coastal State within the EEZ have the same general duties in respect of environmental protection. And also in matters of marine scientific research, states are under the obligation to pay due regard to the rights and duties of other states.⁴³ In respect of the jurisdiction conferred by Article 56(1)(b) this would then mean that the coastal State's jurisdiction is exclusive where and if

³⁸ *Vitzthum*, supra note 26, 411.

³⁹ Compare *von Zharen*, Ocean Ecosystem Stewardship, 23 William & Mary Envtl. L. & Policy Review 1(33).

⁴⁰ *Ibid.*, 33 ff.

⁴¹ See *Hafner*, supra note 28, 264 f.

⁴² Article 77 (Rights of the coastal State over the continental shelf) reads in the relevant part: 2. The [sovereign] rights [over the continental shelf] are exclusive in the sense that if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without the express consent of the coastal State.

⁴³ Article 238 of the Convention.

the state has taken advantage of its prerogative. Other states have thus no concurrent jurisdiction in respect of the subject matters listed in Article 56(1)(b).

If there is no fundamental difference in the legal competencies between jurisdiction and sovereign rights, there is still the question what measures a state may take when exercising jurisdiction. Jurisdiction in a certain matter includes the power to make rules and decisions enforceable within a state territory⁴⁴ as only the enforcement is the act of practical international relevance. The jurisdiction to regulate and the jurisdiction to enforce correspond to each other: The one is always a function of the other.⁴⁵ For the EEZ jurisdiction is expanded by treaty law (and by customary law to the extent that the EEZ is customarily recognised) to be applicable outside the territory up to 200nm seaward of the baselines in respect of certain activities. The question is then what the jurisdiction for the protection and preservation of the marine environment between 12 and 200nm amounts to.

Part XII does not define the scope of jurisdiction in detail. Article 194(4) only cautions to “refrain from unjustifiable interference with activities carried out by other States in the exercise of their rights and in pursuance of their duties in conformity with this Convention.” The establishment of a protected area would appear to constitute a justified interference if the area cannot be protected by other means and if the concerns about the features of the area outweigh the concerns about the restriction of third states’ rights and duties.

Article 194(3) provides for a non-exhaustive list of management aims and respective measures like the prevention of “intentional and unintentional discharges” and accidents, emergency response, regulation of the “design, construction, equipment, operation and manning” of vessels or installations. In respect of the regulation of the “design, construction, equipment, operation and manning” there seems to be a conflict with Article 21(2) on the Laws and regulations of the coastal State relating to innocent passage. This provision expressly prohibits legislation to that effect in respect of foreign ships unless emanating from internationally accepted rules and standards. Even though the regime of Innocent Passage applies only in the Territorial Sea, the coastal State may, *a fortiori*, not enforce any regulation to that effect in the EEZ where its jurisdiction is even more limited as becomes evident from Article 220. To the extent, however, that these measures conform to internationally accepted rules and standards and these laws and regulations serve to prevent, reduce and control the pollution from vessels, Article 21 (2) - and thus Article 194 (3) - harmonises with Article 211(1). And the coastal State may therefore enact and enforce appropriate legislation accordingly.

Articles 207ff. deal with specific international rules and national legislation as they relate to specific types of pollution. In this context questions arise as to the content of these Articles and whether or not they are exhaustive. The provisions refer to matters that are enforceable under the traditional concepts of sovereignty. This becomes evident in

⁴⁴ *Brownlie*, supra note 14, 312.

⁴⁵ *Ibid.*

Article 207 which refers to land-based pollution sources, Article 208 which explicitly employs the nationality principle in respect of seabed activities, Articles 210 and 211 which by reference to Articles 91 and 217, i.e. flag state responsibility, call for legislation in respect of vessel source pollution, as well as in Article 212 which refers to territorial sovereignty and the flag state principle. In terms of enforcement the Convention provides in Articles 216(1)(a) and 220 explicitly for coastal State jurisdiction in the EEZ. The qualifications with respect to vessel source pollution⁴⁶ hint at the scope of coastal State's jurisdiction as regards the subject matters that fall under sovereign jurisdiction of another state: Only where sovereign rights of the coastal State in the EEZ are violated, Article 73(1) confers the right to take measures like "boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance." Conversely, the coastal State may take any protection measures short of such measures. Enforcement of measures establishing a protection area need not necessarily entail the institution of proceedings or the detention of a vessel (and its crew). The latter is only one possible means of exercising immediate force. If a protection area could be lawfully established by a coastal State, it could be enforced by immediate control at sea or by arranging for passive barriers.

An interpretation that coastal States may exercise their jurisdiction, as conferred by Part V and refined in respect of environmental matters by Part XII, only in the way it was envisaged by Article 207 through 220, is not conclusive. The legal basis for environmental jurisdiction is Article 56(1)(b)(iii) of the Convention, not Part XII, section 6 on enforcement, as the provisions in this section appear to establish a duty independent from the declaration of an EEZ and the appropriation of the associated rights and obligations. For example, the reference in Article 220(5) expands the scope of enforcement measures if an economic zone exists, but Article 220 does not make the existence of the economic zone

⁴⁶ Article 220 (Enforcement): In respect of the prevention, reduction and control of pollution from vessels in the EEZ the coastal State may institute proceedings including detention of the vessel

if the vessel "is voluntarily within a port or at an off-shore terminal" of the coastal State "in respect of any violation of its laws and regulations adopted in accordance with this Convention or applicable international rules and standards ..."; or

if "there is clear objective evidence that a vessel ... has ... committed a violation ... resulting in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State, or to any resources of its territorial sea or exclusive economic zone ... provided that the evidence so warrants";

it may if "there are clear grounds for believing that a vessel ... has ... committed a violation of applicable international rules and standards ... require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred"; and

may, if the vessel has refused to give information or if the information supplied is manifestly at variance with the factual situation, undertake physical inspection of a vessel if "there are clear grounds for believing that a vessel ... has ... committed a violation ... resulting in a substantial discharge causing or threatening significant pollution of the marine environment".

a prerequisite for its applicability otherwise. Also, Article 194(3) generally obligates states to take the appropriate measures. Articles 213 through 220 take up the measures listed in Article 194(3) and define the scope of jurisdiction for the relevant state. Yet, the measures in Article 194(3), as mentioned earlier, only indicate measures that states may take in respect of a particular form of environmental protection. Accordingly, sections 5 and 6 can be interpreted as exemplifying the measures the relevant states may take, but not as enumerating the possibilities the relevant states have under the Convention in respect of environmental jurisdiction.

3.2.3 EEZ, Coastal and Third States' Rights: Fishing and Navigation

The rights of other states within any given EEZ are the most important determining factor for the scope of environmental jurisdiction of the coastal State. These are commonly the freedoms of the high seas as warranted by Article 58(1).⁴⁷

Fishing as one of the high sea freedoms is limited by Part V, which confers sovereign rights over living resources to the coastal State. Article 61(2) gives the coastal State a prerogative in respect of conservation measures. In devising conservation measures the coastal State has to take into account a number of factors, which relate directly or indirectly to other states' possibility to partake in the harvest of the living resources. These rights of access of other states have been described as a qualification of the coastal State's sovereign rights.⁴⁸ Yet, if the coastal State so desires, Article 61 provides sufficiently ambiguous language to effectively exclude other states. More importantly in the context of the present analysis, Article 62(4) provides that the coastal State may, in the event of giving access to other states, regulate such access in various ways. Among the possible measures Article 62(4)(c) expressly mentions the designation of fishing areas. From the possibility to designate fishing areas it follows that the coastal State may exclude fishing activities in certain areas. Since Article 62(4)(c) speaks positively of designating fishing areas it would appear that it is of no relevance for what reason fishing in other areas might be not allowed. Thus, when putting up a protected area for the purpose of protecting the environment the coastal State may restrict the access of (non-national) fishers to a different area thereby effectively excluding fishing activities from the protected area. In respect of fishing activities the Convention therefore allows for the establishment of protection areas.

The possibility to restrict fishing in a certain area has no bearing for navigation, as restricting fishing does not impair the freedom of navigation: fishing activities are not a constitutive part of navigation; navigation is a prerequisite for fishing but not *vice versa*. The restriction of navigation is therefore a separate issue. Where shipping as such constitutes

⁴⁷ This excludes effectively the freedom to construct artificial islands and other installations, as well as the freedom of fishing and of scientific research.

⁴⁸ See *Hafner*, supra note 29, 267 ff, 332 ff.

a threat to the marine environment in a particular area,⁴⁹ the question arises whether or not Article 56 of the Convention entitles coastal States to establish zones, in which shipping is restricted or excluded totally. Like fishing the freedom of navigation in the EEZ is qualified twofold: Article 87 confers the freedoms only under the “conditions laid down by this Convention and by other rules of international law”, and for the EEZ Article 58(3) provides “States shall have due regard to the rights and duties of the coastal state and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law.” The “conditions laid down by the Convention” would appear to include the reference to the coastal State’s laws and regulations referred to by Article 58(3), too. Other rules of international law may include customary and treaty law in accordance with the general principles of international law. This qualification becomes relevant when looking at subsequent state practice. Article 58(3) refers back to Part XII (“the provisions of the Convention”) and gives rise to the question which obligation should prevail: to protect the environment or to secure unimpeded navigation; that is to say, can a state lawfully devise more stringent protection measures, as traditional concepts prove to be of insufficient or no consequence, or must it maintain the tradition of the freedoms of the sea. Also, Article 58 makes it clear that the high seas’ freedoms only apply to the extent that they are themselves not incompatible with Part V. The determining factor for compatibility is thus not the freedom as warranted in Part VII, i.e. unqualified (or as qualified in Article 87(1) already), but Part V itself.⁵⁰ The content of Articles 55 through 75 (as evidenced by state practice) defines the limits of the application of Article 87. Again, it appears that the answer to this question depends to a large extent on subsequent state practice.

Also, Article 56(2) expressly obligates the coastal State to have due regard to the rights and duties of other states. Yet, these other states also are under the obligations set out in Part XII, namely to preserve and protect the marine environment (Article 192). Insofar as the threats to the marine environment - to the extent that they were known in 1982 when the Convention was signed - were thought to consist of land-based pollution and pollution from ships,⁵¹ the balance envisaged by Article 56(2) could be achieved by regulating the relevant industry through certain standards. Articles 207 through 220 are evidence and consequence of this perception. Instruments of the International Maritime Organisation

⁴⁹ Shipping as such may cause disturbances of sensitive species, it may also contribute to the alteration and destruction of habitats; dredging for navigational purposes, for example, was identified by OSPAR (s. b.) as a factor of environmental degradation. See also *Ottesen et al.*, Shipping Threats and Protection of the Great Barrier Reef Marine Park-The Role of the Particularly Sensitive Sea Area Concept, in *Gjerde/Freestone* (eds.), Particularly Sensitive Sea Areas-An Important Environmental Concept at a Turning Point, Special Issue 9, 1994, *Int. J. of Marine and Coastal Law* 507 f.

⁵⁰ *Booth*, *Law, Force and Diplomacy at Sea*, 1985, 12 ff, sheds some light on the paradigm of freedom in the Law of the Sea (“‘Freedom’ is a beguiling word, but a slippery concept.”), and effectively purports that the freedom of navigation is not such an elusive unconditional right as often claimed, which is to say that the ‘freedom of navigation’ itself is a legal concept that may undergo changes.

⁵¹ See definition in Article 1(1)(4) of the Convention.

(IMO), such as MARPOL and its protocols⁵², have taken account of the concept portrayed in these Articles and implemented appropriate rules and standards.

Where, however, the disturbance as such constitutes “pollution”⁵³, the Convention and the instruments of IMO, as of to date, are of limited avail.⁵⁴ They operate on the assumption that uses of the sea *per se* are in principle not harmful to the environment, and setting minimum standards is sufficient to contain negative impacts. Evidence of this assumption is the definition of pollution in Article 1(1)(4) of the Convention. Although the definition appears to be fairly broad, it is biased towards the introduction of substances. The meaning of “introduction of energy” would not appear to cover the mere presence or passage of ships. Despite the merits of this concept of pollution, it appears not to be very comprehensive in view of particularly vulnerable areas. The Convention itself does not provide a basis to solve the conflict between the rights and obligations in this respect.

3.2.4 EEZ Protection Areas as a Restriction on the Rights of Third States

Presently, Article 211(6)(a) provides for a procedure to establish a special zone within the EEZ whose regulations may be stricter than otherwise provided for in the Convention.⁵⁵ Possible regulations may not go beyond “such international rules and standards or navi-

⁵² International Convention for the Prevention of Pollution from Ships, adopted on 2 November 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), entry into force on 2 October 1983, 12 I.L.M. 1319 and 17. I.L.M 546 respectively.

⁵³ “Pollution” understood in the sense that some external, i.e. not system inherent, influence has some (potentially) detrimental effect on the natural system/ecosystem. The definition of pollution is determined by the definition of the ecosystem: alien species may constitute pollution in this sense as they may have a deleterious effect on the system. A disturbance by a ship may be pollution in the sense that the system may not have an inherent abatement measure and is therefor thrown - albeit only momentarily - out of its equilibrium.

⁵⁴ To date IMO has not passed any agreement or convention on the establishment of “ship-free” zones. IMO was expected to approve at the end of 2001 Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas (PSSA). A PSSA is defined as “an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic or scientific reasons and which may be vulnerable to damage by international shipping activities”. The ecological criteria suggested, e.g. uniqueness or rarity of the ecosystem, critical habitat for a species, representativeness for ecological processes, diversity of species or ecosystems, biological productivity, spawning or breeding ground, naturalness as a result of lacking human impacts, susceptibility to degradation, and bio-geographic importance, are to a large extent congruent to those listed in the Habitats Directive and other instruments calling for protected areas. Therefore, it would seem that even the freedom of navigation can eventually be restricted in certain (protected) areas in order to preserve the environment. See *Gjerde/Freestone* (eds.), Introduction, supra note 48, 431 ff; and *Gjerde*, Protecting Particularly Sensitive Sea Areas from Shipping: A Review of IMO’s New PSSA Guidelines, in *Int. J. of Marine and Coastal Law* 2002.

⁵⁵ See *Spadi*, Navigation in Marine Protected Areas: National and International Law, 31 *ODIL* 285(296): “With the consent of IMO, a coastal state can legitimately prohibit navigation in certain areas...”; see *Lagoni*, Die Errichtung von Schutzgebieten in der ausschließlichen Wirtschaftszone aus völkerrechtlicher Sicht, *Natur und Recht* 2002, 126-128 for a more detailed analysis of Article 211(6).

gational practices as are made applicable, through the organization, for special areas...” unless the organisation accepts them in accordance with Article 211(6)(c). These additional laws and regulations may relate to “discharges or navigational practices”, they may not, however, require stricter “design, construction, manning or equipment standards” than internationally accepted. Reference to navigational practices does not necessarily mean that navigation as such may be regulated, i.e. where ships may and may not navigate, but only the way how they navigate. Also, Article 211(6) refers to the same concept of pollution as Article 211(1), namely to “laws and regulations for the prevention, reduction and control of pollution from vessels”, which accepts only certain types of pollution. Yet, Article 211(6) would appear to offer the possibility to mint a body of international rules and standards within the framework of the Convention which may eventually lead to generally accepted international rules and standards as referred to in Article 58(3).⁵⁶ And it is quite conceivable that in the context of the IMO the Convention’s concept of pollution is expanded; the recent approvals of Particularly Sensitive Sea Areas (PSSA) indicate such a development.^{57, 58}

⁵⁶Another possibility for a protection area might arise in the context of Article 60(5) which allows for the establishment of safety zones around certain facilities. While the purpose of such a safety zone is first of all the safety of navigation and of the facility, it is quite conceivable that it may also serve the protection of the environment where the facility represents an ecological niche.

⁵⁷ See IMO Doc. A.927(22) Guidelines for the Designation of Special Areas under MAR-POL73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, URL: http://www.imo.org/Environment/mainframe.asp?topic_id=305#A927 visited on 06 September 2002, according to IMO “a PSSA is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific reasons and which may be vulnerable to damage by international shipping activities.” The Guidelines provide guidance to IMO member states for the formulation and submission of applications for the designation of a PSSA. In that process all interests those of the coastal State, flag State, and the environmental and shipping communities must be thoroughly considered on the basis of relevant scientific, technical, economic, and environmental information regarding the area; they also provide for the assessment of such applications by the IMO. The first two designated PSSA are the Great Barrier Reef, Australia (designated a PSSA in November 1990) and the Sabana-Camagüey Archipelago in Cuba (designated a PSSA in September 1997).

⁵⁸A number of possible shipping regulations have been developed under the auspices of IMO, see *Gjerde*, ‘International Legislation in Support of Implementing Natura 2000 in the Marine Environment’ at the Workshop “Application of NATURA 2000 in the Marine Environment”, International Academy for Nature Conservation (INA) on the Isle of Vilm (Germany) from 27 June to 1 July 2001, 9 BfN-Skript 73 (76 ff): Under SOLAS special routing measures such as traffic separation schemes, recommended routes or tracks or deep water routes can be introduced to reduce the risk of collisions or groundings, or to keep vessels at a certain distance from ecologically important areas (SOLAS, General Provisions on Ships Routing Res. A.572(14)); Areas to be Avoided (ATBAs) can be used to keep ships or certain classes of ships or cargoes out of specified and closely defined sea areas (SOLAS, General Provisions on Ships Routing, Res. A. 572(14), ATBAs are generally recommendatory, but may in some cases be made mandatory); no-anchoring areas can be introduced in a defined area where anchoring is hazardous or could result in unacceptable damage to the marine environment (SOLAS, General Provisions on Ships Routing, Res. A. 572(14), this measure could be used to protect critical habitats and other sensitive benthic communities); Vessel Traffic Service Systems (VTS Systems) provide information to ships on local traffic and on problems related to navigation and the environment, and monitor ship movements. (SOLAS, Guidelines for Vessel Traffic Services, Res. A, 857(20), these may prove useful to identify ships carrying hazardous cargoes and to control their safe passage through environmentally sensitive areas); Mandatory Reporting Systems enable the shorebased authority to communicate with a ship to learn its cargo, destination, and

3.3 Other (Subsequent) International Treaties

In international agreements following the Convention the underlying concept in respect of environmental protection differs to some extent from that of the Convention. Living resources *per se* have become a valued target of protective measures.⁵⁹ The interest in securing a source of food supply or natural resources for the future in general ranges equal or even behind the (predominant) aim of protecting the environment in its entirety. Inasmuch as treaties represent the intentions of states, environmental instruments subsequent to the 1982 Convention indicate a change in the interpretation of the rights and duties referred to in the 1982 Convention.

Today, the concept of the ecosystem approach is firmly established in the scientific community and - more importantly - in the realm of decision-makers; it was consolidated in Agenda 21. No longer is a single species, which constitutes a major source of income or economic prosperity, at the focus of concern of policy decisions, but increasingly the whole system, in which a single species or individual is created and nurtured, is taken into account. The understanding of the interdependence of various species is still unsatisfactory, yet it has had an important impact on the development of international law in that respect.

condition (SOLAS, Guidelines and Criteria for Ship Reporting Systems (Res. MSC.43(64)); Compulsory Pilotage. In sensitive areas where the intended route is navigationally intricate and potentially hazardous, the ecological and economic cost of a shipping mishap would be devastating, and there is no other feasible route, the required use of locally experienced pilots on board ships can reduce the risk of accidents; MARPOL Special Areas for oil (Annex I), noxious liquid substances (Annex II) and garbage (Annex V). A state or groups of states can petition the IMO for the imposition of more stringent discharge requirements than are generally applicable on the open sea. (Guidelines for the Designation of Special Areas under MARPOL 73/78, recent revisions approved by MEPC 46 in April 2001, still to be adopted by IMO Assembly); SOx Emission Control Areas pursuant to Annex VI of MARPOL (not yet in force). See also *Peet*, Particularly Sensitive Sea Areas-A Documentary History, in: *Gjerde/Freestone* (eds.), *supra* note. 48, 469 (495).

⁵⁹ One may say that the development in the International Whaling Commission - from its beginnings as a conservation organisation to, later, a preservation organisation epitomised by the moratorium on whaling - is to some extent a precursor of the general direction that international law on natural resources has taken.

3.3.1 Convention on Biodiversity (CBD)

The CBD⁶⁰ is an international convention, which covers all forms of life and ecosystems. Thus, it addresses not only wild species, but also (genetic) diversity within species and the diversity of ecosystems in which species live. Its objectives are described in Article 1:

- The conservation of biological diversity;
- The sustainable use of its components; and
- The fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

By virtue of Article 56(1)(a) of the Convention and Article 4 CBD the Biodiversity Convention is applicable within the EEZ of the contracting parties. Both, the Community as well as its Member States, are contracting parties of the CBD, the obligations laid down in the CBD apply directly both to the Community and to the Member States. As a widely accepted international legal instrument the CBD is capable of indicating a change in states' *opinio juris* in respect of provisions in the Convention.⁶¹

The scope of application of the CBD clearly includes the marine environment at large, yet little is said explicitly as to how and in which respect the CBD applies to the sea.⁶² For the marine environment *in situ* as well as *ex situ* conservation may be appropriate. A decision for none, one, or both of the two depends on the knowledge about the bio-diversity within the jurisdiction and the resources available to the State and the willingness to act.

By virtue of Article 4 CBD, the Contracting Parties control the activities of their nationals within the Territorial Sea and the EEZ.⁶³ Article 4(a) CBD spells out this obligation in respect of a spatial area, Article 4(b) CBD in respect of individuals. To the extent that Article 4(a) refers to national jurisdiction over the marine environment reference must be had to the Convention.

In respect of environmental management Article 8 of the CBD requires: "Each Contracting Party shall [...] (a) establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity." Prerequisite for the designation of a protected area is the objective of conservation. This objective is the maintenance and

⁶⁰ UN Convention on Biological Diversity, adopted 5 June 1992, entry into force 29 December 1993, 31 I.L.M. 818; approved by the EC, 25 October 1993, Official Journal 1993 L 309/1; see for status of the CBD: URL: <http://www.biodiv.org/world/parties.asp>, (visited on 06.09.2002).

⁶¹ See *de Klemm*, supra note 13, 423 (440).

⁶² See *de Klemm*, *ibid.*, 454; also *Joyner*, 'Biodiversity in the Marine Environment: Resource Implications for the Law of the Sea', 28 Vand. J. Transnat'l L. 635 (647).

⁶³ In this context the question may arise to what extent the phrase "subject to the jurisdiction of another state" is of relevance within the framework of the EC; in respect of fisheries, nationals of the member states would seem to be regarded as "European nationals", as the CFP applies to them by virtue of the Treaty which confers jurisdiction to the Community level. Another question in this context is whether or not the CBD is applicable in case of the UK's exclusive fisheries zone.

recovery of species in their natural surroundings. The definition of conservation contains no reference to exploitation. The term "viable population" would seem to refer to the abundance of a species necessary for reproduction rather than for exploitation. In this respect CBD differs from the Convention. And it follows that the designation of a protected area is not coupled to the aim of a sustainable use; the predominant concern of the CBD is the environment as such.

Article 8 (l) also obligates the Contracting Parties to regulate or manage any processes or categories of activities determined to have significant adverse impacts on protected areas. This obligation - weak as it may be - would also apply to fishing and shipping activities. And regulating and managing fisheries activities may entail their exclusion in protected areas.

As regards jurisdiction over protected areas, the implication of the CBD is pretty clear: if national laws or regulations establish a marine protected area, nationals of that state have to abide by the rules, and infringements may be persecuted according to national law. In respect of non-nationals the question remains whether or not the Convention allows for the establishment of protected areas, since Article 22(2) CBD clearly states that the Convention is the prevailing instrument. Thus, only within the limits of Article 56 of the Convention states may act on the basis of the CBD.⁶⁴

CBD calls for the establishment of protected areas but only within the framework of the Convention. *Prima facie* this qualification would mean that there is no change intended. However, inasmuch as the CBD envisages marine protected areas as a means to achieve an end, they may be perceived as a measure of environmental protection as provided for by Article 194(5) of the Convention. Indeed, there would be no conflict between Article 8(a) and 22 of the CBD if Article 8(a) would be regarded as a possible measure envisaged by Article 194(5) of the Convention. Accordingly, the CBD can be read as to obligate contracting parties to make use of their possibilities (and the vague language of the Convention), as limited they may be.

⁶⁴ This may complicate matters since CBD was drafted several years after UNCLOS III at the height of international environmental activism, some of the concepts in the CBD could be rendered void if the ramifications set by the much older Convention prevailed.

3.3.2 Regional Agreements

i) Regional Fishing Organisations (RFO)

To the extent that global instruments only provide a legal framework or general guidance they need to be implemented by subsequent measures. Main tool for the implementation of the Convention in respect of living resources are the RFO, numerous of which have been set up or are being set up world-wide. They provide not only a basis for enforcement measures in particular but also a forum to develop the applicable national and international law as they are a manifestation of states' *opinio juris*. Some caution must be had, as RFO, or regional agreements with a different subject matter⁶⁵ as the case may be, can expand the obligations and rights of their member states beyond the frame of international law vis-à-vis each other⁶⁶ and may thus not reflect states' opinion in this regard.

Most of the RFO promote as their objective conservation and optimum utilisation of the natural resources. Since their focus rests primarily with management of the resources, environmental protection ranks second at best.⁶⁷ Accordingly, the concept of protected areas is not envisaged as such. RFO provide for closed seasons/areas as temporary management tools⁶⁸ but not as a means to preserve the environment as such.⁶⁹ Not much is gained from RFO for the question whether or not there is a possibility or even an obligation to introduce protected areas as a means of environmental management; neither are the RFO phrased in such a way as to establish an obligation to use closed areas as a tool for fisheries management.

⁶⁵ For example the "OSPAR Convention", Convention for the Protection of the Marine Environment of the North-East Atlantic, successor of the Oslo and Paris Conventions, entered into force on 25 March 1998, 16 contracting parties (one of them the European Union), see <http://www.ospar.org/eng/html/welcome.html> visited 14. May 2001 for more information.

⁶⁶ In particular, these agreements can cover areas of the High Seas for which UNCLOS III provides a general obligation for states to take measures or to co-operate in the interest of conservation of marine living resources. Yet, those states that pass measures with the effect of limiting access for their nationals to a high sea fishery in accordance with Article 117 of the Convention put them at a disadvantage vis-à-vis nationals from other states not co-operating. This problem has been mentioned by the FAO's Code of Conduct for Responsible Fisheries, see 8.1 Duties of all States (accessible at <http://www.fao.org/fi/agreem/codecond/ficonde.asp#8>, [visited on 25.07.2001]).

⁶⁷ See *de Klemm*, supra note 12, 447.

⁶⁸ This possibility is expressly listed in the non-exhaustive list of Article 62(4)(b) of the Convention.

⁶⁹ Temporary measures in this sense are not considered sufficient for the purposes of the Habitats Directive and are therefore not capable of alleviating the conflict lined out at the outset of this analysis.

ii) “Barcelona Convention”

The Convention for the Protection of the Mediterranean Sea against Pollution (“Barcelona Convention”)⁷⁰ as such is a non-binding instrument. The Barcelona Convention provides for an integrated approach to the regulation of marine environmental law. The preamble asserts that the parties to the Barcelona Convention are aware of “their responsibility to preserve the common heritage for the benefits and enjoyment of present and future generations.” The Barcelona Convention mandates that contracting parties must take “all appropriate measures to prevent and abate pollution of the Mediterranean Sea area caused by dumping from ships and aircraft.” This as such does neither speak for nor against marine protected areas as states may fulfil their obligations by marine protected areas or other means.

Under the Barcelona Convention^{71,72} the contracting parties adopted a “Protocol concerning specially protected areas and biological diversity in the Mediterranean”.⁷³ This

⁷⁰ Signed 16 February 1976, see 15 I.L.M. 290 (1976), entry into force 12 February 1978, amended 9 - 10 June 1995, renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean; adopted by the EC through Council Decision 77/585/EEC of 25 July 1977, entry into force for the EC 15 April 1978, Official Journal 1977 L 240/1-2; as of 2 Oct. 2000 current parties are Albania, Algeria, Bosnia and Herzegovina, Croatia, Cyprus, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Monaco, Morocco, Slovenia, Spain, Syria, Tunisia, Turkey, and the European Community; the Convention was a result of the Action Plan for the Mediterranean Environment Programme (“Med Plan”, 14 I.L.M. 475 (1975)) within the UNEP Regional Seas Programme launched in 1974: After the negotiation of the Paris Convention for the Prevention of Marine Pollution From Land-Based Sources (13 I.L.M. 352 (1974)) in 1974, problems of marine pollution from ships became the exclusive province of IMO, while problems relating to marine pollution from land-based sources, as well as other non-ship sources, became the exclusive province of UNEP. Under this division of work, UNEP initiated its Regional Seas Programme and negotiated a number of treaties. The Geneva, Nairobi, Kingston and Paipa Protocols correspond to the Barcelona Protocol, they, too, provide for the establishment of marine protected areas under similar conditions. Information about the Convention and its Protocols can be accessed at <http://www.unepmap.org/> (visited 31.05.2001).

⁷¹ The Barcelona Convention is an example for the convention/protocol approach which comprises of the establishment of a framework agreement with subsequent refining and implementing agreements or protocols. The main objective of this concept is to provide flexibility for the contracting parties: while the general aim leaves different avenues for achieving them, varying numbers of states may agree on more stringent measures through supplemental agreements. For a discussion of this approach see Scott et al., Success and Failure Components of Global Environmental Cooperation: The Making of International Environmental Law, 2 (1995) ILSA J. Int'l & Comp. L. 23(42).

⁷² Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, 16 February 1976, 15 I.L.M. 300 (1976), entry into force 12 February 1978, amended 9 - 10 June 1995, renamed Protocol for the Prevention and Elimination of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft or Incineration at Sea; Protocol Concerning Cooperation in Combatting Pollution of the Mediterranean Sea by Oil and Other Harmful Substances in Cases of Emergency, 16 February 1976, 15 I.L.M. 306 (1976), entry into force 12 February 1978; Protocol for the Protection of the Mediterranean Sea Against Pollution from Land-Based Sources, 17 May 1980, 19 I.L.M. 869 (1980), entry into force 17 June 1983, amended 6-7 March 1996, renamed Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources and Activities; Protocol Concerning Mediterranean Specially Protected Areas, 3 April 1982, entry into force (also for EC) 23 March 1986, amended 9 - 10 June 1995 (Annexes adopted 24 November 1996), renamed Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, entry into force 12 Nov. 1999; Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources and Activities, entry into force 17 June 1983, this Protocol makes some of the twenty-year-old commitments of the 1976 Barcelona Convention binding by requiring signatories to adopt appropriate regulations to stop polluting the Mediterranean Sea and rivers that flow into the sea; Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil, adopted 14 October 1994; and Protocol on the Prevention of Pollution of the Mediterranean Sea by Transboundary Movements of Hazardous Wastes and their Disposal, adopted 1 October 1996. Due to the framework convention construction parties to the Convention may not necessarily be parties to the Protocols.

⁷³ Signed 10 June 1995 in Barcelona; adopted by the Council on 22 October 1999, see Official Journal L 322, 14.12.1999 p. 2; for the text of the Protocol see Official Journal 1999 L 322/3-17.

Protocol applies in the geographical area of the Barcelona Convention⁷⁴ and supplements it with an obligation of the contracting parties to “establish specially protected areas in the marine and coastal zones subject to its sovereignty or jurisdiction.”⁷⁵ By virtue of this Protocol the Community and participating Member States⁷⁶ are therefore under an obligation to designate protected areas within the Mediterranean Sea area.

The Protocol does specify a few details about protection areas in Article 6. Most notably it provides:

“The Parties, in conformity with international law and taking into account the characteristics of each specially protected area, shall take the protection measures required, in particular: [...]

(c) the regulation of the passage of ships and any stopping or anchoring; [...]

(g) the regulation or prohibition of fishing, hunting, taking of animals and harvesting of plants or their destruction, as well as trade in animals, parts of animals, plants, parts of plants, which originate in specially protected areas;

(h) the regulation and if necessary the prohibition of any other activity or act likely to harm or disturb the species or that might endanger the state of conservation of the ecosystems or species or might impair the natural or cultural characteristics of the specially protected area;

(i) any other measure aimed at safeguarding ecological and biological processes and the landscape”.

This concept of a protected area is fairly detailed. It is noteworthy in at least two respects. First, inasmuch as it considers protected areas a tool of environmental protection it goes beyond the concept of the Convention; and secondly, it calls for the regulation of shipping beyond the ramifications of the Convention. The reference to international law appears in the light of the subsequent list as a mere lip service, as the Barcelona Convention and its protocols constitute a part of international law itself. Not referring to the Convention specifically, suggests by itself the view of the drafters that the relevant law might not stand still at the provisions of the Convention.

From the point of view of the Convention the regulation of shipping would interfere with the freedom of navigation/right of innocent passage if not drawn up in accordance with international rules and standards as established by IMO or a general diplomatic conference. Even in the Territorial Sea the designation of sea-lanes must follow these standards as the right of innocent passage may be affected. Yet, the scope of the Protocol is too limited to

⁷⁴ Which is, according to Article 1 of the Barcelona Convention: “the maritime waters of the Mediterranean Sea proper, including its gulfs and seas, bounded to the west by the meridian passing through Cape Spartel lighthouse, at the entrance of the Straits of Gibraltar, and to the east by the southern limits of the Straits of the Dardanelles between the Mehmetcik and Kumkale lighthouses.”

⁷⁵ Article 5(1) of the Protocol (see *supra* note 73).

⁷⁶ The Community and the Member States littoral to the Mediterranean are signatories, the protocol has been ratified by the Community itself and by Italy and Spain, the ratification of France and Greece is pending as of February 2003.

indicate any change in international rules or standards in this respect.⁷⁷ And in the context of the European Union not much can be derived in terms of shipping, since the Community having the exclusive competence in respect of transport⁷⁸ has not undertaken to draw up shipping measures. Also, Article 2(2)⁷⁹ contains a general disclaimer in respect of the law of the sea. The only reference to fishing rights is made by inference: "rights ... relating to the law of the sea." The persuasiveness of this reference is shattered by the following enumeration of rights and the direct reference to the "jurisdiction of the coastal State, the flag state and the port state". From the fact that the sovereign rights in respect of natural resources are not listed among the other rights it appears that these are not deemed to be as important as the freedom of navigation and the right of innocent passage. This strikes odd since the coastal State's rights in respect of natural resources played a predominant role in the context of the Convention. The omission in this context could also be interpreted as indicating a change in the estimation of relevance.

As noted above (Fn. 73), not all of the Community's Member States have ratified the Protocol. But in the context of this analysis it is noteworthy that the Community itself has ratified the protocol. While the protocol only applies in the geographic area as defined by Article 2, it may put the Community under an obligation to adhere to its provisions when drawing up its policies, namely the Common Fisheries Policy. The express mention of the regulation or prohibition of fishing for the purpose of protecting the environment provides a legal argument that environmental concerns may override fishing interests. And the Community (and the Member States) have - by virtue of their ratification of the protocol - expressed the opinion that fishing activities may be prohibited for (environmental) concerns other than the depletion of targeted fish stocks.

ii) OSPAR

Another regional agreement relevant in the European context is the OSPAR Convention, combining and replacing the Oslo and Paris Conventions.⁸⁰ Annex V⁸¹ to the OSPAR Convention was adopted in 1998 and incorporated obligations under the CBD into the OSPAR framework.

⁷⁷ Yet, in the context of the revised Guidelines on PSSA, see supra note 54, the regulation of shipping may appear in a different light as member states of IMO may be more inclined to declare such areas.

⁷⁸ See Articles 70 and 71 EC.

⁷⁹ "Nothing in this Protocol ... shall prejudice the rights, the present and future claims or legal views of any state relating to the law of the sea, in particular, the nature and the extent of marine areas, the delimitation of marine areas between states ..., freedom of navigation on the high seas, the right and the modalities of passage through straits used for international navigation and the right of innocent passage in territorial seas, as well as the nature and extent of the jurisdiction of the coastal state, the flag state and the port state."

⁸⁰ See Article 31(1), the Convention (supra note 65) was signed 22 Sept. 1992, entry into force 25 March 1998, contracting parties: Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom of Great Britain and Northern Ireland, Luxembourg, Switzerland and the European Union, adopted by Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic, Official Journal 1998 L 104/1; Convention for the protection of the marine environment of the north-east Atlantic, Official Journal 1998 L 104/2, the text of the Convention can also be accessed at <http://www.ospar.org/> visited on 06 September 2002..

⁸¹ The Community ratified the Annex 8 May, 2000, Official Journal 2000 L 118/44, of the Member States have ratified as of August, 2001: Finland, Spain, Luxembourg, United Kingdom, Denmark, Sweden, and the Netherlands; the text of the Annex can be accessed at <http://www.ospar.org/eng/html/convention/ospar%5Fconv10.htm> visited 06 September 2002.

By virtue of Article 2 of Annex V the Contracting Parties are obliged to “(a) take the necessary measures to protect and conserve the ecosystems and the biological diversity of the maritime area, and to restore, where practicable, marine areas which have been adversely affected”. Especially the last part would arguably allow for the establishment of marine protected areas. The ‘Strategy’⁸² speaks of “the protection and conservation of the ecosystems and biological diversity of the maritime area and ... the restoration of maritime areas”. Guidance on the identification of “specific areas and sites” and their management is left to future programmes and measures. The OSPAR Commission will, according to the Strategy, continue to assess the effects of human activities on ecosystems and biodiversity, also in relation to activities not covered by the OSPAR Convention, for example fisheries.

The OSPAR Convention in its preamble avoids any interference with fisheries management: “Recognising that questions relating to the management of fisheries are appropriately regulated under international and regional agreements dealing specifically with such questions”.⁸³ Traditionally, fisheries management measures include setting catch quota, i.e. national and individual quota, incidental catch limits, minimum fish sizes; prescribing technical restrictions for the gear, i.e. minimum mesh sizes and chafing gear requirements, and the vessels, i.e. technical maximum standards and capacity limits; as well as time restrictions, i.e. closed fishing seasons and limits on the number of fishing days.⁸⁴ To the extent that fisheries management may also include closing off areas, it follows that the

⁸² See OSPAR Strategy on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area (Ref. No. 1998-19), Summary Record OSPAR 98/14/1-E, Annex 37 which had the purpose of directing the future work of the Commission on the protection and conservation of marine ecosystems and biological diversity.

⁸³ These agreements, however, are themselves not clear as to what specific management measures may be adopted, and they appear to allow whatever may be deemed appropriate to achieve the goal: Compare Article 11 (2) of the Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries: “The Commission may adopt proposals for joint action by the Contracting Parties designed to achieve the optimum utilization of the fishery resources of the Regulatory Area. In considering such proposals, the Commission shall take into account any relevant information or advice provided to it by the Scientific Council.” The full text of the Convention is available at <http://www.nafo.ca/about/convention.htm>, (visited 02 June, 2001).

⁸⁴ See Article 7 of the Convention on future multilateral cooperation in North-East Atlantic fisheries: “In the exercise of its functions, as set out in Articles 5 and 6, the Commission may consider *inter alia* measures for:

- (a) the regulation of fishing gear and appliances, including the size of mesh of fishing nets,
- (b) the regulation of the size limits of fish that may be retained on board vessels, or landed or exposed or offered for sale,
- (c) the establishment of closed seasons and of closed areas,
- (d) the improvement and increase of fishery resources, which may include artificial propagation, the transplantation of organisms and the transplantation of young,
- (e) the establishment of total allowable catches and their allocation to Contracting Parties,
- (f) the regulation of the amount of fishing effort and its allocation to Contracting Parties.”

OSPAR Convention does not allow for the establishment of marine protected areas in respect of fishing activities.⁸⁵ Because otherwise there would be a violation of Article 4(1). Support for this assumption in relation to fisheries provides Article 4(1) of Annex V, which contains an express exception: “no programme or measure concerning a question relating to the management of fisheries shall be adopted under this Annex”.

Yet, this does not necessarily preclude any activity in respect of protection areas as the second sentence of Article 4(1) suggests that the OSPAR Commission may propose any action in relation to fisheries to the competent authorities. This leaves it practically to the staff of the OSPAR Commission and its persuasion and persuasive capabilities whether or not measures of this kind may be followed through.

No reference is made to the regulation of navigation or shipping. The Convention excludes from its scope of application activities that are in accordance with the London Dumping Convention⁸⁶ (Article 1(g)(i)) or with other international instruments relating to waste. The Strategy lists a number of activities that are directly or indirectly related to navigation⁸⁷ but does not list navigation as such.

3.4 Conclusion

While there is no clear indication in international law for a preference of (marine) protected areas as a tool of environmental protection or preservation or fisheries management, there is neither an indication to the contrary. The international legal framework leaves enough leeway for states to interpret the objectives of the international instruments in favour of protection areas.

In respect of the Convention it must be concluded that there is no specific legal basis for the establishment of (environmental) protection areas. Part XII of the Convention is not conclusive as regards the individual measures, which may be undertaken in order to

⁸⁵ To the extent that the possibility to restrict recreational fishing is not covered by Fisheries Agreements/Organisations it appears to be irrelevant in the context of the EEZ.

⁸⁶ Convention for the Prevention of Pollution from Ships (MARPOL), signed in London on 2 November, 1973, 12 I.L.M. 1319, as amended by the Protocol of 17 February, 1978, 17. I.L.M 546.

⁸⁷ Namely dredging for navigational purposes, but also introduction of alien or genetically modified species, see Criteria for the Selection of Species and Habitats which need to be Protected, Summary Record IMPACT 1999/15/1, 6; as a follow up to the OSPAR Strategy on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area (Ref. No. 1998-19) [in the text: Strategy], Summary Record OSPAR 98/14/1-E, Annex 37 which had the purpose of directing the future work of the Commission on the protection and conservation of marine ecosystems and biological diversity. OSPAR provides a list of “first candidate human activities”: sand and gravel extraction; dredging for navigational purposes; exploration for oil, gas and solid minerals; construction or placement of artificial islands, artificial reefs, installations and structures; placement of cables and pipelines; introduction of alien or genetically modified species; and land reclamation; as well as tourism and recreation. While fishing is not mentioned expressly, it is obvious that certain fishing methods can cause similar harms to the environment like dredging or sand and gravel extraction. See also Scovazzi, *Marine Specially Protected Areas* (1999) 26 f.

protect the marine environment. This, however, cannot be interpreted as proof against protected areas within the EEZ. The fact that Article 194(3) provides for a *non-exhaustive* list rather suggests an open-ended process to seek and refine suitable environmental protection measures: There is neither a clear indication against protection areas. Also, Article 211(6) envisages clearly the establishment of special zones that may serve environmental protection. Cumbersome as the Article-211-procedure may be, it has the potential for future development. And in the context of the European Union Member States may be required to undertake the thorny way to fulfil their obligations in the European context. The question certainly remains whether or not the actual measure can be considered lawful from the perspective of international law. Clearly, restrictive measures by a coastal State may affect the freedom of navigation in many different ways. The answer to the question depends on the degree of restriction of the freedom, not on the measure being a restriction as such, as restrictions are already envisaged by the Convention.

In respect of fishing, states may on the basis of their sovereign rights designate protected areas, in which fishing activities are excluded;⁸⁸ in respect of navigation, it is necessary to acknowledge that the Convention does not confer any right in absolute terms. There is always a qualification with respect to other states' or coastal States' rights and duties. This is especially relevant for the freedoms of the high seas within the EEZ.

Inasmuch as international law is a continuum, the interpretation of the provisions of the Convention may change over time. The inception of the concept of the EEZ is more than thirty years old. The development since the adoption of the Convention in respect of (scientific) knowledge and concern about the environment has been tremendous. Concern about the environment has been expressed in various international instruments and may also extend the concept of pollution as well as the concept of environmental management in the future. The CBD employs a different definition of pollution than the Convention. The contracting parties to CBD must undertake actions to conserve biological diversity, among them the designation of protected areas. There is no need to act in every single case of endangered biological diversity with the same array of instruments, as CBD subjects every action to its individual appropriateness and viability. Yet, subsequent instruments, like the Barcelona Protocol and its siblings under the UNEP Regional Seas Program, suggest that this general obligation is gaining a clear and distinct shape.

⁸⁸ See *Lagoni*, supra note 55, 125.